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**INTERNATIONAL FRANCHISING**

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**by**

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# *INTERNATIONAL FRANCHISING*

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## ***INTERNATIONAL FRANCHISING***

The intended reader of this paper is a U.S. lawyer representing a U.S. franchisor that is expanding internationally. That lawyer may be in-house or outside counsel. The first section of this paper provides practical and drafting suggestions, covering both business and legal considerations. The second section provides a brief overview of U.S. franchise laws and the ways in which these laws may or may not come into play in international agreements. The third section provides a brief overview of the laws around the world affecting franchising

### **1. Basic Considerations**

A lawyer whose role is to oversee the U.S. franchisor's international expansion should be the principal drafter of all international agreements for that client. Centralizing this drafting responsibility ensures worldwide consistency in the franchisor's agreements to the extent practicable. Presumably, the drafter will know not only the requirements of U.S. law, but also the business needs and policies of the franchisor. Presumably, too, that lawyer will be familiar with the forms of franchise agreements used by the client for its franchises in the U.S. With time, that lawyer will also become familiar with the types of laws the client is likely to face abroad.

#### ***Tips for Business Success***

A U.S. franchisor is most likely to succeed internationally if that company:

- is successful in the U.S. and is seeking to build on that success abroad, rather than to export a concept that is untested or unsuccessful in the U.S.;
- has made an informed decision on which country to enter, has studied the destination market and is confident that the business can be tailored successfully to meet the peculiarities of that market;
- has carefully selected the best available contract partner or partners in the destination country; and
- is prepared to make a substantial commitment of personnel to service and support the foreign market, rather than simply turning over the local business entirely to its contract partner.

The geographic, cultural and linguistic distances separating the franchisee from the franchisor are reasons to devote more energy to the relationship, not less. A company can maximize its chance of success by actively planning its venture abroad and committing real resources to that venture.

In real life, a franchisor will seldom meet the requirements of the ideal client. All too often, U.S. companies begin their international expansion for the wrong reasons. Wrong reasons include the following:

- selling rights to a foreign territory because the U.S. company is desperate for the cash;  
or

- passively accepting the unsolicited offer of a foreign company and then regarding whatever business the U.S. company receives from abroad as found money.

Raising cash by selling territorial rights is not a good way for a franchisor to do business.

No matter how excellent a lawyer you may be, your superb contract drafting skills cannot improve the quality of your client's business partner abroad. Therefore, actively seeking out and selecting the best business partner abroad is at least as important as good drafting and good legal advice.

A great deal of work should go into an agreement before the first draft is presented to the potential contract partner. In the best of all worlds, the client will not to make any commitment to the other party until the client has thoroughly planned the venture in consultation with legal counsel. For example, a promising deal may fall through before it is signed if unexpected costs come to light only after the client makes a price offer to a prospective foreign partner. Moreover, the client will be in a far better bargaining position if the client knows in advance what is permitted and what is required in light of U.S. and foreign law.

### ***The Need for Local Counsel***

The chances of success in any international venture are enhanced by timely consideration of both U.S. law and the law of the destination country. This means that you should engage local counsel in the destination country to review your draft agreement. The agreement will almost always have to be tailored in one way or another to comply with the local law of the destination country, and most of us are not admitted to practice law outside the U.S.

The first and most general question for local counsel is whether the proposed agreement is enforceable in accordance with its terms under the laws of the local country. Specific local laws may override any number of contract provisions.

Where local law requires that the agreement be filed with a government agency, it is usually advisable for the U.S. franchisor to take responsibility for this filing through its own attorneys. This gives the franchisor the ability to negotiate with the government agency through the franchisor's attorney, rather than relying on the foreign partner, who may cite the local country restrictions as reason to renegotiate with the franchisor for terms and conditions that are in the foreign partner's interest. It is usually advisable to reflect in the contract the fact that the franchisor will handle the registration.

Where the local government requires the filing of a local language version of the agreement, the franchisor's local counsel should prepare that foreign language version. The agreement should include a provision to the effect that only the English version will govern.

### ***Trademarks***

One of the very first considerations of a franchise company venturing abroad is whether the company's brand names are protected. Unless the franchisor protects its trademarks in the

destination country, the franchisor may find that its marks infringe the rights of another trademark owner in that country. The franchisor will then be faced with the prospect of either being required to litigate its rights, purchase the mark from the foreign owner or sell under a different mark. The result can be that the franchisor is required to use different brand names in different countries.

Presumably, before initiating any serious discussion with a potential business partner abroad, the franchisor will make a determination of whether the same marks used for the U.S. business will work in the foreign market. The mark may have an entirely different connotation in the destination country. This alone would be reason to use a different mark in that country.

If the mark is likely to be successful from a marketing point of view, it may nevertheless be unregistrable as a matter of law. In some countries, for example, service marks may not be protectable at all.

Another possibility is that the mark may be unavailable in the destination country because someone else has already registered it. Before a franchisor launches its business abroad, the company should have a search firm do a full trademark search to be sure that the franchisor's use of the trademark will not infringe the rights of anyone else. If the search results indicate that the mark is available, the franchisor should seek trademark registration in the destination country. In fact, it is often advisable to apply for trademark registration in several countries, namely those countries in which the franchisor is most likely to enter in the reasonably foreseeable future. This is especially important abroad because trademark rights in most countries are based on registration and not on use. The first to register is the one who has the rights.

In drafting the agreement, it is a good idea to specifically list the trademarks that are being licensed. A franchise agreement is a trademark license agreement. The trademark registrations and applications in the destination country can be listed in an appendix to the agreement rather than the body of the agreement. This facilitates amendments during the term of the agreement. The agreement should specifically acknowledge that the marks are owned by the franchisor. As with any trademark license, the agreement should contain adequate provision for quality control.

Another concern is whether the laws of the destination country will permit the franchisor from stopping the franchisee from continuing to use the licensed trademarks after the agreement is terminated. Not all countries allow for injunctive relief to stop trademark infringement. In some cases, the U.S. franchisor may terminate the agreement only to have difficulty stopping the franchisee from continuing to use the franchisor's trademarks. The relief that is available will affect the way a franchise agreement is drafted, the forum selected for dispute resolution, and other provisions of the agreement.

### ***Trade Secrets***

Franchisors typically offer confidential business methods and techniques to their franchisees and endeavor to maintain the confidentiality of their manuals and training materials. In an international context, confidentiality may be difficult to maintain. Not all countries have

laws that allow for the protection of trade secrets. The contract may be the only legal basis on which the franchisor can protect the confidentiality of its trade secrets. Accordingly, a strong confidentiality provision is essential. Just as in the case of purely U.S. agreements, such a provision should broadly define the information that is confidential. It should limit use of the information to the purpose of fulfilling the franchisee's obligations under the agreement. The confidentiality provision should provide exceptions where the information was public knowledge, was already known to the franchisee or was lawfully revealed by a third party, but a stronger provision from the franchisor's point of view would place the burden of proof on the franchisee in order to meet these exceptions.

While damages may be recoverable for the breach of a confidentiality provision, penalty provisions may not be enforceable in some countries, and injunctions may not be available. Since there is very little that one can do in some countries after a trade secret is wrongfully disclosed, the best practical means of protection may be not to disclose confidential information at all. The second best non-legal means of protection is to select honorable contract partners.

Law regarding trade secrets vary widely from country to country. The technology transfer laws in some countries may seek to encourage the transfer of technology to local companies without restriction on the use of the technology after termination of the agreement. In such countries, the franchisor may want to disclose less proprietary information, since any information disclosed will eventually lose its confidentiality.

While trade secrets are difficult to protect in many countries, other countries have very strict laws regarding trade secrets. England and Italy, for example, provide for criminal sanctions for the appropriation of confidential information.

### ***Business Structure***

A U.S. franchisor can enter a foreign market in many ways. One way might be by directly granting a unit franchise abroad. A single unit agreement gives a U.S. franchisor the ability to try out on a test basis a foreign company that might want to act as a developer or master franchisee for a region or an entire country. A franchisor whose goal is rapid expansion of the number of units in the local country should use a development agreement or a master franchise agreement rather than a unit agreement.

In a development agreement, the local company has the right to open several locations in an agreed territory pursuant to an agreed development schedule. The development agreement is often a framework agreement, with individual units covered by separate agreements with the franchisor.

The development agreement might provide for an initial or test period of just three, four or five years, covering a small number of units. A relatively short test period is useful, because it is difficult to evaluate in advance the franchisee's performance and market acceptance. The agreement can provide for negotiation of subsequent three, four or five-year development schedules. If the parties are unable to agree on a development schedule, another approach

would be to give the developer a right of first refusal on new franchises in the territory for a specified period of time.

If the initial term is a test period, the franchisor might consider granting to the developer the right to open company-owned stores, but not to subfranchise. After this test period, when the local company has established a successful operating record and an experienced organization, the developer might become a master franchisee, also called a subfranchisor.

In a master franchise agreement, the local company has the right to sell franchises in a defined territory. These local franchises are commonly subfranchises of the master franchisee. Occasionally, however, the master franchisee may act essentially as a sales representative who finds local companies or individuals who will then enter into direct agreements with the U.S. franchisor. In either case, the subfranchisor provides assistance to the subfranchisees in much the same manner that the U.S. franchisor provides assistance to its U.S. franchisees.

The developer or master franchisee may be wholly-owned by persons located in the destination country; or it may be a joint venture company owned in part by the franchisor and in part by persons located abroad. At the other end of the spectrum is a wholly-owned subsidiary of the franchisor acting as a master franchisee abroad.

### ***Taxation***

The tax laws of both the U.S. and the destination country can influence both the structure of the arrangement and the way the agreement is drafted. For example, the arrangement should be drafted so that it does not inadvertently create a permanent establishment in the foreign country, subjecting the franchisor to local corporate income taxes.

In setting the rate of royalties, the franchisor must know the rate of withholding taxes on royalties paid by a foreign licensee. The agreement should account for any royalties that will be withheld by indicating whether the royalty rate or amount is net, after withholding, or whether taxes are to be withheld from the gross royalty rate or amount. The agreement should also provide that the franchisee will preserve its tax receipts and submit them to the franchisor, so that the franchisor can receive the benefit of foreign tax credits with respect to its U.S. taxes.

### ***Territory***

Territorial protection and territorial restrictions are central to international franchise agreements, just as they are to U.S. franchise agreements, and they should be clearly and carefully drawn. Special considerations come into play, however, in international agreements.

In some countries, contractual restrictions on exports by the local contract partner may be unlawful. This can pose a problem for a franchisor that grants an exclusive territory to another company abroad. One solution that may be accepted by the local authorities is to provide in the agreement that the local company may export anywhere in the world except to countries in which the licensor has granted exclusive rights to others. The Treaty of Rome makes it unlawful to limit exports from one European Union (EU) member state to another, since one of

the EU's basic tenets is the free movement of goods. However, restrictions on exports outside the EU may be permitted.

The agreement should clearly state the extent of any exclusivity and the extent of any restrictions on competitive activity. Exclusivity can mean that the franchisor will not grant similar rights to others or directly compete in the territory. It can also mean that the franchisee will not sell competing products or services. The first type of exclusivity is often desirable in order to maximize the local party's incentive to sell and market the product or service. The second type of exclusivity assures the franchisor that the franchisee will adequately support the franchisor's products or services rather than those of competitors.

### ***Development Schedule***

The development schedule is a central concept in any development agreement or master franchise agreement. Although it is difficult to estimate the success of a venture or establish a meaningful development schedule when a franchisor enters a market for the first time, it is important to establish some minimum number of units to be opened in a specified period of time.

By granting an exclusive territory for a specified period of time, the franchisor places the success of the local development in the hands of the master franchisee. The master franchisee's failure to exploit the territory can result in a lack of anticipated revenue. If this leads to a dispute between the franchisor and the master franchisee, this dispute can create an opportunity for competitors and may impair the franchisor's reputation, making it difficult to find a new developer or master franchisee after termination. Therefore, the agreement should be as clear as possible on the consequences of a failure to meet the development schedule.

What remedies can the agreement provide if the developer or master franchisee fails to develop the territory adequately? A short contractual term with a clear nonrenewal right is one approach to this issue. Another approach is to give the franchisor the ability to terminate the exclusive development rights of a developer or master franchisee, allowing the developer or master franchisee to continue to operate and service existing units absent a separate event of default. One problem with this approach is that having more than one subfranchisor in the territory may cause conflict, especially if older units are substandard. An alternative might be to reduce the size of the master franchisee's territory. A preferable approach might be to start with a small territory and increase the size if the developer or master franchisee is successful.

Another solution might be for the franchisor to reserve the right to purchase the master franchisee's rights pursuant to an agreed formula so that a new master franchisee may have exclusive rights in the whole territory. The difficulty then would be to come up with a formula that allows for a determination of a fair compensation well in advance of the termination.

### ***Product Supply***

A franchise agreement between a U.S. franchisor and a U.S. franchisee is likely to require the franchisee to purchase equipment, supplies or product inventory from the franchisor or an approved supplier in the U.S. In an international agreement, there may be good reason to

source these items in the local country rather than shipping them overseas from the U.S. The law of the franchisee's country may impose import prohibitions or quotas, or significant duties. Local sourcing may be a condition to local registration of the agreement. On a business level, the goods may be perishable or the cost of international shipment may be prohibitive. U.S. law also restricts the export of certain goods to certain countries.

If the goods are to be sourced by an approved foreign supplier, the franchisor will have to devote the resources necessary to oversee quality control. Where the goods are made using the franchisor's technology or they bear the franchisor's trademarks, the franchisor will have to enter into separate license or manufacturing agreements with the local suppliers.

If the goods are to be supplied by the franchisor, the delivery terms will be a drafting issue. The meaning of the delivery terms will be determined by the commercial law that governs the sale. In domestic sale agreements, the Uniform Commercial Code will apply in almost all cases. U.S. exporters can also apply the UCC to international sales, but this may put the foreign buyer at a disadvantage because the buyer would have to consult with U.S. counsel to understand the implications of the sales contract. In international transactions, it is not uncommon to use internationally accepted definitions of delivery terms, most notably the INCOTERMS, published by the International Chamber of Commerce.

#### *UN Convention on Contracts for the International Sale of Goods*

Another set of rules that comes into play in this context is the United Nations Convention on Contracts for the International Sale of Goods 15 U.S.C.A. (1994 Pocket Part) ("CISG"), which was ratified by the U.N. in 1986 and became effective in the U.S. January 1, 1988. The CISG applies to contracts for the sale of goods between parties whose places of business are in different countries that are signatories to the CISG. These countries include the U.S., Italy, Germany, France, Mexico, Australia, Chile, Argentina and a number of others.

The CISG will apply unless the parties specifically indicate in their agreement that it will not apply. If the parties' intention is to apply the UCC of a particular U.S. state, it may not be sufficient to specify that the law of that state will apply. The CISG is part of that law by virtue of the Supremacy Clause of the U.S. Constitution. In order to exclude application of the CISG, it is necessary to state this intention expressly in the contract. This can be done by specifically indicating that the CISG is excluded, or by referring to the "internal domestic law" of the state, or the law of the state "applicable to parties whose places of business are in the United States."

The CISG is generally similar to the UCC. It differs, however, in some respects. For example, under the CISG, irrevocable offers will be held open without consideration. Also, under the CISG, the acceptance must essentially mirror the offer; otherwise it has the effect of a counteroffer. This effectively eliminates the "battle of the forms" issue that may arise under the UCC.

The CISG does not define delivery terms, such as F.O.B., C.I.F. and others. Therefore, an international agreement for the sale of goods can be governed by the CISG and still use the INCOTERMS or state law to define the meaning of the delivery terms.

### ***Payment Terms***

#### *Currency*

The currency of payment is another subject that needs to be covered in any international agreement that requires payment of money. Many U.S. companies simply quote all prices and fees in U.S. dollars and require payment in U.S. dollars. This can work as long as there is no restriction under the laws of the franchisee's country on payments to parties outside the country in U.S. dollars. On the other hand, one party or the other can be hurt by fluctuations in currency rates over the term of the contract. For this reason, it is a good idea to allow for some flexibility in prices in some manner or another.

A currency conversion clause will be necessary, however, when royalties or other fees are based on a percentage of the price or revenues expressed in the foreign currency, and the payments are to be made to the franchisor in U.S. dollars. In such a case, the agreement should provide a formula for the currency exchange. The parties might apply, for example, the rate of exchange for the purchase of U.S. dollars at a named major bank or as published in a particular newspaper on the day payment is due. It is not a good idea to use the exchange rate on the date the payment is made, because the franchisee may decide to wait for a day with a better exchange rate before making payment.

Countries with weak currencies may require the approval of the central bank to any agreement calling for payments outside the country in U.S. dollars. The central bank may limit the amount that may be paid in U.S. dollars. In the most restrictive countries, the U.S. company may have to receive payment in the local currency and invest it locally. In countries with the weakest currencies, barter or countertrade arrangements may be necessary in order to receive payment abroad.

#### *Method of Payment*

The method of payment is another important subject that should be covered in any international contract. Most U.S. franchisors will want to have royalty payments made in U.S. dollars by transfer into an account in the U.S. specified by the U.S. franchisor. Clearing foreign checks can take up to six weeks, and bank fees are high. In some cases, the foreign company may have a U.S. bank account from which it can make payments by check.

Payments for goods sold internationally are frequently made by letter of credit. When the agreement calls for payment by letter of credit, the letter of credit should be irrevocable, confirmed by a U.S. bank selected by the U.S. company and payable in U.S. dollars in the U.S. Usually, the letter of credit will be payable in full upon delivery of shipping documents. The letter of credit should not contain any language in violation of the U.S. antiboycott regulations.

From a business point of view, the franchisor should ensure in advance that its U.S. bank is willing to confirm a letter of credit issued by the foreign bank if the franchisor is selling goods into a high-risk country. If not, the franchisor may want to provide for cash payment in advance, or to insure the risk or seek a guaranty.

International sales on open credit are becoming increasingly common. Except for large company customers in developed countries, it is usually advisable not to sell on open credit until the seller has been doing business for some time with the foreign company. Even then, the seller may want to take a security interest in the goods sold until payment is made in full, as well as guaranties from the principal shareholders of the foreign company. Enforcement of such security interests and guaranties, however, is bound to be more costly than enforcement of the payment obligations under a letter of credit.

### ***Reporting and Inspection***

Periodic reporting of sales is important in any franchise relationship. With the cultural and geographic distances involved in international agreements, it is especially important for the franchisor to monitor closely the activities of the foreign contract partner and developments in the local market. Such agreements typically require the local master franchisee or area developer to report to the U.S. franchisor regularly on market conditions in the franchisee's country.

As with any franchise agreement or, for that matter, any license agreement, the franchisor or licensor also needs the right to inspect the licensee's products and premises to ensure quality control. Finally, as in any franchise or license agreement, it is important that the franchisor or licensor have the right to inspect the licensee's books and records to ensure that the proper royalties have been paid. This includes the right of access on short notice and the right to make copies.

Close oversight by the franchisor minimizes the real risk that a master franchisee will grant unreported "phantom franchises". This takes real commitment on the part of the U.S. franchisor.

### ***Term and Termination***

Unit franchise agreements typically run for terms of ten to twenty years in the U.S. The same term might be used for unit agreements abroad. As in the U.S., a ten-year term might give the franchisor more control than a twenty-year term because it gives the franchisor more options not to renew a nonproductive franchisee.

Development agreements and master franchise agreements are likely to run for shorter terms than unit agreements. Shorter agreements allow for more frequent adjustments in development schedules.

As with other areas of the agreement, the enforceability of the term and termination provisions of the agreement may be limited by the law of the foreign country. Many countries have laws that protect local agents and licensees. These laws may require the franchisor to have good

cause to terminate or fail to renew, regardless of what the contract provides. Just like the state dealership or franchise relationship laws in the U.S. discussed below, the laws of some countries require that the supplier or licensor have good cause to terminate or fail to renew the agreement. Failure to comply with such laws may give the local franchisee a right to an “indemnity”, which is compensation that might include lost profits, capital expenditures and goodwill. A short, fixed term agreement may help to minimize the effects of these laws for the U.S. franchisor. The agreement should also clearly define what constitutes cause for termination.

### ***Dispute Resolution***

Contractual dispute resolution clauses raise a number of issues, and they are especially important in international agreements. Because of the complexity of the subject, it is not always possible to reach an ideal solution in a particular contract. The following discussion outlines some of the considerations that should go into the drafting of dispute resolution clauses.

#### *Choice of Law*

In any international agreement, it is a good idea to specify a governing law so that there will be some certainty in the interpretation of the agreement. Without a contractual choice of law, the forum court will determine which law applies. Courts in the U.S. alone differ widely in the rules they apply to the choice of law in contractual settings, and they are unpredictable in their results. In an international context, the unpredictability is exacerbated.

A U.S. company doing business around the world will typically provide in its contracts that the law of the state in which its principal office is located to govern, at least to the extent that the foreign country will permit.

However, some countries will require that their own laws apply, either in whole or with respect to certain issues of fundamental local concern, regardless of what the agreement provides. Laws requiring payment of an “indemnity” for wrongful termination are just one example of laws that will be applied as a matter of fundamental policy in the franchisee’s country regardless of the parties’ contractual choice of law. Similarly, courts in the U.S. will apply U.S. law in certain international cases, such as antitrust law.

In Europe and many other parts of the world, as in the U.S., the general rule is that parties may freely choose what law will govern an international agreement. The rationale of the courts is their desire to protect the autonomy and justified expectations of the parties. This promotes certainty and predictability, which are basic objectives of contract law.

Note that a contractual provision to the effect that the CISG and INCOTERMS or the UCC will govern is not a complete solution for franchise agreements. Franchise agreements may or may not include the sale of goods. However, they always cover the sale of services and the licensing of trademarks, neither of which is within the scope of either the UCC or the CISG. Therefore, it is always advisable to specify the application of the laws of a particular jurisdiction.

### *Forum Selection*

Specifying the forum in which disputes are to be resolved is also important in international agreements. A franchise agreement might take one of a number of approaches to the question of forum selection, including any of the following:

1. All litigation will be in the franchisor's jurisdiction.
2. All litigation will be in the franchisee's jurisdiction.
3. Either party may sue the other party in the jurisdiction where the other party's principal office is located.
4. Either party may sue in either jurisdiction.
5. The franchisor may sue in either jurisdiction, but the franchisee may only sue in the franchisor's jurisdiction.
6. All litigation will be in a neutral forum.
7. The agreement is silent on the question of forum selection.

Some franchisors prefer to submit all disputes to the courts of the jurisdiction where the franchisor's principal office is located. In addition to promoting uniformity where the laws of the forum state apply, this approach is obviously convenient for the franchisor, and the expense of traveling to the franchisor's jurisdiction and hiring local counsel might deter franchisees from initiating litigation.

While a clause providing that all litigation will be in the jurisdiction of the franchisee is less common, it would undoubtedly be enforceable. The franchisor, however, might want to allow for the possibility of litigation in the franchisor's jurisdiction, at least when the franchisor is the defendant.

A clause providing that either party may commence litigation in the other party's jurisdiction gives flexibility to both parties and has an aura of fairness. It also has the advantage that the geographic distance to the forum may deter the party from initiating litigation.

Many agreements contain no forum selection clause at all, allowing the plaintiff to decide where to bring any litigation. This would be essentially the same as allowing either party to sue in either jurisdiction.

When parties cannot agree where litigation will be held but they do not want the contract to be silent on the issue, they may provide for litigation in a third country. They may even want to apply the laws of a third country. This may occur, for example, when the two countries have radically different political and economic systems.

While courts in the U.S., Europe and many other parts of the world generally enforce the choice of law and forum of the parties, even the choice of a third country, the law and forum chosen may nevertheless be required to bear some relation to the parties or the transaction. This is not a problem where the law or forum chosen is that of one of the parties. A few jurisdictions, such as New York and London, accept cases from other jurisdictions applying New York or Eng-

lish law even where the parties and the transaction have no connection with the jurisdiction. The rationale of these jurisdictions is their desire to preserve their stature as international commercial centers.

### *Arbitration*

Arbitration is a common method of resolving international disputes. One reason to consider arbitration in international agreements is that many countries have signed the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the New York Convention. This means that the award of the arbitrator or the arbitration panel will be enforceable in most countries. Other reasons to arbitrate include the ability to choose arbitrators knowledgeable in a particular field, the need to maintain confidentiality and the desire to avoid creation of binding precedent. The parties can also specify the administering body. In New York, the American Arbitration Association is probably the most commonly used in international commercial arbitrations, although the CPR Institute for Dispute Resolution and other alternate dispute resolution organizations exist and are active in New York as well.

### *Antitrust Laws*

A handful of countries and the European Union (“EU”) have laws that are more or less similar to the U.S. antitrust laws. Such laws may make certain contractual provisions unlawful. Price fixing, for example, is unlawful in Europe, just as it is in the U.S. EU antitrust law also prohibits contractual export restrictions among countries within the EU. In fact, most exclusive agency, distribution and franchise arrangements would be deemed to restrict competition under EU law, although many such arrangements fall within a block exemption. If the arrangement does not fall within a block exemption, the parties may apply to the European Commission to obtain an exemption.

Article 85(1) of the Treaty of Rome prohibits agreements that restrict trade among member states of the European Community. Specifically, Article 85(1) prohibits all agreements “which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market ....” This provision is commonly viewed as the “antitrust” provision of the Treaty of Rome.

The European Commission adopted a block exemption for franchise agreements in 1988, which became effective in 1989. This exemption specifically permitted many of the restrictions that are typical in franchise agreements. The European Commission replaced this exemption with a regulation, effective June 1, 2000, that applies to vertical restraints generally, including franchises.<sup>1</sup> The regulation creates a “safe harbor” for certain vertical arrangements.

Aside from the U.S., Europe, Canada and Japan, most countries around the world do not have antitrust laws. In countries that do not have antitrust laws it may be possible, for example, for the parties to agree on resale prices. While this may be a temptation, it may create a dangerous precedent as a matter of company policy for a multinational company in which executives are frequently moved from one part of the world to another.

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<sup>1</sup> Bus. Franchise Guide (CCH) ¶ 7101.

In addition to foreign antitrust laws, the U.S. franchisor should be mindful of the possible application of U.S. antitrust law. The U.S. antitrust laws can apply to an international franchise agreement even though the agreement calls for no sale of goods or services in the U.S. For example, it might be unlawful under U.S. law to enter into an exclusive agreement with a foreign distributor who is so important in his market that the agreement would effectively exclude all other U.S. suppliers from that market.

### ***Technology Transfer Laws***

Although globalization is reducing trade barriers around the world, many countries continue to have restrictive, nationalistic, technology transfer laws that pose a real obstacle to foreign franchisors. These laws typically require that an agreement licensing foreign trademarks and other intellectual property be registered in the technology office of the licensee's country, which closely inspects all international license agreements. The technology office may have the power to require changes in the business terms of the agreement, such as limiting the term of the agreement or the amount of royalties. The technology office may also have the power to require changes in the substantive terms of the agreement, such as prohibiting any restrictions on the licensee's post-term use of trade secret information furnished by the licensor to the licensee. Such technology offices also typically have the power to refuse to register the agreement.

Typically, such laws will reach any transaction to be performed within the host country, and only limited exemptions and exclusions of limited utility to franchisors exist. One way a U.S. franchisor might minimize its registration obligations under these laws would be to have only one agreement that requires registration. A U.S. franchisor will frequently enter into both an area development agreement, which contains the development obligations, and separate franchise agreements for each franchise location. By putting all of these obligations in one agreement, a franchisor will only have to deal with one registration obligation.

Where the royalty permitted by the government under the license agreement is too small to justify the license from the franchisor's point of view, the franchisor may decide to require payment of a second fee under a separate technical assistance agreement. This agreement may also require government approval. One problem is that the local authorities in some countries view such a technical assistance agreement as a one-time transfer of technology. Upon the expiration of the agreement, the U.S. company may be required to show that new technology is being provided in order to justify renewal.

Another way of dealing with royalty restrictions might be to enter into a second agreement with the franchisee to make up the shortfall. Such an agreement might be possible if the franchisee has an affiliate outside of the destination country. The U.S. franchisor must be mindful of the requirements of the local law and work closely with local counsel to be sure that any such arrangement will be enforceable and will not contravene local law.

Still another way of dealing with royalty restrictions may exist where a franchisor sells product to the franchisee in connection with the grant of franchise rights. In such situations the

franchisor may price the product to allow for a higher margin. The parties might even enter into a separate product distribution agreement.

### ***Exchange Control Laws***

In many countries, franchisors must deal with exchange control laws. The purpose of such laws is to permit governmental authorities to regulate payments in foreign or “hard” currency outside of the country to non-nationals, thereby avoiding depletion of valuable hard currency deemed necessary for economic growth. In such cases, the central bank may limit the amount that the franchisee or master franchisee may pay the franchisor in U.S. dollars.

One technique for dealing with these laws is to determine whether one of the principals or affiliates of the foreign master franchisee or developer has substantial assets outside of, and arguably beyond the jurisdiction of, the host country imposing the restriction. If so, the franchisor can seek to arrange for offshore payment from one of the principals of the foreign master franchisee or developer, either through an “offshore agreement” or a guarantee.

A second technique used when severe restrictions exist or if the currency is simply not convertible into U.S. dollars is for the U.S. franchisor to receive payment in the local currency and invest it locally until a later date when the law might change, or to negotiate a barter or countertrade arrangement in order to receive payment abroad. Close consultation with counsel will be necessary in order to ensure that any proposed arrangement does not violate applicable law.

### ***Agency Laws***

Many countries have laws that protect local agents, licensees and distributors from wrongful termination. These laws may require the franchisor to have good cause to terminate or fail to renew, regardless of what the contract provides. Just like the dealership or franchise relationship laws in Puerto Rico, New Jersey, Wisconsin and several other states, the laws of some countries require that the supplier or licensor have good cause to terminate or fail to renew the agreement. As discussed above under the heading “Term and Termination”, failure to comply with such laws may give the local franchisee a right to an “indemnity”.

What U.S. lawyers call “sales representatives” are referred to in many countries as “agents”. In some countries, agents enjoy protection against termination that distributors do not have. If a distribution agreement calls for very close direction by the supplier, the distributor may seek in litigation to have the agreement recharacterized as an agency or employment agreement. Employees in many countries enjoy far greater protection than they do in the U.S.

Agency laws vary widely from country to country. For example, while countries with state controlled economies may severely restrict the use of agents, others permit the use of agents, and still others require the use of local agents for government purchases.

### *Other Laws*

The above discussion is far from complete. In addition to the subjects discussed above, you should be alert to issues involving U.S. laws such as the Foreign Corrupt Practices Act, export regulations and laws against compliance with the Arab boycott of Israel.

## **2. U.S. Franchise Laws Affecting International Franchising**

### *The FTC Rule*

The Federal Trade Commission's (FTC) trade regulation rule on franchising became effective in 1979.<sup>2</sup> After an exhaustive study that began in 1971, the FTC determined that the most serious abuses by franchisors related to misrepresentation and a failure to disclose material facts. The remedy, as set forth in the FTC Rule, was presale disclosure. The FTC Rule does not require registration, nor does it regulate the relationship between franchisors and franchisees after the purchase of the franchise.

Until recently, it was not clear whether the FTC Rule applies to the sale by a U.S. franchisor of franchises abroad. It appeared that, in the appropriate circumstances, the FTC Rule might apply to such a transaction.<sup>3</sup> Section 5 of the Federal Trade Commission Act ("FTC Act") provides that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful". "Commerce", as defined in Section 4 of the FTC Act, includes international commerce. Since the FTC Rule became effective in 1979, the FTC has taken the position that the FTC Rule can apply to the sale of franchises abroad by U.S. companies. While many questioned this position, no one had challenged it in court.

A federal appeals court has now recognized the need for clarity on this subject and held that the FTC Rule does not apply to foreign transactions.<sup>4</sup> Consistent with the holding, the

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<sup>2</sup> Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 CFR part 436 (1979), Bus. Franchise Guide (CCH) ¶ 6080 [hereinafter FTC Rule].

<sup>3</sup> See John R.F. Baer, Kenneth R. Costello, Gary R. Duvall, Joyce G. Mazero and Erik B Wulff, *Application of U.S. Franchise Laws to International Franchise Sales*, 15 FRANCHISE L.J. 41 (1995). See also Thomas M. Pitegoff and Andrew Loewinger, *Avoiding the Long Arm of the Law in International Franchising*, (ABA Forum on Franchising, October 1995).

<sup>4</sup> In *Nieman v. Dryclean USA*, No. 95-1390 (11<sup>th</sup> Cir., June 21, 1999), the court reversed a Florida federal district court's holding that the Federal Trade Commission Act applies to the sale of a franchise outside the U.S. An Argentinean citizen had sued a U.S. franchisor to recover damages under the Florida "Little FTC Act" for the unfair trade practice of selling a franchise without the disclosures required under the FTC Rule on Franchising. The prospective franchisee had sought a master franchise agreement giving him the right to sell franchises throughout Argentina. He signed a letter agreement and gave the franchisor a \$50,000 non-refundable deposit in exchange for a sixty-day option to purchase the master franchise agree-

FTC, in its notice of proposed rulemaking issued October 15, 1999, has taken the position that the FTC Rule only applies when the franchise is to be located in the U.S.<sup>5</sup>

### *State Franchise Sales Laws*

Several states have laws similar to the FTC Rule, requiring that extensive disclosures be made at the time a franchise is offered or sold. Most of these state franchise sales laws also require registration of the offer.<sup>6</sup> Failure to comply with the state franchise sales laws can result in both administrative proceedings and private actions by franchisees. The California Franchise Investment Law, passed in 1970, was the first franchise sales law. A number of other states also enacted franchise registration and disclosure laws during the 1970s. New York was the last state to pass a franchise registration and disclosure law, enacted in 1980.

Most of the state franchise disclosure laws apply in the event of an “offer” or “sale” of a franchise in the state. Such laws may apply to the offer of international franchise rights, if (i) the offer originates from the state, (ii) is received or accepted in the state, or (iii) is made to a domiciliary of the state.

There are no reported cases in which a state franchise sales law has been applied to an international franchise transaction. Nevertheless, in the appropriate circumstances, the state franchise sales laws might apply to such a transaction.<sup>7</sup> The New York Attorney General’s Office has taken the position that the New York franchise sales law applies extraterritorially, a position that was judicially confirmed in the case of *Mon-Shore Management v. Family Media*.<sup>8</sup> In that case, the court applied the New York Franchise Sales Act when the offer merely origi-

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ment. The prospective franchisee intended to use the sixty-day period to arrange financing, but failed to raise the necessary capital. He then sought the return of his deposit on the basis that the franchisor had violated the FTC Rule, which required certain presale disclosures. The franchisor argued that the FTC Act did not apply to conduct outside the borders of the U.S. The district court disagreed, holding that “Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some acts are done outside the territorial limits of the United States.” The circuit court reversed, holding that Congress never intended the FTC Act to apply to foreign transactions.

<sup>5</sup> See [www.ftc.gov](http://www.ftc.gov). Proposed Section 436.2.

<sup>6</sup> Fifteen states require disclosure in connection with franchise offers and sales: California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington and Wisconsin.

<sup>7</sup> See John R.F. Baer, Kenneth R. Costello, Gary R. Duvall, Joyce G. Mazero and Erik B. Wulff, *Application of U.S. Franchise Laws to International Franchise Sales; Part II*, 15 FRANCHISE L.J. 107 (1996).

<sup>8</sup> 584 F. Supp. 186 (S.D.N.Y. 1984). See generally, Thomas M. Pitegoff, *Choice of Law in Franchise Agreements*, FRANCHISE L. J. (Summer 1989).

nated in New York, even though the offerees and the franchised businesses were outside the state. This holding was based, in part, on the broad territorial scope of the New York franchise law.

### ***State Franchise Relationship Laws***

In addition to the disclosure laws, several U.S. states have franchise “relationship” laws protecting local franchisees from wrongful termination.<sup>9</sup> Many of these laws also limit the ability of the franchisor to withhold consent to the renewal or transfer of franchise agreements. In some states, such laws cover ordinary dealership arrangements as well as franchises. In 1964, Puerto Rico was the first United States jurisdiction to pass a franchise relationship law, which protects local dealers without regard to industry. A number of other states enacted franchise relationship laws in the 1970s, with Iowa enacting what is probably the toughest franchise relationship law belatedly in 1992.

A U.S. franchisor venturing abroad must consider the possible effect of franchise relationship laws. Several U.S. states have franchise relationship laws, and these laws might potentially apply to franchises outside of the state.

A U.S. franchisor, for example, might enter into a master franchise agreement granting to a company with offices in New Jersey the right to open franchises and subfranchise in a country other than the U.S. In such case, it is possible that the New Jersey Franchise Practices Act (the “NJFPA”)<sup>10</sup> may come into play, requiring the franchisor to have good cause before terminating or refusing to renew the master franchise agreement. The extraterritorial application of the NJFPA under comparable facts was illustrated in the case of *Instructional Systems, Inc. v. Computer Curriculum Corp.*<sup>11</sup> In that case, the New Jersey Supreme Court held that the NJFPA applied to a nonrenewal of the franchise agreement for parts of the franchisee's territory outside of the state of New Jersey, even though the contract called for the application of California law.

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<sup>9</sup> Seventeen states plus Puerto Rico and the District of Columbia have franchise relationship laws: Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Virginia, Washington and Wisconsin. See Thomas M. Pitegoff, *Franchise Relationship Laws: A Minefield for Franchisors*, 45 BUS. LAW. 289 (1989), reprinted in the ABA's BUILDING FRANCHISE RELATIONSHIPS (1996).

<sup>10</sup> N.J. Rev. Stat. §§ 56:10-1 through 56:10-12.

<sup>11</sup> No. 93-5414 (3d Cir. Sept. 16, 1994) (slip opinion), *cert. denied*, 63 U.S.L.W. 3477 (February 21, 1995). See Thomas M. Pitegoff, *Choice of Law in Franchise Relationships: Staying Within Bounds*, 14 FRANCHISE L.J. 89 (1995). Similarly, in *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, Bus. Franchise Guide (CCH) ¶ 9665 (7th Cir. 1990), the court held that the Indiana Franchise Practices Act applied to the nonrenewal of an agreement with a national distributor based in Indiana although the contract called for the application of New York law.

A U.S. franchisor based in New Jersey must also be careful not to choose New Jersey law to govern the agreement. In *Dep't of Motor Vehicles v. Mercedes-Benz*,<sup>12</sup> a Florida court held that the NJFPA applied where the agreement called for the application of New Jersey law, even though the franchisee and the franchised business were in Florida. The court ruled that the contractual choice of New Jersey law evidenced an intent that the NJFPA should apply.

Both the *Mercedes-Benz* and *Instructional Systems* cases are exceptional. In most cases, courts will not apply the franchise relationship law of a state in which the franchisee is *not* located, since these laws are generally intended to apply only to franchise business located within the state. Most of the state franchise relationship laws specifically apply when the franchisee has a place of business within the state. Therefore, even applying these laws would not afford protection to the out-of-state franchisee in most cases.

### **3. Franchise Laws Outside the U.S.**

This section lists the laws of an increasing number of countries that regulate franchise sales. Some of these laws are intended to protect franchisees and are modeled, more or less, after the U.S. franchise disclosure laws. In other cases, particularly formerly controlled economies such as Russia and China, the motivation for enacting franchise laws seems to be to legitimize franchising as a way of doing business. The brief country descriptions that follow are intended merely to alert you of the need to do further investigation.

In order to comply with the disclosure requirements described below, some franchisors have prepared a “multinational” disclosure document that is based on the UFOC but tailored specifically to the international setting. Because the disclosure requirements as well as the substantive contents of the franchise agreements differ from country to country, the actual disclosure document a franchisor uses for any particular country is likely to vary from the multinational form document.

#### ***Australia***

Australia requires franchisors to comply with a Franchising Code of Conduct, a regulation adopted in 1998 under the Australia Trade Practices Act and amended on June 28, 2001, through regulations that became effective on October 1, 2001. The Code applies to overseas franchisors, except where the franchisor grants only one franchise or master franchise to be operated in Australia. The Code includes extensive disclosure requirements for franchisors and more limited disclosure requirements for a franchisee transferring a franchise. The Code replaces a code of voluntary compliance that had been in effect in Australia since 1993.

As with the FTC Rule, the Code does not require any government filing. Disclosure covers the same broad areas as those in the U.S. The Disclosure Document must be updated annually within three months after the end of the franchisor’s fiscal year. Sanctions under the Trade Practices Act include injunctions, fines, private recovery of loss or damage, and court or-

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<sup>12</sup> 408 So.2d 627 (Fla. 1981), modified 455 So.2d 404 (Fla. 1984), pet. for rev. den. 462 So.2d 1107 (Fla. 1985).

ders to disclose information or publish corrective advertising or to take such other action as a court deems appropriate. Both the franchisee and the Australian Competition and Consumer Commission may bring an action against a franchisor for violation of the Trade Practices Act.

### ***Brazil***

Brazilian law requires franchisors to provide each prospective franchisee with a disclosure document, which the franchisor must also submit to the Brazilian Institute of Industrial Property (INPI) for approval. Franchise sales are regulated by Law No. 8955 of December 15, 1994, which became effective on February 14, 1995. On April 15, 1997, the INPI issued Normative Act 135/97 (in replacement of Normative Act 115/93 and Resolution No. 35 of June 30, 1992) establishing rules for the approval of franchise agreements by INPI.

The definition of a franchise in Brazil has a strange sound to the ears of a U.S. franchise lawyer. A franchise in Brazil is a system whereby the franchisor assigns to the franchisee the right to use a trademark or patent, associated with the right to exclusively or semi-exclusively distribute products or services, and also the right to use technology for implementation and management of any business or operating system developed or owned by the franchisor, by means of direct or indirect remuneration, and does not include an employment relationship.

The franchise agreement must also be submitted for INPI approval. Filing at INPI evidences the use of trademarks or patents by a Brazilian registered user to protect such trademarks vis-à-vis third parties, and is a prerequisite to registration of the franchise agreement at the Central Bank of Brazil for approval of remittances abroad. In addition, agreements executed abroad must be registered in Brazil with the Registry of Deeds and Documents.

### ***Canada***

While an Alberta Franchise Sales Law has been in effect since 1980, the Province of Alberta passed a new Franchises Act, Bill 33, on May 17, 1995. Supporting regulations came into effect on November 1, 1995. The Alberta law requires the franchisor to prepare and deliver a disclosure document to each prospective franchisee. There is no requirement to submit the disclosure document to a governmental body.

The Province of Ontario enacted a franchise disclosure law on May 17, 2000, called the Arthur Wishart Act. The Ontario Ministry of Consumer and Commercial Relations issued regulations on October 31, 2000, to implement the disclosure requirements of the Act, which became effective January 31, 2001. In addition to disclosure requirements, the Act includes a substantive requirement of fair dealing.

### ***China***

On November 14, 1997, the Chinese Ministry of Internal Trade issued regulations entitled Trial Implementation Measures for the Administration of Franchise Operations. The regulations require disclosures to prospective franchisees and the recording of these disclosures. They also set out the fundamental rights and duties of franchisors and franchisees, impose a

general good faith requirement on franchisors and franchisees, and contain substantive requirements for franchise agreements.

The disclosures must be recorded with the China Chain Enterprises Association, a quasi-governmental organization charged with formulating rules and codes of conduct for franchise operations. The submission of a disclosure document is for informational purposes; there is no substantive review of the document.

### ***France***

France enacted the “Loi Doubin” (Law No. 89-1008) on December 31, 1989, making France the first country outside of North America to specifically regulate franchising. The Loi Doubin requires licensors to disclose specified information before the execution of exclusive trademark licenses, including franchise agreements. Regulations under the Loi Doubin were issued on April 4, 1991.

The French law and regulations require franchisors to provide prospective franchisees with the draft franchise agreement and the disclosure document. A franchisor’s failure to provide such information may give rise to a private cause of action and is a crime. Charges may be brought by either a government prosecutor or a licensee. There is no requirement to file either the agreement or the disclosure document with the government.

### ***Indonesia***

On June 18, 1997, Indonesia enacted Government Regulation No. 16/1997 on Franchising. The Minister of Industry and Trade issued implementing regulations on July 30, 1997 (No. 259/MP/Kep/7/1997).

The Indonesian law and regulations require franchisors to prepare a disclosure document and to submit it to the Ministry of Industry and Trade for registration. The law also contains requirements regarding the substantive provisions of the agreement, including a requirement that the agreement be governed by Indonesian law and that the agreement be of at least five years’ duration. The Ministry of Industry and Trade has the power to determine the location of franchises outside of provincial capitals. In addition, franchisees are required to submit a report on the progress of the business every six months. Failure to do so would warrant suspension, and eventual revocation, of the license to do business as a franchise.

### ***Japan***

There is no single body of franchise disclosure law in Japan. However, disclosure is required under the Medium-Small Retail Business Promotion Act (the “Retailers Law”), enacted in 1973. This law provides certain government incentives to help small retailers compete with large businesses. Although the statute does not explicitly mention franchising, franchising is within the scope of the statute. Also, an opinion issued by the Fair Trade Commission of Japan requires franchisors to disclose material matters to the prospective franchisees in order to comply with the provisions of the Anti-Monopoly Law and FTC rules.

### ***Malaysia***

The Franchise Act 1998 (Act 590) was enacted in Malaysia in December 1998 and came into force when regulations were issued in October 1999. The Act requires both disclosure to prospective franchisees and registration with a Registrar of Franchises. The Act also imposes relationship requirements. Violation of the Act does not give rise to a private right of action.

### ***Mexico***

The Industrial Property Law of June 27, 1991, which regulates industrial property generally, contains franchise disclosure requirements in Article 142. Article 65 of the Regulations to the IPL, issued November 23, 1994, explain the franchise disclosure requirements. Although the disclosure document need not be registered, the franchise agreement must be registered at the Mexican Institute of Industrial Property (“IMPI”) under the chapter of the law that deals with trademark licenses. Registration makes the license effective vis-à-vis third parties. An abbreviated version of the agreement may be filed, so that the royalty provisions and other provisions may remain confidential.

The definition of a “franchise” under Mexican law is very broad, since it essentially does not include a fee element. Failure to comply with the disclosure and registration requirements can result in both civil and criminal sanctions.

### ***Romania***

Romania requires franchise disclosures under the Ordinance Regarding the Legal Status of Franchises (Ordinance 52/1997), issued in 1997. Like under the Mexican law, the definition of a “franchise under the Romanian law does not include a fee element, making the scope of the law very broad.

### ***Russia***

In January 1996, Russia enacted its first franchise law (Chapter 54 of Part II of the Russian Civil Code). The Russian law requires registration of franchise agreements with a government agency and it regulates the franchise relationship. The law does not require disclosure.

### ***South Korea***

The Korea Fair Trade Commission issued regulations in 1997 governing franchises (Notice Number 1997-4) under the Monopoly Regulation and Fair Trade Act. The regulations essentially restate general licensing laws in a franchise context. The regulations require certain disclosures. In addition, the regulations govern the substantive content of the franchise agreement, prohibiting, among other things, unreasonable requirements regarding the franchisees’ purchases of goods or equipment and limiting the imposition of post-term noncompetition requirements. No government filing is required.

## *Spain*

The Spanish Retail Trading Law (Article 62 of Act 7/1996), enacted on January 15, 1996, and the regulations issued under that law (Royal Decree 2485/1998), contain franchise disclosure requirements and established a franchise registry.

### **4. Conclusion: Negotiating the Agreement**

After the agreement has been drafted to the satisfaction of both the franchisor and its attorney and reviewed by local counsel, the franchisor will present the proposed agreement to the other party, or the franchisor's attorney will deliver it to the other party's attorney.

While franchise agreements are sometimes negotiated in the U.S., negotiation is likely to play a more important role in international franchise agreements because of the likely importance of the area development or master franchise agreement to the overall strategy of the franchisor in the destination country and because of the likelihood that the prospective foreign partner will be an important company with some degree of bargaining power. The unit franchise agreements may not be highly negotiated after the system is up and running, but their form is likely to be negotiated in the context of the negotiation of the master franchise agreement.

Negotiation maximizes the likelihood of a win/win transaction for both the franchisor and franchisee, and is likely to lead to a better agreement than one that is not negotiated. A well-drafted and seriously negotiated agreement will hopefully lead to profits for both parties and should minimize the likelihood of disputes later on.

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Tom has the highest rating available from Martindale-Hubbell. He is rated in AN INTERNATIONAL WHO'S WHO OF FRANCHISE LAWYERS (London 2000) as one of 174 preeminent franchise lawyers worldwide. He is also listed in the Mondaq Survey of Leading I.T. and E-Commerce Lawyers (London) and in Who's Who in American Law. He is a member of the governing board of the World Trade Council of Westchester and a director of the Westchester Information Technology Cluster. He is a former member of the Governing Committee of the American Bar Association's (ABA) Forum on Franchising (1993-1996), a former Associate Editor of the ABA FRANCHISE LAW JOURNAL (1990-1993), and the former Co-Chair of the International Subcommittee of the ABA Business Law Section's Cyberspace Law Committee (1998-2000). In addition, Tom is a panelist for the CPR Institute for Dispute Resolution, serving as an ICANN arbitrator for domain name disputes and as a franchise mediator.

Tom's publications include the following, among many others:

- *Franchise Relationship Laws: A Minefield for Franchisors*, 45 BUS. LAW. 289 (1989), reprinted in the ABA's BUILDING FRANCHISE RELATIONSHIPS (1996)
- *Choice of Law in Franchise Relationships: Staying Within Bounds*, 14 FRANCHISE L. J. 89 (Spring 1995)
- *Avoiding the Long Arm of the Law in International Franchising*, (ABA Forum on Franchising, October 1995) (co-authored with Andrew Loewinger)
- *The Content of International Franchise Agreements*, Fundamentals of International Franchising Program, ABA Annual Meeting (August 1994)

Tom received his law degree in 1976 from Syracuse University College of Law, where he was an editor of SYRACUSE LAW REVIEW. He holds a bachelor of arts degree from Sarah Lawrence College. He studied at the University of Heidelberg, Germany, and at the University of Paris (Sorbonne), where he received a graduate degree in philosophy. He is a member of the New York Bar.