

A scenic view of the Washington Monument in Washington, D.C., framed by cherry blossom branches. The monument is a tall, white, obelisk-shaped structure. The cherry blossoms are in full bloom, with pink and white flowers. The sky is a clear, bright blue. In the foreground, there is a body of water, likely the Tidal Basin, with a bridge and other structures visible in the distance. The overall atmosphere is bright and celebratory.

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LEGAL SYMPOSIUM

Advanced Best Practice for International Regulatory Compliance

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Introduction

- Some 29 countries have franchise specific laws, BUT some with no franchise specific laws most heavily regulate franchising due to local courts applying general legal principles and laws designed to regulate other inter-party relationships
- Must be aware of the potential impact of target market laws on the franchise documentation and sales process BEFORE closing the deal
- Mandatory local laws will impact the franchise agreement even though it is expressed to be subject to the franchisor's home law and the jurisdiction of franchisor's home courts

- This presentation will consider best practice for International Regulatory Compliance in view of
 - The Impact of Franchise Specific Laws
 - The Impact of General Commercial Law

Franchise Specific Laws

- Types
 - Anti-trust regulations
e.g. The EU, Japan and Venezuela
 - Foreign Trade/Investment regulations
e.g. China, Indonesia and Malaysia
 - Pure Franchise regulations
e.g. The USA, Canada, Brazil, France, Italy and Spain

Pre-Contractual Requirements Generally Imposed by Franchise Specific Laws

- Timing of Disclosure
- Cooling off Period
- Contents

Contents

- Basic details of Franchisor
- Description of the franchise and of the market
- Financial information about Franchisor
- Details of the Franchise Network
- Litigation details
- Fees
- Earning claims
- Restrictions with Franchisees
- Obligation of the parties
- Purchase tiers and personal involvement franchise
- Franchisor's IPRs
- Financing arrangements offered by franchisor
- Exclusivity
- Unusual country specific items

Mandatory Contents Imposed by Franchise Specific Laws

These generally comprise;

- Minimum Term
- General Duty of Good Faith
- Franchise Specific Duty of Good Faith
- Others
- Dispute Resolution

Registration Requirements Imposed by Franchise Specific Laws

- General Purpose is to promote transparency
- Examples of Requirements
e.g. Spain, China, Malaysia

Conclusion on Regulatory Compliance Best Practice as Regards Franchise Specific Laws

- Do not use domestic UFDD for international transactions
- Do take advice from expert franchise counsel with strong experience of the target market as regards how local law impacts upon the franchise agreement and the sales process including registration requirements

The Impact of General Commercial Law on the Contents of Franchise Documentation

- Courts in many countries apply general legal principles and laws designed to regulate other inter party relationships to franchising

- These laws and principles impact upon three distinct areas;
 - The pre-contractual relationship/sales process
 - The in-term relationship
 - The termination of the relationship

The Pre-contractual Relationship/Sales Process

- There are two main concepts that impact upon franchise sales
 - Misrepresentation
 - Pre-contractual duty of care e.g. “culpa in contrahendo”

The In-term Relationship

- There are four basic types of laws/principles that impact upon the franchise relationship
 - Duty of good faith and related concepts such as the prohibition of unconscionable behaviour and misleading and deceptive conduct
 - Regulation of Vertical Restraints
 - Unfair Competition Law
 - Consumer Law

The Common Law Approach to the Duty of Good Faith

- The concept of Good Faith is the product of a
“pure heart and empty head”

The German approach to Good Faith (“*Fallgruppen*”)

The concept of “*Treu und Glauben*”

- Good Faith takes three basic forms
 - Collateral – BGB311
 - Adaptive - BGB313
 - Restrictive – BGB138

The French Approach to Good Faith

- “Bonne Foi”
- “*Qui dit Contractual dit juste*”
- Article 1134 Civil Code
- Collateral, Adaptive and Restrictive

Other Examples of a General Duty of Good Faith

- Greek – Article 288 of the Civil Code
- Austria – Supreme Court Rulings despite the concept of *Tren und Glauben* not being in the Civil Code
- Spanish Civil Code Article 1258
- Polish Civil Code Article 56
- Czech Civil Code Article 6 – 228(1)
- Finnish Contracts Act (228/1929)
- Bulgarian Civil Code Article 26(1)

Good Faith Related Concepts

- Prohibition of Unconscionable Behaviour e.g. Australia
 - Competition and Consumer Act 2010 (CCA) s.51

- 11 factors referred to when considering unconscionability but the Simply No Knead case can make it clear that other factors can also be referred to
- Impacts upon a wide range of activities
e.g. misrepresentation, fraud, unjust terms, bad faith in operating the business, excessive charges, secret rebates/commissions etc

- Prohibition of Misleading & Deceptive Behaviour e.g. Australia – CCA s. 52

Vertical Restraints

- “Per se” approach vs “Rule of Reason” approach
- Treaty on the Functioning of the European Union (TFEU) Article 101(1) is an example of the “per se” approach
- Main impact of the “per se” approach is
 - Prohibition of Resale Price Maintenance (cf the *Leegin Creative Leather Products Inc v PSKS Inc* decision in the US Supreme Court)
 - Multi channel sales strategies

Unfair Competition Law

- E.g. German Unfair Competition Act Article 18

Consumer Law

- Gives franchisees additional rights as regards the terms of the franchise agreement
- The UK's Unfair Contract Terms Act 1977
- German Civil Code Article 305-310
- Conflict of Laws can cause problems
e.g. the Benincasa vs Dentalkit Sr. case in the ECJ

The Termination of the Relationship

- There are four types of laws that impact upon the termination of the franchise relationship
 - The law of contract
 - Employment law
 - Commercial agency law
 - Post-termination restrictions

Breach of Contract

- Common law – repudiatory breach based upon contractual terms
- Civil law – more interventionist
 - Germany makes distinction between serious and less serious breaches. Termination without notice is possible but rare. Termination for good cause can still require franchisor to pay compensation
 - France – What amounts to a material breach is defined by jurisprudence – reasonable notice is necessary

Employment Law

- “Hidden Employment” is often a concern in civil jurisdictions
 - e.g. German Termination Protection Act section 23.
 - Similar approach in France, Poland, Austria, Finland, the Netherlands, Sweden and Greece

Commercial Agency Law

- EU Commercial Agency Directive
- (EC) 86/653 applied by analogy by courts in many EU Member States
- Compensation can be payable to a franchise terminated for cause

Contractual Post-termination Restrictions

- Common law jurisdictions allow reasonable post-term restrictions
 - e.g. ProntaPoint plc vs London Litho Ltd and KallKwik Printing (UK) Ltd vs Bell in the UK
- Civil law jurisdictions often apply Commercial Agency law by analogy and so post-termination restrictions must be paid for
- Some jurisdictions simply disallow or severely limit post-term restrictions
 - e.g. South Korea

Conclusion on Regulatory Compliance Best Practice as Regards Non Franchise Specific Laws

- A wide range of impact upon franchising depending upon the target markets' legal system
- Often lacks clarity and is extremely complex
- Pro-franchisee

- Distinct difference of approach between common law and civil law legal systems
- Often far more restrictive than franchise specific laws
- Essential to take advice from expert franchise counsel with strong experience in the target market as early as possible on the sales position

Conclusion on Best Practice for International Regulatory Compliance

- The Regulatory environment in foreign markets will have a substantial impact on the franchisor's sales process and legal documentation and ability to exit the relationship
- Franchise specific laws often follow the US approach but there are subtle and significant differences in many jurisdictions

- Non franchise specific laws can be more restrictive than franchise specific laws, more difficult to understand and less easy to anticipate the impact of e.g. Duty of Good Faith
- Early advice from expert franchise counsel with strong experience of working in the jurisdiction is essential
- Mandatory local laws will apply despite the franchise agreement providing for franchisors home law and jurisdiction