



ICLG

The International Comparative Legal Guide to:

Franchise 2018

4th Edition

A practical cross-border insight into franchise law

Published by Global Legal Group, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Ashford Colour Press Ltd
September 2017

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ISBN 978-1-911367-73-4

ISSN 2055-8082

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General Chapters:

1	Franchising as a Means to Access New and More Lucrative Markets – Iain Bowler, DLA Piper	1
2	Five Key Difference Makers: Best Practices in Enhancing the Likelihood of Your International Franchise Success – Brian Schnell & Lucie Guyot, Faegre Baker Daniels	4
3	Mergers & Acquisitions Involving Franchise Systems: Key Due Diligence Considerations – Joyce Mazero & Sarah Walters, Gardere Wynne Sewell LLP	9

Country Question and Answer Chapters:

4	Australia	Marsh & Maher Lawyers: Robert Toth	16
5	Austria	Rechtsanwaltskanzlei Dr. Amelie Pohl: Dr. Amelie Pohl	24
6	Belgium	FLINN: Benoit Simpelaere & Leonard Hawkes	30
7	Brazil	Daniel Legal & IP Strategy: Hannah Vitória M. Fernandes & André Ferreira de Oliveira	38
8	Canada	Dickinson Wright LLP: Edward (Ned) Levitt & Andrae J. Marrocco	46
9	China	Jones & Co.: Paul Jones & Xin (Leo) Xu	55
10	Denmark	Horten Advokatpartnerselskab: Peter E. P. Gregersen	63
11	England & Wales	DLA Piper: Iain Bowler	69
12	Germany	Hoffmann Liebs Fritsch & Partner Rechtsanwälte mbB: Christoph Schmitt	79
13	India	Kanga & Co: Preeti Mehta & Chetan Thakkar	86
14	Iran	Persia Associates: Dr. Alireza Azimzadeh	94
15	Japan	Anderson Mori & Tomotsune: Kenichi Sadaka & Aoi Inoue	101
16	Kazakhstan	GRATA International: Saule Akhmetova & Timur Berekmoinov	109
17	Portugal	Cuatrecasas: Vasco Bivar de Azevedo & Mónica Pimenta	118
18	Romania	RUBIN MEYER DORU & TRANDAFIR: Cristina Tararache	127
19	Russia	GRATA International: Yana Dianova	134
20	South Africa	Smit & Van Wyk, Inc.: Esmari Jonker	143
21	Switzerland	Badertscher Attorneys at Law: Dr. Jeannette Wibmer	150
22	Turkey	GUNER legal: Haşmet Ozan Güner	157
23	Ukraine	Gorodissky & Partners (Ukraine): Nina Moshynska	164
24	USA	The Richard L. Rosen Law Firm, PLLC: Richard L. Rosen & Leonard S. Salis	174

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South Africa

Smit & Van Wyk, Inc.

Esmari Jonker



1 Relevant Legislation and Rules Governing Franchise Transactions

1.1 What is the legal definition of a franchise?

The Franchise Association of South Africa (FASA) refers to a “franchise” where one party grants to another party the right to operate a business or licence under specific conditions.

The Consumer Protection Act No. 68 of 2008 defines a “franchise agreement” as an agreement between two parties, being the franchisor and franchisee, respectively:

- (a) in which, for consideration paid, or to be paid, by the franchisee to the franchisor, the franchisor grants the franchisee the right to carry on business within all or a specific part of the Republic under a system or marketing plan substantially determined or controlled by the franchisor or an associate of the franchisor;
- (b) under which the operation of the business of the franchisee will be substantially or materially associated with advertising schemes or programmes or one or more trade marks, commercial symbols or logos or any similar marketing, branding, labelling or devices, or any combination of such schemes, programmes or devices, that are conducted, owned, used or licensed by the franchisor or an associate of the franchisor; and
- (c) that governs the business relationship between the franchisor and the franchisee, including the relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisor or an associate of the franchisor.

1.2 What laws regulate the offer and sale of franchises?

The contractual relationship between a franchisor and a franchisee is subject to the law of contract and regulated by means of the common law.

Since 1 April 2011, franchise agreements in South Africa are also subject to the statutory provisions of the Consumer Protection Act, which states that a franchise agreement must:

- (a) be in writing and signed by or on behalf of the franchisee;
- (b) include any prescribed information, or address any prescribed categories of information; and
- (c) comply with the general requirement to be in plain and understandable language.

All franchise agreements are subject to a statutory cooling-off period in terms of which a franchisee may cancel a franchise agreement

with written notice to the franchisor, without costs or penalty within 10 business days after signing of the agreement.

The Regulations of the Consumer Protection Act impose specific contractual and disclosure obligations on a franchisor.

1.3 If a franchisor is proposing to appoint only one franchisee/licensee in your jurisdiction, will this person be treated as a “franchisee” for the purposes of any franchise disclosure or registration laws?

Every transaction which will fall within the ambit of the statutory definition of a “franchise agreement” as specified in terms of the Consumer Protection Act (regardless of the number of franchisees or licensees), would be subject to the statutory franchise disclosure and contractual provisions.

1.4 Are there any registration requirements relating to the franchise system?

No, franchise agreements are not registered in South Africa as there is no official franchise registry.

1.5 Are there mandatory pre-sale disclosure obligations?

Yes. The Consumer Protection Act states that:

(1) Every franchisor must provide a prospective franchisee with a disclosure document, dated and signed by an authorised officer of the franchisor, at least 14 days prior to the signing of a franchise agreement, which as a minimum must contain:

- (a) the number of individual outlets franchised by the franchisor;
- (b) the growth of the franchisor’s turnover, net profit and the number of individual outlets, if any, franchised by the franchisor for the financial year prior to the date on which the prospective franchisee receives a copy of the disclosure document;
- (c) a statement confirming that there have been no significant or material changes in the company’s or franchisor’s financial position since the date of the last accounting officer’s, or auditor’s certificate or certificate by a similar reviewer of the company or franchisor, that the company or franchisor has reasonable grounds to believe that it will be able to pay its debts as and when they fall due; and
- (d) written projections in respect of levels of potential sales, income, gross or net profits or other financial projections for the franchised business or franchises of a similar nature with particulars of the assumptions upon which these representations are made.

The disclosure document must also be accompanied by a certificate on an official letterhead from an accounting officer or the auditor, certifying that:

- (a) the business of the franchisor is a going concern;
- (b) to the best of his or her knowledge the franchisor is able to meet its current and contingent liabilities;
- (c) the franchisor is capable of meeting all of its financial commitments in the ordinary course of business as they fall due; and
- (d) the franchisor's audited annual financial statements for the most recently expired financial year have been drawn up:
 - (i) in accordance with South African generally accepted accounting standards;
 - (ii) except to the extent stated therein, on the basis of accounting policies consistent with prior years;
 - (iii) in accordance with the provisions of the South African Companies Act and all other applicable laws; and
 - (iv) fairly reflecting the financial position, affairs, operations and results of the franchisor as at that date and for the period to which they relate.

The disclosure document should also include: (a) a list and specific details of current franchisees and of outlets owned by the franchisor; and (b) an organogram depicting the support system in place for franchisees.

1.6 Do pre-sale disclosure obligations apply to sales to sub-franchisees? Who is required to make the necessary disclosures?

The Consumer Protection Act makes it clear that every franchisor should provide a prospective franchisee with a disclosure document (containing the minimum prescribed information), at least 14 days prior to the signing of a franchise agreement. The Consumer Protection Act also states that if a franchise agreement is related to a master franchise, the master franchisor's identity should be disclosed. The definition of a "franchise agreement" in terms of the Consumer Protection Act would include both a master franchise agreement as well as a sub-franchise agreement. In both instances, the party granting the rights to the other party would be required to provide a disclosure document.

1.7 Is the format of disclosures prescribed by law or other regulation, and how often must disclosures be updated? Is there an obligation to make continuing disclosure to existing franchisees?

Refer to the answer to question 1.5 above. Good business practice would dictate regular updates and revisions of the disclosure document, especially in view of the fact that all information should be accurate when provided to a prospective franchisee. There are no specific requirements regarding continuing disclosure obligations.

1.8 Are there any other requirements that must be met before a franchise may be offered or sold?

Refer to the answer to question 1.2 above. The Consumer Protection Act Regulations also prescribes minimum information which should be incorporated in a franchise agreement, including:

- a description of the business system;
- types of goods or services which the franchisee is entitled to deal with;

- obligations of the franchisee and the franchisor;
- initial and ongoing training provided by the franchisor;
- conditions of use regarding the trade mark or intellectual property owned by the franchisor;
- description of premises or location and nature of franchisor's involvement;
- terms and conditions relating to payments, territorial rights, duration, termination, effect of termination, renewal, goodwill and assignment of the franchise;
- details of advertising or marketing funds, (if applicable) as well as additional required reference to financial statements and management accounts obligations of the franchisor;
- full particulars of the financial obligations of the franchisee and total investment required;
- details of the franchisor including the legal name, trading name, addresses, contact numbers, directors and shareholders as well as the master franchisor's identity (if applicable); and
- particulars of any restrictions imposed on the franchisee.

Franchise agreements should also include the following:

- the franchisor will provide to the franchisee a written explanation of any terms or sections not fully understood by the prospective franchisee;
- any deposits paid by the prospective franchisee will be deposited into a separate bank account together with a description of how these deposits will be dealt with; and
- the franchisor is not entitled to any undisclosed direct or indirect benefit or compensation from suppliers to its franchisees or the franchise system, unless the fact thereof is disclosed in writing with an explanation of how it will be applied.

1.9 Is membership of any national franchise association mandatory or commercially advisable?

The Franchise Association of South Africa is a voluntary organisation. Franchisors who are registered members of FASA undertake to comply with FASA's Code of Ethics and Business Practices which may add to the credibility of the franchisor and the franchise group. FASA promotes ethical franchising and registered members may receive value added services and other related benefits from FASA (www.fasa.co.za).

1.10 Does membership of a national franchise association impose any additional obligations on franchisors?

Registered members of FASA should comply with FASA's Code of Ethics and Business Practices. The Code provides guidelines and obligations regarding ethical business practices especially in as far as the franchisor-franchisee relationship is concerned.

1.11 Is there a requirement for franchise documents or disclosure documents to be translated into the local language?

The general business language in South Africa is English and there are no specific translation obligations to any of the other official languages.

2 Business Organisations Through Which a Franchised Business can be Carried On

2.1 Are there any foreign investment laws that impose restrictions on non-nationals in respect of the ownership or control of a business in your jurisdiction?

There are generally no restrictions on foreign shareholding in South African companies or foreign franchise investments. Foreign entities are, however, advised to consider sector specific legislation and Black Economic Empowerment (BEE) policies, which may impose certain criteria regarding trading activities in specific market sectors.

2.2 What forms of business entity are typically used by franchisors?

Different entity options are available to conduct business within South Africa, including a sole proprietor, partnership, trust, a South African company or an external company. A South African company would usually be the preferred choice of entity to be used by a franchisor. The South African Companies Act No. 71 of 2008 distinguishes between two types of profit companies, namely a private company and a public company.

2.3 Are there any registration requirements or other formalities applicable to a new business entity as a pre-condition to being able to trade in your jurisdiction?

Yes, if such entities are companies or trusts. Companies are registered with the Companies and Intellectual Properties Commission (CIPC) and trusts are registered with the Master of the High Court.

3 Competition Law

3.1 Provide an overview of the competition laws that apply to the offer and sale of franchises.

The Competition Act No. 89 of 1998 aims to prevent anti-competitive practices and refers to horizontal and vertical restrictive practices, both of which may apply to the franchise industry. Relevant matters in franchise agreements would typically be:

1. territorial restrictions, exclusive dealings and exclusive territories;
2. price fixing, minimum price maintenance and minimum discounts;
3. contractual obligations to source products and services only from a specific supplier; and
4. tying of products.

The above exclusionary acts by a franchisor may be regarded as anti-competitive, unless the franchisor is able to demonstrate that there is a technological, efficiency or pro-competitive gain which outweighs the anti-competitive effect.

3.2 Is there a maximum permitted term for a franchise agreement?

Parties would be free to enter into a term of their choice. In terms of the Consumer Protection Act, the duration of a franchise agreement should be disclosed and agreed upon in the franchise agreement.

3.3 Is there a maximum permitted term for any related product supply agreement?

No, there is no maximum permitted term.

3.4 Are there restrictions on the ability of the franchisor to impose minimum resale prices?

Section 5(2) of the Competition Act prohibits the practice of minimum resale price maintenance. A franchisor may not limit or exclude a franchisee's ability to offer discounts or to sell at lower prices than what the franchisor may impose. A franchisor may, however, provide franchisees with recommended prices.

3.5 Encroachment – are there any minimum obligations that a franchisor must observe when offering franchises in adjoining territories?

In terms of the Consumer Protection Act, any territorial rights which may be granted by a franchisor to a franchisee, should be specified in detail in the franchise agreement. Section 5(1) of the Competition Act may be infringed if there is an arrangement between a franchisor and franchisor regarding an exclusive territory, especially if the effect of such an arrangement would substantially prevent or lessen competition in the trade. A franchisor may, however, raise a defence based on efficiency, technology or other pro-competitive gains in the event where such elements would outweigh any anti-competitive effect as a result of the territorial restrictions.

3.6 Are in-term and post-term non-compete and non-solicitation of customers covenants enforceable?

Such terms would be enforceable provided that the restrictions have been agreed upon between the parties in the franchise agreement. In terms of South African case law, a party would only be entitled to enforce such restrictions if: i) they are reasonable in terms of the duration, area and restrictive actions; ii) they would not deprive the other party from earning a living; and iii) the party who is enforcing the restriction is able to show that it has a protectable interest and legitimate basis for enforcing the restriction.

4 Protecting the Brand and other Intellectual Property

4.1 How are trade marks protected?

Trade Marks are protected in South Africa by means of statute and common law. The South African Trade Marks Act No. 194 of 1993 provides for statutory trade mark protection in terms of which trade marks may be registered for an indefinite period, subject to the renewal thereof every 10 years. Common law trade marks (unregistered marks) are protected by means of the common law and remedies are available in terms of passing off and unlawful competition.

4.2 Are know-how, trade secrets and other business-critical confidential information (e.g. the Operations Manual) protected by local law?

Know-how, trade secrets and confidential information are protected in South Africa under the common law.

4.3 Is copyright (in the Operations Manual or in proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement) protected by local law?

Copyright is regulated and protected under the Copyright Act No. 98 of 1978 which provides protection for: literary works; musical works; artistic works; cinematograph films; sound recordings; broadcasts; programme-carrying signals; published editions; and computer programs. The work that is to enjoy copyright protection must be reduced to a material form. In general, any original work created by a qualified person is eligible for copyright protection. A qualified person refers to any national or resident in South Africa or a Berne Convention country. South Africa is also a party to the Berne Convention and the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights). Franchisors are advised to identify and draw attention to all copyrighted materials which are provided to franchisees.

5 Liability

5.1 What are the remedies that can be enforced against a franchisor for failure to comply with mandatory disclosure obligations? Is a franchisee entitled to rescind the franchise agreement and/or claim damages?

Regulation 2 of the Consumer Protection Act states that any provision in a franchise agreement which is in conflict with the said regulations would be void to the extent of such a conflict. The Franchisee would also be able to apply common law remedies in terms of the law of contract, which may include cancellation of the agreement and/or a claim for damages.

5.2 In the case of sub-franchising, how is liability for disclosure non-compliance or for misrepresentation in terms of data disclosed being incomplete, inaccurate or misleading allocated between franchisor and master franchisee? If the franchisor takes an indemnity from the master franchisee in the Master Franchise Agreement, are there any limitations on such an indemnity being enforceable against the master franchisee?

Each party providing the disclosure information should ensure the accuracy thereof, as the party providing the information would be liable regarding the content thereof. A franchisor, as well as a master franchisee, may incur liability if inaccurate information is provided to a sub-franchisee. Regulation 3 of the Consumer Protection Act states that each page of the disclosure document must be qualified in respect of the assumptions contained therein.

5.3 Can a franchisor successfully avoid liability for pre-contractual misrepresentation by including disclaimer clauses in the franchise agreement?

A franchisor would not be able to avoid liability with disclaimers if representations were made negligently or fraudulently. In terms of common law, the franchisee may institute action against the franchisor based on negligent and/or fraudulent misrepresentations.

In terms of Section 48 of the Consumer Protection Act, no supplier (including a franchisor) may require a consumer (or a franchisee), or another person to whom any goods or services are supplied at the

direction of the consumer: (i) to waive any rights; (ii) to assume any obligation; or (iii) to waive any liability of the supplier (including a franchisor), on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

5.4 Does the law permit class actions to be brought by a number of allegedly aggrieved claimants and, if so, are class action waiver clauses enforceable?

There are no specific franchise class action limitations. In terms of the Consumer Protection Act, it may constitute an unreasonable provision to request a party to waive any legal remedies or rights which it would have been entitled to.

6 Governing Law

6.1 Is there a requirement for franchise documents to be governed by local law? If not, is there any generally accepted norm relating to choice of governing law, if it is not local law?

Parties to a franchise agreement in South Africa normally elect the local law as choice of governing law. There are, however, no specific restrictions on any other foreign governing law, provided that all transactions concluded between the parties in South Africa and business affairs conducted in South Africa would still be subject to compliance with local legislation and regulations.

6.2 Do the local courts provide a remedy, or will they enforce orders granted by other countries' courts, for interlocutory relief (injunction) against a rogue franchisee to prevent damage to the brand or misuse of business-critical confidential information?

A franchisor conducting business in South Africa may approach South African courts at first instance for interlocutory relief to prevent damage to the brand or misappropriation of confidential information. The enforcement of foreign court orders in South Africa is generally regulated by means of the common law. Foreign court orders may establish a cause of action which may be enforced by South African courts, provided that certain requirements are complied with, including the following:

- the foreign court should have had international competence;
- the enforcement of the judgment should not be contrary to public policy in South Africa;
- the judgment should not have been obtained fraudulently;
- the judgment should not involve the enforcement of a punitive or revenue law of the foreign jurisdiction;
- the judgment should not contravene the Protection of Businesses Act 99 of 1978; and
- the judgment should be final and conclusive (meaning that temporary injunctions from foreign courts would not be enforceable).

7 Real Estate

7.1 Generally speaking, is there a typical length of term for a commercial property lease?

The leasing of commercial property may vary depending upon the specific agreement between the parties and nature of the commercial activities, but generally it ranges between three and 10 years.

7.2 Is the concept of an option/conditional lease assignment over the lease (under which a franchisor has the right to step into the franchisee/tenant's shoes under the lease, or direct that a third party (often a replacement franchisee) may do so upon the failure of the original tenant or the termination of the franchise agreement) understood and enforceable?

Yes, such concepts are enforceable provided that the parties have made specific provision pertaining to such matters in the franchise agreement and/or the lease agreement.

7.3 Are there any restrictions on non-national entities holding any interest in real estate, or being able to sub-lease property?

Generally there no restrictions, provided that all local real estate requirements are being complied with.

7.4 Give a general overview of the commercial real estate market. Specifically, can a tenant reasonably expect to secure an initial rent free period when entering into a new lease (and if so, for how long, generally), or are landlords demanding "key money" (a premium for a lease of a particular location)?

Prior to the commencement of commercial leases, a landlord would generally provide the tenant with a 'beneficial occupation' period to fit out the premises during which no rent would be payable. Generally, 'beneficial occupation' would be for a period of 30–60 days; however, depending upon the specific premises and type of business, the parties may agree on a longer or shorter period. Premium locations would normally be subject to higher rent.

8 Online Trading

8.1 If an online order for products or request for services is received from a potential customer located outside the franchisee's exclusive territory, can the franchise agreement impose a binding requirement for the request to be re-directed to the franchisee for the territory from which the sales request originated?

Although there are no specific statutory limitations regarding the re-direction of products between franchisees within a franchise group, it should be noted that Section 5(1) of the Competition Act may be infringed if there is an arrangement between a franchisor and franchisee regarding exclusive territories, especially if the effect of such an arrangement would substantially prevent or lessen competition in the trade. A franchisor may, however, raise a defence based on efficiency, technology or other pro-competitive gains in the event where such elements would outweigh any anti-competitive effect as a result of the territorial restrictions and territorial re-directions.

8.2 Are there any limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement?

Generally, there are no limitations. Should a franchisor require that a former franchisee assign local domain names upon termination of the franchise agreement, it is recommended to regulate the obligation and process in detail in the franchise agreement.

9 Termination

9.1 Are there any mandatory local laws that might override the termination rights that one might typically expect to see in a franchise agreement?

Regulation 2 of the Consumer Protection Act states that a franchise agreement must contain provisions which prevent: (i) unreasonable or overvaluation of fees, prices or other direct or indirect consideration; (ii) conduct which is unnecessary or unreasonable in relation to the risks to be incurred by one party; and (iii) conduct that is not reasonably necessary for the protection of the legitimate business interests of the franchisor, franchisee or franchise system.

The above principles would also apply to termination rights regulated in a franchise agreement.

10 Joint Employer Risk and Vicarious Liability

10.1 Is there a risk that a franchisor may be regarded as a joint employer with the franchisee in respect of the franchisee's employees? If so, can anything be done to mitigate this risk?

In terms of South African employment legislation, a franchisee and its employees would not be regarded as employees of the franchisor (unless there are specific circumstances and other agreement(s) between the parties stating otherwise). It would be advisable to include specific references in a franchise agreement confirming the independent status of the franchisor and franchisee respectively, especially in as far as employment and employees are concerned.

10.2 Is there a risk that a franchisor may be held to be vicariously liable for the acts or omissions of a franchisee's employees in the performance of the franchisee's franchised business? If so, can anything be done to mitigate this risk?

Refer to the answer to question 10.1 above. A franchisor's vicarious liability would be limited to its own employees (which may also be subject to any other liability regarding the franchisor's own wrongdoing or any other liability as a supplier in terms of the supplier accountability provisions of the Consumer Protection Act).

11 Currency Controls and Taxation

11.1 Are there any restrictions (for example exchange control restrictions) on the payment of royalties to an overseas franchisor?

All payments made to foreign entities, including foreign franchisors, would be subject to approval by the South African Reserve Bank, as well as any applicable exchange control regulations.

11.2 Are there any mandatory withholding tax requirements applicable to the payment of royalties under a trade mark licence or in respect of the transfer of technology? Can any withholding tax be avoided by structuring payments due from the franchisee to the franchisor as a management services fee rather than a royalty for the use of a trade mark or technology?

A withholding tax would be payable in respect of royalty payments to be made to or for the benefit of a non-resident for the right to use intellectual property in South Africa. Generally, a withholding tax of 15% would apply, but this percentage may vary depending upon the different taxation agreements or tax treaties between South Africa and other countries. Alternative payment structures may be considered; however, the South African Revenue Services may at any time investigate payments to determine the actual purpose and intention regarding such payments and structures. No withholding tax on a royalty amount would be payable if the amount is effectively connected to a permanent establishment of the non-resident in South Africa.

11.3 Are there any requirements for financial transactions, including the payment of franchise fees or royalties, to be conducted in local currency?

No, there are not.

12 Commercial Agency

12.1 Is there a risk that a franchisee might be treated as the franchisor's commercial agent? If so, is there anything that can be done to help mitigate this risk?

Generally, it is accepted that the franchisor and franchisee are two separate and independent entities. It would be advisable to include a specific provision in the franchise agreement stating that the franchisee has not been appointed as the franchisor's agent and does not have the authority to act as the franchisor's agent at any given time.

13 Good Faith and Fair Dealings

13.1 Is there any overriding requirement for a franchisor to deal with a franchisee in good faith and to act fairly in its dealings with franchisees according to some objective test of fairness and reasonableness?

- In terms of the common law, any negligent or fraudulent dealings by a party may result in liability. The Consumer Protection Act incorporates fundamental rights based on fair and honest dealing, as well as fair and reasonable contract terms and conditions.
- Regulation 2 of the Consumer Protection Act also states that provisions in a franchise agreement should prevent:
 - unreasonable or overvaluation of fees, prices or other direct or indirect consideration;
 - conduct which is unnecessary or unreasonable in relation to the risks to be incurred by one party; and
 - conduct that is not reasonably necessary for the protection of the legitimate business interest of the franchisor, franchisee or the franchise system.

14 Ongoing Relationship Issues

14.1 Are there any specific laws regulating the relationship between franchisor and franchisee once the franchise agreement has been entered into?

Yes, the provisions of the Consumer Protection Act regarding general supply of goods and services between a franchisor and a franchisee would apply to the ongoing relationship between the parties. The relationship between the parties would furthermore be subject to the contractual relationship governed in terms of the law of contract based upon the provisions of the franchise agreement, as well as any other general commercial legislation applicable in the South African trade and market place.

15 Franchise Renewal

15.1 What disclosure obligations apply in relation to a renewal of an existing franchise at the end of the franchise agreement term?

Refer to the answer to question 1.5 above. The Consumer Protection Act does not specifically refer to any disclosure obligations or disclosure requirements at the time of the renewal of a franchise agreement.

15.2 Is there any overriding right for a franchisee to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term irrespective of the wishes of the franchisor not to renew or extend?

There is no specific overriding right for automatic renewal or extension. The Consumer Protection Act states that the franchise agreement should contain provisions regarding extension or renewal terms, or whether there is an option to renew or extend the agreement or not. There are no statutory obligations regarding renewal rights other than that the renewal procedures should be included and addressed in the franchise agreement.

15.3 Is a franchisee that is refused a renewal or extension of its franchise agreement entitled to any compensation or damages as a result of the non-renewal or refusal to extend?

If the franchisor has reasonable grounds to refuse renewal, based upon the provisions of the franchise agreement, the franchisee would not be entitled to any compensation or damages.

16 Franchise Migration

16.1 Is a franchisor entitled to impose restrictions on a franchisee's freedom to sell, transfer, assign or otherwise dispose of the franchised business?

It is a requirement of the Consumer Protection Act that the conditions for transfer of rights and/or assignment of rights be addressed in a franchise agreement. A franchisee may be restricted to transfer its rights and obligations and ownership interest in the franchisee entity, provided that those aspects have been addressed and agreed upon in the franchise agreement.

16.2 If a franchisee is in breach and the franchise agreement is terminated by the franchisor, will a “step-in” right in the franchise agreement (whereby the franchisor may take over the ownership and management of the franchised business) be recognised by local law, and are there any registration requirements or other formalities that must be complied with to ensure that such a right will be enforceable?

Yes, the franchisor may be able to exercise a “step-in” right provided that such instances and actions have been specifically agreed upon in the franchise agreement and such requirements are not in contradiction with the general reasonable and equity requirements of the Consumer Protection Act. There are no specific registration requirements to exercise a franchisor’s “step-in” right.

16.3 If the franchise agreement contains a power of attorney in favour of the franchisor under which it may complete all the necessary formalities required to complete a franchise migration under pre-emption or “step-in” rights, will such a power of attorney be recognised by the courts in the country and be treated as valid? Are there any registration or other formalities that must be complied with to ensure that such a power of attorney will be valid and effective?

There are no specific registration requirements to exercise a franchisor’s “step-in” right. Such provisions would be enforceable provided that they are addressed and agreed upon in the franchise agreement and also, provided that they are not inconsistent with the reasonable and equity provisions of the Consumer Protection Act.



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Esmari Jonker leads the franchising portfolio of Smit & Van Wyk, Inc., a law firm based in Pretoria, South Africa. She is an attorney of the High Court of South Africa and holds LL.B. and LL.M. degrees (with a Master’s degree in Intellectual Property Law). Ms. Jonker has more than 17 years’ experience in franchise law and intellectual property matters, especially in South Africa and Africa. She acts on behalf of local as well as international clients in the franchise industry and advises both franchisors and franchisees with regard to legal matters.

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Patent, Trade Mark and Copyright Attorneys

Smit & Van Wyk, Inc. is a boutique law firm dealing exclusively with Intellectual Property and Franchise law in South Africa. The firm’s fields of practice encompass all aspects relating to patents, designs and trade marks, including litigation, as well as providing advice on the commercial rights attached to each of these forms of protection. They also deal with all aspects of Franchising and Copyright law. Through the combined expertise of their attorneys and experienced support staff they are able to file, prosecute and enforce Intellectual Property rights in South Africa, throughout the African continent and in most foreign jurisdictions.

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