

THE FRANCHISE LAW  
REVIEW

SIXTH EDITION

Editor  
Mark Abell

THE LAWREVIEWS

THE  
FRANCHISE LAW  
REVIEW

SIXTH EDITION

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This article was first published in February 2019  
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Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
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ISBN 978-1-83862-002-8

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARAMIS

ATIEH ASSOCIATES LAW FIRM

BASHAM, RINGE Y CORREA, SC

BECCAR VARELA

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# PREFACE

Since the publication of the fifth edition of *The Franchise Law Review*, there have been yet more major economic and geopolitical developments that have had a significant impact on world trade; the Sino-American trade war, the renewal of Iranian sanctions and Brexit being only three of these. Through all this, however, the apparently inexorable march towards the globalisation of commerce has continued unabated. Despite the slow emergence of a few economic bright spots, the global economy is not performing as well as it might, and there are concerns that the US economy may be approaching a crash.

As a consequence, businesses are often presented with little choice but to look to more vibrant markets in Asia, the Middle East and Africa for their future growth. At the same time, South–South trade is on the increase, perhaps at the expense of its North–South counterpart. All of this, coupled with the unstable wider geopolitical landscape, presents business with only one near certainty: there will be continued deleveraging of businesses in the coming years and, thus, growing barriers to international growth for many of them. All but the most substantial and well-structured of such businesses may find themselves facing not only significant difficulties through reduced access to funding for investment in their foreign ventures, but also challenges arising from their lack of managerial experience and bandwidth.

Franchising, in its various forms, continues to present businesses with one way of achieving profitable and successful international growth without the need for either substantial capital investment or a broad managerial infrastructure. In sectors as diverse as food and beverages, retail, hospitality, education, healthcare and financial services, franchising continues to be a popular catalyst for international commerce and makes a strong and effective contribution to world trade. We are even seeing governments turning to it as an effective strategy for the future of the welfare state as social franchising gains still more traction as a way of achieving key social objectives.

Given the positive role that franchising can play in the world economy, it is important that legal practitioners have an appropriate understanding of how it is regulated around the globe. This book provides an introduction to the basic elements of international franchising and an overview of the way that it is regulated in 37 jurisdictions.

As will be apparent from the chapters of this book, there continues to be no homogenous approach to the regulation of franchising around the world. Some countries specifically regulate particular aspects of the franchising relationship. Of these, a number try to ensure an appropriate level of pre-contractual hygiene, while others focus instead on imposing mandatory terms upon the franchise relationship. Some do both. In certain countries, there is a requirement to register certain documents in a public register. Others restrict the manner in which third parties can be involved in helping franchisors meet potential franchisees. No two countries regulate franchising in the same way. Even those countries that have

a well-developed regulatory environment seem unable to resist the temptation to continually develop and change their approaches – as is well illustrated by the recent changes to the Australian regulations. The inexorable march towards franchise regulation continues, with countries such as Argentina, which previously had not specifically regulated franchising, adopting franchise-specific laws over the past 12 months.

Many countries do not have franchise-specific legislation but nevertheless strictly regulate certain aspects of the franchise relationship through the complex interplay of more general legal concepts such as antitrust law, intellectual property rights and the doctrine of good faith. This heterogeneous approach to the regulation of franchising presents yet another barrier to the use of franchising as a catalyst for international growth.

While this book certainly does not present readers with the complete answer to all the questions they may have about franchising in all the countries covered – that would require far more pages than it is possible to include in this one volume – it does seek to provide the reader with a high-level understanding of the challenges involved in international franchising in the first section, and then, in the second section, explains how these basic themes are reflected in the regulatory environment within each of the countries covered. I should extend my thanks to all of those who have helped with the preparation of this book, in particular Caroline Flambard and Nick Green, who have invested a great deal of time and effort in making it a work of which all those involved can be proud. It is hoped that this publication will prove to be a useful and often-consulted guide to all those involved in international franchising, but needless to say it is not a substitute for taking expert advice from practitioners qualified in the relevant jurisdiction.

**Mark Abell**

Bird & Bird LLP

London

January 2019

# SOUTH AFRICA

*Ian Jacobsberg*<sup>1</sup>

## I INTRODUCTION

South Africa's franchise industry is represented by the Franchise Association of South Africa (FASA), a voluntary association, which aims to develop and safeguard the business environment for ethical franchising.

According to an independent survey commissioned by FASA in 2018, the industry contributed approximately 15.7 per cent of the total South African gross domestic product, up from the previous year's contribution of 13.3 per cent. According to the survey, South Africa currently has 865 franchise brands with approximately 45,000 outlets, which provide employment to 369,573 people (an increase of around 26,000 jobs from the previous year).

Fast-food outlets and restaurants account for 23 per cent of the industry, followed closely by the retail sector at 18 per cent, and building, office and home services at 12 per cent. Other sectors that also feature in the market include childcare, education and training, which make up 9 per cent of the industry, and automotive products and services, accounting for another 8 per cent. The number of international franchise brands in South Africa has increased in the past year from approximately 12 per cent to 27 per cent.

The government has historically not taken an active interest in the franchise industry. However, following sustained lobbying by FASA, there is growing recognition that franchising can effectively address job creation, poverty alleviation, economic growth and black economic empowerment. As a result, the government has allocated a portion of its 'Jobs Fund' to franchising, providing subsidies to franchisors who are committed to promoting new entrepreneurs and developing skills.

## II MARKET ENTRY

### i Restrictions

Franchisors are not distinguished from other market entrants in South Africa as regards compliance requirements.

### ii Foreign exchange and tax

A foreign franchisor may hold an interest in a South African franchise either directly or through a South African registered company.

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<sup>1</sup> Ian Jacobsberg is a partner at Hogan Lovells (South Africa) Inc.

Where control of the business is based outside South Africa, any transaction with a branch, business or subsidiary in South Africa is treated as if that branch, business or subsidiary were a separate person.

Should a foreign investor acquire equity in a South African company, the relevant share certificate must be endorsed 'non-resident', against evidence that the shareholding was acquired at a fair and market-related value, and paid for through the introduction of foreign currency.

Any loans by a foreign franchisor to a South African branch or subsidiary, or to a South African franchisee, requires prior exchange control permission.

While there is no restriction on a foreign franchisor acquiring real estate, any local borrowing to acquire securities or residential property is restricted to a 1:1 ratio between capital contribution and local borrowing.

South Africa has a residence-based taxation system under which residents, as defined in the Income Tax Act,<sup>2</sup> are taxed on their worldwide income, while non-residents are taxed solely on income from a South African source.

### III INTELLECTUAL PROPERTY

#### i Brand search

The Companies and Intellectual Property Commission (CIPC) provides online access to information in respect of patents and trademarks. .

More detailed information, can be obtained by a special search or, alternatively, through an online search, on payment of a prescribed fee.

#### ii Brand protection

South Africa provides statutory protection for four types of intellectual property – patents, designs, trademarks and copyright.

##### *Patents*

A patent is an exclusive right granted for any new invention or idea, which provides for a new way of doing something or offers a technical solution to a problem that has not already been used, or made known or available to the public anywhere.

An application must be made by the inventor or other person who has acquired the right from the inventor. Protection is usually granted for a period of about 20 years and is limited to the country in which it has been granted. Patent protection means that the invention cannot be commercially made, used, distributed, imported or sold without the consent of the patent holder.

##### *Designs*

South African law provides for the registration of two types of designs, namely aesthetic and functional designs. A registered design grants the proprietor the exclusive right to exploit the design for a specified period. To obtain protection, an application must be made to the CIPC.

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2 Act No. 58 of 1962.

### **Trademarks**

Only a trademark that is registered in terms of the Trade Marks Act<sup>3</sup> will enjoy the protection afforded under that Act. To be registered, the mark must be capable of distinguishing the proprietor's goods or services from those of other parties. The mark must also not mislead consumers or violate public order or morality, and may not be the same as, or confusingly similar to, any another registered trademark.

The applicant must file an application with the CIPC for the registration of a trademark in a specific class or classes.

Any person who has prior rights or who believes that he or she would be prejudiced by the registration of a trademark may oppose it. The opposing party must show how he or she would be prejudiced by the registration of the proposed trademark and the grounds for opposition.

An opposition can be filed on the grounds that the trademark is not descriptive or not distinctive, or that it is confusingly similar to an existing registered trademark or conflicts with existing common law rights.

Once a trademark is registered, the proprietor enjoys the exclusive right to use it throughout South Africa. The proprietor may restrain others from making use of any mark confusingly similar to his or her mark. A registration certificate constitutes *prima facie* proof of the proprietor's right.

The Act also provides protection to unregistered marks. To be protected, the mark must be 'well known', as envisaged in the Paris Convention.<sup>4</sup> Protection may be afforded even where the owner does not carry on business in South Africa.

The common law principles of unlawful competition and passing off apply to unregistered trademarks.

### **Copyright**

The Copyright Act<sup>5</sup> confers automatic protection on all original works; no formal registration is required. Copyright can subsist in literary, artistic or musical works, sound recordings, films, computer programs, broadcasts, satellite transmissions and published editions of works.<sup>6</sup>

To be protected, the work must be original, in a material form and created by a 'qualified person'. Qualified persons include South African citizens, residents and persons who are domiciled in South Africa, and citizens and residents of, and persons who are domiciled in, any country that is a signatory to the Berne Convention.

Protection is also afforded where the work is first published in South Africa or one of the other Convention countries. Where a work is created in the course and scope of the creator's employment, copyright will vest in his or her employer.

In a franchise relationship, the franchisor usually grants the franchisee a licence to use intellectual property, such as copyright material and trademarks.<sup>7</sup> The licence need not

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3 Act 196 of 1993, as amended.

4 Paris Convention on the Protection of Industrial Property of March 1883, as revised or amended from time to time and as acceded to by the Republic.

5 Act 98 of 1978.

6 Section 2 of Act 98 of 1978.

7 Tanya Woker, *The Franchise Relationship under South African Law* (Juta Cape Town 2012) 208.

be in writing; however, a franchisor must provide the franchisee with a description of any intellectual property owned by the franchisor, or licensed to the franchisor, which will be used in the franchise and the conditions under which it may be used.<sup>8</sup>

Business ideas, methods, know-how and trade secrets are not protected by statute and must therefore be protected by contractual undertakings by the franchisee not to disclose or use the intellectual property for any purpose not authorised by the franchisor.

### **iii Enforcement**

#### ***Registered Trademarks***

A registered trademark will be infringed:

- a* if a mark identical to or so nearly resembling it as to be likely to deceive or cause confusion, is used in the course of trade, without the authority of the owner, in relation to the goods or services for which it is registered;
- b* if a mark identical or similar to it is used in the course of trade, without the authority of the owner, in relation to goods or services that are so similar to the goods or services in respect of which it is registered, that the likelihood of deception or confusion exists; and
- c* if unauthorised use is made of a mark, in relation to any goods or services, in the course of trade, that is identical or similar to a registered trademark that is well known in South Africa, and use of the mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or repute of the registered trademark, even in the absence of deception or confusion.

Unauthorised use of a registered trademark can be prevented by way of an application to the High Court, which may grant the following relief:<sup>9</sup>

- a* an interdict (injunction);
- b* an order for removal of the infringing mark, and the delivering up of all goods to which the trademark is attached;
- c* damages; and
- d* a reasonable royalty.

#### ***Copyright***

Copyright is generally enforceable by way of an application for an interdict against continued infringement, and a claim may be made for damages or a reasonable royalty, as an alternative or addition to the interdict. The owner may also claim the delivering up of all infringing copies.

Unregistrable intellectual property such as confidential business information, know-how and trade secrets that are protected by contractual undertakings may be enforced pursuant to contract law.

### **iv Data protection, cybercrime, social media and e-commerce**

E-commerce and cybercrimes are governed by the Electronic Communications and Transactions Act 2002 (ECTA), which applies to any electronic transaction or data message.

Data protection in South Africa is currently governed by disparate pieces of legislation, including the Constitution of South Africa 1996, common law, the Promotion of Access to

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8 Regulation 2(3)(i).

9 Section 34(3) of Act 196 of 1993, as amended.



Information Act 2000 and ECTA. The first, consolidated piece of data protection legislation, the Protection of Personal Information Act 2013 (POPIA), is only partially in effect and the provisions that are in effect do not create any substantive obligations. The Information Regulator has indicated that POPIA should be fully effective early in 2019, but the exact time frame is unclear. The Information Regulator has encouraged South African entities to begin to comply with POPIA. Once POPIA becomes fully effective, a 12-month grace period is provided for compliance.

POPIA applies to the processing of personal information by or for a 'responsible party', which is defined as 'a public or private body, or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information'. Personal information, is, generally speaking, any information relating to an identifiable, living, natural person and, where applicable, an identifiable, existing juristic person. To the extent that any person processes personal information, whether in relation to its employees or any other party, POPIA will apply.

POPIA imposes the following conditions for the lawful processing of personal information:

- a* accountability;
- b* processing limitation;
- c* purpose specification;
- d* further processing limitation;
- e* information quality;
- f* openness;
- g* security safeguards; and
- h* data subject participation.

POPIA prohibits the transfer of personal information to a foreign country, except in certain instances, such as where the data subject consents or the recipient of the information is subject to a law, binding agreement or binding corporate rules that provide a level of protection that is substantially similar to the conditions contained in POPIA.<sup>10</sup>

As POPIA is not yet fully effective, data protection in South Africa is currently based on common law, which provides that the voluntary and informed consent of persons is required for the processing of their personal information.

## **IV FRANCHISE LAW**

### **i Legislation**

The Consumer Protection Act 2008 (CPA), together with the regulations promulgated under it, regulate franchising in South Africa. The regulations require a franchisor to provide a prospective franchisee with both a franchise agreement and a disclosure document. The CPA and regulations set out requirements and terms that must be adhered to for a franchise agreement to be valid.

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10 Section 72 of Act 4 of 2013.

## **ii Pre-contractual disclosure**

Pursuant to Regulation 3 of the CPA, a franchisor must provide a prospective franchisee with a disclosure document, dated and signed by an authorised officer of the franchisor, at least 14 days before signature of the agreement. The purpose of the disclosure document is to ensure that the prospective franchisee is not misled as to any material aspect of the franchise business in which they are investing. There is no obligation of ongoing disclosure on the franchisor.

Regulation 3 sets out information that a disclosure document must contain.

The document must be accompanied by an accounting officer's or auditor's certificate, certifying, among other things, that the franchisor's business is a going concern, is able to meet its current and contingent liabilities and financial commitments, and its annual financial statements have been prepared in accordance with generally accepted accounting principles.

If the required information is not included in the document, or is not, at the date of the document, factually correct, the franchisor may be subject to allegations of misrepresentation and non-disclosure. This might entitle the franchisee to cancel the agreement and claim damages.

## **iii Registration**

Registration of franchises is not required. However, if the franchisor or franchisee is an incorporated entity, it must be registered pursuant to the Companies Act.<sup>11</sup> Franchisors and franchisees carrying on business in South Africa may also be required to be registered with the tax authorities for the purpose of paying income tax, employees' tax and value added tax. The franchisor may also be required to register with a regulator that has jurisdiction in the sector into which the franchise falls; for example, real estate, life sciences or financial services.

## **iv Mandatory clauses**

Regulation 2 of the CPA prescribes that certain information must be contained in a franchise agreement, including:

- a* the exact text of Section 7(2) of the CPA, which provides that a franchisee may, by written notice to the franchisor, cancel a franchise agreement without cost or penalty within 10 business days of signing it;
- b* provisions preventing unreasonable fees, prices or other considerations; conduct that is unreasonable or unnecessary in relation to the risks to be incurred by a party; and conduct that is not reasonably necessary to protect the legitimate business interest of the franchisor, franchisee or franchise system;
- c* the franchisor's legal name, trading name, registered office and franchise business office, street, postal and email addresses, telephone number and fax number;
- d* a description of the types of goods or services that the franchisee is entitled to provide and of the franchise business system;
- e* the obligations of the franchisor and franchisee;
- f* a clause requiring the franchisor to disclose any benefit or compensation it receives from suppliers to its franchisees or the franchise system;
- g* full details of the financial obligations of the franchisee in terms of the agreement or otherwise related to the franchised business;

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11 Act 71 of 2008.

- b* restrictions imposed on the franchisee;
- i* terms and conditions relating to termination, renewal, goodwill and assignment of the franchise;
- j* effect of the termination or expiration; and
- k* the extension or renewal terms, if any.

#### **v Guarantees and protection**

Where the franchisee is a company, the franchisor often requires the directors or shareholders of the franchisee to provide it with some type of security for the contractual obligations of the franchisee. For most types of security undertaking to be valid, they must be in writing.

There is no statutory protection for trade secrets and confidential information and franchisors must rely on the common law. In this regard, franchisors often include restraint of trade and confidentiality provisions in the franchise agreement. A restraint of trade will be enforceable if it is not contrary to public policy and is necessary to protect the legitimate interests of the franchisor.

## **V TAX**

South Africa has a residence-based taxation system. Tax resident franchisors will be taxed on their worldwide income and non-resident franchisors will be taxed in South Africa on income from a South African source.

Value added tax (VAT) is levied at a rate of 15 percent, although certain supplies are subject to a zero rate or are exempt from VAT. VAT is payable on the supply of goods or services by a registered vendor in the course of an enterprise. With certain exemptions, VAT is also payable on the importation of goods into South Africa and on imported services. Transfer pricing regulations may also apply to cross-border transactions between connected persons.

South Africa further imposes various forms of withholding tax, which may apply to both franchisors and franchisees.

#### **i Franchisor tax liabilities**

Royalties paid from a source within South Africa to any foreign person are subject to withholding tax at a rate of 15 per cent. The withholding tax may be subject to applicable double-taxation agreement (DTA) relief. The withholding tax on royalties is a 'final tax' (i.e., the royalties will not be subject to further tax in South Africa).

There is no withholding tax on service and management fees.

Non-resident franchisors will be subject to tax on income from a South African source at the corporate tax rate of 28 per cent. There is no branch remittance tax. In the event that a non-resident franchisor has a permanent establishment in South Africa, the profits of the franchisor attributable to that establishment will be taxable in South Africa, subject to any applicable DTA. In the absence of an applicable DTA, the South African source rules apply.

Should a non-resident franchisor establish a subsidiary company in South Africa to act as a master franchisee to South African franchisees, that company will likely be a South African tax resident and will be subject to tax in South Africa at the corporate income tax rate of 28 per cent. Any dividends payable by the South African subsidiary to the non-resident franchisor will be subject to a withholding tax at a rate of 20 per cent, subject to any applicable DTA.

**ii Franchisee tax liabilities**

If the franchisee is a South African tax resident company, it will be subject to the South African corporate income tax rate of 28 per cent. Royalties and service fees paid to a franchisor should be deductible in determining the franchisee's taxable income, subject to the various requirements being met. Withholding tax at 15 per cent must be withheld by the franchisee on the payment of royalties, subject to applicable DTA relief.

**VI IMPACT OF GENERAL LAW**

**i Good faith and guarantees**

South African law recognises the freedom and sanctity of contracts and any contract freely and voluntarily entered into between parties of full legal capacity, is legally enforceable and binding.

Although certain values such as good faith, reasonableness and fairness are recognised, they do not constitute independent substantive rules on which a court may interfere in the contractual relationship. South African law does not imply a duty of good faith in contracts, except where a specific statute applies to a particular type of contract. However, it is required that each party will disclose all relevant facts that may be material to the conclusion of the agreement.

**ii Agency distributor model**

An agreement between two parties will constitute a franchise agreement, as defined in the CPA, if:<sup>12</sup>

- a* a consideration is paid, or to be paid, by the franchisee to the franchisor, for the right to carry on business under a system or marketing plan substantially determined or controlled by the franchisor or an associate of the franchisor;
- b* the operation of the business of the franchisee will be substantially or materially associated with advertising schemes or programmes or trademarks, commercial symbols or logos or any similar marketing, branding, labelling or devices, that are conducted, owned, used or licensed by the franchisor or an associate of the franchisor; and
- c* the agreement governs the business relationship between the parties, including 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.

If the agreement does not meet the criteria above, it may be regarded as a distribution or agency agreement, in which case it will be governed by common law contractual principles, as well as the provisions of the CPA regarding non-franchise relationships. South African law does not specifically provide for distribution or agency agreements.

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12 Section 1 of Act 34 of 2008.

### iii Employment law

In terms of the Basic Conditions of Employment Act 75 of 1997, an employee is described as:

- (a) *any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and*
- (b) *any other person who in any manner assists in carrying on or conducting the business of an employer*

Considering the aforementioned, a franchisee and its employees would not be regarded as employees of the franchisor. The characteristics of an employment relationship are, *inter alia*, that the employee is under the control of the employer, the employee receives remuneration from the employer and the employer is entitled to institute disciplinary action against the employee.

None of these characteristics apply to a franchisee–franchisor relationship, which is merely a contractual one, subject to the provisions of the CPA. It is advisable to include specific reference in the franchise agreement confirming the independent contractor status of the parties.

### iv Consumer protection

Consumer protection is covered by the CPA, which aims to promote a fair, accessible and sustainable marketplace for consumer products and services and to establish national norms and standards relating to consumer protection.

Franchisees are regarded as consumers, and franchisors as suppliers in the context of the franchise relationship. Therefore, franchisees are afforded all the fundamental consumer rights set out in the CPA, such as fair and responsible marketing, disclosure and information, fair and honest dealing, fair just and reasonable terms and conditions, fair value, good quality and safety, supplier accountability, privacy and equality.

### v Competition law

The Competition Act<sup>13</sup> applies to all economic activities in, into or from South Africa and therefore to any franchise agreement concluded in South Africa or that has an effect in South Africa.

Section 4 of the Competition Act prohibits any restrictive horizontal agreement or concerted practice that has the effect of substantially preventing or lessening competition, unless the parties to the agreement or practice are able to show that there are pro-competitive benefits attributable to the agreement or practice that outweigh the anticompetitive effects.

Section 4 of the Competition Act prohibits restrictive horizontal practices, which includes:

- a fixing a purchase or selling price or any other trade condition;
- b dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
- c collusive tendering.

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13 No. 89 of 1998.

If a franchisor imposes territorial limitations on a franchisee by specifying an area or areas where the franchisee may or may not operate or supply goods or services, this could have the effect of stifling competition or creating a monopoly in the market.

Section 5 of the Competition Act prohibits any agreement between parties in a vertical relationship that has the effect of substantially preventing or lessening competition in the relevant market unless pro-competitive benefits are attributable to the agreement that outweigh the anticompetitive effects.

Section 5(2) prohibits minimum resale price maintenance. A franchisor is entitled to recommend a price; however, the franchisee must not be bound to it and must not be subject to any sanction, penalty or disincentive if they depart from the recommended price.

Section 8 of the Competition Act prohibits abuses of dominance, including charging an excessive price, refusing to give a competitor access to an essential facility and engaging in an 'exclusionary act', unless the firm concerned is able to show that the act or agreement has a pro-competitive benefit that outweighs the anticompetitive effects.

This Section might affect exclusive dealing arrangements whereby a franchisor requires a franchisee to purchase all its requirements of a particular kind of product from the franchisor or nominated suppliers, or a tying arrangement that entails a dominant franchisor selling one product on condition that the franchisee purchases another product that is not really required by the franchisee.

Certain sections of the Competition Act are 'rule-of-reason' provisions, in that a party who has potentially contravened the Competition Act may justify its actions by showing that the anticompetitive effects are outweighed by technological, efficiency or other pro-competitive gains. Other sections provide for *per se* prohibitions and do not allow the prohibited conduct to be justified. If a franchise agreement is found to contravene these sections, the parties may face an administrative penalty of up to 10 per cent of their annual turnover for the preceding financial year.

Criminal penalties for cartel conduct have recently been introduced. Directors or officers of a company who caused the company to engage in (or knowingly acquiesce in the company engaging in) a contravention of Section 4 of the Competition Act could face criminal sanctions for their role in the contravention.

The Competition Act is in the process of being amended and the amendments are expected to be signed into law in early 2019. There will be many changes to the current act, in particular in relation to the abuse of dominance.

## **vi Restrictive covenants**

A restraint of trade (or non-compete) provision may be enforced by way of an application to court. At common law, a restraint of trade is in general enforceable and will only be invalid if it is contrary to public policy or public interest. To determine whether a restraint of trade is contrary to public interest, the courts will have regard to two considerations, namely that agreements freely concluded should be honoured and that every person should be allowed to pursue his or her trade, occupation or profession freely. In weighing up these considerations, the court looks at whether the restraint is no wider than is reasonably necessary to protect the relevant interest, having regard to the nature of the activity, the area and the duration of the restraint.

The courts have found, in several cases, that a clause in a franchise agreement imposing a simple restraint on the franchisee not to engage in a similar business after termination of the agreement is unenforceable.<sup>14</sup>

### **vii Termination**

Under the CPA, the franchisee may cancel a franchise agreement, on written notice to the franchisor, within 10 business days of signing the agreement, without any cost or penalty.<sup>15</sup>

The regulations to the CPA provide that the franchise agreement must set out the terms and conditions relating to termination, as well as the effect of termination on the franchisee.<sup>16</sup> The regulations do not prescribe what the content of these terms should be and the parties are therefore entitled to negotiate their respective rights and obligations regarding termination of the agreement. To be legally enforceable, these terms must be fair and allow both parties the opportunity to terminate the agreement in the event of a breach.

The parties may include provisions allowing the franchisor to take over the franchised business on termination of the agreement, and for the lease of the premises from which the franchisee traded to be transferred to the franchisor. Provisions intended to continue after termination of the agreement, including restraint of trade and dispute resolution provisions, will be enforceable if the intention is clear that they should be so.

### **viii Anti-corruption and anti-terrorism regulation**

Prevention and combating of corruption in South Africa is regulated in terms of the Prevention and Combating of Corrupt Activities Act,<sup>17</sup> which defines corruption and other offences relating to corrupt activities, and also sets out the penalties that may be imposed.

The Prevention of Organised Crime Act<sup>18</sup> and the Financial Intelligence Centre Act<sup>19</sup> (FICA) constitute the main legislation intended to prevent money laundering in South Africa. This legislation criminalises transactions involving proceeds of unlawful activities and imposes compliance obligations for businesses and their employees. These involve the reporting of activities that are known or suspected to involve the proceeds of a crime or tax evasion or do not have apparent lawful business purposes. A number of regulations have been passed implementing FICA and compliance is strictly monitored.

Terrorism is covered by the terms of the Protection of Constitutional Democracy against Terrorist and Related Activities Act.<sup>20</sup> It contains measures to prevent and combat terrorist and related activities, to give effect to international instruments dealing with such activities and to provide for a mechanism to comply with United Nations Security Council resolutions that are binding on Member States.

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14 *Pam Golding Franchise Services (Pty) Ltd v. Douglas* 1996 4 SA 1217 (D); *U-Drive Franchise Systems (Pty) Ltd v. Drive Yourself (Pty) Ltd* 1976 1 SA 137 (D); *Kwik Kopy (SA) (Pty) Ltd v. Van Haarlem* 1998 2 All SA 362 (W); 1999 1 SA 472 (W).

15 Section 7(2) of the Consumer Protection Act, 2008.

16 Regulation (2)(3)(n) and (v) of the Regulations to the Consumer Protection Act, 2008.

17 Act 12 of 2004.

18 Act 121 of 1998.

19 Act 38 of 2001.

20 Act 33 of 2004.

## **ix Dispute resolution**

### ***Forum***

Many franchise agreements contain dispute resolution clauses that provide that any dispute between them is to be resolved in a particular forum.

Many agreements provide for disputes to be referred to arbitration, instead of litigation via the courts. The advantage of arbitration is that it can be conducted quickly, the parties have control over the process, they can select an arbitrator with the appropriate expertise, it is confidential and there is flexibility as to procedure. On the other hand, arbitration is generally more costly than litigation in court. It is also common for agreements to provide for disputes to be referred to mediation.

Although arbitration and mediation are becoming more popular as dispute resolution methods, most franchise agreements also allow an aggrieved party to approach the courts for urgent or interdictory relief.

### ***Procedure***

Franchise-related litigation is conducted according to the rules of the court concerned. The duration of a case will vary, dependent upon whether the matter has been referred to a court for adjudication (which usually takes longer as the court roll is always relatively congested) or whether the matter is adjudicated by way of arbitration, which will usually be much quicker as the parties may set their own rules of procedure. One of the advantages of arbitration is that a dispute can be adjudicated in a very short period, whereas the court process cannot be abridged and must follow the normal course pursuant to the Rules of Court.

The legal process may be by way of action or application. When there is no dispute of fact, the proceedings may be brought by way of application, where the matter is adjudicated on affidavits filed. When disputes of facts exist, the legal proceedings must be brought by way of action proceedings by the issuing of a summons and exchange of pleadings, after which the dispute proceeds to trial and witnesses are called to give evidence.

### ***Remedies***

It is possible to obtain an interim or final interdict preventing a defaulting party's continued unlawful conduct, provided the court is satisfied that no alternative remedy, such as an award of damages, will adequately redress the harm caused to the applicant.

Claims for damages are conducted by way of action proceedings.

As a rule, the unsuccessful party in litigation must pay the costs of the successful party.

### ***Enforcement***

Pursuant to the Recognition and Enforcement of Foreign Arbitral Awards Act, South African courts recognise arbitral awards and judgments from countries that are members of the UN New York Convention of 1958. An application to have an award recognised must be made to a South African court. It must be established that the foreign court was competent (i.e., had jurisdiction over the defendant and the original dispute); and the judgment was final and conclusive, and not contrary to South African public policy.



## **VII CURRENT DEVELOPMENTS**

Noteworthy current legal developments likely to affect the industry include pending amendments to the Competition Act. FASA is seeking, in discussion with the Department of Trade and Industry, to secure accreditation for an 'industry code' and the appointment of an ombudsman for the industry under the terms of the Consumer Protection Act. These measures, once adopted, will result in the speedier resolution of disputes by an industry specialist.

# ABOUT THE AUTHORS

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Ian Jacobsberg's skill set covers all aspects of corporate law, including public and private mergers, and acquisitions and disposals, as well as giving advice on franchising, product distribution, advertising and sponsorship, consumer law and the protection and licensing of intellectual property and branding.

He has advised companies in diverse industries, including life sciences, food and agriculture, and the automotive sector, in regard to the regulatory and competition laws affecting their businesses.

Ian acts for numerous South African and international household names in the franchising industry and has prepared franchise and related agreements for franchises in diverse industrial and commercial sectors. He has advised several local and international companies on data protection obligations.

In addition, he has advised many international companies on the protection of foreign intellectual property rights in South Africa, including trademarks, copyright and know-how. This includes the drafting of licensing agreements and assignments of all forms of intellectual property rights, both registered and unregistered.

Ian is a past chairman of the Franchise Association of South Africa and sits on its council and executive committee. He is also a commissioner of the small claims court.

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ISBN 978-1-83862-002-8