Luxury & Fashion 2020

Contributing editors
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Hogan Lovells

LEXOLOGY
Getting The Deal Through

Hogan Lovells

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Lexology Getting The Deal Through is delighted to publish the first edition of *Luxury & Fashion*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Meryl Bernstein and Sahira Khwaja of Hogan Lovells, for their assistance with this volume.

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Introduction

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Fashion meets our fundamental needs, both physical and emotional: clothes keep us protected from the elements but fashion also allows us to express our identities and personalities. Since the beginning of the twentieth century, the global fashion industry has expanded and grown exponentially to what it is today. The fashion industry is now an enormously important part of the global economy. Sales revenues for luxury fashion alone are estimated to be between US$20 billion and US$25 billion in the United States in 2018, with China following very closely behind. The luxury fashion market has been fuelled by a strong economy, encouraging customers to make more purchases. At the same time, luxury fashion brands in the US have become increasingly global in their sales and procurement practices. US and European retailers are increasingly reaching across the Atlantic to reach new customers. Luxury brands in the US have become increasingly reliant on China for their production needs, exposing them to potential losses if a trade war ensues. Indeed, tariffs on Chinese imports are threatening retailers with lower profit margins and requiring fashion brands dependent on Chinese manufacturing to consider moving their production elsewhere.

The ways in which we consume fashion have changed dramatically, particularly over the past 10 years. There has been a gradual shift away from the traditional brick-and-mortar retail experience to online shopping, whether on a computer, tablet or mobile application, and this now includes buying our clothes, a product that we used to want to touch and try on before buying, based only on online photos and descriptions. As a result, department stores and high street retailers are suffering from competition from online-only retailers, such as Amazon and ASOS. The luxury fashion industry is growing fast. According to Interbrand, the global luxury fashion and accessories sector grew 42 per cent between 2017 and 2018, with Louis Vuitton and Gucci among the fastest growing brands in the world. The luxury fashion market has seen robust M&A activity, whether by fashion conglomerates seeking to curate smaller niche brands, by traditional retailers seeking to acquire technology and online platforms, or national or regional companies seeking to increase their geographic footprints, trends that are expected to continue.

Even while eschewing brick-and-mortar retail for e-commerce, customers are also demanding a greater level of personalisation from fashion brands. Luxury brands have always offered a greater level of personalisation than was offered in the general market, but the general market trend towards personalisation, whether in the customisation of products, tailoring of product experiences or curating of a collection of products, is now particularly pronounced in the luxury market. The challenge for luxury brands in the future will be how to maintain their sophisticated profiling techniques and meet the requirements of privacy regulators around the world, in an age where there is increased scrutiny of the use of personal data. In the US, for example, the California Consumer Privacy Act (CCPA) and associated regulations will take effect in 2020. The CCPA grants new rights to Californian customers with respect to the access to and deletion of their personal information. Adhering to new privacy regulations like this requires that luxury and fashion companies carefully consider how they collect and use customer data, even while strategising as to how to harness the power of such data to drive sales. Similarly, with the threat of data breaches constantly looming, luxury fashion companies must be vigilant as to security threats given the all-importance of customer trust and brand protection in the luxury market.

There will always be demand for fashion, but companies that succeed in the luxury fashion sector will be those that can meet the precise and complex fast-changing demands of today's consumer, for whom individuality and identity are acutely important. And success for fashion retailers requires understanding changing market dynamics and the technologies that today's customers are adopting. The luxury fashion market is skewing more heavily toward younger and more diverse customers. Generations Y and Z accounted for 47 per cent of luxury consumers in the United States in 2018. However, luxury brands, which are at the forefront of emerging technology that is being used to redefine the customer experience, are successfully adapting to the demands of a younger market. Virtual and augmented reality technology allows customers to virtually 'try-on' clothes and accessories before buying. Artificial intelligence and machine learning is being used to tailor and personalise the customer experience, based on buying habits and personal information. More recently, artificial intelligence is now being used to design the garments themselves by analysing sales and customer data to create new items that are more likely to appeal to particular customers and market segments. The fashion industry has only just started to consider the legal challenges regarding the use of these technologies, including those around issues such as intellectual property infringement and brand protection.

Luxury brands have also been quick to recognise the potential of social media platforms and social influencers to promote their products directly to their target audience, with great success. Brands use celebrities, well-known online and social media fashion bloggers, virtual social influencers (using computer-generated imagery) and micro-influencers, where the market is very niche. Although the use of social influencers has drawn the attention of the regulators, the use of social influencers currently remains a powerful tool for luxury brands to tap into the growing market of younger consumers. What's more, social media platforms are adopting direct sales channels as an alternative to making purchases directly through a luxury brand's e-commerce website. Given that luxury goods derive value from exclusivity, the impact of these additional distribution channels on brand perception is yet to be seen.

Along with the demand for innovative, customised products and experiences, younger consumers are also increasingly looking for products that are ethical and sustainable; brands that speak to their values as a generation who want to halt climate change. And what's more, the laws of various jurisdictions now require disclosure, whether on a brand's website or products themselves, as to the steps the company is taking with respect to its supply chain. Luxury brands will need to consider environmental and sustainability issues in manufacture and be transparent about their methods, materials and labour standards throughout the supply chain. Blockchain is one way that brands can do this. It can be used to track shipments of raw materials, allowing verification of companies' claims regarding product origins or ethical standards. In this way, luxury brands can build trust with their customers.

Brands that adapt to these trends, reaching customers through new channels and allowing young consumers to enjoy fashion and luxury but also make a statement about who they are in the world today will be the winners in the end.

Canada

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MARKET SPOTLIGHT

State of the market

1 What is the current state of the luxury fashion market in your jurisdiction?

Canada has a vibrant luxury market, which includes department store or multi-brand locations (eg, Holt Renfrew, Saks Fifth Avenue), individual apparel and leather goods brands (eg, Chanel, Prada, Gucci, Bottega Veneta, Louis Vuitton), hospitality (eg, Ritz Carlton, St Regis, Fairmont hotels), automotive and cosmetics and personal care. The luxury market includes not only physical stores and hotels, but also wholesale brand distribution, direct to consumer sales and e-commerce.

Particularly in Canada's major cities (such as Vancouver, Toronto and Montreal), we continue to see new entrants to the market. Foreign luxury businesses continue to see Canada as an attractive market in which to launch international expansion efforts.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

There are a number of legal frameworks that apply, including intellectual property, manufacturing process safety standards, product regulatory standards and international trade law. Generally speaking, product development contracts contemplate intellectual property ownership and the application of royalties, design and fabrication methodologies, and sourcing strategies or restrictions. From the manufacturing and supply chain perspective, effective contractual agreements will contemplate risks and liabilities from the point of manufacture all the way through to retail sale.

Manufacturing contracts are often executed between a producer and a brand owner, a distributor, or directly with a retailer. Terms that are particularly important to include are those governing manufacturing processes, finished product standards, design execution expectations and liability for sub-standard or non-compliant product. Potential corrective measures such as recall protocols are also important to include. On the supply chain side, key issues to consider are production and distribution rights, transportation and shipping, title transfer, import and export compliance and supply chain safety. Recently, emphasis on corporate social responsibility and its interplay in supply chain management has become more important from the perspectives of human rights, brand protection and consumer interest.

Distribution and agency agreements

3 What legal framework governs distribution and agency agreements for fashion goods?

In Canada, commercial distribution and agency relationships are primarily governed by contract law. There is no federal or provincial legislation that specifically targets distributorships or agency agreements in Canada, nor legislation that specifically targets these arrangements for fashion goods.

While there have been Canadian cases in which courts found certain automotive dealers were 'franchisees' under the relevant Canadian franchise legislation, it is unlikely that typical distribution relationships between suppliers of fashion goods and retailers that carry multiple fashion brands would be treated as franchises. Nonetheless, parties should take care to consider if the terms of a particular relationship could constitute an unintended franchise.

A number of courts in Canada have ruled that because distribution relationships require mutual trust between the parties, either party may terminate a distribution agreement by giving reasonable notice to the other party in the event of a breakdown in that trust. To enforce this common law right in court, the terminating party would normally need to put forward evidence to demonstrate that the relationship of trust between the parties is broken.

There is also a line of case law dealing with claims brought by customers and other third parties that claim that a franchisor or manufacturer is legally responsible for the acts of its dealers, distributors or franchisees. While it is rare for a distributor to be treated as an 'agent' of its supplier (and distribution agreements will normally disclaim an agency relationship), the case law has developed a principle known as 'apparent authority' (also referred to as 'agency by estoppel'). Under this principle, where a supplier causes third parties who transact with distributors to reasonably believe they are transacting with the supplier, the supplier may be directly liable to the third party. To mitigate the risk of this outcome, distribution agreements in Canada would normally require distributors to identify themselves as being owned and operated independently from the supplier.

4 What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

Retailers often deal with a fashion brand supplier directly, a distributor representing a particular brand or distributors that represent multiple brands. Typically, the distribution agreements will include provisions that specify whether or not the rights are exclusive, if the rights are limited to a particular territory and any specific rights and obligations associated with the marketing and sale of the products, including (but not limited to) the use of associated trademarks. These agreements also usually specify the relevant ordering procedure, shipping and delivery terms (including title, risk of loss, inspection and acceptance) and payment terms, as well as termination rights and the allocation of risk and liability between the parties.

Import and export

5 | Do any special import and export rules and restrictions apply to fashion goods?

Canadian import and export laws do not impose restrictions specific to fashion goods as such. However, Canada is a party to a number of bilateral and plurilateral free trade agreements (FTAs) that establish preferential tariff provisions for certain textile and apparel goods that are imported or exported within recognised free trade zones (including, for example, the United States, Mexico, Chile, Costa Rica, Honduras, Vietnam and Singapore). These FTAs present an opportunity for textile and apparel products that satisfy prescribed rules of origin to be imported into Canada under preferential trading conditions, often including lower rates of duty. In some instances, textile and apparel goods imported into Canada pursuant to Tariff Preference Level arrangements in FTAs may require an import permit issued by Global Affairs Canada under the authority of the Export and Import Permits Act.

In addition, Canada's Textile Labelling Act and Regulations prohibit the importation of consumer textile articles that are not labelled in accordance with that statute. Specific labelling requirements vary depending upon the article at issue, but generally consumer textile goods must display the fibre content and percentage by mass of the article (in both French and English), and the identity of the manufacturer, processor, finisher, retailer or importer of the product.

Fashion and luxury goods not subject to the Textile Labelling Act (ie, non-apparel and non-fabric goods) may instead be required to comply with Canada's Consumer Packaging and Labelling Act and Regulations (CPLA). Like the Textile Labelling Act, the CPLA prohibits the importation of consumer prepackaged products that do not comply with the specific labelling requirements prescribed in the Regulations. Consumer prepackaged products are broadly defined as including any product (subject to limited exemptions) that is packaged in a container in such a manner that it is ordinarily sold to or used or purchased by a consumer, without being repackaged. Accordingly, a wide variety of luxury and fashion accessories, cosmetics and non-textile goods can be expected to be subject to the CPLA.

Finally, Canada is a signatory to the Convention on International Trade in Endangered Species of Wild Flora and Fauna and has implemented it domestically by way of the Wild Animal and Plant Trade Act and Regulations (WAPTA). Pursuant to the WAPTA, the Canadian government maintains a list of endangered and protected species, the bi-products of which (fur, pelts, skin, etc) can only be imported pursuant to a permit. This includes a number of reptile skins, ivory products and furs of various endangered or protected species.

Corporate social responsibility and sustainability

6 | What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

Securities legislation in Canada requires reporting issuers to disclose the material risks affecting their business and the financial impacts of the risks. This includes material information about environmental and social issues. Issuers may have additional disclosure obligations under the timely disclosure policies of the relevant stock exchange, which require the immediate public disclosure of material information about a company that has a significant effect, or would reasonably be expected to have a significant effect, on the market price of the company's securities.

In October 2010, the Canadian Securities Administrators published Staff Notice 51-333, Environmental Reporting Guidance (the Staff Notice) to assist issuers in understanding their reporting requirements in respect of environmental issues. The Staff Notice does not specifically address social information, but it can be interpreted to include material social information, as disclosure requirements in the Annual Information Form and Management's Discussion and Analysis cover all material issues. Disclosures may be required in connection with risks, environmental trends and uncertainties, environmental liabilities, asset retirement obligations, financial and operational effects of environmental protection requirements and risk oversight and management.

There are also several internationally recognised frameworks and guidelines that Canadian businesses use to voluntarily report on their sustainability initiatives, including the Global Reporting Initiative (GRI) Sustainability Reporting Guidelines, the International Integrated Reporting Framework and the Sustainability Accounting Standards Board (SASB) Standards. The GRI guidelines have been widely adopted by Canadian companies (both publicly traded and privately owned) across industries.

Due diligence of sustainability reporting should consider how companies are managing and informing stakeholders about the company's social, environmental, governance and economic performance, as well as communicating the company's values, priorities and action plans and demonstrating how sustainability is linked to the company's strategy. In addition, the company's key performance indicators, performance and impacts should be considered in assessing the effectiveness of the company's sustainability reporting processes.

7 | What occupational health and safety laws should fashion companies be aware of across their supply chains?

There is federal and provincial or territorial occupational health and safety (OH&S) legislation across Canada that outlines the general rights and responsibilities of employers, supervisors and workers. Provincial or territorial legislation usually applies to all workplaces, except for private homes where work is done by owners or occupants. At the federal level, legislation covers employees of the federal government. OH&S legislation in Canada emphasises the importance of internal responsibility. One of the key elements of an internal responsibility system is the mandatory establishment of joint health and safety committees, where both workers and management are able to provide input to effectively address workplace health and safety issues.

Stakeholders in Canadian workplaces, including employers, supervisors, officers, directors, suppliers, and workers, have legal duties under OH&S legislation. Although Canadian jurisdictions have generally been consistent in establishing the legal duties of workplace stakeholders, specific responsibilities may vary from jurisdiction to jurisdiction. Generally, employers' responsibilities for OH&S matters include providing a safe work environment, appropriate education and training, first aid facilities and written instructions in respect of procedures, reports and notices. Workers' responsibilities for OH&S matters generally include following prescribed procedures with respect to the health and safety of employees, reporting workplace hazards to employers, complying with oral or written directions of a health and safety officer and wearing protective equipment where appropriate. OH&S legislation may also require employers and other stakeholders to report workplace accidents, injuries and occupational illnesses to the relevant regulators.

Employers and workers may also face statutory liability under OH&S legislation, which could result in the issuance of orders and quasi-criminal regulatory charges. Generally, offences under OH&S legislation are strict liability offences, where the prosecution need not prove intent.

If charged, a defendant may be found not guilty if the defendant can prove, on a balance of probabilities, that due diligence was exercised. Certain OH&S legislation, such as the Ontario Occupational Health and Safety Act, also creates statutory due diligence defences.

Directors and officers of companies operating in Canada face personal liability under both federal and provincial OH&S legislation if they authorised, permitted or acquiesced in an offence (exact language varies by statute), and they may be subject to penalties including significant fines, imprisonment or both. Under certain legislation (such as provincial workplace safety legislation), directors and officers have an additional positive duty to take all reasonable care to ensure that the company complies with the legislation. In addition to statutory liability, directors and officers may also face common law liability for tort-based claims.

ONLINE RETAIL

Launch

8 What legal framework governs the launch of an online fashion marketplace or store?

In Canada, various federal and provincial statutes govern the buying and selling of goods and services over the internet. These statutes contain discrete considerations that require specific legal attention of e-commerce retailers. Broadly speaking, primary issues relevant to establishing an online fashion marketplace or store in Canada include compliance with Canadian provincial e-commerce, consumer protection and competition legislation, French language requirements, privacy and security requirements and domain name acquisition including meeting 'Canadian presence requirements'.

Provincial e-commerce laws impose obligations on e-commerce retailers before and after the sale of goods and services to consumers. In general, these laws require: (i) pre-sale disclosure of information (such as the seller's contact information, a description of the goods or services, purchase price, delivery arrangements and shipping and return information); and (ii) delivery of a copy of the agreement to the consumer. Further, these disclosures must be prominent, clear, comprehensible and available in a manner that: (i) requires the consumer to access the information; and (ii) allows the consumer to retain and print the information. In some provinces, these rules only apply to sales over C$50. Note that doing business online in the province of Quebec (or available to Quebec consumers) attracts other legal considerations, such as French language laws and specific consumer contractual requirements.

E-commerce fashion retailers should also be aware of consumer protection rules under the federal Competition Act that prohibit businesses from engaging in deceptive marketing practices for the purpose of promoting a product or a business interest. This prohibition applies to all representations, in any form, that are false or misleading in a material respect.

Canada also has strict private sector privacy legislation, both at the federal and provincial levels, which must be taken into account in the planning and launch of an online fashion marketplace or store. This is discussed in further detail below. Also, organisations conducting transactions via payment cards may be required to comply with the Payment Card Industry Data Security Standard (PCI-DSS) and ensure the terms of those standards bind their service providers or their service providers are PCI-DSS certified.

Online fashion retailers also need to take notice of the Web Content Accessibility Guidelines (WCAG) 2.0, an internationally accepted standard for web accessibility developed by the World Wide Web Consortium. WCAG 2.0 explains how to make web content more accessible to people with disabilities. The Ontario Integrated Accessibility Standards require private sector organisations with 50 or more employees as well as designated public sector organisations to conform to WCAG 2.0. The Ontario government has provided a useful guide for companies to follow to ensure compliance, which includes recommendations for: (i) testing compliance of current websites; and (ii) working with web developers to ensure future websites satisfy WCAG criteria. In the coming years, other jurisdictions in Canada may adopt similar legal requirements.

In terms of selecting a domain name in Canada, the .ca domain name is administered by the Canadian Internet Registration Authority (CIRA). CIRA requires registrants to meet Canadian presence requirements designed to ensure that the .ca domain remains a 'key public resource for the social and economic development of all Canadians'. Retailers typically meet the Canadian presence requirements by creating a Canadian corporation or registering a trademark in Canada that corresponds to the desired domain name.

Because of the widespread accessibility of online vendors, Canadian regulators have been required to determine how and when they will take jurisdiction over a website and its content. The Competition Bureau, for example, will address online marketing and advertising claims if the content is considered to have a fact-based connection to Canadian consumers. Some indicators of a connection include the use of a .ca website, providing pricing in Canadian dollars and offering sales or discounts on transportation to a Canadian jurisdiction.

Sourcing and distribution

9 How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

Sourcing and distribution arrangements are often created to specifically contemplate online sales. From a commercial perspective, standard sourcing and distribution agreements may contain geographic sales limitations that would prohibit online sales to a variety of Canadian and international jurisdictions, so it is often the case that separate and additional agreements are created for online sales. In addition, where larger retail sourcing arrangements might allow for co-mingling of merchandise, this may not always be advisable for online sales. It is possible that regulated products in one jurisdiction may not be lawfully sold in another if regulatory standards differ – this needs to be clearly addressed in a sourcing strategy for potential international online sales.

Larger online retailers often source bulk product that is stored in sourcing warehouses in Canada, from which the product is distributed post-online sale. This can streamline the fulfilment process as international issues such as shipping and customs clearance can cause lag in delivery to customers. In these instances, contractual arrangements between the retailer and the sourcing partner often call for, for example, a certain volume and value of merchandise to be warehoused, or for drop sales arrangements. This largely depends on whether the online retailer is selling direct to consumer, or whether the consumer is purchasing from a third-party vendor using a marketplace platform. Standard sourcing arrangements are not typically suited to cover risk in either case. Accordingly, the sourcing and distribution contractual arrangements are often executed specifically for online sales supply.

Terms and conditions

10 What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

Online orders are generally considered 'future performance agreements' or 'distance sales contracts' under provincial consumer protection legislation, imposing certain obligations on retailers that sell items online. Various provinces have enacted legislation that requires suppliers to disclose certain information and to memorialise the sale in writing.

While an e-commerce retailer should ensure its standard terms and conditions are posted on its website, in certain provinces, distance sales contracts are not binding unless a copy of the contract is provided within 15 days after its formation. Provincial consumer protection legislation imposes strict requirements regarding what information must be included in the contracts. While this information varies in each province, it generally includes the name of the customer, the date of the contract and the terms and conditions, which must be either linked or referenced. The information must be presented in a clear, prominent and comprehensible manner, and the customer must be able to easily retain and print the information. The customer must also be provided with an express opportunity to correct errors in the contract or accept or decline the contract. The practical effect of the legislation is that an internet contract only comes into effect once the retailer sends the customer confirmation of the purchase (along with all the other disclosure required) via email. In many provinces, if a customer is not provided with this disclosure within the required period of time, or if the disclosure they are provided with is deficient, they will be permitted to cancel the contract. Disclosure requirements and timelines vary by province. In British Columbia and Ontario, a customer may also cancel an online order if they are not given the opportunity to accept, decline or correct the contract immediately before entering into it. In the latter case, acceptance of the contract would be acceptance of the terms and conditions upon confirmation of the order.

In drafting internet contracts, an important consideration for retailers is whether to include a clause selecting the governing law or forum for any dispute. With the exception of Quebec, an online contract may include a forum selection clause and governing law clause, selecting the law and forum of another jurisdiction. However, recent jurisprudence from the Supreme Court of Canada casts doubt on the enforceability of such clauses. In Quebec, it is expressly prohibited to include any stipulation that a contract be governed by law other than Quebec's consumer protection legislation. In general, whether the terms of a consumer contract can be found online or are in hard copy written form presented to a consumer, provisions mandating arbitration or waivers of class action proceedings are not enforceable.

Tax

11 | Are online sales taxed differently than sales in retail stores in your jurisdiction?

Online sales are not, in principle, treated differently from sales made in classic brick and mortar retail settings. The consumer is normally liable to pay taxes based on the taxes applicable in the province of the place of delivery of the goods and the supplier is liable to collect such taxes and remit them to the relevant Canadian tax authorities. However, there are situations where customers are not charged the applicable taxes and must self-assess such taxes and pay them directly to the authorities. This may be the case because the supplier is not registered for Canadian sales tax purposes and does not carry on business in Canada. Also, in certain cases, the postal carrier collects the taxes applicable at the Canadian border and collects the provincial sales taxes on behalf of the Canadian tax authorities.

Non-resident suppliers must determine whether they are carrying on business in Canada. If they are, they will have the obligation to register for goods and services and harmonised sales tax and perhaps, for Quebec sales tax. Canadian residents must register for sales taxes if they are making taxable supplies in Canada. Registration for British Columbia, Saskatchewan and Manitoba provincial sales taxes may also be required.

In addition, under a specific regime, 'Canadian specified suppliers' may also be required to collect Quebec sales tax on taxable supplies of corporeal movable property (ie, tangible personal property in Quebec).

Any online retailer should be vigilant on the application of sales taxes and its sales tax obligations and ensure its systems are programmed accordingly.

INTELLECTUAL PROPERTY

Design protection

12 | Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

In Canada, fashion designs can be protected through copyright, trademark rights, and industrial design rights. If a useful article is reproduced more than 50 times, reproducing the article will not infringe copyright (and the rights holder would need to rely on industrial design rights). This 'more-than-50' rule does not apply if the copyright work is used as a trademark, a graphic or photo representation applied to the product, a material that has a woven or knitted pattern or that is suitable for piece goods or surface coverings or for making wearing apparel, or a representation of real or fictitious beings, events, or places. If these exceptions apply, then copyright and industrial design rights can be enforced at the same time. Rights holders often use industrial design registrations in combination with trademark protection under Canadian practice. The rights holder would first file and obtain an industrial design registration for a fashion design and then later file a trademark application for the same design once the design has achieved the requisite distinctiveness. While the design has yet to mature into a trademark registration, the industrial design registration can be enforced against copycats.

13 | What difficulties arise in obtaining IP protection for fashion goods?

Any features that are primarily functional in nature cannot be registered as a trademark. Also, to obtain a trademark registration in fashion designs, a rights holder may need to show that its design has become distinctive in the marketplace, which requires evidence showing extensive use of the design over a fairly long period of time.

Brand protection

14 | How are luxury and fashion brands legally protected in your jurisdiction?

Luxury and fashion brands are legally protected through unregistered and registered trademark rights. Domain names are protected through the CIRA Dispute Resolution Policy (CDRP), which is similar to the Uniform Domain Name Dispute Resolution Policy process.

Licensing

15 | What rules, restrictions and best practices apply to IP licensing in the fashion industry?

The Canadian Trademarks Act requires that a licensor maintains control over the character and quality of the goods and services that are provided under the licensed trademarks. To create a presumption of control, the licensee should be obligated to provide notice indicating its use of the trademark under licence.

Enforcement

16 | What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

Rights holders can enforce their IP rights in provincial or in federal courts. For .ca domain names, rights holders may utilise the CDRP.

Pursuant to the Combating Counterfeit Products Act, brand owners can now file a 'request for assistance' with the Canadian Border Services Agency in pursuing remedies under the Trademarks Act and the Copyright Act.

DATA PRIVACY AND SECURITY

Legislation

17 What data privacy and security laws are most relevant to fashion and luxury companies?

There are several provincial and federal laws in Canada that deal with privacy rights and the collection, use and disclosure of personal information. By default, the handling of personal information by fashion and luxury companies in the private sector is governed by the Personal Information Protection and Electronic Documents Act (PIPEDA), a federal statute enforced by the Office of the Privacy Commissioner of Canada (OPC). However, PIPEDA will not apply where a province has enacted privacy legislation that is deemed substantially similar to PIPEDA (currently British Columbia, Alberta and Quebec), in which case the province's legislation will apply instead of PIPEDA for actions that take place entirely within its borders (with some exceptions).

Further, Canada's Anti-Spam Legislation (CASL) places restrictions and obligations in relation to the sending of commercial electronic messages (defined broadly to include text, sound, voice or image messages) and also includes provisions related to the installation of computer programs and alteration of transmission data. CASL is generally much more strict than the United States' CAN-SPAM Act of 2003. Fashion and luxury companies will need to carefully structure their electronic messaging (eg, email and SMS) campaigns to comply with Canadian laws.

Compliance challenges

18 What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

Canada's privacy laws are relatively strict, at both the federal and provincial levels. Compliance with Canadian privacy legislation requires more than simply drafting or revising a website privacy policy. It requires conducting a privacy audit to assess data flows, retention periods, the purposes of collection, the means of collection, and the technological, administrative and contractual protections that have been put in place to ensure compliance. An ongoing compliance programme is then required to ensure that compliance is maintained. Additional privacy measures may be required for organisations handling sensitive personal information, such as financial or transaction data.

It is also noteworthy that PIPEDA has mandatory reporting and record keeping requirements that are triggered if an organisation experiences a breach of security safeguards involving personal information. All breaches will trigger the requirement to retain records of the breach for a period of 24 months. Breaches that create a real risk of significant harm will trigger obligations to report the breach to the OPC and to notify the affected individuals and any organisations that may be able to reduce the risk of, or mitigate, the harm (which could include law enforcement). Alberta's Personal Information Protection Act also has mandatory breach notification requirements that organisations need to consider when preparing for and responding to data breaches.

In relation to electronic messaging marketing (eg, using email or SMS), organisations will need to pay particular attention to compliance with the strict requirements of CASL, including obtaining consent to send commercial electronic messages, the form and content of the messages themselves, and the manner in which unsubscribe requests must be processed.

Innovative technologies

19 What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

At a high level, to the extent that an individual's personal information is used in connection with any technology, whether new or old, an organisation must ensure that the use is permissible under applicable privacy laws (which may include providing notice to, or obtaining consent from, the individual regarding the use).

More specifically, artificial intelligence and automated decision-making is an area that is expected to evolve in the coming months and years. Canada's privacy laws do not currently explicitly address the use of personal information in connection with automated decision-making, but assertions have been made that PIPEDA's transparency principle already requires a duty to explain any decision-making by machines. Further, Canada's federal government has made proposals to modernise PIPEDA, which expressly contemplates a requirement for transparency in automated decision-making.

Content personalisation and targeted advertising

20 What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

The challenges described above regarding innovative technologies are equally applicable here. When using personal information for targeting content or advertising, organisations will need to ensure compliance with applicable privacy laws including in relation to transparency and consent. Further, individuals generally have a right to withdraw consent in relation to use of their personal information at any time (subject to legal or contractual restrictions), so organisations will need to maintain processes that allow for this withdrawal.

ADVERTISING AND MARKETING

Law and regulation

21 What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

The Competition Act is the key statute that governs advertising and marketing in Canada. Of most relevance for luxury and fashion companies is the Competition Act's core prohibition against making representations to the public, for the purpose of promoting any business interest, that are 'false or misleading in a material respect'. Complementing this general prohibition are a number of more specific restrictions with respect to particular types of representations that promote a business interest, including with respect to a product's performance, ordinary selling price or efficiency (among other things). Note also that certain market sectors are subject to more stringent advertising and marketing restrictions pursuant to specialised regulatory regimes. These sectors include alcohol, tobacco, food and automobiles, for example.

In addition to the Competition Act, marketing and advertising claims in Canada are monitored by Advertising Standards Canada, which is an industry self-regulating body that administers the Canadian Code of Advertising Standards (the Code). Although it does not have the force of law, the Code applies to an array of advertising forms, establishes various parameters for specific advertising modes and content and includes a consumer complaint procedure. Where Advertising

Standards Canada determines that there has been a breach of the Code, it may ask the advertiser to correct the advertisement in question.

Online marketing and social media

22 What particular rules and regulations govern online marketing activities and how are such rules enforced?

Canada's Competition Bureau (responsible for enforcing the Competition Act) and Advertising Standards Canada have each published guidance in relation to the use of social media influencer marketing. In short, this guidance underscores the Competition Bureau's position that material connections between advertisers and influencers must be disclosed in a conspicuous manner. Material connections may consist of various types of compensation, including free products, financial payments or media exposure. The Competition Bureau's policy position in relation to social media influencer marketing and the attendant disclosure obligations, as well as in relation to online marketing activities more generally, derives directly from the general prohibition (described above) against false or misleading representations and deceptive marketing practices.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 What product safety rules and standards apply to luxury and fashion goods?

The Canada Consumer Product Safety Act (CCPSA) and regulations enacted under the CCPSA are Canada's core consumer product safety instruments relevant to luxury and fashion goods. The CCPSA applies to 'consumer products' and prohibits the manufacture, importation or sale of consumer products that pose a danger to human health or safety. 'Consumer products' is defined as including all products that may reasonably be expected to be obtained by an individual to be used for non-commercial purposes. There are limited exemptions to this definition, but fashion and luxury brands should generally anticipate that their products may be subject to the CCPSA.

With respect to luxury food, natural health and cosmetic products, the Food and Drugs Act (FDA) establishes highly specific standards and requirements with which manufacturers, importers, distributors and retailers are required to comply.

Product liability

24 What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

The manufacture, importation, distribution and sale of consumer goods are the subject of heavy regulation in Canada. Various federal statutes impose stringent obligations on retailers and grant regulators broad powers to enforce compliance, including through compliance audits, and to impose fines and penalties. The regulatory regime can directly affect luxury and fashion goods in Canada because goods that fail to comply with the statutory requirements may not lawfully be sold in Canada and may be subject to recall.

For example, the CCPSA prohibits the manufacture, importation or sale of consumer products that pose a danger to human health or safety, and grants the federal government powers to regulate, inspect, test and recall consumer products and creates a wide array of related offences and penalties. Manufacturers, importers, distributors and retailers need to comply with stringent requirements to maintain certain records concerning their products and report 'incidents' to Health Canada within short time frames. Health Canada has broad audit and inspection powers to assess compliance with reporting obligations.

There are various labelling, advertising and marketing requirements for consumer products prescribed under the Competition Act, provincial consumer protection legislation, the Textile Labelling Act, the CPLA, the Precious Metals Marking Act, the CCPSA, the FDA, and regulations related to the foregoing. Certain regulations may impose additional requirements on certain specific categories of products, such as cosmetics.

Sellers of luxury and fashion goods could also be potential defendants in individual and class action product liability litigation relating to allegedly defective products. For example, product liability litigation could include claims to be compensated for the cost of the defective product, as well as damages for any injury or damage arising therefrom. Claims may be based on breach of a contract, negligence or both.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

In addition to shareholder approval requirements for some acquisitions of private businesses (eg, a sale of substantially all of the assets of a corporation generally requires the approval of a special majority (usually two-thirds) of its shareholders) and takeover bids of publicly held businesses (which include stipulations regarding the consideration being offered, the period of acceptance and disclosure requirements), luxury businesses should be aware of Canada's Competition Act and Investment Canada Act requirements. In particular, some luxury businesses may be subject to the more stringent thresholds under the Investment Canada Act for 'cultural businesses'.

Acquisitions of Canadian businesses are subject to the Competition Act and acquisitions by foreign acquirers are subject to the Investment Canada Act. Certain transactions require pre-closing notice and approval under the Competition Act and the Investment Canada Act. In addition, some businesses are considered 'cultural businesses' under the Investment Canada Act, such as the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, the production, distribution, sale or exhibition of film or video recordings, the production, distribution, sale or exhibition of audio or video music recordings, the publication, distribution or sale of music in print or machine readable form, any business activities involving radio communication intended for direct reception by the general public, or any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services. These businesses have different review and approval thresholds under the Investment Canada Act.

Competition

26 What competition law provisions are particularly relevant for the luxury and fashion industry?

The Competition Act's non-criminal or civil provisions allow the Competition Tribunal, on application by the Commissioner of Competition (who heads the Competition Bureau), to review certain business practices, and, in certain circumstances, to issue orders prohibiting or correcting conduct to eliminate or reduce its anticompetitive impact. Reviewable practices include agreements among competitors outside the scope of the criminal cartel provisions, abuse of dominant position, and a number of vertical practices between suppliers and customers, such as price maintenance, tied selling, refusal to supply and exclusivity arrangements. Private parties are also able to apply to the Competition

Tribunal to challenge certain types of reviewable conduct, such as price maintenance, exclusive dealing, tied selling and refusal to deal. There are no price discrimination provisions (similar to the United States Robinson-Patman Act) in the Competition Act.

The luxury and fashion industry should also note that price maintenance is one of the main civil or reviewable practices under the Competition Act with respect to relations between suppliers and retailers. Price maintenance occurs when a person influences upward selling or advertised prices or discourages the reduction of another person's selling or advertised prices by means of a threat, promise or agreement, or when a person refuses to supply another person or otherwise discriminates against that person because of its low-pricing policy, in each case with the result that competition in a market is likely to be adversely affected. For example, price maintenance may occur when a supplier prevents a retailer from selling a product below a minimum price (ie, minimum advertised pricing, or MAP, policies). The Competition Bureau recognises that price maintenance practices are common in many markets and can be pro-competitive in many circumstances. However, in some circumstances, price maintenance may adversely affect competition. For example, price maintenance may raise concerns if: (i) price maintenance facilitates less vigorous price competition among suppliers; (ii) retailers compel a supplier to adopt price maintenance to facilitate less-vigorous price competition among retailers or to exclude discount retailers; or (iii) an incumbent supplier uses price maintenance to guarantee margins for retailers to make them unwilling to carry the products of rival or new entrant competitors to the supplier.

Exclusive dealing, tied-selling and market restrictions may raise concerns if any such practice is engaged in by a major supplier, and the practice has substantially lessened competition (or is likely to). It is therefore prudent for suppliers to consider the competition law risks before engaging in such conduct given the possibility of a Competition Bureau inquiry or application to the Competition Tribunal by the Competition Bureau or private parties.

A 'refusal to deal' situation most frequently occurs where a supplier ceases to supply a retailer or distributor, and the business of such retailer or distributor is seriously affected because none of the potential suppliers are willing to deal with the company. If all the legislative requirements are met, the Competition Tribunal may, on application by the Commissioner of Competition or a private party, order the supplier to accept the customer who was refused supply.

EMPLOYMENT AND LABOUR

Managing employment relationships

27 What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

The types of employment-related legislation with which fashion companies should be familiar, as employers operating in Canada, include legislation dealing with employment standards, labour relations, human rights, occupational health and safety, accessibility standards, federal and provincial privacy rules, and employment benefits, including pension, employment insurance and workers' compensation.

The employment relationship in Canada is governed by a broad array of legislation and common law principles. Employers need to be aware of the various legal considerations to avoid attracting liability in the workplace.

All jurisdictions in Canada have enacted legislation that establishes certain minimum employment standards. Generally, employment standards acts (ESAs) are broad and apply to employment contracts, whether oral or written. The standards defined in the ESAs are minimum standards only, and employers are prohibited from contracting out of or otherwise circumventing the established minimum standards. These laws spell out which classes of employees are covered by each minimum standard and which classes of employees are excluded.

Unlike employers in the United States, Canadian employers may not terminate employees 'at will'. Generally, employers must provide required notice of termination, unless they have just and sufficient cause to terminate an employee without notice. The length of the required notice period varies among jurisdictions, but generally increases with an employee's length of service.

In addition to minimum statutory termination and severance pay entitlements, a terminated non-union employee may be entitled by common law (or civil law in Quebec) to additional notice of termination or pay in lieu of notice. This right may be enforced before the courts. The amount of notice will depend on the employee's individual circumstances, including length of service, age, the type of position held and the prospect for future employment. In most jurisdictions, an employer can limit its liability to the statutory minimum in an employment contract. Employers who wish to avoid or limit liability for common law pay in lieu of notice should therefore have clear terms in written contracts.

Trade unions

28 Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

Fashion companies should note that the federal government and each province have enacted legislation governing the formation and selection of unions and their collective bargaining procedures. In general, where a majority of workers in an appropriate bargaining unit are in favour of a union, that union will be certified as the representative of that unit of employees. An employer must negotiate in good faith with a certified union to reach a collective agreement. Failure to do so may result in penalties being imposed. Most workers are entitled to strike if collective bargaining negotiations between the union and the employer do not result in an agreement; however, workers may not strike during the term of a collective agreement.

Immigration

29 Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

As a general principle, any foreign national who is neither a Canadian citizen nor a permanent resident of Canada cannot work in Canada unless authorised to do so. For Canadian immigration purposes, work is defined as an activity giving rise to the payment of a salary or commission, or that competes directly with activities of Canadian citizens or permanent residents in the Canadian labour market.

If the foreign national is considered to be seeking to work in Canada, the immigration officer will then determine whether: (i) a work permit is required; or (ii) the work in question falls into one of the categories of work for which a work permit is not required (work permit exempt).

Canadian immigration authorities have outlined specific situations in which work completed in Canada will be work permit exempt, including, subject to certain conditions, where providing after sales or lease services, acting under a warranty or service agreement, acting as installation supervisors, acting as trainers and trainees, providing intra-company training and installation activities, for board of directors' meetings, short-term work visits for highly skilled workers, researchers and foreign students studying in Canada.

As a general rule, work that is not work permit exempt requires a work permit under one of two programmes in Canada, namely the Temporary Foreign Worker Program and the International Mobility Program.

The federal Immigration and Refugee Protection Act was recently amended. It imposes a rigorous compliance regime, which is designed to ensure that Canadian employers consistently respect the wage and working conditions of foreign nationals, and imposes serious penalties (including a period of ineligibility for hiring foreign nationals and penal charges) for non-compliance.

UPDATE AND TRENDS

Trends and developments

30 What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

As noted above, Canada continues to attract luxury goods manufacturers, retailers and distributors. In addition, the luxury and fashion market is being impacted by trade agreement developments (including the United States–Mexico–Canada trilateral agreement and the Comprehensive Economic Trade Agreement between Canada and the European Union); a focus on sustainability; the entry into the market of disruptors and new ways of doing business, such as rental services and subscription services; intensifying efforts across all channels to deal with counterfeits and maintain brand integrity; and increased scrutiny of influencer advertising and social media.

Recent changes in legislation and regulation include: (i) amendments to the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, which include record keeping and reporting requirements in respect of transactions involving virtual currency, application of the Act to certain types prepaid cards, and changes to reporting requirements for suspicious transaction reports and electronic funds transfer reports; and (ii) since 1 November 2018, commercial organisations are subject to mandatory data breach reporting requirements under PIPEDA, requiring them to report breaches of security safeguards involving personal information posing a 'real risk of significant harm' to individuals. In addition, in May 2019 the Canadian government announced the introduction of Canada's Digital Charter and proposed legislative reform to modernise PIPEDA.

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MARKET SPOTLIGHT

State of the market

1 What is the current state of the luxury fashion market in your jurisdiction?

According to 'The State of Fashion 2019', jointly presented by The Business of Fashion and McKinsey & Company, Greater China will for the first time overtake the United States as the world's largest fashion market. According to McKinsey & Company's 'China Luxury Report 2019', Chinese consumers at home and abroad spent 770 billion yuan on luxury items in 2018 – equivalent to a third of the global spend. China delivered more than 50 per cent of the global growth in luxury spending between 2012 to 2018 and is expected to deliver 65 per cent of the world's additional spending heading into 2025, according to research based on UnionPay transaction data for the 2019 McKinsey China Luxury Report. Meanwhile, according to Bain & Company's research, as the driving force for global luxury spending in 2019, China made a 26 per cent year-on-year increase in luxury spending in the domestic market, with €30 billion spent on luxury items, by 2025. Chinese consumers are expected to account for 46 per cent of the global market, and are expected to make half of those purchases at home in China. In both the McKinsey Report and Bain research, young luxury consumers are described as the key driving force to power China's luxury market. According to the McKinsey 2019 Report, 71 per cent of total number of luxury consumers are Post-'80s (born in the 1980s) and Post-'90s (born in the 1990s), and 79 per cent of the annual luxury spending were made by Post-'80s and Post-'90s, while the Bains research found that Millennials (aged between 23 and 38) are the main luxury consumers in China.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

There is no specialised legal framework governing the development, manufacture and supply chain for fashion goods in China. The legal framework seems not significantly different from that for other kinds of consumer products, which includes legislation, enforcement and jurisdiction applicable for the fashion industry, with a diversified combination of intellectual properties (including trademark, copyright, patent, trade secrets, etc) contracts, distribution, franchise, advertisement and marketing, labour and employment, dispute resolution, consumer protection, product liability and regulatory compliance such as labels and marks, customs, tax, etc. Being a lightly regulated industry, most business relationships in the fashion industry are created and managed through various types of contracts and agreements, such as distribution and agency in the sales field.

Distribution and agency agreements

3 What legal framework governs distribution and agency agreements for fashion goods?

In China, there is no specific distribution law or agency law governing the fashion industry. In general, agency and distribution business relationships are established and regulated mainly according to the contract law, with the possible involvement of characteristics of sales contracts, commission contracts, brokerage contracts, intermediate contracts or contracts for works, in the form of distribution agreements or agency agreements entered into between the parties.

4 What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

For fashion brands using distribution or agency as business models, distributors or agents are developed, selected and managed mainly according to the geographic territory at provincial level or municipal level. Unlike 15 to 20 years ago, agency or distribution is no longer the most preferred business model in China for the fashion industry, instead, multi-channel retailing and omni-channel retailing have become more and more important for the industry.

In a typical distribution agreement, the following are the most important terms and provisions: definitions and interpretation, appointment of the distributor, rights and obligations of the parties (distributor and brand owner), supply of fashion goods, orders, delivery, payment, pricing and invoicing, title and transfer of the title, stock levels, intellectual property rights, advertising and promotion, confidentiality, term and termination, data privacy, claims and consumer protection, liability and liquidated damages, choice of law and dispute resolution.

Import and export

5 Do any special import and export rules and restrictions apply to fashion goods?

No, there are no specifically applicable import and export rules and restrictions for fashion goods. The following are the major laws and regulations applicable to general products:

- Administrative Regulations of the People's Republic of China on the Import and Export of Goods (effective from 1 January 2002);
- Law of the People's Republic of China on Imported and Exported Commodities Inspection (revised in December 2018) and the Implementing Regulations of it (revised in 2019);
- Regulations of the People's Republic of China on Import and Export Duties (revised in 2017);

- Administrative Measures of the Customs of the People's Republic of China for the Levying of Duties on Imported and Exported Goods (revised in 2018); and
- Regulations of the People's Republic of China on Origin of Imported and Exported Goods (revised in 2019).

If food, cosmetics, gold, gold products or any other regulated product is involved in fashion goods, the specific relevant legislation shall be referred to and complied with, such as:
- the Administrative Measures for the Safety of Imported and Exported Food;
- the Measures for the Inspection, Quarantine, Supervision and Administration of Import and Export of Cosmetics (revised in November 2018);
- the Administrative Measures for the Import and Export of Gold and Gold Products (effective from 1 April 2015); and
- the Regulation of the People's Republic of China on the Administration of the Import and Export of Endangered Wild Animals and Plants (revised in November 2019).

Corporate social responsibility and sustainability

6 What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

There is no legally obligatory requirement and disclosure obligation for fashion and luxury brands in respect of corporate social responsibility and sustainability. If a due diligence is desired on this this topic, we would suggest: (i) providing the brand with a questionnaire with questions to be addressed in as much detail as possible, with supporting documents of information; (ii) interviewing key persons from the brand and its business partners such as its management team members, suppliers and distributors; and (iii) carrying out independent searches with the available resources. If necessary, a third-party, independent expert report may be ordered for this purpose.

Aside from corporate social responsibility or sustainability, consumers in China are entitled by right to know the true information regarding goods purchased, or services received.

7 What occupational health and safety laws should fashion companies be aware of across their supply chains?

The occupational health and safety laws and regulations that fashion companies should be aware of and compliant with across their supply chains in general are no different from those applicable to most of the other industries, the legal requirements of which can be mainly found in the following laws and regulations:
- the Labour Law of the People's Republic of China (revised in 2018);
- the Labor Contract Law of the People's Republic of China (revised in 2012) and its Implementing Regulations of the Labor Contract Law of the People's Republic of China (effective from 18 September 2008);
- the Law of the People's Republic of China on the Prevention and Control of Occupational Diseases (Revised in 2018); and
- the Special Provisions on Labour Protection of Female Employees (effective from 28 April 2012) and the other ancillary legislations.

Taking into consideration the special characteristics of the fashion industry, special attention shall be paid to protection of female employees, especially those who are pregnant, have recently given birth or are nursing, as well as child labour, excessive overtime and other incompliant high risks that need to be made aware of and avoided.

ONLINE RETAIL

Launch

8 What legal framework governs the launch of an online fashion marketplace or store?

In China, the E-commerce Law of the People's Republic of China (effective from 1 January 2019) (E-commerce Law) governs the e-commerce activities conducted within the territory of China that shall include the launch and operation of an online fashion marketplace or store. As defined by this Law, 'e-commerce' refers to business activities conducted on an information network such as the internet to sell goods or provide services.

Sourcing and distribution

9 How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

A retailer operating through e-commerce is defined as an 'operator on a platform', which sells goods or offers services on e-commerce platforms. Together with the 'e-commerce platform operators' as defined below, the 'operators on platforms' are called 'e-commerce operators', according to the E-commerce Law of the People's Republic of China (effective from 1 January 2019).

In order to be eligible for e-commerce, the e-commerce operator shall first of all register itself as an e-commerce market subject, unless he or she is an individual selling home-made agricultural or ancillary products, and transactions and revenues relating to those sales and services are trivial. Where the business activities conducted by an e-commerce operator are subject to the relevant administrative approval according to law, the administrative licence shall be obtained first in accordance with the law. In respect of sourcing, there is no specific legal requirement or limitation for the e-commerce retailer (ie, the operator on a platform), and for retail, there are detailed and specific legal requirements that the retailer needs to comply with, mainly pursuant to the above-mentioned E-commerce Law, such as consumer protection, data privacy, antitrust, anti-unfair competition, e-commerce contracts, online payment, delivery, e-commerce dispute resolution, import and export control regulatory compliance, etc. In addition, other applicable laws and regulations shall also be complied with, such as: (i) the General Rules of the Civil Law of the People's Republic of China; (ii) the Contract Law of the People's Republic of China; and (iii) the Law of the People's Republic of China on Electronic Signatures and others that relate to the conclusion or performance of e-commerce contracts.

Terms and conditions

10 What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

According to the E-commerce Law, 'an e-commerce platform operator' refers to a legal person or an unincorporated association that provides services in respect of online business sites, trading matchmaking and information release for two or more parties involved in deals to facilitate their efforts to conduct trading activities independently, which means launch and operation of the e-commerce website. Together with the 'operators on platforms', the 'e-commerce platform operators' are collectively called 'e-commerce operators'. Therefore, the legal and compliance requirements for e-commerce operators shall be taken into consideration while online terms and conditions are being drafted for the e-commerce platform operator client, especially such as consumer protection, data privacy, antitrust, anti-unfair competition, e-commerce contracts, online payment, delivery, e-commerce dispute resolution, import and export control regulatory compliance, as well as other applicable laws and regulations like the General Rules of the Civil Law of the People's Republic of China, the Contract Law of the People's Republic of China, and the Law of the People's Republic of China on Electronic Signatures. According to the E-Commerce Law, there are specific legal obligations for the operators of e-commerce platforms, such as:

- conducting due diligence and managing the operators on the platforms;
- drafting platform service agreement and designing e-commerce transaction rules in line with the principles of openness, fairness and justice;
- specifying rights and obligations in respect of entry into and exit from the platform;
- building up the operators' files and reporting the same to the market regulatory authorities;
- reporting their tax-related information to the tax authorities;
- taking cyber security protection measures;
- preparing emergency plans;
- recording and saving information about transactions on their platforms for no less than three years;
- managing products and services quality control;
- protecting consumers' rights and data privacy;
- building and improving the credit rating system; and
- establishing rules on protection of intellectual property rights, etc.

Tax

11 | Are online sales taxed differently than sales in retail stores in your jurisdiction?

No, online sales are taxed at the same rate, in the same manner as sales in retail stores.

INTELLECTUAL PROPERTY

Design protection

12 | Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

In China, copyright, trademark and patent (design) are major intellectual property rights that may be applicable to fashion designs, subject to the legal requirements being satisfied. For one fashion design, it is possible to be protected with copyright, trademark and patent (design) at the same time, so long as the requested conditions are met. According to the Copyright Law of the People's Republic of China (revised in 2010), whether published or not, works of citizens, legal entities or other organisations of the People's Republic of China enjoy copyright protection.

Copyright enjoyed by non-Chinese nationals or stateless persons in their works pursuant to an agreement between their home country or country of habitual residence and China, or under an international treaty to which both countries are parties, is also protected. Works of non-Chinese nationals or stateless persons that were first published in the territory of China enjoy copyright protection in China too. Works of authors who are nationals of a country that has not entered into an agreement with China or is not a party to an international treaty to which China is a party, or who are stateless persons, are also protected if they were first published in a country that is a party to an international treaty to which China is a party, or simultaneously in a country which is a party to such a treaty and a country outside such a treaty.

In general, the copyright in the works shall be owned by its author – the person who created the works. For work created to the will and under the responsibility of a legal entity or other organisation, the legal entity or other organisation shall be deemed the author. The copyright in the works jointly created by two or more co-authors shall be jointly owned by the co-authors. The copyright in the works made for hire shall be owned by the employer if the works were created with resources provided by the employer, unless otherwise provided by the Copyright Law. For commissioned works, the ownership of copyright shall be subject to the agreement entered into between the commissioning party and the commissioned party. Where there is no expressive agreement on that, the copyright shall be owned by the commissioned party. In practice, it is difficult to grant copyright protection to fashion design unless it is recognised by the court as works of fine art. According to the Trademark Law of the People's Republic of China (revised in 2019), in general only the registrants of trademarks registered in China may enjoy the exclusive right and be protected, unless the trademarks are recognised as well-known trademarks that may also enjoy protection.

To seek registered trademark protection, any sign that distinguishes the goods of a natural person, legal entity or other organisations from those of others, including any word, device, letter, number, three-dimensional sign, color combination, sound and combination thereof may be applied for registration as a trademark. Besides application by a single party, two or more natural persons, legal entities or other organisations may jointly file one application and jointly enjoy the right. According to the Patent Law of the People's Republic of China (revised in 2008), for the design patent right, the scope of protection shall be confined to the design of the product as shown in the pictures or photographs, and the brief description may be used to explain the said design as shown in the pictures or photographs. According to the Patent Law, for the invention-creation (including design) jointly created by two or more individuals or legal entities in collaboration, the right to apply for patent shall be jointly enjoyed by such legal entities and individuals, unless there is different agreement reached among parties. When the application is approved, the legal entities or individuals that file the application are the patentees.

13 | What difficulties arise in obtaining IP protection for fashion goods?

There are different challenges for fashion goods to gain protection under intellectual property protection. Comparatively speaking, in general it is more advisable to seek registered trademark protection if, strategically speaking, the fashion brand is planning to be developed. In addition, if designs of the fashion goods are those wishing to be protected, copyright protection is more suitable; however, the fashion designs need to be proved to be works of fine art to be protected under copyright. If patent (design) is desired, the whole patent filing procedure needs to be gone through and usually it will cost more money and take a longer time, which thus is rarely considered by the fashion industry.

Brand protection

14 | How are luxury and fashion brands legally protected in your jurisdiction?

From a brand protection perspective, luxury and fashion brands can be protected through the following ways: (i) registered trademarks; (ii) unregistered trademarks; (iii) domain names; and (iv) unfair competition, among which registered trademarks is more advisable, as all trademarks registered with the Trademark Office of the People's Republic of China will be protected.

If unregistered trademarks can be recognised as well-known trademarks, they will get protection, too. However, in practice it is not easy to get recognition. While determining whether one trademark is well-known or not, the following factors will be considered by the Trademark Office: (i) the degree of popularity of the trademark in its trading areas; (ii) the time period the trademark has been in use; (iii) the duration, extent and geographical range of advertising and publicity of the trademark; (iv) the records on the protection of the trademark as a well-known trademark; and (v) other reasons for the reputation of the trademark.

Domain name protection is also an alternative; however, it is not a very strong type of protection, and if a domain name is desired, the names both in Chinese and foreign languages shall be considered and decided. Besides intellectual property rights, anti-unfair competition has become more and more important in luxury and fashion brand protection practice, sometimes being used together with the intellectual protection measures. According to the Anti-Unfair Competition Law of the People's Republic of China (revised in 2019), the following misleading acts are prohibited, which may confuse or mislead people into thinking that products are the products of someone else or there exists certain relationship between such products and the products of someone else:

- unauthorised use of a mark that is identical or similar to the name, packaging or decoration of another business' goods that has influence to a certain extent;
- unauthorised use of another business' corporate name (including its shortened name, trade name, etc), the name of a social group (including its shortened name, etc) or the name of an individual (including his or her pen name, stage name, translated name, etc.) that has influence to a certain extent;
- unauthorised use of the main domain name, website name or webpage that has influence to a certain extent; or
- other misleading or confusing acts that are sufficient to lead people to think products are someone else's products or there exists certain relations between products and someone else.

Therefore, if, with evidence, the luxury or fashion brand owner may claim against the infringing party based on the Anti-Unfair Competition Law, the punishments provided by the Law are variable depending on the seriousness of the proved misconduct, including civil liability, administrative liability – even criminal liability, and the utmost civil liability for indemnification can be as high as 5 million yuan, in addition to confiscation of the illegal gain from the misconduct.

Licensing

15 What rules, restrictions and best practices apply to IP licensing in the fashion industry?

There is no specific law or regulation governing IP licensing in the fashion industry. In practice, taking into consideration the industry's characteristics and Chinese market practice, it is advisable to take the following into consideration and into action:

- conducting necessary due diligence prior to licensing;
- negotiating for and concluding a definitive licence agreement, with clear definitions, terms and conditions such as licensed properties, exclusivity, whether or not sub-licensing is permitted, territory, licensing fees, licensed commodities, right to audit, prior approval requirements, breach of contract, liquidated damages, governing laws, jurisdictions and dispute resolution, etc;
- carrying out licensing management such as quality control, prior approval management, taking disciplinary and corrective actions, IP protection and enforcement; and
- post-licensing management either upon expiry or because of earlier termination, especially management of intellectual properties protection, post-licence clearance.

In addition, regulatory compliance shall be taken into serious consideration especially that which is relevant to customs clearance, product liability and consumer protection, as well as industry-specific regulatory compliance requirements if fashion goods are relevant to cosmetics and healthcare, food and beverage, electronic and telecommunication products.

Enforcement

16 What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

Depending on the facts and the evidences available, in general, the rights holders may consider and decide whether to take actions against infringing parties for copyright infringement, trademark infringement, patent (design) infringement, or unfair competition, and where there is a contractual relationship between the right holder and the infringing party, it is also advisable to claim for breach of contract. To enforce such intellectual property rights, the rights holders may choose to chase the infringing parties for administrative liabilities through reporting the infringement cases to the competent administrative authorities, to file lawsuits at the court to claim for civil liabilities, or to report the cases to the public security bureau to claim for criminal liabilities subject to certain conditions being met. If the infringement is found cross-border, the rights holders may apply for customs injunction. The details such as major requirements to be met and procedures to be followed can be found in article 60 and 61 of the Trademark Law of the PRC, and article 12 of the Regulations of the PRC on the Customs Protection of Intellectual Property Rights. In practice, the customs injunction is very helpful for the trademark rights holders, who may apply to the customs office for impoundment of the infringing goods if it is discovered that the suspected infringing goods are about to be exported and to leave China.

DATA PRIVACY AND SECURITY

Legislation

17 What data privacy and security laws are most relevant to fashion and luxury companies?

There is no data privacy or security law specifically applicable for the fashion and luxury industry. The general legislation on data privacy and security as follows shall be relevant:

- the Cyber Security Law of the People's Republic of China (effective from 1 June 2017);
- the E-commerce Law of the People's Republic of China (effective from 1 January 2019);
- the Guideline for Internet Personal Information Security Protection (effective from 10 April 2019);
- the Provisions on Protection of Personal Information of Telecommunication and Internet Users (effective from 1 September 2013);
- the Standards on Information Technology Security and Personal Information Security (GB/T35273-2017);
- the Basic Requirements on Information Security Technology and Information System Security Multi-Level Protection (GB/T22239-2008, to be finalised); and
- the Administrative Measures for Internet Information Services (revised in 2011).

Compliance challenges

18 What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

Taking into consideration the significant booming growth of e-commerce in the luxury and fashion industry, the popularity of cross-border transactions as well as the fact that turnover in the industry is high, with personnel of all seniority levels frequently moved to each other, the challenges of keeping confidentiality, seeking balance between data collecting and data privacy and cyber security become more and more critical and difficult. According to the relevant laws and regulations, consumers' privacy protection, right to know, right to delete, right to correct, right to literal consent, right to visit, right to deregister, and right to cancel shall be well protected. Failing in this regard may cause the luxury and fashion companies to be triggered for being in violation of the legal and regulatory compliance requirements.

Innovative technologies

19 What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

Legal and regulatory compliance requirements shall be seriously taken into consideration by luxury and fashion industry players while marketing the goods or services to consumers, especially when technology is deployed for such purpose, like facial recognition or other artificial intelligence technologies. To be compliant, the laws, regulations and standards as listed in question 17 shall be fully understood and complied with. In particular, the following points shall be borne in mind prior to handling any private data or personal information:

- personal information and private data that is obligatory to be protected include but are not limited to:
    - all kinds of information recorded by electronic or other means that can be used to independently identify or be combined with other information to identify a natural person's personal information including but not limited to the person's name, dates of birth, ID numbers, biologically identified personal information, addresses and telephone numbers, etc., as well as communication and contact means, records and content of the communications, account numbers and pin numbers, assets information, credit information, travel and visit records, residence address, health and physiological information, transaction records, etc.;
- collection of the personal information or private data shall be subject to prior written consent given by the individual who owns such information and data – the relevant agreement shall be signed between the collector and the owner, and the purpose, method and scope of information collection shall be made very clear in it, known and agreed by the owner prior to collection. No information or data exceeding the scope may be collected, no collection shall be conducted through the way of 'tie-in' sale or service, no sensitive information or data such as ethnicity, nationality, political views or religious belief shall be collected and no original biological information shall be collected. In addition, the collection process shall be ensured with security and safety;
- storage of the collected personal information and private data shall be strictly in compliance with the legal requirements, with the necessary encrypted storage method, for a certain time period, with necessary copies and within the territory of China unless it is legitimately approved to be transmitted cross-border; and
- usage of the collected personal information and private data shall be in line with all of the legal requirements and within the scope as agreed in the agreement between the collector and the owner. The owner shall enjoy the right to control the collected information or data and the right to revise or delete the information or data collected, and appropriate access authority shall be established to protect the owner. Besides, necessary measures shall be taken to make the information or data displayed on the media not recognisable. In addition, if there is a persona created automatically, for the purpose of targeted marketing, search engines, personalised news alerts and targeted advertisements, it is permitted to not obtain the owner's consent in advance; however, the owner shall be entitled by right to refuse or decline. If usage involves credit rankings, judicial decisions or similar, which may cause legal impact to the owner, or if the usage is cross platform, then the owner's consent shall be obtained in advance;
- sharing and transfer of the collected information or data in general is not allowed, unless certain conditions are satisfied, such as legality and necessity is assessed and supported, the consent from the owner is obtained etc;
- public disclosure of the collected personal information and private data is in general not allowed, unless certain conditions are met; and
- a crisis management mechanism shall be established, which shall include immediate reaction process and process of immediate reporting to the government authorities in case of any crisis, as well as responding and handling the crisis.

In addition, if operated via e-commerce, the operators are prohibited to disclose, revise or destroy the collected personal information or private data and shall take all necessary action to ensure their confidentiality and security. In case of any risk or potential risk of disclosing, destroying or losing any of the collected information or data, the operator involved shall take immediate action and keep the owner informed and keep reporting to the government authority. The owner is entitled by right to request the e-commerce operator to delete his or her personal information if collection or usage of such information or data is found in violation of the legislation or agreement reached between the collector and the owner. Last but not least, because of strong and strict protection of juveniles, it is advisable to not collect personal information or private data in respect of or arising from juveniles.

Content personalisation and targeted advertising

20 What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

Considering the fact that personalisation of online content and targeted advertising are mainly developed based on information and data collected from consumers as well as the analysis made and programme created thereon, which unavoidably include sensitive personal information and private data, as a result, luxury and fashion companies shall be fully compliant with all legal and compliance requirements in relation to and arising from such personal information and private data, whether or not they are directly or indirectly involved in collecting, storing, using, sharing or transferring or disclosing any of these. See question 19 for detailed requirements from a data privacy and security perspective. For advertisement compliance and consumer protection purposes, refer to the following legal and compliance requirements:

- the right to privacy is explicitly defined as part of the 'civil rights and interests', which are legitimate rights and interests enjoyed by civil parties and protected by the Tort Law of the People's Republic of China (effective from 1 July 2010);
- no advertisement shall involve any circumstance that damages personal or property safety, or reveals personal privacy, according to the Advertising Law of the People's Republic of China (revised in 2018); and
- while collecting or using any consumer information, the business operator shall fully follow the principles of acting in a legitimate, justifiable and necessary way and shall expressly indicate the purpose, method and scope of collection or use of the information and must obtain the consent from the concerned consumer, the collecting and using rules shall be made clear to the consumer and shall fully comply with legal requirements under the laws and regulations as well as the agreement reached between the consumer and the business operator.

The collected information shall be strictly kept confidential, and shall in no case be disclosed, sold or provided to any third party. Necessary measures shall be taken as protection. If there is no consent or request from the consumer, or if expressly declined or refused by the consumer, the business operator shall not send any marketing information to the consumer, according to the Law of the People's Republic of China on the Protection of Consumer Rights and Interests (revised in 2013).

ADVERTISING AND MARKETING

Law and regulation

21 | What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

The laws, regulations applicable to advertising and marketing communications by luxury and fashion companies are not different from those for other industries, which mainly include the following:

- the Advertising Law of the People's Republic of China (revised in 2018);
- the Interim Measures for the Administration of Internet Advertising (effective from 1 September 2016);
- the Regulations on Control of Advertisement (effective from 1 December 1987);
- the Interim Measures for Promotion and Administration of Public Interest Advertising (effective from 1 March 2016);
- the E-commerce Law of the People's Republic of China (effective from 1 January 2019);
- the Anti-Unfair Competition Law of the People's Republic of China (revised in 2019); and
- the Law of the People's Republic of China on the Protection of Consumer Rights and Interests (revised in 2013).

For food, functional food, healthcare and medical, cosmetics and beauty goods and services, special examination and approval shall be obtained prior to marketing and promotion. In addition, as there are local legislations, it is also advisable to check local legal requirements and practice in advance.

Online marketing and social media

22 | What particular rules and regulations govern online marketing activities and how are such rules enforced?

The Interim Measures for the Administration of Internet Advertising (effective from 1 September 2016) is the most relevant regulation governing online advertisement activities. Although, when certain content is triggered, other laws or regulations may also be relevant, such as the Anti-Unfair Competition Law of the People's Republic of China (revised in 2019), which explicitly list the misleading and confusing acts that in practice are frequently used by the infringing parties to mislead or confuse consumers in China via illegally using the luxury and fashion brand owners' marks, packaging, corporate names, domain names, websites, apps, social media accounts or such similar to the original. In practice, this measure has been strictly enforced by the State Administration for Market Regulation and the local branches of it at different levels throughout China. According to statistics from the State Administration for Market Regulation, in 2018, there were 23,102 cases being investigated and closed with administrative punishment because of violation of the aforesaid Interim Measures for the Administration of Internet Advertising. The total amount of the confiscated money was 334.51 million yuan, which represented 55.9 per cent of the total advertisement violation cases, and 44.1 per cent of the total amount of the confiscated money, the year-on-year increase of internet advertisement cases was 55 per cent and the year-on-year increase of total amount of the confiscated money was 37.4 per cent. Generally speaking, it was wildly accepted that such changes were mainly because of the booming growth of mobile terminal applications usage in addition to internet applications.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 | What product safety rules and standards apply to luxury and fashion goods?

There is no product safety law, regulation, rule or standards specifically applicable to the luxury or fashion industry in China, which means the general product safety related laws and regulations shall apply, which mainly include: (i) the Product Quality Law of the People's Republic of China (revised in 2018); (ii) the Tort Law of the People's Republic of China (effective from 1 July 2010); (iii) the Contract Law of the People's Republic of China (effective from 1 October 1999); and (iv) the Law of the People's Republic of China on the Protection of Consumer Rights and Interests (revised in 2013). When import or export is involved, the Law of the People's Republic of China on Imported and Exported Commodities Inspection (revised in April 2018) will become relevant. In addition, there are some goods, services or industry-specific safety legal requirements or standards, which, if triggered, shall be fully complied with by luxury and fashion industry players, such as automobiles and parts, electronic products, telecommunication products, glasses, sunglasses, healthcare and medical, cosmetics and beauty, food (including functional food) and beverages.

Product liability

24 | What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

There is no regime specifically governing product liability for luxury and fashion goods; thus, general product liability legislation shall apply. According to the Product Quality Law of the People's Republic of China (revised in 2018), both manufacturers and sellers shall be responsible for product quality (ie, product liability in accordance with the Law), and each of them shall establish and improve their respective internal product quality management systems and have them rigorously implemented, and from a government administration perspective, the people's governments at all levels shall ensure the implementation of the aforesaid Law and urge the manufacturers and sellers to reinforce the product quality management. The market regulation department under the State Council is responsible for nationwide product quality supervision, and the other relevant departments under the State Council are in charge of product quality supervision according to their respective responsibilities. The local market regulation departments at or above the county level are responsible for product quality supervision within their own administrative areas. In case of finding any violation of the aforesaid Law such as power abusing, negligence, malpractice for personal gain, covering-up in respect of any violation, any legal entity or individual knowing the finding is entitled to report any of such violations to the market regulation departments or other relevant departments. The market regulation departments and relevant departments shall keep confidential the whistle blower and award it, him or her for it.

In practice, the state adopts a supervision and inspection system with random inspection from time to time as a major measure to monitor product quality. More detailed information and procedures can be referred to the abovementioned Law. At the same time, the China Consumers Association and its branch offices at different local levels are frequently involved when the product liability issue is reported or claimed by a consumer. In reality, most of the product liability cases were finally closed through settlement between the luxury or fashion companies and the consumers without going through legal procedures, which was mainly because the brand owners normally tried to avoid making the cases wildly known to the public, so as to avoid reputational risk and media crisis. To the extent of the cases and actions being available for public access, no significant notable product liability litigation or enforcement was found.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

There are various considerations that need to be considered when there is a M&A or joint venture deal being planned. If it is an inbound investment, first of all, accessibility for foreign investment needs to be assessed and cleared. In luxury and fashion industry, in general there is no obligatory local ownership requirement, which means in most cases the business can be wholly owned by a foreign investor, whether in the field of design, manufacture, distribution, retail or most relevant services. However, if the luxury or fashion related service or business falls into any of the following categories, foreign investment is prohibited:

- internet news services;
- online publishing services;
- online audiovisual programme services;
- internet culture operation (excluding music) and internet public-oriented information release services (excluding that as permitted under China's World Trade Organization accession commitments);
- news agencies (including but not limited to press agencies);
- editing, publishing and production of books, newspapers, periodicals, audio-visual products and electronic publications;
- all levels of broadcasting stations, television stations, radio and television channel and frequency, radio and television and engagement in the video on demand business of radio and TV and in the provision of services of installation of the ground receiving facilities for satellite television broadcasting;
- radio and television programme production and operation (including introduction);
- film production, distribution, cinema and the introduction of films services; and
- selling cultural relics by auction, cultural relics stores, state-owned cultural relic museums and cultural and artistic performance groups.

Aside from those prohibited for foreign investment, certain business or services are restricted for foreign investment: such as for printing of luxury or fashion publications, the controlling interest shall be held by a Chinese party, and for an automobile manufacturer – with or without luxury or fashion related, at least 50 per cent of its shares shall be owned by Chinese parties, unless being categorised as a special vehicle or renewable-energy vehicle manufacturer. And for luxury or fashion-related market survey companies, there must be a Chinese shareholder and the cooperation shall be in the form of equity joint venture or cooperation joint venture. If broadcasting or television listening and rating surveys are involved, the controlling interest shall be held by a Chinese party, and in no case would social surveys be permitted for foreign investment.

In the education sector, higher education in luxury or fashion fields is only allowable in the form of Sino-foreign joint cooperation, which is obligatorily managed and directed by the Chinese party (ie, the highest leader or management team member shall be a Chinese national), and in the administrative council, board of directors or joint administration committee, at least 50 per cent of the members shall be Chinese nationals. In addition, if project verification and record-filing is obligatory for a foreign investment project or if a special licence is obligatory, the foreign investor shall accomplish and complete accordingly. Furthermore, it is advisable to understand and assess the key legal and compliance requirements in the project planning process, especially employment and labour, environment, health and safety, tax and customs duty, foreign exchange, and import and export, on the basis of business planning such as business module and operation planning. If it is an outbound investment, firstly, the project needs to be assessed, so as to decide whether it will be triggered as a 'sensitive project', which then will be subject to National Development and Reform Commission (NDRC) examination and approval, although by nature luxury or fashion is not defined as 'sensitive'. However, if it is luxury or fashion-related news media, real estate, hospitality, cinemas or sports clubs, or if it is relating to equity investment funds or investment platforms that established overseas without specific industrial projects, it is sensitive and restricted and shall be subject to strict review and approval, and if the project investment by the Chinese investor exceeds US$0.3 billion, or if investment is made to country or region in the sensitive area, or if the investment is made into a business that is encountering a huge loss, then the project may be much more strictly reviewed and decided. If it succeeds with the NDRC procedures, the outbound investment will need to go through procedures with the Ministry of Commerce, the foreign exchange regulatory agency and the relevant bank or their respective competent local branch offices. Although, no matter whether it is inbound or outbound investment, so long as it is a cross-border transaction, the following shall be taken into consideration and be prepared for: (i) merger control review; (ii) national security review; (iii) foreign exchange control; and (iv) government commitment or contract, etc, which cannot be explained in detail here because of the complexity and length of the context.

Taking into consideration the characteristics of the luxury and fashion industry, the following are strongly suggested to be taken into consideration for an M&A or joint venture deal:

1. identifying the scope, types and evaluation of the assets (including intellectual property rights and other intangible value of the business) involved in the deal with details, which are desired by the investor or offered by the investee;
2. identifying the personnel who are critical for the business and operation involved in the deal and checking their shareholder and employee relationship with the parties involved in the deal;
3. understanding the key factors of business and operation, such as sourcing, sales (distribution, retail, franchise if any), making SWOT analysis on competition, strength, weakness, etc;
4. structuring the deal based on due diligence results, especially with content relating to (1) to (3), to decide whether to do an equity deal or asset deal, an equity joint venture or cooperation joint venture, which is directly relevant to whether or not the assets or intellectual properties relating to the luxury or fashion business and operation shall be transferred or not, and how much shall they be evaluated so as to decide the M&A deal value or the sharing structure of the joint venture.

As to the personnel, it is critical to decide who shall be retained for continuity and value of the deal and how to make sure such personnel will be retained, either through shareholders' arrangement, senior management team stock option plan arrangement, plus necessary business protection measures such as confidentiality agreement, intellectual property rights ownership agreement and non-compete protection. Regarding the sourcing and sales relationship, if it were an asset deal or a new joint venture project, it is critical to get necessary representations, warranties and other commitments from the relevant parties to ensure continuity and consistency of the business and operation. If the luxury or fashion business to be acquired or invested has been operated under the name of the designer as an individual, for the M&A or joint venture deal as desired, it is important to have that 'name' or 'brand' transferred to the acquiring party or the joint venture, and at the same time, make sure the non-compete agreement, intellectual property rights ownership agreement and other necessary arrangements are accomplished and guaranteed.

Competition

26 | What competition law provisions are particularly relevant for the luxury and fashion industry?

Similarly, there is no specific competition law particularly applicable to the luxury and fashion industry, it is the general laws and regulations in antitrust, anti-monopoly, competition, pricing and other relevant fields that shall apply, mainly focusing on legal and compliance requirements on pricing control, distribution compliance and online sales, governed by the following laws and regulations:

- the Anti-Monopoly Law of the People's Republic of China (effective from 1 August 2008);
- the Interim Provisions on the Prohibition of Monopoly Agreements (effective from 1 September 2019);
- the Pricing Law of the People's Republic of China (effective from 1 May 1998);
- the Guide for the Anti-monopoly Declaration for the Merger or Acquisition of A Domestic Enterprise by A Foreign Investor (effective from 8 March 2007);
- the Guidelines of the Anti-monopoly Commission Under the State Council Concerning the Definition of Relevant Markets (24 May 2009); and
- the Anti-Unfair Competition Law of the People's Republic of China (revised in 2019).

For luxury and fashion brand owners, there are several key antitrust compliance challenges that need to be taken into serious consideration. First, price-fixing shall be avoided, although it is not a typical nor traditional risk for the luxury and fashion industry, but for almost all industries of goods or services. In summary, vertically, it is prohibited for the brand owners to reach vertical monopoly agreement with the distributors or dealers to fix the resale price or to limit the minimum resale price when goods are sold to third parties, or to fix the price level, range of price changes, profit level, discounts, handling fees and other expenses when goods are resold, or to limit the minimum resale price or doing so by limiting the range of price changes, profit level, discounts, handling fees and other expenses when goods are resold, or to fix the resale price or limit the minimum resale price through other means. Horizontally, it is prohibited for the brand owners who are competitors to reach a horizontal monopoly agreement to fix or change the goods or services' price level, range of price changes, profit level, discounts, handling fees or other expenses, or to agree to adopt a standard formula to calculate prices, or to limit the operators' independent power regarding pricing, or to fix or change the prices by other means. In addition, according to the Pricing Law of the People's Republic of China (effective from 1 May 1998), it is prohibited for the business operators such as the brand owners to collude with others to manipulate the market price, and it also stipulates that goods shall be sold at the prices expressly marked and no additional price shall be charged in addition to such are expressly marked on the goods.

Second, the luxury and fashion brand companies shall avoid abusing their dominant market position, which eliminates or restricts competition. As defined by the law, 'dominant market position' refers to a market position where an operator (brand owner) can control the prices or volume of goods or other trades in a relevant market, or can obstruct or affect other operators' capability to enter into a relevant market. According to the relevant laws and regulations, the following acts are deemed abuse of dominant market position, thus prohibited:

- selling products at unfairly high prices or buying goods at unfairly low prices;
- selling goods at a price lower than cost without justified reasons;
- refusing to trade with relevant trading counterparts without justified reasons;
- restricting trading counterparts to the trading only with the said operator or its designated party without justified reasons;
- conducing tie-in sales without justified reasons; or
- adding other unreasonable conditions to the trading, discriminating against trading counterparts of the same qualifications with regard to transaction price, etc, without justified reasons, and other practices determined by the anti-monopoly law enforcement authorities as abuse of dominant market position.

Third, the following monopoly agreements shall be avoided, which are prohibited by the laws and regulations: agreements between competitors that:

- limit the production volume or sales volume of goods;
- divide the sales market or the raw material procurement market;
- limit the purchase of new technologies and new equipment or limiting the development of new technologies and products; or
- conduct boycott of trading, which jointly refuses to supply or sell goods to specific operators, jointly refuses to purchase or sell goods of specific operators; jointly restricts specific operators from trading with operators which are in competition with them; and jointly boycotts trading by other means. In practice, luxury or fashion group with multiple brands shall pay special attention to this compliance requirement, as they need to avoid violation of any of such while negotiating or signing agreements with landlords, suppliers, services providers or their distributors, dealers or retailers.

Fourth, during promotion and advertising of luxury or fashion goods or services, advertisement is prohibited to contain any information that belittles the other luxury or fashion products or services, nor to denounce the reputation or good name of the competitors.

Fifth, when there is a luxury or fashion-related M&A deal or joint venture project, merger control review is an important compliance requirement to meet with. According to the Anti-Monopoly Law of the People's Republic of China (effective from 1 August 2008) and the Guide for the Anti-monopoly Declaration for the Merger or Acquisition of A Domestic Enterprise by A Foreign Investor (effective from 8 March 2007), when concentration of undertakings as a result of a deal may cause certain standards obligatory for reporting to be reached, the parties involved shall report to the State Council anti-monopoly law enforcement authority in advance. In principle, the acquiring or merging party shall report; however, the acquired or merged party may also report. If multiple parties meet the requirements to report, they may report jointly or separately, by themselves, or by their lawyers on their behalf.

Sixth, luxury and fashion brand owners shall be aware that industry associations shall not make arrangements for industry players to engage in the monopolistic practices, otherwise it will also be triggered as violation of the anti-monopoly laws and regulations.

Last but not least, all of the above-mentioned antitrust compliance challenges exist not only in offline operation of luxury and fashion business, no matter it is design, manufacture, distribution, retail, promotion, marketing or related sales, but also for online business.

EMPLOYMENT AND LABOUR

Managing employment relationships

27 What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

In China, the employer and employees' relationship is mainly governed by following laws and regulations:

- the Labour Law of the People's Republic of China (revised in 2009);
- the Labour Contract Law of the People's Republic of China (revised in 2012);
- the Implementing Regulations of the Labour Contract Law of the People's Republic of China (effective from 18 September 2008);
- the several Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Labor Dispute Cases;
- the Circular of the Ministry of Human Resources and Social Security on Implementing the Newly Revised Labor Contract Law to Strictly Regulate Labor Dispatch (effective from 13 January 2013);
- the Circular of the Ministry of Labor on Issuing and Distributing the Opinions on Several Issues concerning the Implementation of the Labor Law of the Peoples Republic of China (effective from 4 August 1995);
- the Social Insurance Law of the People's Republic of China (revised in 2018); and
- various other local and departmental regulations, measures in respect of employment and labour-related matters.

Considering the luxury and fashion business and operation practice in China, as well as the employment and labour legal and compliance requirements, it seems that the legal relationship most popularly and widely existing between the individuals and companies in the industry are employment relationships (ie, labour contract relationships as defined by the Labor Contract Law). In addition to that, there are various contractual relationships involved like contracts for works, service-based agreements between various freelancers and companies, such as designing service provided by independent designers, hand-craftmanship services provided by craftsmen, celebrity endorsement services provided by celebrities and models, marketing or promotion services by marketing freelancers, journalists, writers or key opinion leaders. According to Chinese laws and regulations, interns are students, thus cannot be employed as employees.

As an employer, a luxury and fashion company shall be particularly aware of the following legal and compliance requirements.

First, the establishment, conclusion, performance, amendment, cancellation or termination of a labour contract relationship between an employee and an employer shall be strictly subject to the Labour Contract Law of the People's Republic of China. Labour contracts shall be concluded in writing and in a Chinese version, at the same time that a labour relationship is established or within a limited time period soon after that, failing which legal liability may be caused to the employer. As a foreign brand, the employer may decide whether to sign a foreign language contract in addition to the Chinese version; however, it is subject to the employee whether to agree to sign the foreign language version.

Second, a labour contract shall be either with a fixed-term, an open-ended term or a contract terminates upon completion of a specific task. It is advisable to be careful about an open-ended term, as it imposes more legal liabilities on the employer. According to law, an open-ended contract is concluded as agreed between the employer and employee; however, if an employee eligible for an open-ended contract proposes or agrees to renew and conclude a labour contract in certain circumstances, an open-ended contract shall be obligatory, unless the employee requests a fixed-term contract.

Third, all employer labour rules and regulations shall be formulated according to the law, while rules on labour compensation, working hours, leave and rest, occupational safety and hygiene, insurance and welfare, training, work discipline or work quota management matters that may have a direct impact on the employees' immediate rights and interests are being formulated, amended or decided, the employer shall immediately make such rules presented to the employees representative congress or to all employees for discussion, and decide based on fair discussion or negotiation with them. In the process of decision and implementation of such company rules and the important matters, if deemed inappropriate by the trade union or employees, they are entitled to bring such comments to the employer and have them improved through discussion and negotiation with the employer. The employer shall publicise all company rules, policies, processes as well as important matters that may directly impact the employees' benefits or interests, or to inform the employees of the same.

Fourth, it is important to include confidentiality provisions and non-competition provisions in the labour contract or in a separate agreement entered between the employee and the employer to protect the employer's trade secrets, other confidentiality as well as the intellectual properties.

Fifth, all of the other legal requirements in respect of working hours, rest and vacations and special protection for female staff and workers and juvenile workers, personal information and private data shall also be strictly complied with.

Sixth, as termination of employment based on employee misconduct is very difficult in practice, it is always advisable to make disciplinary actions as detailed as possible and have such rules, policies, processes approved by the employees' representative congress or all employees signed off by each of the employees in writing as a personal written commitment. Last but not least, as labour dispatch is a frequently used practice in luxury and fashion industries especially in manufacture, marketing or retail, it is extremely important for the companies to understand and fully comply with the dispatch related regulations, more specifically, the Circular of the Ministry of Human Resources and Social Security on Implementing the Newly Revised Labour Contract Law to Strictly Regulate Labour Dispatch.

Trade unions

28 Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

There is no specific legal or regulatory requirement for trade unions for the luxury or fashion industry in China; therefore, the general laws and regulations shall apply, which mainly include the Labour Union Law of the People's Republic of China (revised in 2009) and the various local implementing measures promulgated by different provinces, municipalities, etc for implementation of this law, as well as other relevant labour and employment-related laws and regulations. According to the Labour Union Law of the People's Republic of China, all workers in the enterprises, public institutions and administrative authorities in China shall enjoy the right to participate in and form labour unions according to the laws and regulations, regardless of their ethnicity, race, sex, occupation, religious belief or education background, and such right shall not be obstructed or restricted by any organisation or individual. It is explicitly stipulated that the basic duty of a labour union is to protect the legitimate rights and interests of employees. The labour unions shall organise employees through an employees' representative congresses or other means to participate in the democratic decision-making, democratic management and democratic supervisory processes of their working unit.

According to the relevant laws and regulations, the labour union shall intervene when:

- any of the employees' rights or interests is infringed because of their employer's violation of the labour-related laws and regulations, such as: when any employee's wage is withheld or reduced by his or her employer, when the employer fails to provide a safe and hygienic working environment, when the employer extends the working hours arbitrarily, when the employer infringes the special rights and interests of female employees or juvenile employees, when the employer commits any other serious infringement of the labour rights and interests of any of the employees;
- the working conditions, the safety and health facilities designed, constructed and put into use simultaneously together with the major construction project in respect of a newly constructed, expanded or technologically renovated project need to be supervised and monitored, and the comments made by the labour union shall be carefully handled by the enterprise or administrative authority, which shall provide the labour union with handling result in writing thereafter;
- workers are found to be ordered or forced to work in danger; or when a hidden huge accident risk or occupational hazard is discovered during the production process, the labour union is entitled to suggest with solutions, which shall be seriously considered and researched by the enterprises concerned, and feedback shall be immediately provided. When there is a finding about an emergency that endangers the employees' lives or safety, the labour union shall have the right to suggest organising to evacuate the employees as soon as possible, and the enterprise in concern must immediately react to take actions;
- there is investigation into infringement cases in which any legitimate right or interest of employees is infringed by any enterprise or public institution;
- there is investigation into cases in which any employee died or was injured because of any accident or any other reasons that seriously harm employees' health – the labour union shall provide suggestions and shall have the right to claim against the party that shall be legally liable;
- there is a strike or work-to-rule – the labour union shall negotiate with the enterprise, public institution or relevant party on behalf of the employees, to express the employees' point of view, requests and proposals. The enterprise or public institution shall handle it so long as the employees' requests are reasonable. The labour union shall assist them to handle it; or
- there is any labour dispute – the labour union shall participate in the mediation.

In addition, the labour union above the county level may provide legal services to the subordinate labour unions and employees, it shall also assist to implement the collective welfare projects and provide necessary assistance in handling the wages, health, safety and social security matters for the employees. In addition, the labour union shall be involved when important issues regarding enterprise operation, management and development are being studied, or meetings concerning wages, welfare benefits, health and safety, social security and other matters relating to the immediate interests of the employees are being held, and on the board of directors or board of supervisors shall be employees representatives, who shall be elected in accordance with the Company Law.

According to the laws and regulations, the labour union operating funds shall come from the following sources: membership dues levied on the union members, monthly allocation equivalent to 2 per cent of the total wages of the employees, income paid by the enterprises and public institutions that subordinated to the labour union, the subsidies from the government, and other income. In addition, the facilities, premises and other material requirements necessary for labour unions shall be provided by the enterprise.

In operation, the luxury and fashion companies shall make sure to involve the labour union when they are formulating, amending, deciding the company rules, policies and processes that need to be binding on the employees; refer to question 26 for details.

In addition, the labour union must be brought in when:

- working hours need to be extended because of necessity of production and operation, the employer shall negotiate with the labour union and the employees, and it may decide to extend the working hours within the limit as allowed by the Labour Law after the negotiation;
- collective contract is involved, the draft shall be presented to the employee representative congress or all of the employees for discussion and approval, and be concluded by the labour union with the employer, on behalf of the employees, and if the employer is found violation of the collective contract which harms the employees' rights and interests, the labour union may request the employer to be liable for it, and it may claim against the employer on behalf of the employees through labour arbitration or lawsuit if a settlement agreement is not reached through negotiation;
- layoffs are planned, the employer shall explain to the labour union or all of the employees in details 30 days in advance, and report the layoff plan to the government labour administrative authority with comments from the labour union or all of the employees;
- unilateral earlier termination of a labour contract with an employee is planned by the employer, it shall inform the labour union with excuses for earlier termination. If the employer is found violation of law, administrative regulation or labour contract, the labour union is entitled to request the employer to correct, and the latter shall carry out research on the suggestions from the labour union and shall provide the labour union with its written feedback; or
- there is violation of the labour or employment laws, regulations, labour contracts or collective contracts, the labour union is entitled to make suggestions and to request the employer to correct such violations.

If the employee decides to take legal action such as arbitration or litigation, the labour union shall provide support and assistance in accordance with the laws and regulations. Last but not least, the labour union has the responsibility to supervise the occupational disease prevention and control as well as to safeguard workers' legitimate rights and interests. Therefore, the employer shall seek and listen to opinions from the labour union while developing rules and regulations on occupational disease prevention and control. Besides, if any employer conceals to report or omits to report in respect of occupational diseases, the labour union and employees may report the facts to the labour administrative departments directly.

Immigration

29 | Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

There is no special immigration law or regulation for the luxury or fashion industry. If a Chinese luxury or fashion company plans to hire a foreigner to work in China, it is defined as 'foreign employee working in China', and the foreigner shall not be of Chinese nationality as stipulated in the Nationality Law of the People's Republic of China. For such a foreigner to be legitimately employed in China, the following laws and regulations shall be complied with: (i) the Circular on the Issuance of the Regulations on the Management of the Employment of Foreigners in China (revised in 2017); and (ii) the Administrative Regulations of the

People's Republic of China on Entry and Exit of Aliens (effective from 1 September 2013).

First of all, the Chinese employer shall apply for employment permission for foreigners and may employ foreigners only after obtaining the certificates of the People's Republic of China permitting the employment of foreigners. To obtain the certificates, the employer shall submit all requested documents and materials to the authority including most of which are relevant to the desired foreign employee, the employer shall explicitly explain and prove to the government authority that employment of the foreigner is necessary and a replacement is not available in China. The foreigner to be employed shall meet various conditions as requested. Most importantly, the foreigner shall be healthy, be free from criminal records and possess the professional skills needed by the employer; in practice, the education records of the foreigner shall be legally verified and acceptable by the authority. If the employer is a foreign-invested entity, no supervisory authority's approval is requested, and the procedures can be a little bit simplified. The foreigner shall apply for an occupational visa (Z Visa) from the competent Chinese embassy or consulate in his or her country or region. As soon as the foreign employee crosses the Chinese border, the employer shall apply for the work permit for him or her within 15 days' time. If the foreigner is employed as a representative or chief representative for representative office of a foreign enterprise, or if employed to work for a government-related institution or organisation, he or she might be exempted from certificates of permission and work permits. Upon obtaining the work permit, the foreign employee shall go to the social security department to apply for a residence permit for work.

To be compliant, it is extremely important to maintain consistency among facts and the certificates, information, materials and documents submitted, more specifically, the actual employer, profession, title, employment region and other employment-related information shall be exactly the same as those that were prescribed by the authority on the certificates, work permit and other records as filed with the authorities. In case of any change, the employer is obligated to update the filing with the government authority within a certain time period, failing which may cause cancellation or invalidity of the original certificates or work permit, and be triggered with relevant legal liabilities at the same time. The work permit is subject to annual inspection; therefore, the employer must complete the inspection within 30 days prior to the expiry date of every year. The term of the labour contract entered into between the employer and the foreign employee shall not be longer than five years, which, however, shall be able to be renewed upon approval. If approved, the work permit can be applied to be renewed. Last but not least, dispatch and services outsourcing is not allowed for foreigners from an employment point of view. In addition, residents of China Taiwan, Hong Kong SAR and Macao SAR working in mainland China shall separately follow the Provisions of the Administration of the Employment of Taiwan, Hong Kong, and Macao Residents in the Mainland and not the laws and regulations as mentioned, therefore employment of foreigners in China's Taiwan, Hong Kong SAR and Macao shall also be otherwise discussed.

UPDATE AND TRENDS

Trends and developments

30 What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

In the luxury and fashion industry, licensing is a field worth being noticed and explored, especially from a new business development point of view.

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Success stories for sharing include the continuous success of Coty's perfume licensing collaboration with a couple of world-leading luxury and fashion brands, and Uniqlo's apparels and accessories licensing collaboration with famous artists and cartoons.

In 2018, the global retail sales of licensed merchandise was US$280.3 billion; fashion was the third-largest licensed property type with an 11.5 per cent share. In China (including Hong Kong SAR), the total retail sales of fashion-licensed merchandise was US$1.8 billion, representing 19.23 per cent of the total regional retail sales of all licensed merchandise, which was the second-largest licensed property type. Globally, the United States ranked number one for years. In China, crossover and brands collaboration are very welcome by consumers, either when there are continuous new products in the fast fashion brands or when the traditional Chinese brands collaborate with new or innovative brands and artists, both in the luxury and fashion fields.

From an intellectual property perspective, China has been working extremely hard on legislation and enforcement, not only to protect intellectual properties, but also to respect innovation, creativity and to promote utilisation and commercialisation of intellectual property rights. One example of legislation best practice sharing is that in 2019, China revised the Trademark Law of the People's Republic of China, to enhance stronger registered trademark protection and to effectively crack down on malicious trademark registration. One significant change is that monetary compensation for infringement is significantly increased, from 'one to three times' to 'one to five times' of the relevant calculated amount, and the verdict of the amount is increased from 'up to 3 million yuan' to 'up to 5 million yuan'. In enforcement, customs offices have been continuously taking action to fight against intellectual property infringement. In 2019 campaigns, the General Customs Office and its local branches made more focus and put more resources into fighting against infringement through all transportation channels, including transportation by sea, by air, by land, by rail, by courier and by mail. They monitored different types of trading with special attention to online trading, which became more and more popular, and which also made anti-infringement more difficult. Another focus in 2019 was to enhance more protection of multinational companies' trademarks.

France

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Crefovi

MARKET SPOTLIGHT

State of the market

1 What is the current state of the luxury fashion market in your jurisdiction?

France is the number one player worldwide in the luxury fashion sector, as it is home to three major luxury goods conglomerates, namely:

- LVMH Moet Hennessy-Louis Vuitton SE (full year (FY) 2017 luxury goods sales US$27.995 billion and the number one luxury goods company by sales FY2017, with a selection of luxury brands, such as: Louis Vuitton, Christian Dior, Fendi, Bulgari, Loro Piana, Emilio Pucci, Acqua di Parma, Loewe, Marc Jacobs, TAG Heuer, Benefit Cosmetics);
- Kering SA (FY2017 luxury goods sales US$12.168 billion and the number four luxury goods company by sales FY2017, with a selection of luxury brands, such as: Gucci, Bottega Veneta, Saint Laurent, Balenciaga, Brioni, Pomellato, Girard-Perregaux, Ulysse Nardin); and
- L'Oreal Luxe (FY2017 luxury goods sales estimate US$9.549 billion and the number seven luxury goods company by sales FY2017, with a selection of luxury brands, such as: Lancome, Kiehl's, Urban Decay, Biotherm, IT cosmetics).

Chanel, the French privately owned luxury icon, is now headquartered in the United Kingdom and published its financial results for the first time in 2018. As a result, the most notable change in the top 10 luxury goods leaders was the entry of Chanel Limited into position number six (FY2017 luxury goods sales: US$9.623 billion).

French stalwart, Hermes International SCA, is now in position number 11 in the FY2017 luxury goods sales ranking, with FY2017 luxury goods sales at US$6.255 billion (selection of luxury brands: Hermes and John Lobb).

France achieved the highest year-on-year luxury good sales growth in FY2017, at 18.7 per cent, supported by an increase in tourist numbers and stronger consumption. Because France is home to some of the largest luxury goods companies in the world, with four companies in the top 11 – LVMH, Kering, L'Oreal Luxe and Hermes – the seven companies based in France (in addition to the four above-mentioned, SMCP SAS (Sandro, Maje, Claudie Pierlot), Longchamp SAS and Zadig & Voltaire) took the greatest share (23.5 per cent) of the total luxury goods sales of the Top 100 in FY2017.

LVMH, Kering and Hermes International all reported double-digit net profit margins, with Hermes achieving 22.1 per cent in FY2017, benefitting from a high level of productivity at its production sites and the positive impact of foreign exchange hedges from 2016.

Revenues in the luxury goods market should amount to US$18.820 billion in 2020 in France. The French market is expected to grow annually by 3 per cent, from 2020 to 2023, with an outlook that is improving, following a series of 'yellow vest' demonstrations that began in November 2018 resulting from discontent over rising fuel prices, but which lost momentum over 2019. The worst of the impact from the yellow vest protests being now over, this supports a recovery in demand from both tourists and domestic consumers in what is a key strategic market for global luxury players.

The French luxury goods market's largest segment is the luxury fashion segment, with a market volume of US$6.991 billion in 2020. Within the luxury fashion segment, the market's largest segment is the luxury apparel segment, with a market volume of US$4.961 billion in 2020, in France.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

The French law on duty of viligance of parent and outsourcing companies, dated 27 March 2017 (article L 225-102-4 inserted in the French commercial code), is the French response to the UK Modern Slavery Act and the California Transparency in Supply Chains Act.

This is a due diligence measure that requires large French companies to create and implement a 'vigilance plan' aimed at identifying and preventing potential human rights violations – including those associated with subsidiaries and supply chain members.

The law applies to any company headquartered in France that has (i) 5,000 or more employees, including employees of any French subsidiaries; or (ii) 10,000 or more employees, including French and foreign subsidiaries.

The law requires that the viligance plan address activities by the company's subcontractors and suppliers (referred to as 'supply chain entities'), where the company maintains an ongoing business relationship with these supply chain entities, and such activities involve its business relationship. The viligance plan, as well as the minutes related to its implementation, must be made available to the public.

As of February 2019, the enforceability of this new French law was mitigated, at best. Certain corporations had still not published a vigilance plan regardless of their legal obligation to do so (eg, Lactalis, Credit Agricole, Zara or H&M). Those that had published vigilance plans merely included them in their chapter on social and environmental responsibility within their company's annual report. Such viligance plans were vague and had gaps, the actions and measures were not detailed enough and only very partially addressed the risks mentioned in the risk mapping. There is, therefore, room for improvement.

The usual contractual arrangements for the relationships relating to the development, manufacture and supply chain for fashion goods in France are standard French law-governed manufacturing agreements or supplier agreements.

Such contractual arrangements are subject to the French civil code on contract law, and the general regime and proof of obligations, which was reformed in October 2016, thanks to Order No. 2016-131 of 10 February 2016. The order codified principles that had emerged from the case law of French courts, but also created a number of new rules applicable to pre-contractual, and contractual, relationships, such as:

- new article 1104 of the French civil code, which provides that contracts must be negotiated, concluded and performed in good faith, and failure to comply with such obligation can not only trigger the payment of damages, but also result in the nullification of the contract;
- new article 1112-1 provides that if a party to the contractual obligations is aware of information, the significance of which would be determinative for the consent of the other party, it must inform such other party thereof if such other party is legitimately unaware of such information, or relies on the first party;
- new article 1119 provides that general conditions invoked by a party have no effect against the other party, unless they have been made known to such other party and accepted by it. In the event of a 'battle of the forms', between two series of general conditions (eg, general sales conditions and general purchase conditions), those conditions that conflict are without effect;
- new article 1124, which provides that a contract concluded in violation of a unilateral promise, with a third party that knew of the existence thereof, is null and void; and
- new article 1143 provides that violence exists when a party abusing the state of dependency in which its co-contracting party finds itself, obtains from such co-contracting party an undertaking which such co-contracting party would not have otherwise agreed to in the absence of such constraint, and benefits thereby from a manifestly excessive advantage.

Distribution and agency agreements

3 | What legal framework governs distribution and agency agreements for fashion goods?

In addition to the reform of the French civil code on contract law and the general regime and proof of obligations explained in question 2, distribution and agency agreements for fashion goods need to comply with the following legal framework:

- European regulation (EU) No. 330/2010 dated 20 April 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union (TFEU), which places limits on restrictions that a supplier could place on a distributor or agent (the Regulation);
- article L134-1 of the French commercial code, which sets out what the agency relationship consists of;
- article L134-12 of of the French commercial code, which sets out that a commercial agent is entitled to a termination payment at the end of the agency agreement;
- Books III and IV, and article L442-6 of the French commercial code, which set out that a relationship between two commercial partners needs to be governed by fairness and which prohibit any strong imbalance between the parties; and
- the Law No. 78-17 dated 6 January 1978 relating to IT, databases and freedom (French Data Protection Act) and its implementation decree No. 2005-1309.

French luxury houses often use selective distribution to sell their products. It is, indeed, the most-used distribution technique for perfumes, cosmetics, leather accessories or even ready-to-wear.

The Regulation provides for an exemption system to the general prohibition of vertical agreements set out in article 101(1) of the TFEU. The lawfulness of selective distribution agreements is always assessed via the fundamental rules applying to competition law, in particular article 101 of the TFEU.

Selective distribution systems may qualify for block exemption treatment under the vertical agreements block exemption set out in article 101(3) of the TFEU.

4 | What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

Under French law, it is essential to avoid any confusion between a distribution agreement and an agency agreement.

French law sets out that a distributor is an independent natural person or legal entity, who buys goods and products from the manufacturer or supplier and resells them to third parties, upon the agreed trading conditions, and at a profit margin set by such distributor.

A distributor may be appointed for a particular territory, either on an exclusive, or non-exclusive, basis.

Under French law, there is no statutory compensation for the loss of clientele and business due to the distributor upon expiry or termination of a distribution agreement. However, French case law has recently recognised that some compensation may be due when some major investments had been made by the distributor, on behalf of the manufacturer or supplier, in the designated territory.

Moreover, there is no statutory notice period to terminate a distribution agreement under French law. However, most distribution agreements set out a three-to-six-month termination notice period.

French law sets out a detailed legal framework relating to the role of commercial agent, which is of a 'public policy' nature (ie, one cannot opt out from such statutory legal provisions). In particular, commercial agents must be registered as such, on a special list held by the registrar of the competent French commercial court.

Under French law, not only is it very difficult to terminate a commercial agent (except for proven serious misconduct), but also there is a statutory considerable compensation for the loss of clientele and business that is due to the terminated agent by the manufacturer or supplier.

Selective distribution is the most commonly used distribution structure for luxury goods in France, as explained in question 3.

Such selective distribution systems of luxury products can escape the qualification of anticompetitive agreements, pursuant to article 101(3) of the TFEU (individual and block exemption). However, in 2011, the European Court of Justice (ECJ) held that the selective distribution agreement that has as its object the restriction of passive sales to online end-users outside of the dealer's area excluded the application of the block exemption in its decision in *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*. The ECJ ruled that it was down to the French courts to determine whether an individual exemption may benefit such selective distribution agreement imposed by French company Pierre Fabre Dermo-Cosmétique SAS to its distributors. To conclude, it is clear that the ECJ set out that the prohibition of internet sales, in a distribution agreement, constitutes an anticompetitive restriction.

Import and export

5 | Do any special import and export rules and restrictions apply to fashion goods?

A French company, upon incorporation, will be provided with the following numbers by the French authorities:

- an intra-community VAT number, provided to all companies incorporated in a member state of the European Union (EU);
- a SIRET number, which is a unique French business identification number; and

- an EORI number, which is assigned to importers and exporters by the French tax authorities, and is used in the process of customs entry declaration and customs clearance for both import and export shipments, travelling to and from the EU and countries outside the EU.

Fashion and luxury products manufactured outside of the EU, and brought into the EU, will be deemed to be 'imports', by French customs authorities.

When fashion and luxury products are transferred from France, or another member state of the EU, to a third party country in the rest of the world (outside of the EU), then these products will be deemed to be 'exports' by French customs authorities.

For imports of fashion and luxury products, (ie, when they enter the EU), the French importer will have to pay some customs duties or other taxes when it imports these products from a third-party country to France or another member state of the EU.

Such customs duties are the same in each of the 27 member states of the EU because they are set by EU institutions. The importer can compute such customs duties by accessing the RITA encyclopedia, which sets out the integrated referential to an automated tariff, for each luxury and fashion product.

Through rather complex manipulations on the RITA encyclopedia, the importer can find out the relevant customs duties, additional taxes and any other fees (such as anti-dumping rights) payable for each type of fashion product and other imported merchandise.

For example, if you are importing a man's shirt in France or any other EU member state from China, there will be a 12 per cent customs duty to pay (the customs duty).

Such customs duty will be payable on the price paid to the Chinese manufacturer for the man's shirt in China plus all transportation costs from China to France (or another EU member state).

Therefore, if the man's shirt has a manufacturing price (set out on the invoice of the Chinese manufacturer) of €100, and if there are €50 of transportation costs, the customs value basis will be €150 and the customs duty amount will be €18 (€150 multiplied by 12 per cent).

The computation of customs duties, additional taxes and other charges being such a complicated and specialised area, and the filling out of customs declarations being done only on the Delta software that is accessible only to legal entities that have received an authorisation to use such software, most EU companies that sell fashion and luxury goods use the services of registered customs representatives, also called customs brokers or customs agents.

For exports of fashion and luxury products (ie, when they leave the EU to go to a third party in the rest of the world), a French company will not have to pay any customs duties or other taxes. However, it is also important to check whether such third-party country will charge the French exporter some customs duties, additional taxes and other charges, upon the luxury and fashion products entering its territory.

In addition, it is important for the importers to double check whether the EU, and consequently France, may be giving preferential treatment to fashion and luxury products imported from certain developing countries, which names are set out on the list entitled Systeme Generalise de Preference (SPG). SPG is a programme of trade preferences for goods coming from developing countries, such as Bengladesh, Vietnam, etc. It may be financially more advantageous to manufacture luxury and fashion products in the countries that are included on the SPG list, to ensure that lower tariffs and customs duties will apply when importing these products to the EU.

Finally, and especially if the goods are in the luxury bracket, it may be possible to put a 'Made in France' label on them, provided that the products were assembled in France.

Corporate social responsibility and sustainability

6 | What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

As explained in question 2, the French law on duty of viligance for parent and outsourcing companies, dated 27 March 2017 (article L 225-102-4 inserted in the French commercial code) is the legal framework that applies to disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in France.

The vigilance plan made compulsory by this French law must set out a detailed risk mapping stating the risks for third parties (ie, employees, the general population) and the environment. French companies subject to this law must then publish their risk mapping, explicitely and clearly stating the serious risks and severe impacts on health and safety of individuals and on the environement. In particular, the vigilance plan should provide detailed lists of risks for each type of activity, product and service.

It is these substantial risks (ie, negative impacts on third parties and the environment deriving from general activities) on which vigilance must be exercised and which the plan must cover. Moreover, the vigilance plan must include the evaluated severity criteria regarding the level, size and reversible or irreversible nature of the impacts, or the probability of the risk. This prioritisation should allow the French company to structure how it implements its measures to resolve the impacts or risks of impact.

The vigilance plan, as well as the minutes related to its implementation, must be made available to the public.

The French law on duty of viligance of parent and outsourcing companies sets out some stringent enforcement mechanisms. Any person with a demonstrable interest may demand that a company comply with the due diligence requirements (ie, creating and implementing a vigilance plan) and, if the French company fails to comply, a court may fine the offending company up to €10 million, depending on the severity of the breach and other circumstances. Additionally, if the activities of a French company – or the activities of its supply chain entities – cause harm that could have been avoided by implementing its viligance plan, the size of the fine can be trebled (up to €30 million), depending on the severity and circumstances of the breach and the damage caused, and the company can be ordered to pay damages to the victims.

7 | What occupational health and safety laws should fashion companies be aware of across their supply chains?

As set out above in our answers to questions 2 and 6, the French law on duty of viligance of parent and outsourcing companies, dated 27 March 2017 (article L 225-102-4 inserted in the French commercial code) is the legal framework that applies to disclosure obligations in relation to occupational health and safety across their supply chains, for fashion and luxury brands in France.

In addition, the main legislation on occupational health and safety in France is set out in Part IV of the French labour code, entitled 'Health and Safety at Work'. Health and safety at work legislation is supplemented by other parts of this labour code (ie, work time legislation, daily rest period, respect of fundamental freedoms, bullying, sexual harassment, discrimination, execution in good faith of the employment agreement, work council competencies, employee delegates' abilities).

Collective bargaining is also a source of health and safety legislation (via inter-branch agreements, branch agreements, company-level agreements) in France. These collective agreements regulate employer versus employee relationships, in particular as far as occupation health and safety are concerned.

ONLINE RETAIL

Launch

8 What legal framework governs the launch of an online fashion marketplace or store?

The 'Hamon' law of 17 March 2014 transposes the provisions of the Directive 2011/83/EU on consumer rights, which aims at achieving a real business-to-consumer internal market, striking the right balance between a high level of consumer protection and the competitiveness of businesses. This law strengthened pre-contractual information requirements, in relation to:

- the general duty to give information that applies to any sales of goods or services agreement entered into on a business-to-consumer basis (for on-premises sales, distance sales and off-premises sales); and
- information specific to distance contracts about the existence of a withdrawal right.

Thanks to this law, the withdrawal period has been extended from 7 to 14 days. It introduced the use of a standard form that can be used by consumers to exercise their withdrawal rights. Such form must be made available to consumers online or sent to them before the contract is entered into. If a consumer exercises this right, the business must refund the consumer for all amounts paid, including delivery costs, within a period of 14 calendar days.

Also, the General Data Protection Regulation (GDPR) and the French Data Protection Act with its implementation Decree No. 2005-1309, govern the launch of any online fashion marketplace or store in France. This is because e-commerce stores must have a data privacy policy, as well as a cookies policy, as well as some general terms and conditions of use of their e-commerce website, as well as some general terms and conditions of sale on their e-commerce website in place, which all comply with the GDPR and the French Data Protection Act. These online marketplaces must also appoint a data protection officer, to ensure that they comply with such data protection legal framework and so that the Commission Nationale Informatique et Libertes (CNIL, the French data protection authority) has a point of contact within the French online fashion marketplace or store.

With respect to the cookies policy, e-commerce stores must comply with the cookies and other tracking devices guidelines published by the CNIL in July 2019.

Sourcing and distribution

9 How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

As explained in our answer to question 4, luxury and fashion brands (manufacturers, suppliers) cannot ban their distributors from selling their products online, through e-commerce, since this would be a competition law breach under article 101 of the TFEU, entitled an anti-competitive restriction.

However, luxury and fashion brands may impose some criteria and conditions for their distributors to be able to sell their products online, in order to preserve the luxury aura and prestige of their products sold online, via the terms of their distribution agreements.

Terms and conditions

10 What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

As explained in question 8, these terms and conditions for customers of an e-commerce website must comply with the GDPR, the French Data Protection Act and the cookies and other tracking devices guidelines from the CNIL.

Therefore, those terms must comply with the following principles:

- privacy by design, which means that fashion and luxury businesses must take a proactive and preventive approach in relation to the protection of privacy and personal data;
- accountability, which means that data controllers, such as an e-commerce website, as well as its data processors, must take appropriate legal, organisational and technical measures allowing them to comply with the GDPR. They must be able to demonstrate the execution of such measures to the CNIL;
- privacy impact assessment, which means that an e-commerce business must execute an analysis relating to the protection of personal data, on its data assets, to track and map risks inherent to each data process and treatment put in place, according to their plausibility and seriousness;
- a data protection officer must be appointed, to ensure the compliance of treatment of personal data by fashion businesses whose data treatments present a strong risk of breach of privacy;
- profiling, which is an automated processing of personal data allowing the construction of complex information about a particular person, such as his or her preferences, productivity at work and whereabouts. This type of data processing may constitute a risk to civil liberties; therefore, online businesses doing profiling must limit their risks and guarantee the rights of individuals subjected to such profiling, in particular by allowing them to request human intervention or contest the automated decision; and
- right to be forgotten, which allows an individual to avoid that information about his or her past that interferes with their current, actual life. In the digital world, that right encompasses the right to erasure, as well as the right to dereferencing.

Tax

11 Are online sales taxed differently than sales in retail stores in your jurisdiction?

No, online sales are not taxed differently than sales executed in brick-and-mortar stores. They are all subjected to a 20 per cent VAT rate, which is the standard VAT rate in France, and which is applicable on all fashion and luxury products.

INTELLECTUAL PROPERTY

Design protection

12 Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

French fashion designs are usually protected via the registration of a design right in France, with the Institut National de la Propriété Industrielle (INPI). Articles L 512-1 et seq and R 511-1 et seq of the French intellectual property code govern the design application and registration process.

Of course, this French design protection applies in addition to any registered or unregistered community design right that may exist.

To qualify for protection through the French design right, the design must be novel and have individual character. Functional forms, as well as designs in breach of public policy or morality, are excluded from protection.

French fashion designs are protected by copyright, as long as they meet the originality criteria. Indeed, article L 112-2 14 of the French intellectual property code provides that 'the creations of the seasonal industries of garments and dresses' fall within the remit of copyright, as 'works of the mind'.

Copyright being an unregistrable intellectual property right in France, the existence of copyright on fashion products is often proven via the filing of an 'envelope SOLEAU' with INPI, or by keeping all prototypes, drawings and research documents on file, to be able to prove the date on which such copyright arose.

Indeed, under the traditional principle of unity of art, a creation can be protected by copyright and design law. Recent case law distinguishes between these IP rights, by stating that the originality required for copyright protection differs from the individual character required for design protection, and that both rights do not necessarily overlap.

In the same way, the scope of copyright protection is determined by the reproduction of the creation's main features; while in design law the same overall visual impression on the informed user is required.

As far as the ownership of commissioned works is concerned, the default regime in France is that both an independent creator (ie, a fashion freelancer, contractor, creative director) and an employee of any French fashion house is automatically deemed to be the lawful owner of all intellectual property rights on a fashion and luxury item that he or she has created during the course of his or her service or employment. Therefore, it is essential in all French law-governed service providers agreements entered into with third-party consultants, and in all French law-governed employment agreements entered into with employees, to set out that an automatic and irrevocable assignment of all intellectual property rights in any fashion creation will always occur, upon creation.

13 | What difficulties arise in obtaining IP protection for fashion goods?

France enjoys the most extensive and longstanding intellectual property rights in connection with fashion designs. As explained in question 12, copyright protection is extended to any original work of the mind.

Even spare parts are protectable under French design law, which means that a design protecting only a spare part (eg, a bag clip) is valid without taking into consideration the product as a whole (ie, the bag).

Therefore, IP protection for fashion goods is very achievable in France, and it is important for applicants to systematically register their designs (not rely simply on copyright law) to be on the safe side.

Brand protection

14 | How are luxury and fashion brands legally protected in your jurisdiction?

Luxury and fashion brands are usually protected by a French trademark registration filed with INPI.

French trademarks are governed mainly by Law 1991-7, which implements the EU first council directive related to trademarks (89/104/EEC) and is codified in the French Intellectual Property Code. This code was amended several times, in particular by Law 2007-1544, which implements the EU IP rights enforcement Directive (2004/48/EC).

Ownership of a trademark is acquired through registration, except for well-known trademarks within the meaning of article 6-bis of the Paris convention for the protection of industrial property dated 20 March 1883. Such unregistered well-known trademarks may be protected under French law if an unauthorised use of the trademark by a third party is likely to cause damage to the trademark owner or such use constitutes an unjustified exploitation of the trademark.

To be registered as a trademark, a sign must be:

- represented in a way that allows any person to determine precisely and clearly the subject-matter of the trademark protection granted to its owner;
- distinctive;
- not deceptive;
- lawful; and
- available.

French trademarks, registered with INPI, may coincide with EU trademarks (filed with the EUIPO) and international trademarks (filed with WIPO, through the Madrid protocol).

Under French law, unauthorised use of a trademark on the internet also constitutes trademark infringement. The rights holder may sue those that unlawfully use its trademark on the ground of trademark infringement or unfair competition.

Moreover, luxury and fashion brands are also protected by domain names, which may be purchased from domain name registrars for a limited period of time on a regular basis.

French domain names finishing in .fr can only be purchased for one year, once a year, pursuant to the regulations of the French registry for .fr top level domains, Afnic.

It is the responsibility of the person purchasing, or using, the domain name in .fr to ensure that he or she does not breach any third-party rights by doing so.

A dispute resolution procedure called Syreli is available for disputes relating to .fr domains, along with judiciary actions. This procedure is managed by Afnic and decisions are issued within two months from receipt of the complaint.

With online ransom, a proliferation of websites being used for counterfeit sales, fraud, phishing and other forms of online trademark abuse, most French luxury and fashion companies take the management and enforcement of domain name portfolios very seriously.

With the advent of new generic top-level domains (gTLDs), it is now an essential strategy for all French luxury and fashion houses to buy and hold onto all available gTLDs relating to fashion and luxury (eg, .luxury, .fashion, .luxe).

Licensing

15 | What rules, restrictions and best practices apply to IP licensing in the fashion industry?

French IP rights may be assigned, licensed or pledged.

The French intellectual property code refers to licences over trademarks, patents, designs and models, as well as databases. With respect to copyright, this code only refers to the assignment of the patrimonial rights of the author (ie, representation right and reproduction right) in its article L122-7. In practice, copyright licences often occur, especially over software.

When it involves French design rights, the corresponding deed, contract or judgment must be recorded in the French Design register, to be enforceable against third parties. The documents must be in French (or a translation must be provided). Tax will be incurred only up to the 10th design, in a recordal request filed with INPI. For community designs, recordal must be made with EUIPO. For the French designation of an international design, recordal must be requested through WIPO for all or part of the designation.

When it involves French trademarks, the corresponding deed, contract or judgment should be recorded in the INPI French trademark register, especially for evidentiary and opposability purposes, for the licensee to be able to act in infringement litigation and to be enforceable against third parties. Again, the copy or abstract of the deed, or agreement, setting out the change in ownership or use of the trademarks should be in French (or a French translation be provided).

Of course, copyright of fashion products does not have to be recorded in any French register, as there is no registration requirement for French copyright. However, best practice is for the parties to the deed, agreement or judgment to keep, on record, for the duration of the copyright (70 years after the death of the creator of the copyright) such documents, so that the copyright assignment, pledge or licence may be enforceable against third parties.

Fashion brands such as Tommy Hilfiger, Benetton and Ermenegildo Zegna use franchising to access new markets, increase their online presence and develop flagship stores. Franchise agreements generally include a trademark, trade name or service mark licence, as well as the transfer of knowhow by the franchisor, to the franchisee. On this note, knowhow licences exist in France, although knowhow does not constitute a proprietary right benefiting from specific protection under the French intellectual property code.

A licensor must make some pre-contractual disclosure to prospective licensees, pursuant to article L330-3 of the French commercial code, when he or she makes available to another person a trade name or a trademark, and requires from such other person an exclusivity undertaking with respect to such activity. The precontractual information must be disclosed in a document provided at least 20 days prior to the signature of the licence agreement. Such document must contain truthful information allowing the licensee to commit to the contractual relationship in full knowledge of the facts.

A licensing relationship governed by French law must comply with the general contract law principles, including the negotiation, conclusion and performance of contracts in good faith (article 1104 of the French civil code). This statutory legal provision implies an obligation on each party of loyalty, cooperation and consistency. In the event of breach of this good faith principle, the licence may be terminated and damages potentially awarded.

Enforcement

16 What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

Lawsuits involving the infringement or validity of a French design, or the French designation of an international design, may be lodged with one of the 10 competent courts of first instance (Bordeaux, Lille, Lyon, Marseille, Nanterre, Nancy, Paris, Rennes, Strasbourg and Fort-de-France).

Lawsuits involving the infringement, in France, of a registered or unregistered communitiy design may be lodged only with the Paris court of first instance. An invalidity action against a community design may only be brought before EUIPO. However, invalidity may be claimed as a defence in an infringement action brought before the Paris tribunal.

The scope of protection for the design is determined exclusively by the various filed views, on the design registration, irrespective of actual use. Therefore, applicants should pay great care to those views, when filing a design application, so as to anticipate the interpretation made by the judiciary tribunal.

Infringement is identified when a third-party design produces, on the informed observer, the same overall visual impression as the claimant's design.

The infringement lawsuit may be lodged by the design owner, or the duly recorded exclusive licensee.

The claimant will be indemnified for lost profits, with the court taking into account: (i) the scope of the infringement; (ii) the proportion of actual business lost by the claimant; and (iii) the claimant's profit margin for the retail of each unit.

Damages may also be awarded for the dilution or depreciation of a design.

As far as trademarks are concerned, lawsuits may be lodged before the 10 above-mentioned competent courts at first instance if they are French trademarks or the French designation of an international trademark. Lawsuits relating to the infringement of EU trademarks may only be lodged with the Paris judiciary tribunal.

Such infringement proceedings may be lodged by either the trademark owner or the exclusive licensee, provided that the licence was recorded in the trademark register.

To determine trademark infringement, the judiciary tribunal will assess: (i) the similarity of the conflicting trademarks, on the basis of visual, phonetic and intellectual criteria; and (ii) the similarity of the goods or services, bearing such trademarks, concerned. Such trademark infringement may be evidenced by any means.

To secure evidence of the infringement, and to obtain any information related to it, rights holders may ask, and obtain, from the competent judiciary tribunal, an order to carry out a seizure on the premises where the products that infringe the copyright, trademarks, designs, etc are located. Such order authorises a bailiff to size the suspected infringing products, or to visit the alleged infringer's premises to collect evidence of the infringement by taking pictures of the suspected infringing products, or by taking samples. The IP rights holder must lodge a lawsuit against the alleged infringer with the competent judiciary tribunal within 20 working days, or 31 calendar days, whichever is the longer, from the date of the seizure. Otherwise, the seizure may be declared null and void on the request of the alleged infringer, who may also ask for some damages.

In addition, IP rights holders may also request an ex parte injunction, to prevent an imminent infringement, which is about to happen, or any further infringement, to the competent judiciary tribunal.

Infringement action, for all IP rights, must be brought within three years of the infringement. There is one exception, for copyright, which statute of limitations is five years from the date on which the copyright owner was made aware, or should have been aware, of such copyright infringement.

There is also an option to protect design rights, copyright, trademarks, patents, etc at French borders, which we often recommend to our fashion and luxury clients. They need to file their IP rights with the Directorate-General of Customs and Indirect Taxes, via a French and EU intervention request, and obtain some certifications from those French customs authorities, that such IP rights are now officially registered on the French and EU customs databases. Therefore, all counterfeit products infringing such IP rights registered on these French and EU customs databases, which enter the EU territory via French borders, will be seized by customs at French borders for 10 days. Potentially, provided that certain conditions are met, French customs may permanently destroy all counterfeit products thus seized, after 10 days.

DATA PRIVACY AND SECURITY

Legislation

17 What data privacy and security laws are most relevant to fashion and luxury companies?

As explained in questions 8 and 10, fashion and luxury companies must comply with the GDPR, the French Data Protection Act and the cookies and other tracking devices guidelines from the CNIL.

Compliance challenges

18 What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

The strict compliance with the GDPR, as well as the amended version of the French Data Protection Act, do present some challenges to luxury and fashion companies and to their business models.

Indeed, on a factual level, most small- and medium-sized enterprises (SMEs) incorporated in France are still not in compliance with the GDPR, the French Data Protection Act and the cookies and other tracking devices guidelines from the CNIL. Most of the time this is because such SMEs do not want to allocate time, money and resources to bringing their business in compliance, while they are fully aware that a serious breach may trigger a fine worth up to 4 per cent of their annual worldwide turnover, or €20 million, whichever is greater.

Fashion and luxury companies now have to take owernship of, and full responsibility for, the rigorous management and full protection of their data assets. They can no longer rely on a 'I was not aware this may happen' defence strategy, which was very often used by fashion companies before the GDPR entered into force when their internal databases or IT systems got hacked or leaked to the public domain (eg, Hudson's Bay Co, which owns Saks Fifth Avenue, Macy's, Bloomingdales, Adidas, Fashion Nexus, Poshmark). The way to rise up to such challenge, though, is to see the GDPR as an opportunity to take stock of what data your company has, and how you can take most advantage of it. The key tenet of GDPR is that it will give any fashion company the ability to find data in its organisation that is highly sensitive and high value, and ensure that it is protected adequately from risks and data breaches.

With the GDPR, almost all fashion and luxury businesses worldwide that sell to EU customers (and therefore French customers), either online or in brick and mortar locations, now have a Data Protection Authority (DPA). Businesses will determine their respective DPA with respect to the place of establishment of their management functions as far as supervision of data processing is concerned, which will allow them to identify the main establishment, including when a sole company manages the operations of a whole group. However, the GDPR sets up a one-stop DPA: in case of absence of a specific national legislation, a DPA located in the EU member state in which such organisation has its main or unique establishment will be in charge of controlling its compliance with the GDPR. This unique one-stop DPA will allow companies to substantially save time and money by simplifying processes.

To favour the European data market and the digital economy, and therefore create a more favourable economic environment, the GDPR reinforces the protection of personal data and civil liberties. This unified regulation will allow businesses to substantially reduce the costs of processing data currently incurred in the 27 member states: organisations will no longer have to comply with multiple national regulations for the collection, harvesting, transfer and storing of data that they use.

The scope of the GDPR extends to companies that are headquartered outside the EU, but intend to market goods and services into the EU market, as long as they put in place processes and treatments of personal data relating to EU citizens. Following these EU residents on the internet to create some profiles is also covered by the scope of the GDPR. Therefore, EU companies, subject to strict and expensive rules, will not be penalised by international competition on the EU single market. In addition, they may buy some data from non-EU companies, which is compliant with GDPR provisions, therefore making the data market wider.

The right to portability of data allows EU citizens subjected to data treatment and processing to gather this data in an exploitable format, or to transfer such data to another data controller, if this is technically possible. Compliance with the right to portability is definitely a challenge for fashion and luxury businesses.

Innovative technologies

19 What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

Innovative technologies, such as AI and facial recognition, involve automated decision making, including profiling.

The GDPR has provisions on:

- automated individual decision making (making a decision solely by automated means without any human involvement); and
- profiling (automated processing of personal data to evaluate certain things about an individual), which can be part of an automated decision-making process.

These provisions, set out in article 22 of the GDPR, should be taken into account by fashion and luxury businesses when deploying innovative technologies. In particular, they must demonstrate that they have a lawful basis to carry out profiling or automated decision making, and document this in their data protection policy. Their Data Protection Impact Assessment should address the risks, before they start using any new automated decision making or profiling. They should tell their customers about the profiling and automated decision making they carry out, what information they use to create the profiles, and where they get this information from. Preferably, they should use anonymised data in their profiling activities.

Content personalisation and targeted advertising

20 What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

There is a tension, and irrevocable difference, between the GDPR's push towards more anonymisation of data, and the personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour. This is because the latter needs data that is not anonymous, but, instead, traceable to each individual user.

Indeed, a fashion and luxury business cannot truly personalise an experience in any channel – a website, a mobile app, through email campaigns, in advertising or events in a store – unless it knows something about that customer, and the luxury business cannot get to know someone digitally unless it collects data about him or her. The GDPR and the increasing concerns around privacy complicate this process.

However, GDPR does not prohibit fashion businesses from collecting any data on customers and prospects. However, they must do so in compliance with the core GDPR principles set out in question 10.

ADVERTISING AND MARKETING

Law and regulation

21 What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

Advertising and marketing communications are regulated by the following French laws:

- Law dated 10 January 1991 (the Evin Law) that prohibits advertising alcohol on French TV channels and in cinemas, and limits such advertising on radio and on the internet;
- Law dated 4 August 1994 (the Toubon Law) that provides that the French language must be used in all advertising in France; and

- Decree dated 27 March 1992 that provides for specific rules relating to advertising on TV.

Various legal codes set out some specific rules governing advertising and marketing communications in France, such as: the French consumer code, which prohibits deceptive and misleading advertising, and regulates comparative advertising; or article 9 of the French civil code, which protects individuals' images and privacy.

Moreover, there are some industry codes of practice, drafted by the French advertising self-regulation agency (ARPP), which represents advertisers, agencies and the media. These codes of practice set out the expected ethical standards and ensure proper implementation of these standards, through advice and pre-clearance, including providing mandatory advice before the broadcast of all TV advertising.

The French consumer and competition governmental authority (DGCCRF) has investigative powers in relation to all matters relating to the protection of consumers, including advertising and marketing practices.

DGCCRF agents are entitled to enter the professional premises of the advertiser, advertising agency or communication agency during business hours to request an immediate review of documents, take copies of these documents, and ask questions.

The ARPP works with an independent jury that handles complaints against advertisements that violate ARPP standards. Its decisions are published on its website.

If there is a data breach within a marketing campaign, the CNIL, the French DPA, may fine the cuprit data controller (such as an advertiser or an agency) up to €20 million, or 4 per cent of their worldwide annual turnover, whichever is the highest.

Online marketing and social media

22 | What particular rules and regulations govern online marketing activities and how are such rules enforced?

Online marketing activities are regulated in the same manner as activities conducted in the 'real world', pursuant to the French digital economy law dated 21 June 2004. However, more specific to the online world, the digital economy law provides that pop-ups, advert banners, and any other types of online adverts must be clearly identified as such and therefore distinguished from non-commercial information.

Article L121-4-11 of the French consumer code provides that an advertiser who pays for content in the media to promote its products or services must clearly set out that such content is an advertisement, through images or sounds clearly identifiable by consumers. Otherwise, this is a misleading advert or an act of unfair competition.

The ARPP issued a standard relating to digital adverts, communications carried out by influencers, native advertising, etc emphasising the fact that all such online marketing communications and advertising should be clearly distinguishable as such by consumers.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 | What product safety rules and standards apply to luxury and fashion goods?

French law dated 19 May 1998, which is now set out in articles 1245 et seq of the French civil code, transposes EU Directive 85/374/EEC on the liability for defective products in France.

Alongside this strict civil liability for defective products exists some criminal liability for defective products on the grounds of deceit, involuntary bodily harm, involuntary manslaughter or endangering the lives of others.

Articles 1245 et seq of the French civil code apply when a product is considered unsafe. Therefore, a fashion business would be liable for damage caused by a defect in its produts, regardless of whether or not the parties concluded a contract. Consequently, these statutory rules apply to any end-user in possession of a fashion product, whether or not such end-user had entered into an agreement with the fashion company.

Articles 1245 et seq of the French civil code provide for a strict liability, where the claimant does not need to prove that the 'producer' made a mistake, committed an act of negligence or breached a contract. The claimant only has to prove the defect of the product, the damage suffered and the causal link between such defect and such damage.

A defective product is defined in article 1245-3 of the French civil code, as a product that does not provide the safety that any person is entitled to expect from it, taking into account, in particular, the presentation of such product, the use that can reasonably be expected of it and the date on which it was put on the market.

Such strict civil liability rules apply to the 'producer', a term that may refer to the manufacturer, the distributor, as well as the importer in the EU, of defective products.

As soon as a risk of a defective product is recognised, the 'producer' should comply with its duty of care and take all necessary actions to limit harmful consequences, such as a formal public warning, a product recall or the mere withdrawal of such product from the market.

Product liability

24 | What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

The regime governing product liability for luxury and fashion goods is described in our answer to question 22.

The 'Hamon law' dated 17 March 2014 introduced class action for French consumers. Consequently, an accredited consumer association may take legal action to obtain compensation for individual economic damages suffered by consumers placed in an identical or similar situation, that result from the purchase of goods or services.

There has been no notable recent product liability litigation in the fashion and luxury sectors. However, a health class action matter is currently pending before the Paris judiciary tribunal. A pharmaceutical company was sued by 4,000 French individuals because it sold an anti-epileptic drug without providing adequate information relating to the use of such drug during pregnancy. As a result, some French babies were born with health defects because such drug has detrimental effects on foetal development. The judiciary tribunal should hand down its decision about the laboratory's liability soon.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 | Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

As set out in question 2, the general contract law provisions included in the French civil code, which underwent a major reform in 2016, must be complied with. Therefore, for private M&As, the seller would seek to promote competition between different bidders through a competitive sale process, which conduct must comply with the statutory duty of good faith.

In France, it is compulsory for the transfer of assets and liabilities from the seller to the buyer to cover all employment contracts, commercial leases and insurance policies pertaining to the business. Except from those, all other assets and liabilities relating to the transferred business may be excluded from the transfer transction by agreement. Furthermore, the transfer of contracts requires the approval from all relevant counterparties, thus making the prior identification of such contracts in the course of the due diligence an important matter for any prospective buyer.

In private M&As, there is no restriction to the transfer of shares in a fashion company, a fashion business or assets in France. However, French merger control regulations (in addition to merger control regulations of other EU member states) may require a transaction to be filed with the French competition authority (FCA) if: (i) the gross worldwide total turnover of all the fashion companies involved in the contentration exceeds €150 million; and (ii) the gross total turnover generated individually in France by each of at least two of the fashion companies involved in the concentration exceeds €50 million.

There are no local ownership requirements in France. However, French authorities may object to foreign investments in some specific sectors that are essential to guarantee France's interests in relation to public policy, public security and national defence. As of today's date, fashion and luxury are not part of these sectors that are protected for national security purposes.

In addition to prior agreements, such as non-disclosure agreements or promises, final agreements will set out the terms relating to the transaction; in particular, a description of the transferred assets, the price, the warranties granted by the seller, the conditions precedent, any non-competition or non-solicitation clauses. Asset purchase agreements must set out compulsory provisions, such as the name of the previous owner, some details about the annual turnover, otherwise the buyer may claim that the sale is invalid. Most of these agreements, and most sales of French targets and assets, are governed by French law; in particular, the legal transfer of ownership of the target's shares or assets.

More specific to the fashion and luxury industries, any sale of a fashion business would entail transferring the ownership of all intellectual property rights tied into that fashion target. As such, the trademarks, which have sometimes been filed on the name of the founding fashion designer of the acquired fashion business (eg, Christian Dior, Chantal Thomass, John Galliano, Ines de la Fressange) would be owned by the buyer, after the sale. Thus, the founding fashion designer would no longer be able to use his or her name to sell fashion and luxury products, without infringing on the trademark rights of the buyer.

Competition

26 | What competition law provisions are particularly relevant for the luxury and fashion industry?

Articles L 420-1 and L 420-2 of the French commercial code are the equivalent to articles 101-1 and 102 TFEU and provide for anticompetitive agreements and abuses of a dominant position, respectively.

Specific provisions of the French commercial code are also applicable, such as article L 410-1 et seq on pricing, article L 430-1 et seq on merger control, L 420-2-1 on exclusive rights in French overseas communities, L 420-5 on abusively low prices and L 442-1 et seq on restrictive practices.

For example, a decision handed down by the Paris court of appeal on 26 January 2012 confirmed the existence of price fixing agreements, and anticompetitive behaviour, between 13 perfume and cosmetics producers (including Chanel, Guerlain, Parfums Christian Dior and Yves Saint Laurent Beaute) and their three French distributors (Sephora, Nocibe France and Marionnaud). The court also upheld the judgment from the FCA, dated 14 March 2006, sentencing each of these luxury goods companies and distributors to fines valued at €40 million overall.

Court action for breach of competition law may be lodged with a French court of the FCA by any person having a legal interest. Class actions have been available since the entering into force of the Hamon law dated 17 March 2014, but only when the action is filed by a limited number of authorised consumer associations.

There has been a rise in antitrust damage claims lodged in France, and French courts are now responsive to such claims. A section of the Paris commercial court has been set up to review summons lodged in English, with English-language exhibits, and can rule on competition cases with proceedings fully conducted in the English language.

As set out in question 4, while selective distribution is tolerated as an exemption, pursuant to article 101(3) TFEU, total restriction of online sales by a manufacturer, to its selective distributors, is a breach under article 101(1) TFEU (*Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emplo*i, ECJ, 2011).

The ECJ has refined its case law (which, of course, applies to France) in its 2017 ruling in *Coty Germany GmbH v Parfümerie Akzente GmbH*. The ECJ ruled that a contractual clause, set out in the selective distribution agreement entered into between Coty and its selective distributors, and which prohibits members of such selective distribution network from selling Coty cosmetics on online marketplaces, such as Amazon, complies with article 101(1) TFEU. This is because, according to the ECJ, the clause is proportionate in its pursuit of preserving the image of Coty cosmetics and perfumes, and because it does not prohibit distributors from selling Coty products on their own online e-commerce sites, provided that some quality criteria are met.

This new ECJ case law is useful guidance for national courts on how to assess, in pragmatic terms, the prohibition of selling luxury products in marketplaces. Indeed, the Paris court of appeal handed down a judgment in relation to the validity of a similar clause set out in the contracts for Coty France on 28 February 2018, and used the ECJ analysis to confirm the validity of such prohibition, in relation to a marketplace that sold Coty perfumes during private sales.

EMPLOYMENT AND LABOUR

Managing employment relationships

27 | What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

Employer–employee relationships are governed by the following complex set of laws and regulations that leave little room for individual negotiation:

- the French labour code set out a comprehensive legal framework for both individual and collective relationships between employers and employees;
- collective bargaining agreements have been negotiated between employers' assocations and labour unions covering the industry as a whole, or between employers and labour unions covering a company. In the former case, the collective agreement usually applies to the industry sector as a whole, even to companies within that sector that are not part of the employers' associations (for the fashion and luxury sectors, the 'clothing industry collective agreement', the 'textile industry collective agreement (OETAM)', or the 'collective agreement for the footwear industries' may apply, for example); and
- individual employment agreements, which relate only to the aspects of the employer–employee relationship not already covered by the labour code or relevant collective bargaining agreement.

Because more than 90 per cent of French employees are protected by collective bargaining agreements, the rules set out in the French labour code are supplemented by more generous rules in areas such as paid leave, maternity leave, medical cover and even working time.

Under the 'Aubry Law' dated 19 January 2000, a standard 35-hour working week became the rule. Employees working beyond 35 hours are entitled to overtime. A company-wide collective bargaining agreement may provide for a maximum working time of 12 hours, and a maximum weekly working time of 46 hours over 12 consecutive weeks. Extra time is either paid via overtime, or compensating by taking extra days off (called RTT).

Any dismissal of a French employee must be notified in writing, and based on a 'real and serious' cause. A specific procedure must be followed, including inviting the employee to a pre-dismissal meeting, holding such meeting with the employee, and notifying the dismissal by registered letter with an acknowledgement of receipt. Dismissal for economic reasons and dismissals of employee representatives are subject to additional formalities and requirements, such as the implementation of selection criteria to identify the employees to be dismissed, the involvement of, and approval from, the French labour authorities and compulsory consultation with employee representatives. Upon termination, French employees are entitled to a number of indemnities (severance payment, notice period, paid holidays, etc) and, should the dismissal be deemed to be unfair, the 'Macron scale', set out in article L 1235-3 of the French labour code, provides that, in case of a court claim for unfair dismissal, French labour courts must allocate damages to former employees ranging between a minimum and a capped amount, based on the length of service with the former employer. Because many regional labour courts were resisting the application of the Macron scale to their court cases, the French supreme court ruled in July 2019 that the Macron scale is enforceable and must apply.

Of course, French freelancers and consultants who work for fashion and luxury houses are not protected by the above-mentioned French labour rules applying to employer–employee relationships. However, French labour courts are prompt at requalifying an alleged freelancing relationship into an employment relationship, provided that a subordination link (characterised by work done under the authority of an employer, which has the power to give orders, directives, guidelines, and to control the performance of such work, and may sanction any breach of such performance) exists, between the alleged freelancer and the fashion company. Most creative directors of French fashion houses are consultants, not employees, and therefore have the right to execute other fashion projects or contracts, for other fashion houses (for example, Karl Lagerfeld was the creative director of both Chanel and Fendi).

Article L 124-1 et seq of the French education code provide that a 'gratification' (not a salary) may be paid to an intern, in France, if the duration of his or her internship is more than two consecutive months. Below that time frame, a French company has no obligation to pay a gratification to an intern. The hourly rate of such gratification is equal to a minimum of €3.90 per internship hour; however, in certain sectors of the industry where collective bargaining agreements apply, the amount may be higher than €3.90.

Trade unions

28 | Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

As mentioned in question 24, an employer may have to consult employee representatives if it wants to dismiss, for economic reasons, some of its employees. Also, trade unions, either covering a company or a group of companies, or covering an industry as a whole, negotiate, and will renegotiate and amend, any collective bargaining agreements in place in France.

Unsurprisingly, employee representatives play a very important role, in French employer–employee relationships. Depending on the size of a company, some employee delegates or a works council, as well as a health and safety committee, may have to be appointed and set up. Such employee representatives not only have an important say on significant business issues such as large-scale dismissals, but must be consulted prior to a variety of changes in the business, such as acquisitions, or disposals, of business lines or of the company itself. In French companies with work councils, employee representatives are entitled to attend meetings of the board of directors, but are not allowed to take part in any votes at such meetings. As a result, most strategic decisions are made outside of board of directors' meetings.

Dismissals of employee representatives are subject to additional formalities and requirements, such as the approval given by French labour authorities.

While the top creative management of French fashion houses may be terminated at will, because most creative directors are freelancers, the core labour force of most French fashion and luxury houses (eg, blue-collar workers on the shop floor (seamstresses, etc), lower to middle management, etc) is almost immovable because of the above-mentioned strict French labour laws relating to hiring and firing. One advantage of such 'job security' is that French students and the young labour force do not hesitate to train for, and take on, highly specialised and technical manual jobs, which are necessary to creative and exceptionally high-quality luxury products (eg, embroiderers working for Chanel-owned Lesage, bag makers working for Hermes, feather workers employed by Chanel-owned Lemarie and all the seamstresses working for Chanel and all the haute couture houses in Paris).

Immigration

29 | Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

Yes, the multi-year 'passeport talent' residence permit was created to attract foreign employees and self-employed persons with a particular skillset (eg, qualified or highly qualified employee, self-employed professional, performer or author of a literary or artistic work) in France.

Such residence permit provides the right to stay for a maximum of four years in France, starting from the date of arrival in France. A multi-year residence permit may also be granted to the spouse and children of the 'talented individual'.

UPDATE AND TRENDS

Trends and developments

30 | What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

The future prospects of the luxury and fashion sectors in France are extremely high, because the Macron reforms are slowly but surely transforming the French economy into a liberalised and free-trade powerhouse, bringing flexibility and innovation at the forefront of the political reform agenda. However, the downside to these sweeping changes is the resistance, violence and riots that have taken place, and still regularly happen, in France, and in Paris in particular, emanating from a French people unsettled about, and scared of, a more free and competitive economic market.

Fashion and luxury businesses are the first to bear the brunt of these violent acts of resistance, as their retail points on the Champs Elysees and other luxurious locations in Paris and in the provinces have been heavily disrupted (and sometimes ransacked) by rioters, some 'yellow vests' and 'anti-pension reforms' social unrest movements.

However, in the medium to long term, fashion and luxury businesses will be among the first to benefit from those sweeping reforms, thanks to a highly productive, and more flexible, French workforce, better contractual and trade conditions to conduct business in France and abroad, and a highly efficient legal framework and court system that are among the most protective of IP rights owners, in the world.

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MARKET SPOTLIGHT

State of the market

1 What is the current state of the luxury fashion market in your jurisdiction?

The luxury fashion market is quite relevant in Germany. Being one of the strongest economies in Europe, it is also an important market for luxury brands. In addition to the strong international brands like Gucci, Prada etc, you see a tendency to more individual products. You do not find them on the main street or in the luxury districts but more in the 'hipper' or indie parts of town. Trends are clearly hand-crafted and green, eco or sustainable products, etc.

Of course, there is the online versus bricks and mortar shopping situation. Online sales are on the rise and a lot of shops are closing. While this also relates to fashion, it does affect goods like books, electronics etc more heavily. It is worthwhile mentioning that the two biggest German department stores, Kaufhof and Karstadt, have merged in recent years, which is a clear sign of the struggle of bricks and mortar retail. Many retailers (and brands retailing their own products) are working on multi-channel solutions.

Finally, many fashion brands are struggling. Last year saw a number of bigger-size bankruptcies in Germany, including in the fashion sector with Gerry Weber.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

There are no specific legal stipulations, but standard civil law applies. General terms and conditions (T&Cs) are subject to strict provisions under German law that also largely apply to business-to-business (B2B) contracts. According to German law, standard contractual clauses are, in particular, ineffective if they are surprising (unusual) or unreasonably disadvantage the other party of the contract. The relevant aspect is not whether the T&Cs are labelled as such, but whether they are used as a standard and will or shall not be negotiated.

Stipulations relating to business secrets are very important (in particular considering the requirements following from the new German Law on the Protection of Trade Secrets) and there is a strict regime on delivery times, including penalties.

Distribution and agency agreements

3 What legal framework governs distribution and agency agreements for fashion goods?

There are no specific legal stipulations, but standard civil law applies. Also, there are restrictions for T&Cs, even in a B2B context, that have to be borne in mind.

A relevant regulation concerns the indemnification of the commercial agent according to section 89b of the German Commercial Code. The commercial agent will receive a 'reasonable indemnity' for business he or she has brought to the principal. The amount is capped at one year's commission. Section 89b is binding law and cannot be circumvented. The provision is often applied by analogy to authorised dealers if certain conditions are met.

4 What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

There are numerous models to arrange distribution. The German market does not differ much from other international markets. On the retail side, the most commonly used model is still the normal dealership model (ie, the dealer acquires goods from the fashion label and sells it to consumers). This model is used both online and offline. Many fashion and department stores offer high street brands like Tommy Hilfiger, Levi's, adidas etc. Another quite common model is that fashion labels more and more arrange their retail through their own stores: 'mono label' stores. This is true for players like Zara and H&M but also and especially in the luxury market where you have stores like Bottega Veneta, Cartier, Prada, Hermès, etc. Luxury brands aim at protecting their luxury brand image through a controlled retail environment.

Import and export

5 Do any special import and export rules and restrictions apply to fashion goods?

There are some restrictions on the EU level. According to Regulation (EU) 2017/1509, there is a luxury goods embargo (import and export) for the Democratic People's Republic of Korea (article 10, paragraph 1a and b, and Annex VIII); and according to Regulation (EU) 36/2012, a ban on exports of luxury goods to Syria (article 11b, Annex X).

Corporate social responsibility and sustainability

6 What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

Many companies have established a voluntary code of conduct or code of ethics or the like. Furthermore, there are various voluntary programmes and sustainability organisations and labels. In addition to that, for bigger companies (fulfilling certain preconditions and generally employing more than 500 employees), there is a statutory obligation to also provide a report on corporate social responsibility matters. As a result of the German Commercial Code, for bigger companies there exists an obligation to add a non-financial statement to the company reports and to include statements regarding corporate social responsibility in their reports. Details on the necessity and content should then be reviewed on an individual basis.

7 What occupational health and safety laws should fashion companies be aware of across their supply chains?

There are various occupational health and safety laws and requirements existent in Germany. Inter alia, there are regulations on working times, maternity protection and parental leave, industrial and safety provisions, technical rules for operational safety and principles of accident prevention, laws regarding work equipment, safety and health at work rules, occupational safety rules, product safety rules and various laws on specific workplaces (eg, computer workplaces, industrial workplaces, workplaces with hazardous materials, etc). Compliance with all industrial standards and applicable laws and provisions needs to be ensured and it is advisable to also include this in any supply or service contracts (naturally depending on concrete contents and circumstances). Furthermore, an employer has to comply with all mandatory rules in this regard and must not expose employees to risks.

ONLINE RETAIL

Launch

8 What legal framework governs the launch of an online fashion marketplace or store?

The launch and operation of an online fashion marketplace or store is subject to e-commerce legislation and other relevant regulation, primarily included in the German Civil Code (BGB), the Introductory Act to the German Civil Code, the German Telemedia Act or the Unfair Competition Act (UWG). In terms of data protection, the General Data Protection Regulation (GDPR) as well as the German Federal Data Protection Act (BDSG) are applicable. With regard to the presentation of prices and price components (eg, VAT) in the online fashion marketplace or store, the Quotation of Prices Regulation needs to be considered.

In particular, websites must comply with applicable e-commerce and platform legislation, including (pre- and post-contractual) information obligations, the right of withdrawal, transparency on the moment of purchase ('buy-with-obligation-to-pay' button), obtaining prior consent of the website user before placing cookies (if needed) and complying with geo-blocking restrictions pertaining to the accessibility of the website by customers that reside in another EU member state. Also, during the sales process, unfair commercial practices towards consumers must be avoided.

Online marketplaces and online stores must, furthermore, comply with applicable contract law, including business-to-consumer contracting legislation.

Sourcing and distribution

9 How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

While e-commerce legislation does not directly affect retailers' sourcing and distribution arrangements, it is recommended to review the existing agreements before the launch of an e-commerce website to ensure that they do not contain exclusive distribution channel provisions that (if valid from an antitrust law perspective) might be infringed by selling through the online website.

There are also obligations that may indirectly impact sourcing and distribution arrangements. Furthermore, sometimes a model of 'drop-shipping' is used. This is a form of e-commerce, where the merchant, in fact the intermediate party, offers products in its online store that are not in stock. The producer, wholesaler or supplier deliver the products directly to the end-user (ie, the customer).

Terms and conditions

10 What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

Online terms and conditions must comply with the very strict German legislation on standard terms and conditions, as set out in sections 305 et seq of the BGB. Notably, the German legislation on standard terms and conditions imposes strict restrictions not only in relation to consumer customers (B2C sales), but also in relation to business customers (B2B sales).

In B2C contracts, the statutory warranty regime is mandatory. Furthermore, as mentioned above, traders must provide certain pre-contractual information before the contract is concluded. Some of this information must also be provided to the customer after the purchase has been made. Often, this information is included in the general terms and conditions. Information that must be provided to a customer, inter alia, includes information about the right to withdraw from the contract, without providing reasons, within 14 calendar days from the day the consumer received the goods.

Further, the terms and conditions must be effectively implemented in accordance with section 305 of the BGB (eg, by a clear reference to the terms and conditions or by clicking a checkbox before placing an order).

Tax

11 Are online sales taxed differently than sales in retail stores in your jurisdiction?

No, taxation for online sales as such does not vary from taxation for offline sales; taxation depends on the type of commercial activity.

INTELLECTUAL PROPERTY

Design protection

12 Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

Generally speaking, design rights, copyrights and also trademarks can be applicable to fashion designs:

- Design rights are the most relevant rights, as they can protect both shapes and patterns. Design rights can be obtained through registration or use. Registered designs are available on the national and EU level. Unregistered rights are only granted on the EU level.
- Copyright can apply to fashion goods, which are considered applied art. For commissioned work, it is advisable to have agreements

in place that transfer any rights to the employer or instructing company, as the 'work made for hire' doctrine does not apply in Germany. Copyrights of employees often automatically transfer to the employer, even if the employment contract has no clauses referring to copyrights.

- If a certain (often recurring) element of a fashion design is known within the public as designating the fashion design from one company or designer, trademark protection can be obtained for this element as well.
- Lastly, the German Act Against Unfair Competition also provides a claim against slavish imitations of objects (and thereby fashion goods), but only if the imitated object has a competitive originality. As a rule of thumb, this means that the object should be different to previously published objects.

All these rights can overlap and apply to the same fashion design. Generally, it is advisable to apply for a registration of an IP right, even if unregistered rights are available. Providing proof of unregistered rights in litigation is very often more expensive than the registration costs.

13 What difficulties arise in obtaining IP protection for fashion goods?

The most common difficulties are technical features, which cannot be protected via copyright, design or trademarks. Common style elements and previously known designs are also not eligible for protection.

Trade mark protection for fashion goods – for example, a 3D trademark for a certain recurring element of a fashion line – is only possible if this element is capable to serve as an indication of origin. Copyright protection for applied art (such as fashion) still requires a very high level of creativity, which is rarely achieved. The easiest way of protecting fashion goods is a design registration, as far as the fashion good can be considered 'new' (as a whole or in parts).

Brand protection

14 How are luxury and fashion brands legally protected in your jurisdiction?

Brands are best protected through trademark registrations, as a trademark through use can only be obtained if a relevant portion of the consumers recognise the brand. Except for well-known trademarks, no brand should rely on unregistered trademark rights in Germany (and even for those, registration is strongly recommended). If the company name is identical to the brand, then the company name's granted right can be used to protect the brand as well. A company name right is gained by having relevant commercial activity in Germany.

Licensing

15 What rules, restrictions and best practices apply to IP licensing in the fashion industry?

There are no general restrictions to IP licensing in Germany. Both unregistered and registered rights (trademarks, designs, copyrights) can be licensed, either exclusively or non-exclusively, to a third party. Copyright in Germany consists of both moral rights and exploitation rights. The latter can be transferred or licensed to a third party. The moral rights will, to some extent, always remain with the author and cannot be waived, transferred or licensed.

IP licence agreements for fashion goods should be drafted carefully and contain clear rules on quality of the products, the desired situation at the point of sale, where the products can be sold and how the trademark should be presented.

Enforcement

16 What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

Germany offers similar enforcement options to other European jurisdictions. IP rights can be enforced against registrations (at the relevant offices), against uses (at the courts) and at the border (at the customs office).

Germany is a favourable jurisdiction for litigation, particularly in urgent cases. Preliminary injunctions are granted within a few days, during trade fairs and sometimes also within a few hours. The lawyer fees are to be reimbursed and court fees are capped. The financial risk can therefore be calculated in advance.

DATA PRIVACY AND SECURITY

Legislation

17 What data privacy and security laws are most relevant to fashion and luxury companies?

In terms of data protection, the GDPR as well as the BDSG apply.

Compliance challenges

18 What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

Luxury and fashion companies are typically well-known brands, for whom negative publicity about security incidents could seriously damage the reputation of their brand. This is all the more relevant because, in the past, various administrative fines imposed under the GDPR are related to security, data breaches and a lack of technical and organisational security measures to safeguard personal data.

Furthermore, as a consumer-focused industry, the retail fashion industry broadly relies on cookies, online tracking technologies, personalised advertising and direct marketing. As such, the industry will need to closely monitor the relevant legal developments in this field, in particular around consent requirements for cookies, tracking and personalised advertising, including the ongoing legislation process on the ePrivacy Regulation. The German data protection regulators have expressed particularly strict views and announced increased enforcement activities in this field. Companies such as retail fashion companies operating in these areas are well advised to keep a close watch on these developments.

Innovative technologies

19 What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

Innovative technologies typically entail the processing of personal data (whether or not pseudonymised). Accordingly, compliance with applicable data protection rules is key when relying on innovative technologies. Depending on the type of technology and on the level of invasiveness, performing a Data Protection Impact Assessment (DPIA) is advisable or even required. In any event, the processing needs to be shaped and limited according to the rules of necessity and proportionality, and a legal justification (legitimate interest or potentially consent) needs to be identified. It is also crucial to implement a deletion concept to avoid accumulating unnecessary amounts of data. If service providers are engaged, appropriate data processing agreements need to be concluded. Also, all relevant data protection information notices need to be updated so as to reflect the new processing activities.

Content personalisation and targeted advertising

20 What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

With regard to both advertising techniques there are many developments ongoing on the legal spectrum, both in Germany as well as in Europe. The trend appears to shift towards a stricter interpretation and use of advertising techniques, although it is currently unclear where the boundaries will fall and for which technologies they will apply.

Certain forms of profiling or personalisation trigger the need for a DPIA.

ADVERTISING AND MARKETING

Law and regulation

21 What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

The UWG contains the most relevant regulations on advertising and marketing. The obligations set forth in this act can be enforced either by competition watchdogs or by competitors. The latter are – depending on the industry – often very eager to oppose unlawful activities of their competitors, to prevent an advantage. This self-regulating system has been proven to be very diligent.

Online marketing and social media

22 What particular rules and regulations govern online marketing activities and how are such rules enforced?

Advertising and marketing materials must not be misleading. This is not only inherent in false information. Instead, incomplete information may, in particular as to relevant product features, also trigger an erroneous concept in consumers related to certain goods.

Influencers are typically bloggers having a significant number of followers, and often receive free-of-charge product samples to enable them to comment positively on related products in their online channels. Unfair competition law requires the disclosure of any such commercial speech to consumers; they should not be led to believe that the comments posted on certain products were devoid of any commercial background. Therefore, posts referring to branded products, typically indicating a link to related product websites, shall generally be marked as 'advertising'.

Specific rules govern the advertising of goods such as foodstuffs, alcohol, tobacco or gambling.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 What product safety rules and standards apply to luxury and fashion goods?

Generally, there are no safety rules and standards for clothing. This is different for electronic elements (smart clothing) or safety clothing.

There is a labelling requirement for textiles. This is the German implementation of EU Regulation No. 1007/2011. This contains a restricted number of fibre names that have to be used.

Product liability

24 What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

The regime that governs product liability in Germany is included both in the German Product Liability Act and sections 823 to 853 BGB on tort law. The Product Liability Act is an implementation of the EU Product Liability Directive (Directive 85/374/EEG). The rules on product liability protect consumers against damage or injury caused by defective products.

Product liability in terms of the Product Liability Act is, in principle, a strict liability under the German tort regime and cannot be excluded in a contract. In principle, the producer is liable for damage caused by a defect in his or her product. If product liability claims are be based tort law in terms of the German Civil Code, the producer is (also) generally liable for damages caused by a defective product but it is not strict liability; fault is a prerequisite for a claim.

In a broader sense, product liability law in Germany is also connected with product safety law (ie, the Product Safety Act). The Product Safety Act contains public law provisions on the safety of certain consumer products placed on the market and it is an implementation of the EU Product Safety Directive (Directive 2001/95/EC). Product liability claims brought against producers can also be based on product safety law in connection with tort law in terms of the German Civil Code; fault is required for such a claim.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

Generally, there are not many special considerations on the M&A side. There are especially no local ownership requirements. Of course, it is necessary to deal with own name issues if a business has the designer's name – but that is a relevant issue in all jurisdictions. It is also important to make sure that all relevant IP is within the target company and not with any designers, owners etc.

Competition

26 What competition law provisions are particularly relevant for the luxury and fashion industry?

In particular, relevant competition law provisions for the luxury and fashion industry in Germany are sections 1, 19 and 20 of the German Act against Restraints of Competition (ACR). Section 1 ACR corresponds to article 101 of the Treaty on the Functioning of the European Union (TFEU) in that it prohibits restrictive agreements and concerted practices while sections 19 and 20 ACR correspond to article 102 TFEU and prohibit the abuse of (relative or absolute) market dominance. These provisions are especially relevant in the context of exclusive arrangements, selective distribution systems, pricing arrangements and customer allocation.

Beyond German national legislation, the European competition law regime also applies. The EU provisions for vertical agreements (EU Vertical Block Exemption Regulation No. 330/2010, VBER, and accompanying Guidelines on the Application of article 101(3) TFEU to vertical agreements). Vertical agreements according to this regime are quite common in the luxury and fashion industry whenever products or services are distributed or resold. If a company restricts a distributor's freedom to determine resale prices and not merely recommends specific prices, this is considered illegal under the regime for vertical agreements with the exception of maximum resale prices. Furthermore, it is generally prohibited to issue restrictions on online sales and reselling as well as establishing absolute territorial protection. The regime is, however, currently being reviewed with a draft by the EU Commission for new block exemptions on vertical agreements being expected in the course of this year.

The rise of e-commerce has in general sparked the interest of competition authorities with Germany being no exception. The German Federal Cartel Office (BKartA) has shown a relatively strict approach when it comes to scrutinising restrictions in online sales, such as, for example, third-party platform bans. The strict German approach to the e-commerce phenomenon is helped by the fact that German competition law extends the rules on dominant companies also to 'strong' undertakings to which other partners, such as namely distribution partners, do not have an alternative and are thus dependent.

Last summer, the BKartA achieved far-reaching improvements in terms and conditions for merchants on Amazon online marketplaces. For example, Amazon is now no longer exempt from any liability with regard to other vendors on its platform and no longer has the unrestricted right to immediate termination and blocking of vendor accounts without giving reasons. The BKartA is also cooperating with its French colleagues to assess risks for competition associated with the use of algorithms. In a joint study, the authorities focused in particular on pricing algorithms and collusion but have also considered potential interactions between algorithms and the market power of the companies using them. On a European level, the Commission is also stepping up enforcement on e-commerce agreements following its Digital Single Market objectives.

Furthermore, according to the currently pending revision of the German ACR, there will likely be introduced an additional control of abusive behaviour for companies with 'outstanding cross-market significance for competition'. This specific control regime may mainly be relevant for very large, market-leading online or social media platforms. In general, the revision will modernise the ACR with regard to the challenges of digital markets. The revised German ACR is expected to be implemented in the second half of 2020.

EMPLOYMENT AND LABOUR

Managing employment relationships

27 What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

There is a general statutory minimum wage of €9.35 gross per hour (in 2020).

As the protection against dismissal is high in Germany, companies sometimes prefer to use freelancers for some tasks instead of employing employees directly. While this is permissible in general, the hurdles for a real freelance or service contract practiced are quite high, and as the assessment is not only depending on the contractual circumstances, but also on the performance in practice and the daily work, companies need to be careful. An integration into the business, the giving of work instructions, etc, would lead to a factual employment relationship with the obligation to pay social security contributions (and potential fines for misclassifications).

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Trade unions

28 Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

An important aspect of the legal framework consists of collective agreements for certain sectors or industries, including the retail sector. These agreements are negotiated between trade unions and employers or employers' associations. While in some sectors and states there are mandatory collective agreements that are to be considered, there also are many regions where no mandatory collective agreement for fashion companies exist. Nevertheless, employees might go on strike for the conclusion of a collective agreement and the competent trade union is relatively aggressive.

There is also strong co-determination of works councils in Germany. If a works council is established (such employee representation body can be elected if the establishment has at least five employees), broad co-determination and consultation rights exist and need to be complied with (regarding social, personal and economic matters).

Immigration

29 Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

In general, foreigners' access (eg, non-EU member citizens) to the labour market is limited pursuant to the provisions of the Germans Residence Act. Access is in principle limited to certain occupational groups and normally requires a prior approval of the Federal Employment Agency; nonetheless, there are numerous exemptions to this principle. In fact, in recent years and legislation, additional measures have further liberalised access to the German labour market. However, one practical issue in daily practice is that the competent authorities do not act or decide fast and applicants sometimes must wait a long time for appointment dates.

For unskilled and low-skilled workers, however, access to the labour market remains limited. In contrast, in the case of highly qualified foreign nationals such as university graduates, the legal barriers to working in Germany have been reduced. Simplified rules on access to the labour market especially apply to academics, high qualified professionals, executives, senior employees, specialists and similar groups. Also, foreign nationals with a recognised university degree have easier access to the labour market under the EU blue card system.

All EU citizens can easily work and reside in any member state.

UPDATE AND TRENDS

Trends and developments

30 What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

There appear to be two important trends: digitalisation and eco or sustainable. Both lead to legal questions and challenges. In terms of advertising there are many questions especially relating to misleading advertising. How do influencers have to disclose remunerations? When is a product sustainable? Regulatory and unfair competition law go hand in hand. This leads to question of consumer protection that has become a very important topic for EU legislation. Influencer marketing is one of the hottest topics at the moment.

Digitalisation makes it harder for brands to control their brand image as pricing (and price differences) become much more obvious. This leads to antitrust questions and challenges. Consumer protection also has a strong influence here. It is quite apparent that this has a strong influence on both legislation as well as the practice of offices and courts.

Hong Kong

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MARKET SPOTLIGHT

State of the market

1 What is the current state of the luxury fashion market in your jurisdiction?

Hong Kong is a duty-free zone and, thus, luxury goods here are generally cheaper than most other places in Asia. Hong Kong has long been one of the top luxury destinations in the world, and the city is estimated to account for between 5 and 10 per cent of the annual global sales of luxury goods. The Hong Kong luxury goods market, including apparel, footwear, leather accessories, eyewear, watches and jewellery, and cosmetics, amounts to around US$6 billion in 2019. The most popular brands with the highest revenues are those of the LVMH group, Swatch Group, Kering, Rolex, Chow Tai Fook and Chanel.

A large part of the sales is contributed by visitors from mainland China. However, since the anti-extradition protests began in June last year, visitor arrivals dropped sharply with the number of mainland tourists to Hong Kong falling 42.3 per cent, and consequently retail sales dropped, impacting the luxury end most heavily.

Compared to most other top luxury goods markets, the percentage of online sales is relatively low in Hong Kong at about 6 per cent in 2019. Traditional in-store shopping is likely to continue to dominate in Hong Kong as the high density of retail space means shopping in physical stores is very convenient.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

The development, manufacture and supply chain for fashion goods are governed by general contract law in Hong Kong. The usual contractual arrangements for the development and manufacture of fashion goods are the development agreement and the manufacturing agreement, respectively. The usual contractual arrangements for the supply chain for fashion goods include the distribution agreement, sale of goods agreement, sales representative agreement and franchise agreement.

Distribution and agency agreements

3 What legal framework governs distribution and agency agreements for fashion goods?

Distribution and agency agreements are governed by common law principles of equity and contract.

Distribution agreements are also governed by the competition law in Hong Kong and especially the Competition Ordinance (HKCO) (Cap 619). Selective distribution agreements are often beneficial for competition but there is a higher risk of harming competition and breaching the HKCO. Agency agreements are not generally subject to competition rules.

Agency agreements are governed by the agency principles, which are general rules deriving principally from the law of contract. The common law also governs the rights and liabilities of principal and agent. Besides, the Factor Ordinance (Cap 48) governs the rights and obligations of mercantile agents.

4 What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

Distributors are usually appointed on an exclusive or non-exclusive basis. There is also selective distribution agreement where a supplier, in appointing a distributor as part of a selective distribution system, agrees to appoint additional distributors only if they meet certain criteria. This is designed to maintain the brand and image and is commonly utilised by luxury brands.

The usual contractual terms and provisions include territories, channels, reserved channels, product classifications, exclusivity, trademarks licensed, ownership of intellectual property, duration of the agreement, terms of the sale of products, payment terms, delivery terms, obligations of the distribution, termination, etc.

Import and export

5 Do any special import and export rules and restrictions apply to fashion goods?

There are no specific importing and exporting rules and regulations for fashion goods in Hong Kong.

Usually, all cargo imported into or exported from Hong Kong via air, land and sea is subject to customs control. Hong Kong Customs and Excise Department (Hong Kong Customs) is responsible for monitoring the imports and exports of goods and has the power to inspect the documentation (eg, manifests) and examine the goods.

For imports of goods, the importers are required to complete customs clearance and declaration formalities with Hong Kong Customs. Charges are based on the value and nature of goods imported, except for articles exempted from declaration charge.

Certain goods, such as food, pharmaceuticals and vehicles, are subject to more strict control by the Trade and Industry Department (TID); for example, the 'prohibited articles' or 'reserved commodities' under the Import and Export Ordinance (Cap 60) and the Reserved Commodities (Control of Imports, Exports and Reserve Stocks) Regulations (Cap 296A). In which case, shipping companies, airlines and transportation companies must, within 14 days of import or export, deliver the relevant manifests and licences to the TID for manifest checking.

Corporate social responsibility and sustainability

6 What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

There is no specific requirement in relation to corporate social responsibility and sustainability for fashion and luxury brands. The Companies Ordinance (Cap 622) requires public companies and the larger private companies (ie, companies that do not qualify for simplified reporting) and guarantee companies to prepare a more comprehensive directors' report that includes an analytical and forward-looking 'business review', while allowing private companies to opt out by special resolution. The business review will provide useful information for shareholders. In particular, the requirement to include information relating to environmental and employee matters that have a significant effect on the company is in line with international trends to promote corporate social responsibility.

Generally, the contracts are advised to contain corporate social responsibility representations and warranties where the seller represents and warrants to the buyer that it has implemented and conducts its business in accordance with corporate social responsibility values and policies. In addition, the seller represents and warrants that it complies with, and has required its subcontractors and suppliers to comply with, corporate social responsibility laws, rules and regulations.

Besides reporting their sustainability efforts if and as required by the law, luxury and fashion companies should work on creating corporate social responsibility awareness, integrating sustainability into business models and increasing transparency in respect of environmental, employee and other corporate social responsibility related matters.

7 What occupational health and safety laws should fashion companies be aware of across their supply chains?

The occupational health and safety laws in Hong Kong are comprised of the Occupational Safety and Health Ordinance (OSHO) (Cap 509) and the Occupational Safety and Health Regulation (OSHR) (Cap 509A).

The OSHO requires the employers, including fashion companies, to contribute to safety and health in the workplaces by:

- providing and maintaining plant and work systems that do not endanger safety or health;
- making arrangements for ensuring safety and health in connection with the use, handling, storage or transport of plant or substances;
- providing all necessary information, instruction, training and supervision for ensuring safety and health;
- providing and maintaining safe access to and egress from the workplaces; and
- providing and maintaining a safe and healthy work environment.

The OSHR sets down some basic requirements for accident prevention, fire precaution, workplace environment control, hygiene at workplaces, first aid, as well as what employers and employees are expected to do in manual handling operations.

ONLINE RETAIL

Launch

8 What legal framework governs the launch of an online fashion marketplace or store?

There is no specific e-commerce law in Hong Kong. Rather, online fashion marketplaces and stores are regulated by a network of laws in relation to the contract details, description of goods and services to be provided, payment methods, delivery arrangement, goods safety, digital signature, consumer data privacy, etc, which comprises the following:

- the Sale of Goods Ordinance (SOGO) (Cap 26);
- the Supply of Services (Implied) Ordinance (Cap 457);
- the Consumer Goods Safety Ordinance (CGSO) (Cap 456);
- the Unconscionable Contracts Ordinance (UCO) (Cap 458);
- the Trade Descriptions Ordinance (TDO) (Cap 362);
- the Electronic Transaction Ordinance (Cap 553);
- the Payment Systems and Stored Value Facilities Ordinance (Cap 584); and
- the Personal Data (Privacy) Ordinance (PDPO) (Cap 486).

Sourcing and distribution

9 How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

The on-demand nature of e-commerce imposes a high requirement on the logistics and supply chain infrastructure. Instead of the traditional retail logistics, small shipments are delivered to customers of online stores located in all different places who require fast delivery and convenient return.

Besides, e-commerce contracts require contractual terms on online payment arrangements and protection of consumer data.

'Dropshipping' is a new form of e-commerce where the online store owners buy products from suppliers in advance. They advertise the suppliers' products on their websites, receive direct payments from end customers and redirect the orders to the suppliers who then shop the orders directly to the end customers. 'Dropshipping' is legal in Hong Kong as long as branded, copyrighted items or dangerous goods are not involved.

Terms and conditions

10 What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

It is important to include terms and conditions on an e-commerce website that are sufficient to provide the e-commerce provider as well as the customers with the necessary legal protection against any customer service issues or disputes that may arise in relation to the goods traded on the website. The terms and conditions form a contract between the e-commerce provider and the customers that binds both parties. The following are some important considerations that should be taken into account when drafting online terms and conditions.

Information accuracy

As information changes from time to time, it is important to include a statement that the e-commerce provider will ensure and will make reasonable effort to ensure that information on the website is complete, accurate and current and to include a disclaimer that information (eg, prices, product descriptions, stock quantities) on the website may occasionally be inaccurate, incomplete or outdated, so as to avoid customer complaints on inaccuracy of information or any liability that arise therefrom.

Level of protection to e-commerce customers

The terms and conditions must offer a level of protection to e-commerce consumers and must not contain terms that are unfair, unreasonable or onerous to the e-commerce customers, as under the UCO, a consumer has the right to avoid or alter the contract if it is found to be unconscionable.

Intellectual property

Intellectual property rights are easily prone to infringement by unauthorised parties for online businesses. The e-commerce provider must state clearly its ownership over its intellectual property rights (eg, its logo, trademarks, brand name) and to limit the use of site content and features by the customers (eg, for 'personal and informational' purposes only) to ensure that its intellectual property rights are not misused in any way.

Disclaimer of liability

Product losses or damage that are beyond the e-commerce provider's control can occur (eg, the products may be broken or damaged or lost during delivery). The terms and conditions should specify the damages that the e-commerce provider is liable to the customers, and the events that the e-commerce provider will and will not be responsible for in case of any loss, liability, damage, personal injury or expense of any kind that may be suffered by the customer.

Tax

11 | Are online sales taxed differently than sales in retail stores in your jurisdiction?

No. According to the Departmental Interpretation and Practice Notes No. 39: Treatment of Electronic Commerce issued by the Inland Revenue Department in July 2001, e-commerce is treated on the same basis as conventional forms of business and no particular business form should have either an advantage or a disadvantage for tax purposes.

INTELLECTUAL PROPERTY

Design protection

12 | Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

Fashion designs may be protected by a wide range of IP rights under the Hong Kong law including trademarks, registered designs, copyrights (for original artistic work) and patents. They are governed by the Trade Marks Ordinance (TMO) (Cap 559), the Registered Designs Ordinance (RDO) (Cap 522), the Copyright Ordinance (CO) (Cap 528) and the Patent Ordinance (Cap 514), respectively.

Section 15 of the CO provides where a work is made on the commission of a person and there is an agreement between the author and the commissioner of the work that expressly provides for the entitlement to the copyright, copyright in the commissioned work belongs to the person who is entitled to the copyright under the agreement. However, the commissioner will have an exclusive licence to use the work for purposes reasonably contemplated at the time of commission.

13 | What difficulties arise in obtaining IP protection for fashion goods?

In Hong Kong, not all ideas, inventions or creations are protected. IP protection for the fashion industry, particularly clothing and fashion accessories, is of paramount importance. The fashion goods' appeal to consumer, albeit determined by a range of factors, is largely related to the appearance or distinct feature of the good itself. The appearance, known as 'design' under Hong Kong law, incorporates the element of shape, configuration, pattern or ornament applied to an article by any industrial process. With effect from 27 June 1997, Hong Kong has its own independent designs legislation (ie, the RDO). One difficulty arising from registration is that the Hong Kong designs registration system is separated from other design systems in the world, including that of China. That means if a fashion industry player has a particular design registered in the design registry in China, it must separately register the design in Hong Kong to enjoy the relevant protection conferred by the RDO.

Another difficulty brought about by the evolution of internet, digitalisation and an increasingly global market for digital content is the prevalence of copying in the fashion industry or mimicking of styles with immaterial amendments in fashion goods. In practice, given the fast-changing nature in the fashion industry that implicates industrial behaviour, we rarely see fashion players registering their clothing designs and relying on the RDO to go after copyists. Instead, most of them on rely on trademark law for IP protections.

Brand protection

14 | How are luxury and fashion brands legally protected in your jurisdiction?

Word and device marks may be protected through filing a Hong Kong trademark application and registered trademarks are protected under the TMO. An unregistered trademark will not be protected under the TMO even if it has been registered in other jurisdictions, including mainland China. An unregistered trademark is only protected under common law against the action of passing off.

Owners of trademarks can protect their rights against bad-faith registration of domain names by claiming trademark infringement or passing off. Each registrant of country code top level domains of '.hk' (HK Domain Name) is bound by the Domain Name Dispute Resolution Policy, which imposes mandatory arbitration proceedings in the event of dispute. A dispute over a HK Domain Name can generally be resolved by arbitration in around two months from the lodging of the complaint. Arbitration in this instance provides a quick and cost-effective dispute resolution mechanism compared to court proceedings.

Licensing

15 | What rules, restrictions and best practices apply to IP licensing in the fashion industry?

Trade marks and registered designs are the most relevant IP rights to the fashion industry. The legal requirements on licensing of trademarks and registered designs are contained in the TMO and the RDO.

A licence of a trademark or a registered design needs to be in writing and signed by or on behalf of the grantor. It is not legally required but highly recommended to register any such licence with the Trade Marks Registry or the Designs Registry (as applicable), as an unregistered licence is not effective against anyone that subsequently acquires a conflicting interest in the trademark or design (as applicable) without knowledge of the unregistered previous licence. Additionally, an exclusive licensee is not entitled to damages or an account of profits for an infringement proceeding occurring after the grant and before the registration of the licence (unless the application for registration is made within six months of the date of the licence).

Enforcement

16 | What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

Hong Kong has developed a comprehensive legal framework for the enforcement of copyright, trademarks and registered designs and a wide range of enforcement measures are available, which include civil action, criminal action and customs enforcement. The options that are commonly utilised are: (i) issuing cease and desist letters; (ii) bringing civil proceedings; (iii) applying for injunctions; and (iv) recording IP rights with Hong Kong Customs who are responsible for seizing counterfeit goods and arresting suspects involved in the infringing activities under the TDO.

Hong Kong Customs is responsible for monitoring the imports and exports of goods and has the power to detain the suspected infringing goods. If the detained products are verified to be counterfeit by the registered IP right owners, Hong Kong Customs can seize the goods and prosecute the relevant importer or exporter. If IP right owners suspect that infringing goods will be imported to Hong Kong (and have reasonable grounds to believe so), they can apply to the Hong Kong court for a civil detention order. With such an order being granted, Hong Kong Customs will conduct the search and seizure operations accordingly.

DATA PRIVACY AND SECURITY

Legislation

17 What data privacy and security laws are most relevant to fashion and luxury companies?

The PDPO is the principal legislation on data privacy in Hong Kong and is generally applicable to fashion and luxury companies. There are no separate regulations specific to fashion and luxury companies.

The Office of the Privacy Commissioner for Personal Data (the Privacy Commissioner) is an independent statutory body overseeing the enforcement of the PDPO in Hong Kong. The Privacy Commissioner has issued non-binding codes of practice, guidance notes and information leaflets to assist organisations and individuals to manage and safeguard personal data. Most relevant to the fashion and luxury industry are:

- Guidance for Data Users on the Collection and Use of Personal Data through the Internet;
- New Guidance on Direct Marketing;
- Guidance on Preparing Personal Information Collection Statement and Privacy Policy Statement; and
- Online Behavioural Tracking.

The PDPO is organised around six data protection principles, which lay down the legal requirements to be observed by data users in handling different aspects of a data processing cycle from collection, accuracy, retention, use, security, policy transparency to the access and correction of personal data.

Compliance challenges

18 What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

As a consumer-facing industry, luxury fashion retailers should pay particular attention to ensure compliance with direct marketing regulations under the PDPO. Investigation and prosecution relating to direct marketing practices have always been the focus of enforcement actions by the Privacy Commissioner. Retail companies should make sure they obtain the customer's consent before using his or her personal data (eg, contact details) for direct marketing purposes. The use of personal data in direct marketing without the customer's consent is a criminal offence punishable by a fine of HK$500,000 and imprisonment. Additionally, the customer has the right to request the companies to stop using his or her personal data for direct marketing to which he or she had previously consented without incurring any charge.

Innovative technologies

19 What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

Companies should carefully consider whether any data collected with such innovative technologies constitute personal data before jumping into a conclusion too easily. With the emergence of Big Data, more types of data previously not considered 'personal' can fall under the scope of 'personal data' if, combined with other data, it can be processed to directly or indirectly identify an individual.

Technologies such as facial recognition collect biometric data, which could be sensitive data. Under the PDPO, the collection of personal data must be 'necessary and not excessive'. Biometric data is typically collected for access controls for security purposes and such use is permitted with appropriate safeguards. Using biometric data, such as facial images, for retail purposes may not meet the requirement that personal data collected must be 'necessary and not excessive'.

Often, the retailers would engage third parties to supply such innovative technologies. This type of arrangement would typically create a data-user–data-processor relationship between the retailer and the third party. Under the PDPO, a data processor is not directly liable, and the data user may be held liable as the principal for any wrongful act of its authorised data processor. Therefore, it is advisable that a retailer includes in its contract with such third-party providers data protection clauses to ensure compliance and provide itself with recourse against the data processor in the event of breaches. Helpful guidance was given in the 'Outsourcing the Processing of Personal Data to Data Processors' information leaflet issued by the Privacy Commissioner, which lists non-exhaustively the types of contractual obligations that should be included.

Content personalisation and targeted advertising

20 What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

ADTech tracking the online behaviour of customers is increasingly being adopted in marketing strategies. Behavioural information collected may constitute personal data even if it does not contain unique identifiers, as long as such information taken in its totality can be used to directly or indirectly identify an individual. With the advancement of technology – in particular, Big Data – it is anticipated that more information previously not regarded as personal will now be in scope and if companies do not follow up with adequate policies or protection, they could inadvertently be in breach of the law. Companies should consult to the Online Behavioural Tracking information leaflet mentioned above before deploying such technology.

ADVERTISING AND MARKETING

Law and regulation

21 What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

With freedom of expression being a constitutional right and core value in Hong Kong, there is generally no law or regulation restraining or restricting advertising and marketing in Hong Kong. Having said that, advertising and marketing communications may be governed by the TDO, which is a key legislation prohibiting false trade descriptions, false, misleading or incomplete information, false marks and misstatements in respect of goods or services provided in the course of trade. While there are pieces of legislation, regulations or codes of practice in relation to advertising standards specific to certain sectors (eg, medicine, tobacco products, gambling, and radio and television programme services) there are no such pieces of legislation, regulations or codes specific to the luxury and fashion sector.

Online marketing and social media

22 What particular rules and regulations govern online marketing activities and how are such rules enforced?

There is currently no specific law or regulation governing online conduct of marketing or business activities in Hong Kong. However, such activities may be regulated by the TDO. The TDO specifies various unfair trade practices that traders may deploy against consumers, commission of which will constitute an offence under the TDO. Examples of unfair trade practices that may be relevant to online marketing are misleading omissions of material information that cause or are likely to cause the average consumer to make a transactional decision that a consumer would not have made otherwise, bait advertising, bait and switch, wrongly accepting payment and using aggressive sales techniques.

Hong Kong Customs is the principal government agency responsible for enforcing the TDO. If the online trader has committed an offence under the TDO, the following enforcement actions may be taken by the Hong Kong Customs and Excise Department:

- issuing warning or advisory letters to the online trader concerned;
- with the consent of the Secretary for Justice of Hong Kong, seeking and accepting an undertaking from the online trader pursuant to which he, she or it undertakes not to continue, repeat or engage in conduct or commercial practice of the kind or of a substantially similar kind of concern;
- applying to the court for an injunction to order the online trader not to continue, repeat or engage in the contravening conduct; or
- instituting criminal proceedings against the online trader (usually where the contravention is serious).

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 What product safety rules and standards apply to luxury and fashion goods?

Hong Kong does not have any rules or standards for product safety specific to luxury and fashion goods. However, because luxury and fashion goods are often consumer goods (those ordinarily supplied for private use or consumption), their safety requirements will be regulated under the CGSO. Manufacturers, importers and suppliers of consumer goods are required under the CGSO to ensure that the goods they supply for local consumption are reasonably safe with regard to the following circumstances:

- the manner in which, and the purpose for which, the goods are presented, promoted or marketed;
- the use of any mark, instructions or warnings on the goods given for the keeping, use or consumption of the goods;
- compliance with reasonable safety standards published by a standards institute; and
- the existence of any reasonable means to make the goods safer.

Product liability

24 What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

In Hong Kong, there is no specific statutory regime governing product liability for luxury and fashion goods. However, certain laws applicable to general consumer goods may apply.

If the luxury and fashion good is defective or does not meet the general safety requirement under the CGSO or comply with the applicable approved standard for those goods, then the person may be liable on conviction to a fine or imprisonment under the CGSO.

The SOGO also provides that there is an implied condition that the goods for sale: (i) must be of merchantable (satisfactory) quality; (ii) must be reasonably fit for their purposes, including any particular purpose made known by the buyer to the seller; (iii) must correspond with the description; and (iv) if a bulk purchase of the goods is made and a sample is shown before delivering the whole lot must correspond with the sample. Failure of the seller to meet the above implied conditions constitutes a breach of contract by which consumers are entitled to reject the goods and demand a full refund.

A product liability claim may also be found under common law or existing laws of contract and tort.

There has not been any notable product liability litigation or enforcement action in relation to luxury and fashion goods in recent years.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

The luxury and fashion industry is an ever-growing sector and has a relatively resilient market. To build up or maintain competitiveness in the increasingly consolidated market, strengthening the products and building or expanding the brand, and equipping the business with the resources necessary to reach an ever-expanding consumer base should be the major business objectives of luxury and fashion companies.

M&A in the luxury and fashion industry often involves complex acquisition strategies to achieve the company's business objectives and requirements. Transactions therefore need to be well structured and carefully executed. Examples of acquisition strategies include: (i) horizontal acquisition, a typical type of M&A in the luxury and fashion industry, where a luxury and fashion company acquires a similar company to quickly and effectively strengthen its brand and increase its market shares; (ii) acquisition of distribution channels or suppliers to maintain brand integrity; and (iii) entering into licence and distribution agreements, joint ventures or local partnerships, usually pursued by young brands to establish or strengthen their presence on a global scale.

Due diligence forms an important part of any M&A transaction, and when acquiring a luxury and fashion company, identifying and verifying the intellectual property rights (eg, copyright, trademarks and registered designs) of the target company is of particular significance as they are valuable assets of the company that its brand name and reputation are built on, and it is important to make sure that they are valid or duly registered and are not subject to any encumbrance.

It is also vital to identify the legal and beneficial titles to the shares and real estate of the company as they are two distinct interests. A person registered as holding the legal title to the property may merely be a nominee with another party having the right to receive the economic benefits of the property. In transferring title to assets or properties subject to Hong Kong law, companies should observe the applicable laws or regulations on notifications to be given, consents from third parties to be obtained and registrations to be made.

Where a joint venture is to be established, from a legal perspective, the joint venture vehicle should best be organised in a jurisdiction in which there is an established legal regime on company law where specific performance is available as a remedy. This is particularly important for enforcing provisions in a joint venture agreement on brand protection and equity transfers.

The following are issues that a brand owner should take into consideration in setting up or managing a joint venture:

- the brand owner should consider contributing only a licence over the brand to the joint venture vehicle, and should have very tight control over brand positioning and quality; and
- when exiting the market, the brand owner should consider the right to terminate any licence or taking reassignment of any brands whose ownership has been contributed to the joint venture vehicle. The brand owner should also consider controlling the distribution channel and pricing of any remaining inventory and imposing non-compete restrictions on the other joint venture party for a period of time after termination of the joint venture.

Competition

26 What competition law provisions are particularly relevant for the luxury and fashion industry?

The key legislation in Hong Kong on competition law is the HKCO and its subsidiary legislations. The HKCO prohibits three major areas of anti-competitive conduct:

- the First Conduct Rule prohibits agreements or concerted practices between undertakings and decisions of an association of undertakings that have the object or effect of preventing, restricting or distorting competition in Hong Kong;
- the Second Conduct Rule prohibits an undertaking that has a substantial degree of market power in a market from abusing its power through engaging in conduct that has the object or effect of preventing, restricting or distorting competition in Hong Kong; and
- the Merger Rule prohibits a merger involving a carrier licensee under the Telecommunication Ordinance (Cap 106) that creates the effect of substantially reducing competition in Hong Kong.

Competition issues under both the first and second conduct rules are likely to arise on sale or distribution of luxury and fashion goods in Hong Kong, in particular:

- vertical price restrictions, such as resale price maintenance or recommended/maximum price;
- exclusive distribution and exclusive customer allocation;
- anticompetitive tying and bundling;
- exclusive dealing;
- predatory pricing; and
- limiting or controlling production, markets, technical development.

There is currently no guidance under the HKCO or its subsidiary legislations on online sales restrictions in Hong Kong.

EMPLOYMENT AND LABOUR

Managing employment relationships

27 What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

The Employment Ordinance (EO, Cap 57) is the main piece of legislation governing the employment relationship in Hong Kong. To qualify for substantial protection under the EO, it is necessary to prove that the employee is in a 'continuous contract of employment'. The criteria for a continuous contact of employment can be found in section 3 and Schedule 1 of the EO, which requires that the worker must have worked for the same employer during each of the previous four weeks for at least 18 hours in each of those four weeks. As a result, most part time, temporary and casual workers are excluded from the main protections and entitlements in the EO. However, causal workers and part-time workers who have worked a sufficient number of hours and have satisfied the continuous contract requirement are entitled to all or some of the protections.

Minimum Wage Ordinance (Cap 608) applies to all employees except for certain specified categories that include persons to whom the EO does not apply, students undertaking internships necessitated by their curricula, and work experience students under the age of 26.

The two common categories of workers are employees and independent contractors and their usual contractual arrangements are contract of employment (either written, verbal or implied by law) and contract for services (eg, independent contractor agreement, professional services agreement, consultancy agreement, etc).

Trade unions

28 Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

In Hong Kong, the level of employee participation in trade unions is relatively low, compared to many other key jurisdictions. But the Basic Law and the legislation governing trade unions, that is, the Trade Unions Ordinance (Cap 332), have offered employees fundamental freedom and protections in various aspects. Further, employees gain extra protection in a strike situation in terms of termination payments.

There is no statutory recognition of collective bargaining agreements in Hong Kong and employees will be able to rely on the terms only if the provisions have incorporated into the employees' contract of employment.

For trade disputes in the private sector in Hong Kong, the Labour Relations Ordinance (Cap 55) sets out the avenues for resolving such disputes through conciliation, mediation, arbitration and hearing by a board of inquiry.

Immigration

29 Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

Fashion companies have the statutory duty to ensure all the employees are lawfully employable and it is an offence to employ a person who is not a holder of an identity card or other valid travel document (with no condition of stay prohibiting him or her from taking employment in Hong Kong imposed on him or her) under sections 17G and 17I of the Immigration Ordinance (Cap 115). An employer who employs an employee who does not possess the necessary work authorisation is potentially guilty of an offence and is liable to a fine of up to HK$350,000 and to imprisonment for three years. This requirement applies whether the employee is undertaking work on behalf of a Hong Kong entity or an overseas entity registered in Hong Kong.

The Immigration Department allows certain categories of work activities termed 'business-related activities' to be conducted by a person who does not possess an employment visa and enters Hong Kong holding a visitor's visa, which include the following:

- concluding contracts or submitting tenders;
- examining or supervising the installation or packaging of goods or equipment;
- participating in exhibitions or trade fairs (except selling goods or supplying services direct to the general public, or constructing exhibition booths);
- settling compensation or other civil proceedings;
- participating in product orientation; and
- attending short-term seminars or other business meetings.

UPDATE AND TRENDS

Trends and developments

30 **What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?**

The future prospects of Hong Kong's luxury retail market depends heavily on how the protests evolve. The number of mainland China visitors has fallen sharply since the protests began and Hong Kong's retail market has taken a big hit. Several leading brands, such as Prada, have permanently shut down some stores to limit their exposure, while many other brands have adopted a wait-and-see approach, adjusting down inventories, temporarily shutting down stores and giving unpaid leave to employees. Though it is yet to be determined if the ongoing protests will have a permanent impact on Hong Kong's status as a top luxury shopping destination, it is safe to say the situation will remain unfavourable in the short term.

Several brands have altered their strategy towards mainland China customers, placing more focus on Japan and South Korea, which are increasingly popular shopping destinations for mainland China customers. In case the conflict does have a permanent impact on luxury sales in Hong Kong, brands will have to shift their focus more towards local resident customers, who are more price-sensitive compared to their mainland China counterparts. Refocusing on local residents may also promote e-commerce in luxury retail sales, which has seen sluggish growth in Hong Kong as compared to many other regions. This is because of the fact that a large number of shoppers are travellers, and that the presence of multiple stores within a small area means there is hardly any need for e-commerce. However, if brands plan to reduce their exposure in Hong Kong, they may look at shutting down physical stores and promoting e-commerce sales.

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MARKET SPOTLIGHT

State of the market

1 What is the current state of the luxury fashion market in your jurisdiction?

The fashion business is really a big thing in Italy, as it is the homeland of designers who made the history of fashion, worldwide renowned brands, and a venue for hundreds of specialised enterprises, as well as for artisans whose hands are internationally valued. The market comprises big companies, international groups, and small and medium enterprises.

According to a recent report published by Confindustria Moda, the aggregate turnover of the fashion industry in Italy was worth about €22 billion in 2017. Clothing drives the industry, making up 49.6 per cent of the total turnover, followed by footwear at 15.1 per cent. Women's fashion leads with a turnover of about €13.3 billion in 2018. Not surprisingly, exports (63 per cent of the total turnover in 2018) are constantly increasing.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

Italian Civil Code provisions apply to manufacturing arrangements. Their main specificities are:

- the contractor takes on the risk, organisation and supervision related to the business and contractual performance;
- the brand, as a principal, is jointly liable for all salaries, insurance, severance indemnities, etc towards the contractor's employees up to two years post-termination;
- long-term agreements may be terminated at any time with reasonable notice;
- warranty coverage lasts for two years provided defects are notified within 60 days from detection; and
- the brand is entitled to unilaterally terminate the agreement, provided it reimburses all expenses and loss of earnings.

When the contractor manufactures goods for more brands, manufacturing line, equipment and products destined to each brand are kept separate (to ensure brand protection).

Sub-supply agreements are specifically regulated by Law No. 192/1998, which imposes strict and mandatory requirements to ensure that the sub-supplier does not become economically dependent on the brand. These include: payment terms cannot exceed 60 days; IP rights cannot be assigned to the brand for unreasonable consideration; and sub-suppliers cannot assign more than 50 per cent of activities to third parties, unless authorised. Any non-compliance is void and unenforceable with regard to the sub-supplier.

Procurement of raw materials (eg, silk or leather) and components (eg, stones) is subject to the Italian Civil Code rules except for specific provisions on: exclusivity, to ensure that competitors will not take advantage of similar products or technologies; and right of first refusal in favour of the supplier, if the brand wishes to rely on the most economical or quality-competitive providers on the market.

Distribution and agency agreements

3 What legal framework governs distribution and agency agreements for fashion goods?

For outsourced distribution and resale, brands may recur to selective distribution systems (see question 26) and franchising agreements.

Franchising agreements are preferred to ensure full brand integration and higher control over the distribution line. They are regulated by Law No. 129/2004 and Ministerial Decree No. 204/2005 (see question 4).

No specific laws govern sales agency agreements in the fashion and luxury sector: the Italian Civil Code and a national labour collective agreement apply. It is, however, common to provide additional tasks (eg, availability of a showroom, marketing support, etc) that are not necessarily peculiar to ordinary sales agency contracts. The sales agent relationship with an individual triggers a self-employment relationship where, against the agent's commitment to promote the affairs of the principal, the latter pays a commission on the affairs concluded thanks to the agent's activity. The contract can be executed for a definite or indefinite period (in the latter case, each party may resign by granting a minimum notice, unless the termination is grounded on a serious misconduct incurred by the other party).

4 What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

Franchising agreements, to be concluded in writing, shall not last less than three years. Agreements with the franchisor (ie, the brand owner) usually include specific provisions on:

- location of where the business is carried out;
- management of IP rights and know-how ensuring that franchisees (ie, entities managing the stores under the brand's name) use IP rights in compliance with the brand's policy;

- parties' contributions to setting up the business;
- store interior decoration and furnishing; and
- stock and post-sale assistance services management.

Distribution agreements are usually structured as framework agreements disciplining the overall relationship between the brand and its distributors and by subsequent single purchase orders. Typical provisions include:
- stock arrangements, also in case of termination of the agreement;
- minimum sales and performance requirements, including marketing activities;
- post-sale assistance;
- extended warranties; and often
- exclusivity provisions in favour of the brands.

Finally, agency agreements usually contain specific provisions on:
- where to operate;
- consideration to be paid to agents (usually a percentage of the value of the agreement procured);
- powers to represent and bind, if at all the principal (ie, the high-end brand);
- exclusivity; and
- indemnity provisions in case of termination.

A post-termination non-compete obligation is not mandatory but advisable. This obligation, to be agreed in writing, can last a maximum of two years following termination and must be adequately compensated.

Import and export

5 Do any special import and export rules and restrictions apply to fashion goods?

Italian law does not provide for special rules or restrictions for the import and export of fashion goods.

Given that such goods usually incorporate IP rights, attention should be paid to the sales contractual conditions and to goods value for custom duties purposes. Pursuant to the Union Custom Code, the primary basis for the determination of the goods custom value shall be the transaction value (ie, the price actually paid or payable for the goods when sold for export). Therefore, it is necessary to include in the declared custom value the royalties and licence fees due for using the IP. Otherwise, Customs Authorities will have the power to amend this value and increase the taxable base for custom duties purposes.

Finally, the World Trade Organization recently authorised the United States to charge special custom duties on luxury goods coming from Europe. It is thus advisable to carefully evaluate the export requirements for fashion goods from Italy to the United States.

Corporate social responsibility and sustainability

6 What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

Although no law regulates sustainability with specific reference to fashion and luxury, Legislative Decree No. 254/2016 (implementing EU Directive 2014/95) sets specific obligations for big companies, defined as those counting more than 500 employees and more than €20 million total assets or more than €40 million net revenues from sales. If a fashion brand falls within these limits, it needs to make a sustainability disclosure covering environmental and social aspects, including the respect of human rights, environmental impact and fight against corruption.

Italian legislation does not provide for any due diligence obligation on environmental, social and governance aspects. Nevertheless, given the increasing attention to sustainability and the number of worldwide scandals involving fashion brands, it is quite common in the field to adopt policies and codes of conduct, the respect of which is monitored through audits.

7 What occupational health and safety laws should fashion companies be aware of across their supply chains?

Companies operating in the fashion and luxury sector must – like any other employer – strictly comply with the obligations on health and safety requirements at work mainly provided by Legislative Decree No. 81/2008 (ie, drafting and periodically updating a risk assessment, training personnel, adopting any measures aimed at excluding or reducing the risks for employees, etc).

Because of the complexity and technicality of the health and safety obligations, it is strongly advisable to appoint an external consultant supporting the employer with this duty.

ONLINE RETAIL

Launch

8 What legal framework governs the launch of an online fashion marketplace or store?

In Italy, e-commerce is regulated by Legislative Decree No. 70/2003 (implementing EU Directive 2000/31 on e-commerce). The sale of products online is subject to the filing of the SCIA, a notice informing the authorities that online commerce is being started. Failure to comply will lead to administrative sanctions, regulated on a regional basis.

Online fashion marketplaces and stores shall also comply with laws governing business-to-consumer (B2C) transactions, many of which were transposed in Legislative Decree No. 206/2005 (Consumer Code), including EU Directives 2011/83 on consumer rights, 1999/44 on guarantees and 29/2005 on unfair commercial practices. This legislation sets out a number of rules, including disclosure and transparency towards consumers and conclusion of online contracts, etc. Failure to comply may lead to contract unenforceability with regard to consumers or to administrative sanctions up to €5 million.

In addition, more sectoral (national, regional or both) legislation may apply (eg, on online extraordinary sales).

Finally, EU Geoblocking Regulation 2018/302 prohibits discrimination against consumers and, in limited cases, against businesses, based on their nationality, place of residence or establishment when buying goods or services on online platforms, requiring mandatory access to foreign platforms, applicability of similar conditions and acceptance of foreign payment methods.

Sourcing and distribution

9 How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

Recent years have shown that high-end brands are finally – after decades of in-store predominance – fully embracing the tech world by offering high-ranked e-commerce platforms. Still, experts maintain that Italian fashion is growing (up 4.8 per cent as opposed to 2018) slower than other markets because of limited digitalisation.

Terms and conditions

10 | What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

Special considerations apply to both business-to-business (B2B) and B2C platforms, while others apply only to B2C platforms.

In both B2B and B2C relationships, the liability of the trader for wilful misconduct or gross negligence cannot be limited or excluded, also in case of death or personal injury. Moreover, article 1341 of the Italian Civil Code requires that burdensome provision of general terms and conditions listed thereunder (eg, limitation of liability, early termination, forum selection, etc), need a written and separate acceptance by customers for them to be valid and enforceable. In B2C agreements, these provisions would also need to be 'expressly negotiated' with customers to be valid. Because, however, B2C general terms and conditions are not usually negotiated, burdensome provisions contained thereunder are unlikely enforceable with regard to consumers, even if accepted by means of a specific 'click'. In terms of warranty to be offered in case of lack of conformity, the off-line discipline (ie, 12 months for B2B agreements) also applies to online transactions.

In B2C relationships, rules on consumer information require fashion traders to provide Italian consumers with minimum information requirements in clear and comprehensive language, in Italian, prior to or after (depending on the type of information) the conclusion of a distance contract, including:

- trader identity and contacts;
- good main characteristics;
- total price (inclusive of taxes, delivery or postal charges and other costs);
- existence of a legal guarantee on goods;
- arrangements for payment, delivery and performance;
- consumer right of withdrawal within the 14-day cooling-off period and relevant exceptions;
- return and refund policies;
- applicable law and jurisdiction (taking into consideration mandatory rules applicable to consumers); and
- reference to the possibility to solve disputes via the online dispute resolution platform provided by the EU Commission.

Tax

11 | Are online sales taxed differently than sales in retail stores in your jurisdiction?

The sales venue (online or retail stores) does not impact on the tax regime applicable in Italy. Indeed, the relevant income is subject to the income and sales taxes based on the ordinary Italian tax rules.

The key issue is determining whether a company is subject to taxation in Italy. This depends on the tax residence of the seller and on whether the sales present a territorial nexus with Italy. The following are subject to taxation in Italy:

- Italian tax resident sellers, on their worldwide income, which includes both in-store (in Italy and abroad) and online sales; and
- sellers that are not tax resident in Italy, on their sales performed through an Italian permanent establishment.

The definition of 'permanent establishment' was recently broadened to include the 'digital permanent establishment' arising whenever there is a 'significant and continuous economic presence in Italy structured as to avoid a physical presence in Italy' (article 162 of Presidential Decree No. 917/1986). In the absence of guidelines on its application, companies willing to carry out a significant and continuous online sale activity in Italy might want to pay special attention to its economic organisation.

Besides, with Law No. 145/2018 Italy introduced the 'tax on digital services'. Once implemented (most likely from 1 January 2020), this tax will imply, if a number of conditions are met, the application of a 3 per cent tax on some of the services that are usually connected to e-commerce activities, including, by way of example, providing advertising on a digital interface targeted to users of the same interface.

INTELLECTUAL PROPERTY

Design protection

12 | Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

In Italy, fashion goods are eligible for protection under design, copyright, trademark and unfair competition law. In some circumstances, these rights may overlap.

Design protects not only the final product but also patterns, packaging, etc, as long as they are new and have individual character. Protection lasts 25 years but it is possible to file the application within 12 months from first disclosure. This means that a brand may present a product at a fashion show, probe its success and then apply for registration.

Under EU Regulation 6/2002, directly applicable in Italy, any unregistered design meeting the above requirements is granted a three-year protection starting from the first disclosure to the public within the EU. This right is very useful for fashion products with a short market life (eg, lasting only a season).

Copyright arises automatically when a work is created and does not require registration. It is sufficient that the result is original. However, for industrial design works, article 2, No. 10 of Italian Copyright Law also requires artistic value. The Court of Milan recognised that the after-ski 'Moon Boots' have artistic value, relying on the fact that Louvre Museum has considered them among the 100 most representative industrial design works of the twentieth century.

Finally, the shape of a product may also be protected as a 3D trademark, if it is new and has distinctive character (eg, the Hermes 'Birkin' bag) and under article 2598 of the Italian Civil Code, regulating unfair competition.

In general, works made for hire eligible for protection under design and copyright law belong to the principle. It is important that the scope of the contractual agreement with designers specifically mentions the conceiving and design of goods and that this activity is properly compensated.

13 | What difficulties arise in obtaining IP protection for fashion goods?

Functional elements are excluded from design protection. Also, designs or trademarks contrary to public policy and to accepted principles of morality may not be registered as designs or trademarks.

Moreover, a trademark is excluded from registration that consists exclusively of the shape, or another characteristic, which results from the nature of the goods, is necessary to obtain a technical result, or gives substantial value to the good. This last ground for refusal is the most dangerous for fashion products, as the case laws states that a shape gives substantial value to a fashion good if it plays an important role in consumers' decision to purchase it. In application of this principle, the Court of Venice declared invalid the shape trademark covering Crocs shoes.

That said, registering a design in Italy is not difficult. The office does not carry out any substantive examination, but simply verifies that formal requirements are met.

Brand protection

14 | How are luxury and fashion brands legally protected in your jurisdiction?

Italian law grants protection to both registered and unregistered trademarks, provided that they are new and distinctive. These may include brand names, product names, patterns, colours and shapes. Domain names, trade names, store signs and any other distinctive signs used by the company can also be protected under the Italian IP Code.

Licensing

15 | What rules, restrictions and best practices apply to IP licensing in the fashion industry?

Licensing may concern all or part of the goods for which the trademark is registered or used. Two main restrictions shall be considered:

- the licence shall not deceive the public as to those product features that are essential in the public's perception; or
- for non-exclusive licences, the licensee shall undertake to use the trademark to distinguish only products identical to those of the licensor or other licensees.

In manufacturing agreements including a trademark licence, it is advisable to provide that trademark owners may carry out audits to check that the trademark is used correctly and to regulate the procedures to adopt following the termination of the agreement (stocks; unfinished products; return of moulds and documents, etc).

As to copyright, while moral rights cannot be waived, licensed or assigned, economic rights may. The rights of economic exploitation of the work include the right to create copies of the work, create derivative works, display the work publicly, or sell or assign the rights to third parties.

While agreeing a licence in writing is not mandatory under Italian law, it is surely advisable and, as far as copyrights are concerned, Italian Copyright Law requires that any transfer of copyright is proved in writing.

Enforcement

16 | What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

Interim proceedings are the most efficient means through which a brand may stop the manufacturing, promotion or marketing of counterfeits as well as obtain the disclosure of information on the infringer, its products and activity. To file a preliminary injunction, claimants must provide evidence in support of prima facie entitlement to the claim and urgency of the claim.

Interim proceedings usually last a couple of months (whereas proceedings on the merits may last up to two or three years) and are a good option when the time necessary for obtaining a decision on the merits would make it useless, as typically happens for some fashion products.

Proceedings concerning IP rights fall within the exclusive jurisdiction of specialised courts dealing with infringement, non-infringement and invalidity actions.

Infringements may also be prosecuted as a crime under the Italian Criminal Code and Copyright law.

With respect to trademarks, opposition is available to prevent the registration of a trademark that is identical or similar to a previously registered one.

Finally, an application for action with the Italian Customs Agency under EU Regulation 698/2013 allows right holders to stop the circulation of goods infringing their IP rights.

DATA PRIVACY AND SECURITY

Legislation

17 | What data privacy and security laws are most relevant to fashion and luxury companies?

Fashion and luxury companies are required to comply with EU Regulation 679/2016 (General Data Protection Regulation (GDPR)), which came into force on 25 May 2018. GDPR applies both to companies processing personal data as part of the activities of one of their branches established in the EU, regardless of where the data is processed, and to companies established outside the EU, offering goods or services to individuals in the EU or targeting EU customers by profiling.

Companies processing personal data are also required to comply with the Italian Privacy Code (Legislative Decree No. 196/2003, as amended by Legislative Decree No. 101/2018 to align with GDPR) and with the Italian Data Protection Authority's guidelines (eg, on marketing and against spam of 2013).

Compliance challenges

18 | What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

The 'accountability principle' is the most significant challenge, imposing on companies responsible business management, considering the risks associated with the activity carried out and ensuring full compliance of personal data processing with the applicable legislation.

This includes taking a 'privacy-by-design and by-default' approach where brands incorporate data protection into the architecture of their services and products, also by taking appropriate technical and organisational measures ensuring that their organisation complies with GDPR principles of lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality. Concretely, these principles shall be considered when developing new IT services or products (including those deploying innovative technologies such as wearable technologies) that involve processing customers' personal data or new business strategies that may have privacy implications (eg, by assessing whether the data processed are excessive for the intended purpose).

Before GDPR, the Italian Data Protection Authority agreed to extend to seven years the retention period to process customer personal data for profiling and marketing purposes through a customer relationship management system to some fashion brands, because of the lower frequency of luxury goods purchases. This offers a useful indication of what is considered appropriate.

GDPR also includes very concrete measures that may impact fashion brands. For example, when carrying out large-scale customer profiling, companies shall carry out a data protection impact assessment (DPIA) (see answer 19) and appoint a data protection officer, who shall directly report to the highest management and act as point of contact for data subjects for any issue.

Innovative technologies

19 | What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

Before processing personal data for operations that are likely to result in a high risk to the rights and freedoms of natural persons, the GDPR requires carrying out a DPIA.

This shall describe the processing operation, evaluate its necessity and proportionality and manage any risks arising therefrom, by assessing the level of risk and determining appropriate mitigation measures. In this regard, article 29 of the Guidelines on DPIA of the Working Party, establish that applying new technological or organisational solutions – such as certain Internet of Things (IoT) applications that involve new forms of data collection and usage – may represent a high risk to individuals' rights and freedoms that could have a significant impact on their privacy and daily lives. In such circumstances, a DPIA is required.

Similarly, the Italian Data Protection Authority indicates the DPIA as necessary to carry out data processing by using innovative technologies (eg, IoT; artificial intelligence systems; monitoring carried out by wearable devices).

Content personalisation and targeted advertising

20 What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

GDPR provides that data subjects shall have the right not to be bound by a decision based solely on automated processing producing legal effects on him or her, unless such activity is:

- necessary for concluding, or performance of, a contract between data subject and data controller;
- authorised by union or member state law to which the controller is subject; or
- based on the data subject's explicit consent.

The Italian Data Protection Authority in the 'Guidelines on the processing of personal data for online profiling' specifically provides that any processing of personal data for profiling purposes, other than those necessary for providing the service (eg, virus filters), shall be carried out with the data subject's informed consent.

Information on data processing must be clear, complete, exhaustive and visible from the first page of the site, to allow data subjects to express their consent. In any case, the right to revoke the choice must always be guaranteed through a clearly visible link.

In addition, activities aimed at analysing or predicting aspects concerning the data subject's personal preferences or interests, also carried out online or through apps, require the data controller to first carry out a specific DPIA.

ADVERTISING AND MARKETING

Law and regulation

21 What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

Misleading and comparative advertising is regulated by Legislative Decree No. 145/2007, implementing EU Directive 2006/114. Misleading advertising may also amount to an act of unfair competition under article 2598 of the Italian Civil Code.

Furthermore, advertising is subject to the Consumer Code rules and, in particular, to articles 21 and 22 punishing misleading omissions and unfair commercial practices.

Finally, the Advertising Self-Regulatory Body (IAP) adopts a Self-Regulatory Code that specifically regulates commercial communications and advertising. The code is applicable to IAP signatories only, but is regarded as an authoritative source for best practices. Some rules are particularly interesting for fashion brands (eg, the use of body images inspired by aesthetic models clearly associated with eating disorders that are harmful to health is forbidden).

Special rules are adopted for specific sectors, such as cosmetics, the advertising of which is regulated by EU Regulation 1223/2009.

Online marketing and social media

22 What particular rules and regulations govern online marketing activities and how are such rules enforced?

In 2019, the IAP formally adopted the Digital Chart Regulation, which is part of the Self-regulatory Code, setting online marketing standards.

While the IAP monitors the market to check compliance with the Self-regulatory Code, the Italian Competition Authority (ICA) is entrusted with enforcing European and Italian consumer protection legislation. They are quite active: in the past three years, the ICA twice sent moral suasion letters to hundreds of influencers and brands.

Generally speaking, influencers' marketing requires higher standards of clarity and transparency that the ICA explained at the end of an investigation involving Alitalia, Aeffe and some Italian influencers. According to the ICA:

- Companies must adopt specific 'guidelines' setting the rules of conduct for influencers, to be included in any cooperation agreement with them; invite influencers to comply with the legislation when sending them free or modest-value supplies; and send to business units involved in influencer marketing a formal communication recommending compliance with the legislation on unfair commercial practices.
- Influencers must, when promoting a product as part of a business agreement, disclose the promotional nature of the content by including appropriate hashtags (eg, #advertising, #sponsoredby).

From a data protection perspective, the most relevant provisions regulating marketing are established in the GDPR, the e-privacy Directive 2002/58, the Italian Privacy Code and the Data Protection Authority's guidelines on marketing and against spam. The user's consent is required to carry out marketing activities by means of automated calling or communication systems without human intervention. The same applies to the processing carried out by means of electronic communications performed by email, MMS or SMS or other means.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 What product safety rules and standards apply to luxury and fashion goods?

The general rules on product safety are set forth by Consumer Code, implementing EU Directive 2001/95 on general product safety.

Different provisions related to the specific materials and products apply to luxury goods. The most relevant regulation for textiles is EU Regulation 1007/2011. All textile products made available on the market must be provided with the fibre composition label, in Italian, easily visible and accessible. Labelling and marking requirements on fibre composition apply to textile products containing at least 80 per cent by weight of textile fibres and some textile components.

As to footwear, labelling requirements are set forth by Ministerial Decree 11 April 1996 (implementing EU Directive 94/11) requiring that labelling provides information on the materials that constitute at least 80 per cent of the surface area of the footwear upper, lining and sock, and at least 80 per cent of the outer sole volume.

Legislative Decree No. 190/2017 provides for sanctions for violation of the textile and footwear labelling rules.

Materials used must also comply with general EU legislation related to restrictions on the marketing and use of dangerous substances and preparations (eg, EU Regulations 1907/2006 (REACH), 2019/1021 on persistent organic pollutants and 528/2012 on biocidal products).

Specific restrictions apply to the use of the Italian words for 'leather', 'fur' and 'hide' (including synonyms and words deriving from them) under Law No. 1112/1966.

Product liability

24 | What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

Fashion goods would fall into the scope of the Consumer Code, implementing also EU Directive 85/374, governing general product liability.

The producer shall be held liable for any damages caused by its defective product (ie, not ensuring 'the safety that can be reasonably expected'). The plaintiff is required to prove damage, defect and causation between them. Thus, unlike the Italian general tort regime, product liability is unrelated to the assessment of any producer's fault. However, Italian courts often apply the general tort regime when deciding product liability cases.

No recent litigation or enforcement action, specifically concerning the sector, has made the news.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 | Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

Whenever a business is built around a designer's name (often also a controlling or significant shareholder) agreements with him or her have to be carefully considered as this business model exposes the investment to a number of risks (eg, termination of the cooperation, major disagreements on brand policies or strategies, etc) that shall be properly addressed in transaction agreements.

IP rights are crucial assets in this industry. A sensible investor should perform an accurate due diligence at least on the manner in which: these rights are protected and enforced; the business is managed to avoid violation of third parties' rights; IP rights have been disposed (eg, very long or broad in scope licences or joint ventures may be detrimental to the investors' development plans).

The supply chain is similarly crucial and an accurate due diligence on the target's organisation is essential. Service quality and brand reputation are indeed key factors in the fashion industry and a supply chain that is not reliable (in terms of quality and timing) or not compliant with social responsibility standards may be risky.

Finally, in a business based on the intangible, talents are essential. Thus, retaining policy, non-compete and non-disclosure agreements with key employees is an area of great attention.

Competition

26 | What competition law provisions are particularly relevant for the luxury and fashion industry?

In Italy, free competition is protected by law No. 287/1990 as applied in parallel with articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and related EU Regulations and Guidelines (ie, EU Regulation 330/2010 on Vertical Restraints and related guidelines; guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements) as well as the rules set forth for merger and acquisitions.

Selective distribution agreements are particularly relevant for the industry. Purely qualitative selective distribution is considered to fall outside article101(1) TFEU for lack of anticompetitive effects, provided that it does not contain any of the hardcore restrictions set out in article 4 of EU Regulation 330/2010 (price; territory; restriction of active or passive sales to end users by selective distributors; cross-supplies) and the three conditions laid down in section 175 of the Guidelines on Vertical Restraints are met. In particular:

- the nature of the product must necessitate this system;
- resellers must be selected on the basis of objective criteria of qualitative nature uniformly applied; and
- the criteria must not go beyond what is necessary.

Even if those conditions are not satisfied, the agreement could still be eligible for the exemption if it does not contain any hardcore restrictions and the market share of both supplier and buyer does not exceed 30 per cent.

In 2019, the Court of Milan – in line with the *Coty* decision, C-230/2016 – ordered an online platform to refrain from marketing and promoting in Italy the products of the well-known brand Sisley, claiming that these sales were in violation of its selective distribution system. The court found that the commercial conditions submitted to retailers were in line with the applicable rules in view of the 'objective, qualitative and non-discriminatory nature of the criteria on which they are based and their appropriateness and proportionality in relation to the protection objectives of the brand commercial image and luxury aura', thus recognising the selective distribution system validity.

Furthermore, the ICA initiated investigations for anticompetitive agreements that culminated in the imposition of fines on eight major modelling agencies, representing 80 per cent of Italy's market share.

EMPLOYMENT AND LABOUR

Managing employment relationships

27 | What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

Collaborations with freelancers are quite common in the sector. However, such contractual arrangements (legally, self-employment relationships) often actually trigger a typical employment relationship, with consequent risk of reclassification of the relationship as employment. This impacts salary, social security coverage and the general management of the relationship.

Accordingly, in building up or increasing the staff, it is crucial to have a preliminary assessment of whether new members are actually autonomous as to timing and modalities of their performances or, differently, are subject to a strict agenda unilaterally managed and decided by the employer, notwithstanding whether personally or through a digital platform. In the latter case, it would be advisable to hire them as employees from the beginning.

Contractual arrangements usually include confidentiality, protection of trade secrets, non-compete and management of suppliers' provisions.

Trade unions

28 | Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

No. Each employee is free to join a trade union and cannot be discriminated because of his or her registration with (or the lack of registration to) a union. If there are more than 15 employees in a business unit, each union (there are several unions in each sector, with five main ones) may appoint a union representative from among the employees.

Immigration

29 **Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?**

Italian law on immigration is quite restrictive as to non-EU citizens coming to Italy for working reasons. However, there are various exceptions (business purposes, high technical skills, etc) that generally allow companies to send people to Italy with no particular issues.

UPDATE AND TRENDS

Trends and developments

30 **What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?**

As a worldwide trend, Italian brands will have to think digital-first and be active with sustainability issues as well as careful with all the abovementioned changes.

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MARKET SPOTLIGHT

State of the market

1 | What is the current state of the luxury fashion market in your jurisdiction?

The Netherlands is home to the European headquarters of several leading international fashion brands, such as Tommy Hilfiger, Calvin Klein, Patagonia, Karl Lagerfeld, Nike and Asics. Combined with the many Dutch-origin companies also present on the scene – like Scotch and Soda, Suitsupply, G-Star and Hunkemöller – this makes for a vibrant luxury and fashion market in the Netherlands with an international, creative workforce. Amsterdam even prides itself in having the world's highest concentration of denim brands.

In 2017, the value of the apparel market in the Netherlands was already US$14.5 billion and also the footwear market brings in several billion a year. In 2019, 15 per cent of the fashion retail turnover was achieved through online channels, and this market is still growing steadily with an increasing focus on achieving an omnichannel shopping experience. Also, topics like sustainability, the circular economy and re-commerce are becoming ever more important in the Dutch market. Just like in other countries, 2019 was a turbulent year for fashion companies with a number of bankruptcies and relaunches of smaller and medium-sized Dutch brands. 2020 is expected to bring new challenges of its own.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 | What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

The development, manufacture and supply chain for fashion goods are governed by general commercial and contract law. In the Netherlands, a general freedom of contract applies. However, under Dutch law, any commercial contract is subject to a reasonableness and fairness test. The concept of reasonableness and fairness may, in specific circumstances, set aside or imply certain contract clauses.

The contractual arrangements regarding the development and manufacturing of fashion goods are often included in dedicated development or manufacturing agreements. As regards the supply chain, companies usually sell their products through a network of vertical agreements (e.g., through distribution, franchise and agency agreements).

Distribution and agency agreements

3 | What legal framework governs distribution and agency agreements for fashion goods?

The distribution agreement has no specific statutory basis in Dutch law. Because the distribution agreement is commonly used in the Netherlands, several specific subjects related to distribution relationships – for example, the termination of distribution agreements – have been clarified in case law.

The agency agreement has a statutory basis in Dutch law and is regulated in Title 7.7.4 of the Dutch Civil Code. The relevant legislation is, inter alia, based on the EU Directive on the coordination of the laws of the member states relating to self-employed commercial agents (Directive 86/653/EEG).

4 | What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

Agency and distribution agreements for fashion goods are often framework agreements that provide the terms that govern separate purchase agreements or orders.

Agency and distribution agreements for fashion goods are often concluded for a specific territory, such as a country (Netherlands) or a group of countries (Benelux). Agents and distributors are, further, usually appointed on an exclusive or non-exclusive basis.

Relevant contractual terms and provisions to include in agency and distribution agreements for fashion goods are, inter alia, stipulations regarding the duration of the relationship, applicable minimum purchasing obligations (subject to competition law requirements), relevant sales targets, marketing efforts, renumeration, recalls, and protection of intellectual property rights.

In addition to the above, it is important to keep in mind the luxury fashion sector specifics when drafting more 'standard' contractual clauses. It will, inter alia, be relevant to consider the seasonality of fashion when agreeing on possible (premature) termination options, including notice periods and any termination fees.

Import and export

5 | Do any special import and export rules and restrictions apply to fashion goods?

As a starting point, it is very helpful to assess and determine the correct origin and commodity code of the relevant fashion good being imported or exported. This will enable fashion companies to better identify the applicable rules and restrictions such as whether upon import or export a product needs a permit or stamp under the Convention on International

Trade in Endangered Species of Wild Fauna and Flora (CITES). Some examples of import and export rules and restrictions are as follows:

- fashion goods containing certain fur or leather or other parts from endangered species are subject to prohibitions or specific licensing requirements;
- seal-related fashion goods are subject to prohibitions. Seal products entail all products, either processed or unprocessed, deriving or obtained from seals;
- jeans originating from the United States attract additional customs duties upon importation into the EU and need to be taken into account;
- fashion and luxury goods made subject to EU sanction regimes:
  - the EU sanctions against North Korea, prohibiting the sale, supply, transfer or export of luxury goods to North Korea as well as the import, purchase or transfer from North Korea of luxury goods; and
  - fashion goods being regarded as economic resources subject to export prohibition to any EU sanctioned parties.

In practice, it is recommended to gain insight of the import and export rules and restrictions at an early stage in view of being able to apply for and obtain any required licences or certifications enabling business operations and the related supply chain to run smoothly.

Corporate social responsibility and sustainability

6 | What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

Generally, listed companies with more than 500 employees have to report on a number of non-financial aspects in their annual report. Information to be provided on corporate social responsibility should in any event touch on policies relating to (i) environmental, social and personnel matters, (ii) respect for human rights and (iii) the tackling of corruption and bribery. Companies are given a large amount of freedom in their reporting, through mostly non-binding guidelines. Sustainability is more often put as a separate discussion item on the agenda of the general meeting and it is sufficient to include a statement in the management report; a separate, more detailed sustainability report is not mandatory.

7 | What occupational health and safety laws should fashion companies be aware of across their supply chains?

The Dutch health and safety laws focus on industrial accidents and occupational diseases (*risque professionnel*) and on sickness illness and absenteeism of workers in general (*risque sociale*). The employer must provide a safe workplace, identify possible hazards and risks, take action where needed and inform employees about the risks and prevention. Furthermore, employers are obliged to report accidents and seek advice from occupational health experts on the risk inventory and assessment. The employer is further obliged to have a contract with an occupational safety and health service or an occupational physician, whose advice or guidance must be sought in case of long-term sickness.

The main Dutch regulations regarding working conditions are:

- the Working Conditions Act, which provides general provisions for employers and employees on how to deal with occupational safety and health; for example, to have a written occupational safety and health policy and a risk inventory;
- the Working Conditions Decree, which covers a wide range of specific occupational health and safety topics, such as provisions on workplaces, dangerous substances, noise, vibrations, etc;
- the Working Conditions Regulation, which contains very specific provisions that are changing relatively fast; for example, the occupational exposure limit for dangerous substances;
- the Major Accidents Decree and Regulation, which deal with legislation in the field of major accidents related to dangerous substances; and
- the Working Hours legislation, covering, inter alia, maximum working hours per shift and the obligation to properly register working hours (exemptions apply).

The Labour Inspectorate monitors compliance with occupational safety and health legislation and regulations.

ONLINE RETAIL

Launch

8 | What legal framework governs the launch of an online fashion marketplace or store?

Online marketplaces and online stores are regulated by e-commerce legislation, primarily included in the Dutch Civil Code. The legislation relevant for online marketplaces or online stores is mostly the Dutch implementation of the relevant EU regulations and directives.

Websites must comply with applicable e-commerce and platform legislation, including (pre-contractual) information obligations, the right of withdrawal, obtaining prior consent of the website user before placing cookies (if needed) and complying with geo-blocking restrictions pertaining to the accessibility of the website by customers that reside in another EU member state. Also, during the sales process, unfair commercial practices towards consumers must be avoided.

Online marketplaces and online stores must, furthermore, comply with applicable contract law, including business-to-consumer contracting legislation.

Sourcing and distribution

9 | How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

E-commerce brings the retailers' sourcing and distribution arrangements within the framework of the e-commerce legislation as contained in the Dutch Civil Code. This means, inter alia, that retailers must comply with (pre-contractual) information obligations, the right of withdrawal, obtaining prior consent of the website user before placing cookies (if needed) and complying with geo-blocking restrictions pertaining to the accessibility of the website by customers that reside in another EU member state. Furthermore, sometimes a model of 'drop-shipping' is used. This is a form of e-commerce where the merchant, in fact the intermediate party, offers products in its online store that are not in stock. The producer, wholesaler or supplier delivers the products directly to the end user (ie, the customer).

Terms and conditions

10 | What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

Online terms and conditions must comply with the Dutch legislation concerning general terms and conditions. This legislation is included in Title 6.5.3 of the Dutch Civil Code and is based on the EU directive on unfair terms in consumer contracts (Directive 93/13/EEG).

Online terms and conditions should not be 'unreasonably onerous' for the customer (i.e., consumers or small and medium-sized businesses). Whether a clause is unreasonably onerous depends on the circumstances of the specific case. Clauses that are considered unreasonably onerous in all circumstances are included in an exhaustive list (the 'black list'). The Dutch Civil Code also contains a list of clauses that are presumed to be unreasonably onerous for consumers (the 'grey list'). Such clauses are not automatically void, but if found unreasonable in the given circumstances, the clause can be set aside. The relevant articles also regulate the applicability and use of general terms and conditions in contracts with consumers or small to medium businesses.

As mentioned above, traders must provide certain pre-contractual information before the contract is concluded. Some of this information must also be provided to the customer after the purchase has been made. Often, this information is included in the general terms and conditions. Information that should be provided to a customer, inter alia, includes information about the right to withdraw from the contract, without providing reasons, within 14 calendar days from the day the consumer received the goods.

Tax

11 | Are online sales taxed differently than sales in retail stores in your jurisdiction?

For a start, sales in retail stores are taxed with the local value added tax (VAT) rate (currently 21 per cent).

Online sales in the Netherlands where both the seller and the buyer are based in the Netherlands (domestic sales) are taxed with the same VAT rate.

For online sales by buyers in the Netherlands not involving a domestic sale, the VAT rate treatment is based on certain factors, such as where the seller is based (other EU member state or outside the EU) and the location from where the fashion products are being shipped.

For example, online sales from sellers based in another EU member state are taxed either by the regular Dutch VAT rate for domestic sales, or with the VAT rate of the EU member state where the seller is based in the event that certain sales volumes are not met.

INTELLECTUAL PROPERTY

Design protection

12 | Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

Fashion designs may be protected by a wide range of IP rights in the Netherlands, which can in part also overlap.

Dutch case law easily accepts copyright protection in works of applied art, including fashion designs. As there is no registration requirement, this offers a straightforward way for fashion designs to be protected. An added benefit is that Dutch case law will in certain cases accept a pan-European injunction on the basis of copyright in the event of a copyright infringement. It must, however, be ensured that the copyright is vested in the right party and that the design process is properly documented. While copyright will automatically accrue to the employer where a work is created within the framework of the employment, provided no other agreements are in place, the copyright commissioned works created by freelancers or outside agencies will remain with the author (thus such freelancer or agency) unless a written deed of copyright transfer is executed.

Fashion designs may also be protected through registered and unregistered design rights. Registered design rights are available at either the Benelux or EU level, while unregistered design rights are only granted at an EU level pursuant to the EU Design Regulation, the latter only giving a short period of protection of three years. Neither a Benelux design right application nor an EU design right application is submitted to a substantive check on novelty and individual character before registration, so a registered right is relatively easy to obtain but at the same time not guaranteed to be valid. Having a registered right may be beneficial in enforcement activities.

Fashion designs may in some circumstances also be registered as a trademark. There is the option of going for a Benelux trademark or for an EU trademark. However, contrary to design rights, trademarks are substantively examined before registration and it also possible for third parties to file an opposition within two months (for a Benelux trademark) or within three months (for an EU trademark) from publication. Fashion designs often run into issues concerning a lack of distinctiveness, technical features or the fact that they add substantial value to the goods, which can all preclude them from being registered as a trademark.

Nowadays, with the increasing prevalence of fashion tech, event patents will be relevant for fashion designs. Although it is possible to file a Dutch patent application, most parties would use the European patent system instead.

Finally, additional protection may be found in the doctrine of slavish imitation, a part of unfair competition. This prevents against copying the look of a product, where that product has its own position on the market (as compared to the design of other similar products), there is a risk of confusion, and the copycat could have designed its product differently without detracting from the soundness and usefulness of the product.

13 | What difficulties arise in obtaining IP protection for fashion goods?

One difficulty that can arise is that fashion goods often also contain technical features. Such features cannot be protected under either copyright, design rights, trademarks or unfair competition. Yet they are usually not sufficiently inventive to merit patent protection either.

In terms of copyright and unfair competition, common style elements are also excluded from protection. Although a specific interpretation of a general style can be protected under copyright, it is sometimes difficult to draw a strict line between a general style and a specific interpretation. In the case *Broeren v Duijsens* (2013), the Dutch Supreme Court held that where it concerns a common style that is not protected under copyright law, no further protection will be offered under the doctrine of slavish imitation (unfair competition) either.

Several difficulties may also arise when trying to protect the appearance of fashion goods through trademark law.

Firstly, a trademark must be distinctive. In terms of word marks, this requirement is fairly simple and merely requires the proprietor not to pick a descriptive term. In relation to shape marks and other 2D representations of (parts of) goods including position marks, EU case law has consistently held that the average consumer is not accustomed to recognising such signs as an indication of origin where they coincide with the appearance of (part of) the product. These trademarks will therefore only be distinctive *ab initio* where they depart significantly from the norm or the customs in the sector at the time of filing. A mere variation of what is already on the market is not sufficient. If this cannot be shown, then the trademark applicant will need to provide evidence of the trademark having acquired distinctiveness through use in either the entire Benelux (for a Benelux trademark) or the entire EU (for an EU trademark).

Secondly, EU and Benelux trademark law also excludes protection for signs that consist of a shape or other characteristic that gives substantial value to the goods. Briefly put, if the consumer buys the goods because of their appealing look, then trademark law cannot provide protection for that look. Furthermore, also technical features or features that result from the nature of the goods are excluded from trademark protection. These three exceptions cannot be overcome by showing acquired distinctive character.

Brand protection

14 | How are luxury and fashion brands legally protected in your jurisdiction?

Word and device marks may be protected through filing either a Benelux trademark application or an EU trademark application. Furthermore, the trade name of a company is separately protected under Dutch law as a trade name right, provided that it has been used externally in the course of trade. Whether any trade name rights exist depends on the use of the trade name, not on the registration thereof with the Dutch Chamber of Commerce. The registration of a domain name as such does not create any rights but may under certain circumstances contribute to establishing use of a trade name. There is no recognition of unregistered trademarks under Dutch or Benelux law.

Licensing

15 | What rules, restrictions and best practices apply to IP licensing in the fashion industry?

Rules governing IP licensing are distributed over the various acts relating to each type of IP right.

The Dutch Copyright Act provides that a licence can be granted for the whole or part of the copyright. An exclusive licence can only be granted by way of a written deed.

Both the Benelux Convention on Intellectual Property Rights (BCIP) and the EU Trademark Regulation provide that a licence to a trademark can be granted for all or part of the goods and for all or part of the territory. To invoke a licence against third parties, it should be recorded in the register. For fashion businesses, trademark licence agreements especially require special attention, given that sales contrary to the provisions of the licence agreement may still lead to exhaustion of trademark rights. In that case, the trademark owner will only have a claim against the licensee for breach of contract but will not be able to stop third parties from further marketing the goods in question. The owner can only rely on its trademark rights when the licensee has acted contrary to licence provisions regarding the (i) duration of the licence, (ii) form in which the trademark may be used, (iii) goods covered by the licence, (iv) territory and (v) quality of the goods and services. It is, therefore, essential to include clear arrangements on these points, especially concerning the quality and supervision requirements that the licensee must meet.

The BCIP and Community Design Regulation contain similar provisions as compared to those set out above for trademark licensing.

Enforcement

16 | What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

IP rights can be enforced in the Netherlands through preliminary injunction proceedings or proceedings on the merits. Where a case is particularly urgent and the infringement is clear cut, an injunction may also be obtained through *ex parte* proceedings without prior hearing of the defendant, particularly where delay would cause irreparable harm.

The Netherlands can be a particularly favourable jurisdiction for copyright holders, as Dutch courts readily grant copyright protection to works of applied art and furthermore under certain circumstances assume jurisdiction to grant pan-European injunction on the basis of copyright against Dutch defendants and any co-defendant sued in the same action with a Dutch defendant where there is a close connection between the cases.

Dutch customs are also active in stopping counterfeit and other infringing goods from entering the EU via the Netherlands through their specialised IP team in Groningen. Customs may stop suspected infringing goods *ex officio* and will then contact the rights owner and the addressee of the goods, but it is also possible to submit a customs request asking customs to pro-actively monitor for any suspected infringements. In the latter case it may be recommendable to organise training sessions with customs to properly identify counterfeit.

Finally, rights holders can also take action against the registration of any conflicting trademark applications through filing oppositions, cancellations and revocations at the Benelux Office for Intellectual Property.

DATA PRIVACY AND SECURITY

Legislation

17 | What data privacy and security laws are most relevant to fashion and luxury companies?

The EU General Data Protection Regulation 2016/679 (GDPR), the Dutch GDPR Implementation Act and articles 11.7 and 11.7a of the Dutch Telecommunications Act implementing the spam and cookie obligations under the EU ePrivacy Directive (2002/58/EC, as amended 2009/136/EC).

Compliance challenges

18 | What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

Generally, the luxury and fashion industries face challenges with regard to data security. Companies operating in these industries are most often public facing and well-known brands for whom negative publicity about security incidents could seriously damage the reputation of their brand. This is all the more relevant because most administrative fines imposed under the GDPR are related to security, data breaches and a lack of technical and organisational security measures to safeguard personal data.

Furthermore, as a consumer-focused industry, the retail fashion industry will face various challenges in the field of spam, cookies and other forms of direct marketing. For example, there are continued developments around new legislation for direct marketing, both on a Dutch as well as European level, as illustrated by proposed new rules on telemarketing in the Netherlands as well as renewed attempts for an ePrivacy Regulation. Further to this, in the absence of the aforementioned ePrivacy Regulation, more and more European regulators have issued guidelines and started enforcement proceedings on direct marketing topics, often using the GDPR as a way to justify a stricter interpretation of direct marketing rules. Companies such as retail fashion companies operating in these areas are advised to keep a close watch on these developments.

Innovative technologies

19 | What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

Some new technologies can be quite invasive and intrusive to the privacy of individuals. When use of such technologies involves the processing of personal data, it must adhere to the general principles of necessity and proportionality. In short, these requirements together ensure that the most effective and least intrusive way (ie, also in consideration of alternatives that are less intrusive) to process personal data is chosen and that the interference in the privacy of individuals is proportionate in consideration of the objectives of the retail fashion company.

Especially with more invasive innovative technologies such as facial recognition, it could be that the use of such technologies does not meet the requirements of necessity and proportionality when deployed. Companies wishing to apply such technologies are advised (and sometimes required) to perform a data protection impact assessment (DPIA), which will, inter alia, allow them to assess how to meet these requirements.

Furthermore, most EU countries have specific national rules for the processing of special category data such as biometric data. In the Netherlands, for example, the use of biometrics (including fingerprints and facial recognition) is restricted by law to specific purposes.

Content personalisation and targeted advertising

20 | What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

With regard to both advertising techniques there are a lot of developments ongoing on the legal spectrum, both in the Netherlands as well as in Europe. The trend appears to shift towards a stricter interpretation and use of advertising techniques, but it is currently unclear where the boundaries will fall and for which technologies they will apply.

For example, there are continued developments around new legislation for direct marketing, both on a Dutch as well as a European level, as illustrated by proposed new rules on telemarketing in the Netherlands and renewed attempts for an ePrivacy Regulation. Further to this, in the absence of the aforementioned ePrivacy Regulation, more and more European regulators have issued guidelines and started enforcement proceedings on direct marketing topics, often using the GDPR as a way to justify a stricter interpretation of direct marketing rules. Companies such as retail fashion companies operating in these areas are advised to keep a close watch on these developments.

In the Netherlands, certain forms of profiling or personalisation could trigger the need for a DPIA.

ADVERTISING AND MARKETING

Law and regulation

21 | What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

Advertising and marketing communications are firstly covered by the rules on unfair commercial practices (articles 193a to 193j, Dutch Civil Code) and misleading and comparative advertising (articles 194 to 196, Dutch Civil Code).

There is also a self-regulatory framework called the Dutch Advertising Code. This Code applies to all types of advertising and may be enforced through recommendations from the Dutch Advertising Code Committee and naming and shaming for parties who do not comply. Particularly relevant for luxury and fashion companies are the specialised codes on social media and influencer marketing and on cosmetics.

Online marketing and social media

22 | What particular rules and regulations govern online marketing activities and how are such rules enforced?

Currently, the rules for online marketing – in particular influencers and vloggers – are mainly based on two types of self-regulation:

- Advertising on social media is covered by the Dutch Advertising Code Social Media & Influencer Marketing (RSM), which is enforced by submitting a complaint to the Dutch Advertising Code Committee, who can issue a warning and who keep a naming-and-shaming list for parties who do not comply. The main requirements of the RSM are: (i) ads must be identified as such where there has been any compensation in cash or in kind; (ii) children under 12 years old may not be used to advertise products or services on social media; and (iii) the advertiser is responsible for ensuring that the influencer follows these rules.
- Several YouTube vloggers have created De Social Code, which provides guidance on when and how to identify that a video has been sponsored. There are no sanctions for non-compliance.

Advertising on TV is already covered by the Media Act, which is supervised by the Dutch Media Authority that can enforce the Act through substantial fines. After the implementation of the new Media Act, expected in September 2020, influencers' online video channels will also be covered by the Media Act and can be subject to the same substantial fines as already apply to advertising on TV.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 | What product safety rules and standards apply to luxury and fashion goods?

In the Netherlands, the relevant product safety rules and standards are included in the Dutch Commodities Act, including underlying legislation, such as the General Product Safety (Commodities Act) Decree. This legislation mainly includes safety requirements and labeling and packaging requirements.

Specifically for luxury and fashion goods, the Textile Articles (Commodities Act) Decree will also be relevant. This is the Dutch implementation of EU Regulation No. 1007/2011. This Decree, inter alia, contains the obligation to label goods that consist of over 80 per cent textile. Rules regarding the fire safety of fashion and, in particular, nightwear are, inter alia, included in enforcement agreements on fire safety of clothing.

Product liability

24 | What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

The regime that governs product liability is included in Title 6.3.3 of the Dutch Civil Code. This is the Dutch implementation of the European Product Liability Directive (Directive 85/374/EEG). The rules on product liability protect consumers against damage or injury caused by defective products.

Product liability is, in principle, a strict liability under the Dutch tort regime and cannot be excluded in a contract. In principle, the producer is liable for damage caused by a defect in his or her product.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 | Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

As with M&A transactions in any sector, one should consider what would be the preferred deal structure (i.e., whether the transaction should be structured as a share sale or a sale of all or part of the assets of the target company). Generally speaking, intellectual property is a key component in M&A transactions in the luxury fashion industry, which is reflected in the due diligence investigations as well as in the transaction documentation (notably the representations and warranties). In addition, retention of key persons (such as designers) as well as restrictive covenants is often a point of attention.

Technological innovations are also becoming increasingly important in the luxury fashion industry. Many fashion companies have (in one way or another) an online sales and marketing presence, which triggers all sorts of potential legal issues that are often part of the scope of due diligence and transaction documentation.

Competition

26 | What competition law provisions are particularly relevant for the luxury and fashion industry?

Competition law plays a role in the luxury and fashion industry in relation to all forms of distribution and online sales, particularly when it concerns exclusive arrangements, selective distribution, pricing arrangements, customer allocation, etc. Articles 6 and 24 of the Dutch Competition Act (DCA) are the cornerstones of the Dutch competition law framework. Article 6 DCA corresponds to article 101 of the Treaty on the Functioning of the European Union (TFEU) – prohibition of restrictive agreements and concerted practices. Article 24 DCA corresponds to article 102 TFEU – prohibition of abuse of dominance.

The EU competition law regime for 'vertical agreements' (EU Vertical Block Exemption Regulation No. 330/2010 and accompanying Guidelines on the application of article 101(3) TFEU to vertical agreements) applies directly to the distribution of luxury and fashion products in the Netherlands. The notion of vertical agreements covers all types of distribution or re-selling of products or services, except agency agreements under which the agent bears no commercial or financial risk for the products or services delivered (other than its own commission). This EU regime, dating from 2010, is currently under review. The EU Commission is expected to issue a draft for the new block exemption on vertical agreements in the course of 2020.

While recommending resale prices to distributors and retailers is generally allowed under the regime for vertical agreements, it is considered illegal to restrict a distributor's freedom to determine its resale price with the exception of maximum resale prices. Similarly, restrictions of online sales, restrictions on reselling and absolute territorial protection (passive sales bans) are generally prohibited.

Recently, e-commerce agreements are under more scrutiny as the European Commission is stepping up enforcement on e-commerce agreements (following its Digital Single Market objectives). As the Commission notes in its recent ecommerce sector inquiry, there is an uptake in selective distribution as this enables suppliers of (luxury) brand products to get more control over the quality of distribution of their products. The Dutch Authority for Consumers and Markets (ACM) considers that dual pricing may be justified according to article 101(3) TFEU. Thus, the supplier may ask a different price for products that will be sold online (eg, if the costs for offline reselling are significantly higher compared to the online sale).

Companies that are not dominant are generally free to determine their own resale prices and discounts as well as their contract partners. Even if dominant, the application of different prices to different customers or different categories of customers for goods whose costs are the same does not in itself indicate exclusionary abuse (ACM decision of 30 August 2012 in case 7464 *Van der Zwan – Kluwer*). There are no specific Dutch rules prohibiting selling at a loss (for non-dominant companies).

EMPLOYMENT AND LABOUR

Managing employment relationships

27 | What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

Because the fashion industry particularly works with a lot of freelancers and external creative experts, there is always a risk that the arrangement with a contingency worker will be reclassified as an employment agreement, if challenged by the contingency worker. The contingency worker may be inclined to do so, for example, in case of sickness (claiming statutory continued payment of sickness) or upon the termination of the relationship at the initiative of the employer. The test to be applied by the court will include many elements, the most important one being the question whether or not the employer exercises supervision and control over the contingency worker. The court will apply a 'substance over form' test.

Without going into detail, in essence there are only two relevant types of contracts for contingency workers:

- a services agreement for the provision of well-defined services, whereby the recipient of those services (the fashion company) will not exercise supervision and control over the service provider (or individual worker who will be engaged in the provision of the services) or the individual contractor; and
- a supply of personnel agreement, pursuant to which the supplier will supply the individual worker to the fashion company to perform work for the benefit and under supervision and control of the fashion company.

The likeliness of the above-mentioned risks materialising will largely depend on the chosen contracting structure, but also on the actual performance (compliance with the structure parameters).

Another common contractual arrangement in the fashion industry relates to interns: provided that the individual is truly engaged as an intern (i.e., no employment; no real work contribution; no real work obligation; preferably still registered at university; no salary, just a moderate allowance), the risk of requalification in this respect will be limited. However, if the internship agreement is reclassified as an employment agreement (at the initiative of the intern), the time spent will count towards continuous service. Under Dutch law, this would count as an initial fixed-term employment agreement, meaning the following contract will count as the second employment agreement (which, under certain circumstances, may lead to the employment agreement being considered permanent).

Trade unions

28 | Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

Trade union

Collective labour agreements are rather common in the Netherlands, either at the company or industry level. In principle, the collective labour agreement binds the parties and their members. In some sectors, however, (parts of) a collective labour agreement can be binding by law for all employers and employees working in a specific sector. The Collective Labour Agreement Retail Non-Food – Fashion Sport & Lifestyle has a long history of being binding by law and this is also currently the case (until 31 December 2020).

Trade unions mainly play a role in negotiating collective labour agreements and in situations involving mass redundancies.

Works council

Especially relevant for larger fashion companies that, for instance, have their headquarters in the Netherlands is the fact that each company with 50 employees or more should install a works council. In addition to the right to information, the main rights of the works council are the right to provide advice and the right of prior consent.

Works councils have a legal right to provide advice on a number of legally prescribed important topics. This advice should be sought at a time when the works council can still materially influence the decision of the company. If the company does not respect the advice of the works council, the works council can petition a special chamber of the Court of Appeal of Amsterdam.

Works councils also have a legal right to provide consent prior to a decision to introduce, amend or abolish a regulation on a number of legally prescribed topics. If a works council does not consent to a proposed decision and the company wants to continue with the decision, the company should seek consent from a cantonal judge. If a company does not obtain prior consent or approval of a cantonal judge and still continues with the decision, the works council can annul the decision.

The costs reasonably necessary for the performance of the duties of the works council shall be borne by the employer.

Immigration

29 Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

Because a large number of international fashion companies have their headquarters in the Netherlands and these companies are often run by an international workforce, immigration law can be an important topic in the industry. Employees from the European Union (except Croatia), European Economic Area (EEA) or Switzerland do not have to obtain a valid work permit before starting work.

A work permit will in principle (i.e., unless an exception applies) only be granted to the employer of nationals from outside the EU, EEA or Switzerland if no potential worker can be found within the EU, EEA or Switzerland. The work permit must be obtained prior to the foreign worker performing any work.

Several exceptions apply to the requirement to obtain a work permit. Some examples are where:

- the foreign worker performs certain types of work and occasionally works in the Netherlands for a short period (examples include business trips, preparation of fashion shows or the launch of a new store);
- the foreign worker is a 'highly skilled migrant';
- the foreign worker holds a residence permit that states 'permitted to work';
- the foreign national holds a residence permit allowing self-employment for the type of work concerned; and
- the foreign national has attained at least a Master's degree in the Netherlands, then he or she can obtain a residence permit for a maximum of one year to find a job as a highly skilled migrant or to start an innovative company.

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UPDATE AND TRENDS

Trends and developments

30 What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

Like other luxury and fashion companies around the world, the Dutch market is currently focused primarily on increasing sustainability in the sector, finding new ways of introducing a circular economy and creating value from 're-commerce'. Subscription and rental models for fashion products are gaining importance and this increased focus on sustainability and shifting consumer behaviour is putting pressure on the more traditional fast-fashion companies. Another future prospect is fashion tech, which is already starting to blur the line between fashion companies and tech development.

There are a few changes in the law on the horizon, which may be relevant to luxury and fashion companies. For instance, the EU Commission is expected to issue a draft for the new block exemption on vertical agreements in the course of 2020, which will impact the distribution of luxury and fashion products. In the field of direct marketing, there are continued developments around new legislation, both on a

Dutch as well as a European level. Finally, the new Media Act is set to be implemented in September 2020, which will have consequences for advertising through online vlogging as it places influencers' online video channels within the scope of the Media Act and thereby potentially makes them subject to substantial fines in case of non-compliance.

Portugal

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MARKET SPOTLIGHT

State of the market

1 What is the current state of the luxury fashion market in your jurisdiction?

The luxury fashion market in Portugal has experienced a huge growth and increase of branding presence in the past 10 years, after around 20 years of dark times.

During the 1990s and 2000s, Portugal struggled against a major-scale counterfeiting of goods, especially in the luxury apparel industry. The north of the country was, in fact, on the frontline of combat with a huge amount of family manufacturing businesses that worked in basements and small manufacturing units and had produced millions of counterfeit apparels from reputed brands.

The uncontrolled phenomenon led to a ripple effect down to the businesses of the industrial north: companies within the fashion industry. This had a major impact on the overall business and retention of contracts for manufacturing of luxury branded products.

Moreover, the impact of sales within these frontiers was very small as only a small percentage of the population has access to luxury fashion goods and the market was too small for representative investments.

However, in the past 10 years, the country has experienced a boom in tourism development, traditionally concentrated in the south. Lisbon has in fact become a leading city for short-break holidays, a pearl within Europe, which has impacted hugely on the number of famous fashion houses now open in the Portuguese capital.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

The Portuguese legal framework does not specifically foresee the types of contracts used in the manufacturing or development of products.

The most common agreements are simple orders for production of materials or final goods subject to general rules on contracts.

Fashion goods, especially luxury brands, are subject to the high pressure caused by counterfeiting, hence the first concern when it comes to the development and manufacture of goods should regard penalties for undue use of information for the development and manufacturing of the products. Penalties alone will preclude the right of indemnification so these should always be combined with express agreement of the parties on the right of indemnification for further damages suffered.

Strong clauses on intellectual property rights ownership, including authorship rights and designs and models should also be foreseen to avoid copying protected designs.

Distribution and agency agreements

3 What legal framework governs distribution and agency agreements for fashion goods?

Agency agreements are regulated by the Portuguese Agency Law, which comprises a series of mandatory provisions, including a specific provision on clientele indemnification upon contract term.

As such, brands tend to reject agency agreements and adopt more flexible models such as franchise and distribution agreements. Both franchise and distribution do not have specific legislation and are basically ruled by contractual models based on the general rules of the Portuguese Civil Code.

4 What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

The agreement structure comprises the use of specific branding rules, minimum target sales per season including autumn/winter and spring/summer collections. When companies have the option of franchising, minimum store opening requirements in a given number of years is also common.

Rules on intellectual property, the branding process, marketing and qualifying points of sale are also very common.

When the agreement includes direct sales to consumers, the luxury premium brands also include clauses with requirements for the brand to only be nearby very specific premium brands (eg, a shop window can only include a small amount of designated premium brands, etc).

Import and export

5 Do any special import and export rules and restrictions apply to fashion goods?

With regard to import and export, fashion goods follow standard general import and export rules.

The import of goods for further sale in the country shall have to respect the legal framework for sale of goods to consumers (ie, tagging of the products, etc).

Export will include limitations to embargoed countries.

Corporate social responsibility and sustainability

6 What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

There are no specific requirements nor disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury products in Portugal. Nonetheless, companies are required to comply with any legal obligations applicable that may be related with the compliance of consumer rights, employment law, mandatory environmental regulations, including waste management obligations.

Companies often claim to have pledged to their own corporate social responsibility and sustainability rules or to a third-party code of conduct to increase their reliability among clients and the public in general. Although this is admitted by Portuguese law, an unfair commercial practice takes place if a company falsely claims to be a signatory to a code of conduct or displays certification signs without it being true, which is an administrative offence under Portuguese law subject to payment of a fine.

A legal due diligence is advisable to make sure that the product placed in the Portuguese market and relevant communications with regard to its properties are compliant with local requirements.

7 | What occupational health and safety laws should fashion companies be aware of across their supply chains?

Companies are responsible for providing a safe working environment for employees. Occupational hygiene and health can reduce occupational hazards by identifying and minimising factors that may eventually reduce the safety of employees' environments. Safety at work sensitises employees and seeks to eliminate unsafe conditions, preventing work accidents.

According to current legislation (Law No. 102/2009 of 10 September), the responsibility for occupational hygiene and safety applies to all branches of activity, private, cooperative and social sectors, employees and their employers, and self-employed workers.

Employers must comply with the following main obligations:

- ensure the exercise of the activity in safe conditions (in accordance with the general principles of prevention);
- provide adequate information and training so that employees can develop the activity in safe conditions;
- take measures and instruct employees to cease activity in the event of serious or imminent danger;
- adopt first aid and firefighting and evacuation measures, identifying the employees responsible for their application;
- monitor the health of employees according to the risks to which they are potentially exposed;
- observe the legal, general and specific health and safety requirements to be applied in the company; and
- bear the burden of the organisation and operation of the occupational safety and health service and its preventive measures.

ONLINE RETAIL

Launch

8 | What legal framework governs the launch of an online fashion marketplace or store?

Current legal provisions on e-commerce in Portugal are a result of the transposition of European directives on this matter, particularly the Directive on Electronic Commerce and other relevant directives aiming for consumer protection, including with respect to distance contracts.

Any terms and conditions of sale of an online fashion marketplace shall be submitted to a specific legal regime applicable to pre-made content contracts without negotiation such as the terms and conditions typically found in an online store. This legal framework contains some restraints about the content of such contracts, including, but not limited to, the use of exclusion and limitation of liability clauses in certain circumstances. Therefore, there are some clauses that may be considered to be null and void under this legal framework and their applicability to the Portuguese customer may be questioned in cases of litigation.

Also, online sales shall need to contemplate the right of regret of the consumer, thus providing alternatives to return the goods at no cost except for regular mail.

Having this said, the launch of an online fashion marketplace or store is not subject to a prior regulatory permit from local authorities under the EU principle of freedom to provide services.

Sourcing and distribution

9 | How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

There is no specific legal framework on this topic, which means that e-commerce companies subject to the Portuguese law shall be subject to its general rules of law.

For example, the Portuguese Competition Act prohibits agreements between companies or concerted practices with the purpose to prevent, distort or restrict competition within the Portuguese market, including, but not limited to, those that intend to limit or control production or share markets or sources of supply.

Terms and conditions

10 | What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

The terms and conditions of sale should contain mandatory information regarding contracts concluded online, including, without limitation, the right of cancellation, payment terms, existence and conditions of after-sales assistance and commercial guarantees. Other relevant issues may concern the applicable returns policy, delivery obligations and dispute resolution.

Regarding the use and operation of the website itself, general terms and conditions are also advisable to address issues such as copyright ownership of contents made available online, product and service reviews, and to provide mandatory information on a website's ownership and contacts.

A privacy policy (including relevant information on the usage of cookies) is also highly recommended to assure compliance with the General Data Protection Regulation and protection of privacy in electronic communications.

Tax

11 | Are online sales taxed differently than sales in retail stores in your jurisdiction?

No. The VAT rate applicable is the same whether sales are made online or in a physical store and the company income tax regime is also equivalent.

INTELLECTUAL PROPERTY

Design protection

12 | Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

Fashion goods will be protectable under intellectual property rights both as authorship rights or design rights.

The Portuguese legal framework on intellectual property protection is polarised on the Authorship and Neighbouring Rights Code on one side and on the Industrial Property Code on the other. A series of other diplomas gravitate around these two areas, including software programs protection, linked to authorship rights and community designs liked to industrial property.

A fashion design could be protected within authorship rights when complying with the authorship rights protection requirements (ie, the work is an intellectual creation of the human spirit). Authorship rights are not dependent on registration, but a registration (useful for evidence effects) could be obtained at the general inspection of cultural activities.

Authorship rights are split into moral and patrimonial rights. Moral rights are inalienable, indispensable and imprescriptible, while patrimonial rights include the right to economical exploration of the works and are both assignable and licensable. Full assignment of patrimonial rights over a work is subject to public deed.

Regarding authorship in commissioned works, agreements should always contemplate that the ownership of the creations belongs to the company hiring the service. If not, the patrimonial rights over the works will remain vested in the author.

Trade marks and design protection are industrial property rights, subject to registration for effectiveness. The essence of the industrial property right lays in the economic exploitation of the protected right. These are also subject to licensing and assignment, which could be executed by means of written agreement.

Commonly, there is an overlap of authorship rights with industrial property rights. Because the parties intend to protect the patrimonial content of their work, they usually opt for industrial property protection alongside authorship rights protection.

In case of the fashion industry, the most common rights include trademarks for protection of the company brand and design protection for some works.

Differently from authorship rights, commissioned work is presumed to be on the ordering party ownership.

13 | What difficulties arise in obtaining IP protection for fashion goods?

Design protection is, in the main, similar to European Union protection with no major differences.

Brand protection

14 | How are luxury and fashion brands legally protected in your jurisdiction?

Branding protection is effective under registration as a trademark. There is also a right of priority for filing a trademark application for anyone who uses an unregistered brand for a period not exceeding six months.

The branding could also be used as a domain name for online IP.

There is a protection for attempts to use famous or well-known trademarks in domain names.

Licensing

15 | What rules, restrictions and best practices apply to IP licensing in the fashion industry?

Licensing must be in writing. Trade mark licences need to be recorded at the Trademark Office to produce any effects towards third parties.

Enforcement

16 | What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

Portugal has implemented the enforcement directive both for authorship rights and industrial property rights. The holder of an intellectual property right may file a claim or a preliminary injunction at the intellectual property court, including for discovery procedures and ex parte measures.

Regarding customs control, Portugal applies the EU Regulations on customs seizures.

DATA PRIVACY AND SECURITY

Legislation

17 | What data privacy and security laws are most relevant to fashion and luxury companies?

There are no data protection laws specifically related to fashion and luxury companies. Therefore, general terms of law will apply. The General Data Protection Regulation and the Portuguese law assuring its execution into Portuguese law, as well as the legal regime concerning the protection of privacy in electronic communications must be taken into consideration. This is particularly relevant if marketing activities involve intricate profiling and targeted advertising, for example.

Compliance challenges

18 | What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

The General Data Protection Regulation may pose a challenge if some internal procedures are not adopted beforehand to secure data protection compliance. Nonetheless, such a challenge is entirely manageable upon the adoption of these procedures.

Innovative technologies

19 | What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

The main concern is to find a proper balance between the companies' needs and desires and the restrictions imposed by the General Data Protection Regulation. For example, in cases where sensitive data is involved (as would be the case if a person's biometric data was used for facial recognition purposes), such balance will require the company to obtain the explicit and informed consent of the consumer before processing his or her personal data and, in some specific data protection operations, such as those involving automated decision-making processes, proper information should be provided at the time the data is collected. Therefore, the most relevant concerns regarding this would be, on the one hand, to secure proper legal basis to process the personal data and, on the other, to provide to the consumer the relevant information at the right time.

Content personalisation and targeted advertising

20 | What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

Personalised online content and targeted advertising cannot take place without some level of data processing. Therefore, it is important to secure compliance with the General Data Protection Regulation and the legal regime concerning protection of privacy in the electronic communications sector. Any company should make sure that it has a proper legal basis to process personal data for the purposes it has in mind and that such information was legitimately obtained in compliance with applicable data protection laws. The same compliance principle should be taken into consideration with regard to the usage of any non-essential cookies, which cannot take place without the user's prior, explicit and informed consent.

ADVERTISING AND MARKETING

Law and regulation

21 What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

The Portuguese Advertising Code is the cornerstone of advertising and marketing communications. Among other relevant obligations, any marketing communication or advertising message needs to be easily identified, lawful, accurate and consistent with consumer rights. An infringement of the applicable provisions is considered to be an administrative offence and sanctioned with payment of a fine.

Self-regulation provisions exist but they are only applicable to those entities that decide to adhere to them, which means they are not mandatory.

Online marketing and social media

22 What particular rules and regulations govern online marketing activities and how are such rules enforced?

There is no specific legal provision regulating online marketing activities such as social media influencer marketing and user-generated content. However, the local control authority has issued a guide to best practices on partnerships established between brands and influencers. It showed a conservative approach to this matter and, therefore, much of the local commercial partnerships that appear on local influencers' social media should be considered as advertising.

Having this said, commercial partnerships between brands and local social media influencers is quite frequent and in most situations the concerned posts do not comply with the indications of the good practices guide.

Unfortunately, there is no official data on any sanctions applied by the local control authority regarding this.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 What product safety rules and standards apply to luxury and fashion goods?

Fashion goods are subject to European Union legislation on safety rules and product information, including information on materials used in the manufacture of the goods and all use and care instructions.

Product liability

24 What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

The producer is liable for the defects of the product.

Consumers, the main target of luxury fashion goods, are entitled to a two-year warranty on the goods (on all non-perishable products), including general terms of warranty on replacement of defective products, and repair within a 30-day period or a full refund.

In practical terms, the aforementioned are not commonly claimed in the fashion industry or in most of the type of goods sold.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

When preparing for an M&A or joint venture, companies should perform a full due diligence to the intellectual property rights of the target company, including ancillary areas, such as analysis of the agreements entered into with designers and the creative team to ascertain the full extent of the intellectual property rights portfolio.

Competition

26 What competition law provisions are particularly relevant for the luxury and fashion industry?

Portugal applies general EU rules on competition, hence common EU limits on pricing and quotas on exclusivity in a territory are the most common topics.

EMPLOYMENT AND LABOUR

Managing employment relationships

27 What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

In terms of regulations, the main law is the Portuguese Labour Code (Law 7/2009 of February 12) along with its respective regulation (Law 105/2009 of September 14).

It is also important to highlight the collective labour regulations, the most common form being the collective bargaining agreement (CBA), an agreement between labour unions and employer associations, which regulates the activities of the sectors in question.

In principle, the CBA only applies to the employers and employees that are members of the employer's association and trade unions, respectively. However, the government often issues extension regulations by virtue of which both employers and employees not affiliated must comply with the CBA's provisions.

The usual types of employment contracts in Portugal are contracts for an indefinite period (permanent) and term contracts (either fixed and unfixed). Term contracts are subject to written form, are allowed only to cover the temporary needs of the company and their total duration (including renewals) cannot exceed two years. Failing to fully justify the temporary need or exceeding the maximum duration leads to the conversion of the term contract into a permanent contract.

The law provides for training contracts that cannot usually exceed 12 months and entitle the trainee to a training allowance that cannot be inferior to the social support index defined annually by the government.

Hiring freelancers is a common practice. Companies or group companies responsible for at least 50 per cent of the freelancer activity must contribute annually to Portuguese social security. The contribution rate borne by the contracting entities corresponds to 10 per cent in situations where economic dependence is over 80 per cent, and 7 per cent in the remaining situations.

It is usual that employees with commercial jobs are paid sales commissions according to plans set by the company. The Portuguese Labour Code expressly forbids the employer from diminishing the employee's remuneration.

Termination in Portugal is a highly regulated and formal procedure. The prohibition of dismissal without just cause is a constitutional principle; hence, the employer cannot terminate a contract for political or ideological reasons, nor on notice except where a term contract is in place.

The employment contract can be terminated by expiry, by agreement, dismissal with cause following a disciplinary procedure, through a redundancy procedure or collective dismissal, dismissal for inability to adapt, termination by the employee on notice or with just cause.

Retail activity is subject to several collective bargaining agreements that are territorially applicable by district. These bargaining agreements provide among other matter for categories, remuneration, meal allowance and other pecuniary allowances, holidays, normal working hours, working schedule, overtime and promotions.

Some of the collective bargaining agreements also provide for organisational requirements (for instance they require the existence of a manager for each group of salespersons with more than X people).

Trade unions

28 | Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

Portuguese law regulates the creation and activities of trade unions and workers councils.

Trade unions are entitled to:

- enter into collective bargaining agreements;
- provide services of an economic and social nature to their members;
- participate in drafting labour legislation;
- initiate and intervene in court suits and administrative procedures or defend their members' interests;
- participate in companies' restructuring processes; and
- establish relations or join international trade organisations.

Members of workers councils and representatives of trade unions in a company are only required to work a limited number of hours per month, with the remaining time being spent attending to the duties of their office without loss of salary.

The following principles apply at the workplace:

- provided that certain requirements are met, employees have the right to meet during working hours (up to a maximum limit of 15 hours per year), with no loss of salary and seniority; and
- union representatives are entitled to have a room set aside for trade union activities or establishments with at least 150 employees, and also have the right to display information in an agreed place.

Workers councils must be consulted by the company, in writing, on the following matters:

- winding up of the undertaking and requests for bankruptcy;
- any measures that lead or may lead to a substantial reduction of the headcount, the substantial deterioration of working conditions or substantial changes in the work organisation;
- changes to the criteria for employee professional classification and promotions; and
- change of location of the company or of that of any of its establishments.

CBAs can only be established between trade unions (or trade union associations) and employers (or employers associations).

Immigration

29 | Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

To enter into Portuguese territory legally, foreign nationals must meet the following conditions, they must:

- possess a travel document, such as a passport, the validity of which must outlast the duration of the required stay;
- have a valid entry visa adequate for the purpose of the stay; and
- have sufficient livelihood means for the duration of the stay, differentiated according to the period of time intended for the stay, or have a resident of Portugal vouch for their livelihood.

The different types of visas to work in Portugal are the following: short-term visa; temporary visa; and residence visa. There are general conditions for the issuing of a visa, common to all the types mentioned, where the individual must:

- not be subject to a ban from Portugal;
- not be registered, and have indications of non-admission, in the Immigration Services (SEF) Integrated Information System nor in the Schengen Information System;
- have travel insurance;
- have parental authorisation, when minor; and
- have proof of means of livelihood.

The short-term visa

The short-term visa is used in cases of a seasonal activity with a duration limited to 90 days, with the following conditions, that the individual must:

- have a signed employment contract valid for seasonal activity;
- have adequate protection in the event of a health hazard, such as health insurance and work insurance;
- have proper housing with a renting contract or equivalent;
- follow the conditions presented in national legislation, for regulated activity; and
- be a holder of valid transportation documents that ensure the return to their countries of origin.

The temporary visa

The temporary visa allows for the entry and stay in Portugal for a period of up to one year, to work as an independent contractor, to pursue scientific research activities, to teach in a higher education institution or carry out a highly qualified activity, or seasonal work for a period over 90 days.

The application for a temporary entry visa must be submitted to the embassy, consular post or section of the applicant's home country or in the consular district of their country of residence, on the appropriate form and with the following documents attached:

- two identical passport photographs;
- a passport;
- a criminal record check certificate issued by the authorities in the country of nationality or of the applicant's current residence;
- a request for a check of the Portuguese criminal record by the SEF;
- valid travel insurance, which can cover the necessary expenses for medical care, including urgent medical care as well a possible repatriation;
- copy of a return ticket;
- promise of employment contract or contract, for temporary employment; and
- a statement issued by the Institute for Labour and Professional Training stating that the promise or contract of employment refers to job offers available to third-country nationals.

The residence visa

The residence visa 'is intended to allow entry into Portugal, to request a residence permit'. This visa gives its holder license to enter Portugal twice and remain for four months.

There are different types and purposes of residence visas for:

- work for wages;
- self-employment or immigrant entrepreneurs;
- research or a highly qualified activity;
- study, student exchange, job internship or voluntary work;
- allowing college students mobility; and
- family reunification.

The residence visa for wage earners must be requested at the embassy, consular post or sections of the country of the usual residence or in a country where his or her state of residence has consular jurisdiction. The granting of this visa 'depends on the existence of job opportunities not filled by Portuguese citizens, nationals of member states of the European Union, of the European Economic Area or of a third state with which the EU has signed an agreement of free movement of workers, as well as of workers from third states that have legal residence in Portugal'.

Residence permit

The residence permit allows a foreign citizen to live in Portugal for a temporary period (temporary residence permit) or even indefinitely (permanent residence permit).

The temporary residence permit is a residence permit that allows the foreign citizen to reside in Portugal for one year, it being renewable for successive periods of two years. It must also be renewed whenever there is any change in the identification information recorded therein.

The permanent residence permit allows the foreign citizen to reside in Portugal for an indefinite period with no expiry date. However, it must be renewed every five years or whenever there is a change of personal identification details.

In addition, there are several types of residence permits such as the permit for wage earning work, voluntary work or even family reunification.

To apply for a residence permit for work for wages, the applicant must meet the following conditions, they must:

- hold a residence visa (see below);
- be absent of any fact which, if known to the authorities before issuing visas, would have prevented such granting;
- have a presence in Portugal;
- possess the means of livelihood;
- have accommodation;
- have no convictions for any crime that in Portugal is punishable with imprisonment for more than a year;
- not be in a period of ban on re-entry, following deportation;
- not be included in the Schengen Information System alert list, nor in the Integrated Information System of the SEF for the purpose of refusing entry;
- have a legal employment contract; and
- be enrolled in social security.

However, there is the possibility of applying for the residence permit without being the holder of a residence visa. This exception is applicable when the foreign citizen has an 'employment contract or an employment relationship as testified by a trade union, an association with a seat on the Advisory Board on Immigration or by the Authority for Working Conditions, has entered the country legally and remains legally and is registered with social security and timely pays its respective social insurance'.

To be eligible for a permanent residence permit, the foreign citizen needs to comply with the following conditions:

- be a holder of a temporary residence permit for at least five years;
- not have been convicted with a penalty or penalties that individually or together exceed one year in prison, in the last five years of residence in Portugal;
- have means of livelihood;
- have accommodation; and
- have basic knowledge of the Portuguese language.

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UPDATE AND TRENDS

Trends and developments

30 **What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?**

The number of new initiatives for talent retention in new technologies and in all innovative areas has exponentially increased and will certainly bring future generations of creative people to work and develop the luxury fashion industry.

On the other hand, the increase in high-profile tourism and the consistent rise of quality tourism will help consolidate Lisbon as a central nerve of the European tourism network, pushing forward the growth of luxury brand presence in the country.

In legal terms, Portugal has a new Industrial Property Code that entered into full force in effect in July 2019. Trade mark proceedings have suffered some changes and the future will tell if these were for the best.

South Korea

Yong-Hoon Cho and Hee Won (Marina) Moon

Kim & Chang

MARKET SPOTLIGHT

State of the market

1 What is the current state of the luxury fashion market in your jurisdiction?

According to market data research firm Statista, the Korean luxury fashion market amounted to US$5.3 billion (apparel and accessories, exclusive of prestige cosmetics and fragrances) in 2018 with brands under the corporate umbrellas of LVMH, Kering, Chanel, Hermès, Prada, Richemont Group, Armani Group and EssilorLuxottica, among others, carving up a substantial portion of the market as major players. However, given the size of the Korean luxury market, which was the eighth largest luxury fashion market in the world as of 2018 according to Euromonitor, nearly all major global brands are competitively represented as other independent brands also enjoy considerable consumer support.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

The development, manufacture, and supply chain for fashion goods are governed by generally applicable business and regulatory laws, including the Korean Commercial Code (the KCC), the Monopoly Regulation and Fair Trade Act (the FTL), and the Fairness in Distributor Transactions Act (the FDTA). Under this legal framework, companies develop, manufacture and supply fashion goods by choosing among or combining three main contractual arrangements:

- assertion of direct control through a Korean subsidiary or affiliate;
- use of local distributor or agent; and
- licensing arrangement.

Deciding the optimal contractual arrangement is ultimately a business judgment that needs to take into account the maturity, brand recognition and business risk assessment of each brand, so long as the resulting arrangement conforms to the relatively stringent requirements of applicable law. Accordingly, some companies choose to assert direct control over all aspects of the supply chain for fashion goods, while others opt to delegate certain aspects of their business to their local distributors, agents or licensees to minimise the business risk associated with the direct-control strategy.

Distribution and agency agreements

3 What legal framework governs distribution and agency agreements for fashion goods?

The KCC applies to the basic contractual relationship between a supplier and its distributor or agent as a general matter, while the FTL, the primary body of competition law in Korea, mandatorily applies to regulate anticompetitive behaviours, abuse of superior bargaining position, and other unfair trade practices that may arise out of the distribution and agency agreements.

Additionally, to reinforce the regulation of unfair trade practices specifically in supplier–distributor transactions, the FDTA, a special law accompanying the FTL, came into effect on 23 December 2016. The FDTA sets forth specific types of abuse of superior bargaining position prohibited in the context of supplier–distributor relationships and delegates the Korea Fair Trade Commission (the KFTC) with the authority to survey, regulate and sanction unlawful supplier–distributor transactions, including those executed prior to the FDTA's effective date of 23 December 2016.

Meanwhile, fashion goods are often sold via department stores, duty-free stores, and other large retailers; these arrangements are governed by the Act on Fair Transactions in Large Franchise and Retail Business (the Large Retailer Act).

4 What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

Luxury brands have largely shifted to the strategy of marketing their goods through directly-managed flagship stores and leased sales floors in department and speciality stores; however, many mass-appeal and fast fashion brands maintain traditional distribution and agency arrangements to hedge the business risk associated with lack of market knowledge and brand recognition, or to obtain wider coverage of the market. In particular, brands with business models founded on mass production and large-volume sales often form joint ventures or brand partnerships with large conglomerates or trading companies, to utilise the established supply networks that cover wider territory in return for share of the profits. Consignment sales, albeit concentrated among high-value goods such as timepieces and jewellery, are another long-standing arrangement in the fashion industry.

Some fashion companies have also adopted a parallel marketing structure where they directly control their goods in one channel, while opting to employ local agents or distributors to handle other channels. This parallel structure is particularly visible in duty free stores, where different brands within the same corporate family use different marketing strategies from direct-control marketing to use of local agent, distributor or licensee depending on the varying degree of brand maturity and recognition.

Distribution and agency structures in Korea are fluid as fashion brands jump from one structure to another depending on their market performance. This fluidity can result in various FTL and FDTA-related issues; for example, there can be challenges in terminating existing local distributors and agents, which are often heavily dependent on a single brand, as they may argue that the fashion brands have unfairly benefited from their efforts and investments in cultivating the market and building brand recognition. The exodus from traditional distribution and agency structures is accelerating as more fashion brands are entering the Korean market directly with foundational brand recognition built from the outside, through wide access and exposure afforded by social media and global marketing strategies.

The commonly used terms and provisions in distribution and agency agreements include:

- detailed description of IP rights and their scope of use;
- consent requirement for local marketing strategies;
- consequences of termination; and
- survival clause for certain material rights and obligations.

Import and export

5 | Do any special import and export rules and restrictions apply to fashion goods?

Fashion goods are subject to general laws governing all imports and exports, including the International Trade Act and the various free trade agreements (FTAs), as well as the Customs Act, Value-Added Tax Act and Individual Consumption Tax Act.

The FTAs that Korea entered into with the European Union and the United States entered into force in 2015 and 2012, respectively, are of particular importance to fashion goods as they afford customs benefits upon submission of certificate of origin.

Meanwhile, the Individual Consumption Tax Act generally imposes additional taxes to certain imported luxury goods, at a rate of 20 per cent of the amount exceeding the statutory base value:

- jewellery or precious metal products exceeding 5 million South Korean won in value;
- fur or leather products (excluding rabbit fur and products made therefrom, and raw fur) exceeding 5 million South Korean won in value;
- timepieces exceeding 2 million South Korean won in value; and
- luggage or bags exceeding 2 million South Korean won in value.

The individual consumption tax is levied on the person obligated to pay customs duties upon declaration of the imported product (eg, the importer).

Corporate social responsibility and sustainability

6 | What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

The following statutes contain generally applicable provisions related to corporate social responsibility and sustainability, although they neither penalise violations nor require disclosure or implementation:

- the Sustainable Development Act;
- the Framework Act on Low Carbon and Green Growth;
- the Small and Medium Enterprises Promotion Act;
- the Industrial Development Act; and
- the Framework Act on Small and Medium Enterprises.

A more directly applicable law for environmental protection is the Act on the Promotion of Saving and Recycling of Resources. Among other restrictions, this Act prohibits companies from providing disposable shopping bags at stores located in large-scale shopping malls, including department stores (with a limited exception for certain paper bags).

However, there is growing public attention and discourse regarding corporate social responsibility and sustainability efforts, so future developments can be anticipated

7 | What occupational health and safety laws should fashion companies be aware of across their supply chains?

The Occupational Safety and Health Act (the OSHA) sets forth the following requirements for all companies doing business in Korea, including fashion companies:

- prepare health and safety guidelines;
- establish evacuation plans for and conduct evacuation drills;
- implement health and safety-related training programmes; and
- perform health and safety risk analysis.

Notably, a recent amendment to the OSHA added a requirement for companies to take measures to prevent 'emotional labourers' (ie, customer-facing sales and service representatives) from suffering mental health effects because of verbal or physical abuse by customers. Such measures include temporary suspension or redirection of all customer service-related tasks upon request from an emotional labourer. Further, retaliatory action against emotional labourers making the aforementioned request is subject to criminal sanctions.

Meanwhile, the National Health Insurance Act and Industrial Accident Compensation Insurance Act require all companies to share the burden of the national health insurance programme, provide periodical health check-ups, and subscribe to an industrial accident compensation insurance policy.

ONLINE RETAIL

Launch

8 | What legal framework governs the launch of an online fashion marketplace or store?

The Act on Consumer Protection in Electronic Commerce (the E-Commerce Act) regulates all online marketplaces and stores. The general requirements for launching an online fashion marketplace or store include the following:

- business registration prior to launching the online marketplace or store,
- online retail business report to the KFTC or local government;
- value-added telecommunication service provider report to the regional Radio Management Office;
- third-party payment gateway (PG) service provider registration to receive PG service; and
- registration with the Korea Communications Commission.

In addition, the online marketplace or store's landing page and product page are required to have certain information, most notably the business information, privacy policy, terms and conditions of use, payment terms, cancellation policy, and exchange, refund and warranty terms.

Sourcing and distribution

9 | How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

Prevalent use of e-commerce has opened the Korean market to an influx of parallel imports or 'grey imports', which refer to a third party's import of foreign genuine goods, separate and distinguishable from import authorised by the foreign trademark owner, through importers legally or economically related to the trademark owner. Parallel imports are encouraged by the Korean authorities as they promote domestic competition, and they have attained mass appeal in Korea as parallel importers arbitrage steep discounts afforded by the various holiday sales (eg, Black Friday or Boxing Day) in overseas markets to undercut the fashion and luxury brand retailers in Korea.

In some instances, e-commerce has made it financially less feasible to maintain physical stores, causing brands to shift their distribution arrangements from offline stores to online platforms.

Terms and conditions

10 | What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

The Standardised Contract Regulation Act applies generally to online terms and conditions, with several mandatory provisions relating to consumer protection.

Further, the E-Commerce Act contains several requirements that should be incorporated in online terms and conditions, relating to preservation of transaction records, electronic payment security, and order cancellations, product returns, and refunds.

Online terms and conditions should also include a privacy policy that is compliant with Korean privacy laws, including the Act on Promotion of Information and Communications Network Utilisation and Information Protection (the Network Act) and Personal Information Protection Act (the PIPA).

Tax

11 | Are online sales taxed differently than sales in retail stores in your jurisdiction?

No, online sales are not taxed differently than sales in retail stores.

INTELLECTUAL PROPERTY

Design protection

12 | Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

Fashion designs may be protected under the Trademark Act, Copyright Act, Design Protection Act, and Unfair Competition and Protection of Trade Secret Act (the UCPL), and different IP rights can overlap in a single fashion design.

The Trademark Act and Copyright Act can be employed to protect fashion designs but only under stringent conditions. The Trademark Act, for example, protects fashion designs that have been registered as a trademark and that are prone to consumer confusion if misappropriated. The 'Burberry pattern' is one example that has found protection as a trademark. A fashion design can also be protected as a copyright, more specifically as a work of applied art, under very strict conditions. To be deemed a work of applied art, a fashion design must be separable from the functionality of the incorporating product. However, the nature of fashion design makes such a separation difficult and, thus, unprotected under the Copyright Act.

The UCPL can protect fashion design, notably by prohibiting counterfeits, or 'any transfer of goods that imitate the shape or form of a product manufactured by another person' for a statutory term of three years.

Meanwhile, the Design Protection Act is generally ineffectual for the purpose of protecting fashion designs. This is because design registrations under the Design Protection Act require novelty, creativity and industrial purpose, but (i) any design featured in online or print media in Korea or overseas prior to a design application is deemed to have lost its novelty, and (ii) any design created by combining designs in the public domain or easily recreated by shapes or forms widely known in Korea or overseas is deemed to lack creativity. These generally do not apply to fashion designs, given the transiency of fashion trends, affinity to borrow from past styles, and emphasis on exclusivity derived from scarcity.

13 | What difficulties arise in obtaining IP protection for fashion goods?

See question 12.

Brand protection

14 | How are luxury and fashion brands legally protected in your jurisdiction?

Luxury and fashion brands are protected under the Trademark Act upon obtaining a trademark registration. Unregistered trademarks or those that cannot be registered but are nonetheless found to have attained popular recognition can be protected under the UCPL.

A legitimate claim holder can register, possess or use a domain name. If the current owner had registered, possessed or used a domain name for illegitimate purposes, a legitimate claim holder (eg, luxury or fashion brand whose trademark had been misused, misappropriated or diluted by the domain name) may seek cancellation of such a domain name, or request transfer of registration through a court proceeding under the Internet Address Resources Act or mediation proceeding before the Internet Address Dispute Resolution Committee.

Licensing

15 | What rules, restrictions and best practices apply to IP licensing in the fashion industry?

General rules under the KCC, the FTL and the Review Guidelines on Unfair Exercise of IPRs promulgated by the KFTC apply to IP licensing in the fashion industry.

The best practices for IP licensing involve protection against misuse or overuse of IP rights that can dilute or hurt the brand reputation, such as by devising mechanisms to monitor the use of licensed IP rights. It is essential to include a clear description of the IP rights being licensed and scope of permitted use, as well as consent requirement for any use of IP rights beyond that scope. Moreover, to guard against residual effects in the event of terminating IP licensing arrangements, the consequences of termination should be clearly defined to secure control over use of IP rights even after termination.

Enforcement

16 | What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

IP holders can bring civil or criminal actions and file formal complaints with the Korea Trade Commission (the KTC) and the Korea Customs Services (the KCS) to enforce their IP rights. At the court level, two types of actions are available: (i) civil suit seeking permanent injunction against the manufacture, import, and sale and damages resulting therefrom; or (ii) administrative suit seeking preliminary injunction against the manufacture, import and sale.

An administrative suit is particularly effective for fashion companies when considering the relatively short product lifecycle of fashion goods.

IP holders can also petition the KTC to investigate unfair trade practices including the manufacture, import, export and sale of goods that infringe IP rights, and to impose corrective and penal measures on infringements.

By filing a formal complaint with the KCS, IP holders can seek suspension of release of imported or exported goods that infringe IP rights. This action is of particular import to foreign companies as it may be used to block counterfeits flowing in and out of Korea, and also pre-empt any dilution of IP rights both in Korea and abroad.

Finally, an infringement on IP rights as well as violation of the UCPL may be thwarted by bringing a criminal action with the possibility of a prison sentence and criminal fine.

All the various legal actions and administrative complaints may be taken simultaneously to enforce IP rights, and in practice, preliminary injunctions are often sought while other actions and complaints are pending to prevent any misuse, misappropriation or infringement of IP rights.

DATA PRIVACY AND SECURITY

Legislation

17 What data privacy and security laws are most relevant to fashion and luxury companies?

The PIPA is the primary data privacy and security law in Korea. However, if a company provides online services through a website or mobile application and processes the personal information of users of such services, the Network Act will apply (taking precedence over the PIPA). Both apply to 'personal information', which is defined broadly to include any information that can be used to identify a living person.

Compliance challenges

18 What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

Korean privacy laws strictly require opt-in consent, with detailed requirements for obtaining informed, express and prior consent for the collection, use, transfer and storage of personal information. Luxury and fashion companies often seek to share customers' personal information with overseas headquarters or corporate affiliates, but specific consent is generally required even for transfer within the same corporate family.

Korean privacy laws also have specific requirements for security measures (ie, technical, organisational and physical measures) intended to ensure the safety of personal data. Hence, databases employed by fashion and luxury companies built in view of foreign privacy regulations often require reconfiguration to comply with the data privacy and security requirements in Korea.

Further, Korean data privacy laws require specific documents relating to personal information processing, such as a privacy policy, data processing agreement and personal data internal management plan. They also require that companies handling personal data appoint privacy-specific personnel, including the Chief Privacy Officer and Chief Information Security Officer, to monitor and supervise the flow of personal information.

Innovative technologies

19 What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

The very strict opt-in regime in Korea requires that luxury and fashion retailers obtain informed, express and prior consent to use customers' personal data for marketing purposes. Any attempts to deploy innovative technologies must take these requirements into account. To the extent facial recognition or other biometric data-based technologies use customers' personal information, the PIPA and the Network Act would apply; for example, companies are required to encrypt any biometric data stored or transferred for use in marketing activities.

Content personalisation and targeted advertising

20 What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

No specific law regulates the processing of online behavioural information or online targeted advertising under the current regulatory regime. However, the Korea Communications Commission, which is the primary government authority enforcing the Network Act, issued ad hoc Guidelines on the Protection of Personal Information regarding Targeted Online Ads (the Online Ad Guidelines) in 2017 in an effort to address some of the privacy and security law concerns associated with data-driven inferences regarding consumer behaviour. The Online Ad Guidelines define the method by which a provider of targeted advertising services should process behavioural information and the rights that such a provider should guarantee the users. To elaborate, the Online Ad Guidelines stipulate four main principles that should be followed to protect behavioural information: (i) ensuring transparency in collection and use; (ii) guaranteeing user control; (iii) ensuring the security of behavioural information; and (iv) increasing awareness and reinforcing remedies for damages.

ADVERTISING AND MARKETING

Law and regulation

21 What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

All advertising and marketing communications, including those by luxury and fashion companies, are required to be compliant with the Fair Labelling and Advertising Act (the FLAA) and are supervised by the KFTC, while specific types of advertising and marketing communications may come under the purview of other applicable laws and regulations. Under the FLAA, false, exaggerative, deceptive, unfairly comparative or slanderous advertisements are prohibited and may be subject to criminal liability.

Broadcast advertising and marketing communications are subject to review by the Korea Communications Commission and the Korea Communications Standards Commission under the Broadcasting Act. These Commissions are tasked with identifying commercial messages, prohibiting misleading advertising that is exaggerative, false, deceptive or overly comparative, restricting indecent, undignified, sexual or discriminatory advertising, and controlling certain advertising practices for specific product categories.

Any outdoor advertising and marketing communications, including billboards and outdoor signage, are subject to review by local governments under the Act on Management of Outdoor Advertisements and Promotion of Outdoor Advertisement Industry (the Outdoor Advertising Act). Each level of local government is authorised to grant or revoke permits and to order the removal of outdoor advertisements upon review. The Outdoor Advertising Act expressly prohibits various types of ad content, including content that is obscene, inappropriate for youth, supports or instigates racial or gender discriminations and human rights violations, or otherwise prohibited by other laws and regulations.

The Act on the Promotion of Newspapers and the Act on Promotion of Periodicals Including Magazines govern commercial messages in printed media and impose similar restrictions as those outlined above.

Finally, luxury and fashion companies are subject to certain restrictions when providing products, gifts, discounts or other items of value to members of the media, as employees of public and private media are considered 'public officials' under the Anti-Graft Act. The Anti-Graft Act imposes criminal penalties for any benefits given to public officials (including media) exceeding 1 million South Korean won per instance (market value); other benefits may be subject to administrative penalties, with certain exceptions such as 50,000 South Korean won for gifts. These restrictions apply even in the absence of quid pro quo or corrupt intent. Given the generally high price-point for luxury and fashion products, and common practice of 'seeding' items among journalists and other influential individuals, the Anti-Graft Act can affect how marketing strategies are implemented in Korea.

Online marketing and social media

22 What particular rules and regulations govern online marketing activities and how are such rules enforced?

The provisions in the FLAA and other applicable laws govern online marketing activities. In addition, the KFTC has promulgated ad hoc Review Guidelines on Online Advertising to provide detailed rules for online marketing activities. Under the guidelines, online marketing activities should make clear representation of the goods or services being marketed and should not hide, blur, remove or make illegible any detail that could affect a consumer's purchasing decision. Additionally, online marketing activities should clearly communicate that the contents shown or represented are for commercial purposes.

The KFTC has also promulgated the Review Guidelines on Labelling and Advertising Regarding Recommendations and Guarantees to regulate social media influencer marketing. Under the guidelines, companies are required to ensure that influencers clearly disclose their commercial interests (compensation, sponsored products, etc) for each recommendation or guarantee made in relation to a product or service (eg, a sponsored post). Where an influencer fails to disclose the commercial interests in a recommendation or guarantee, this is construed as deceptive advertising prohibited under the FLAA, thus subjecting the company to corrective action and an administrative fine.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 What product safety rules and standards apply to luxury and fashion goods?

The Electrical Appliances and Consumer Products Act (the Consumer Products Act) and the Special Act on the Safety of Children's Products (the Children's Products Act) are product safety laws that apply to luxury and fashion goods.

The Consumer Products Act requires safely attached tags or packaging containing information on materials used, manufacturer, country of origin and handling instructions. This information should, in principle, be labelled in the Korean language.

The Children's Products Act is an addendum to the Consumer Products Act that requires even stricter product safety requirements on 'goods or parts or accessories thereof mainly designed for, and used by or used for children aged 13 or younger'.

Product liability

24 What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

The Product Liability Act applies to luxury and fashion goods as a general matter. There has been no notable recent product liability litigation or enforcement action in relation to fashion goods.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

Local ownership is not a requirement for M&A or joint venture transactions in Korea. However, some relevant issues warrant consideration in M&A or joint venture transactions, such as adequacy of IP protection, compliance with data privacy laws, and conformity of existing distribution or agency structures to the FTL and the FDTA.

Meanwhile, when a designer seeks to build a business around his or her own name, there can be limitations from the trademarks perspective. For example, a surname common in Korea by itself cannot be registered as a trademark under the Trademark Act, unless the surname is incorporated into a logo or drawing. However, foreign surnames are permitted as a standalone trademark. Hence, designers building a business around their surname may obtain trademark protection if the name is not a widely used surname in Korea or incorporated into a trademark-worthy design.

Competition

26 What competition law provisions are particularly relevant for the luxury and fashion industry?

The competition law provisions pertinent to the luxury and fashion industry (the FTL and FDTA) include prohibitions against resale price maintenance, unfair refusal to deal, coerced purchase, coerced sales targets, coercion to provide economic benefits, abuse of superior bargaining position and unfair restrictions to product returns.

A competition-related government policy that is particularly relevant for the luxury and fashion industry is the government's encouragement of parallel imports, discussed in question 9. The government's rationale is that parallel imports, often sold at a lower price, benefit consumers, expand consumers' right to choose and promote intra-brand competition.

EMPLOYMENT AND LABOUR

Managing employment relationships

27 What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

Fashion companies are required to comply with generally applicable employment laws such as the Labour Standards Act, which governs the overall management of relationships with employees.

Given the pervasive use of temporary agency workers or other part-time workers as salespersons in the fashion and luxury industry, the Act on the Protection of Temporary Agency Workers is particularly relevant. Under this law, companies may use freelancers and interns as fixed-term and part-time employees. However, notwithstanding the formalities of a service contract, freelancers or independent contractors are deemed regular employees if they are under direct supervision and control by the company in terms of working hours, rest period and performance evaluation. In such a case, freelancers or independent contractors are entitled to certain statutory employment benefits, including statutory severance pay, paid annual leave and strict 'just cause' requirement for termination and other disciplinary action.

Further, fixed-term or part-time employees including freelancers, interns and independent contractors are subject to the Act on Protection of Fixed-Term and Part-Time Employees, which stipulates a strict two-year term limit for fixed-term service contracts. For fixed-term service employees who have worked for over the two-year limit, companies are obligated to hire them as regular employees.

Meanwhile, under the Employment Promotion and Vocational Rehabilitation of Persons with Disabilities, companies of a certain size are required to employ a statutorily prescribed number of individuals with disabilities.

Trade unions

28 Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

All companies, including fashion companies, are subject to the same legal and regulatory considerations when dealing with trade unions or work councils, under the Labour Standards Act, Trade Union and Labour Relations Adjustment Act, and Act on the Promotion of Workers' Participation and Cooperation. Under this legal framework, trade unions or works councils can be formed to negotiate with company management on behalf of their members, and employers are required to establish a labour-management council to facilitate such negotiations. Employers are also prohibited from engaging in the following unfair labour practices in relation to trade unions or works councils, subject to criminal penalties:

- taking discriminatory actions against union activities;
- requiring anti-union contracts;
- refusing to engage in collective bargaining; and
- controlling or interfering with the formation or operation of trade unions.

Immigration

29 Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

As with other companies, fashion companies must comply with the Immigration Act and Act on the Employment of Foreign Workers, which require different types of visas for different assignments or entities located in Korea. The following visa types are often used by companies seeking to move staff across borders or hire and retain talent in Korea:

- D-8 Visa: a long-term visa for expatriates of a Korean subsidiary or joint venture assigned to move from a foreign affiliated company;
- D-7 Visa: a long-term visa for expatriates of a branch or liaison office of a foreign national company in Korea who have been assigned from and worked with the head office, branch or other affiliates for at least one year prior to the Korean assignment; and
- E-7 Visa: a visa for foreigners directly hired by a Korean company, including a branch or a foreigner-invested company.

Additionally, if a foreign worker is traveling with family, an F-3 Visa is the most common dependent visa for family members of foreigners working in Korea. Its effective period runs in parallel to that of the work visa of the foreign worker.

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UPDATE AND TRENDS

Trends and developments

30 What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

In the backdrop of the continued success of Hallyu ('Korean Wave', a coinage representing the dispersion of Korean pop culture across Asia), Korea was presented with an opportunity to become a major tourist destination, which has in turn boosted the appeal of purchasing fashion goods in Korea's many high-end duty-free stores.

Meanwhile, the 'jik-gu' purchasing pattern ('direct purchase' in the Korean language, which refers to the recent increase in direct purchases from overseas that are shipped to Korea) has made the fashion goods available more diverse. This expansion of the market beyond the traditional confines of a national market has enabled smaller foreign luxury and fashion brands, which were traditionally constrained by limited resources, to survey and later enter the market.

Further, the growing influence of Korean celebrities and other fashion influencers on how we dress has elevated social media platforms as key marketing tools for reaching younger consumers. However, the rapid adoption of social media platforms among fashion companies and growing marketing power of celebrities and influencers have also attracted the attention of the KFTC, which has begun investigations on 'recommendations or endorsements' of goods and services by influencers, and promulgated ad hoc rules and regulations targeting such influencer-based marketing strategies.

Spain

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MARKET SPOTLIGHT

State of the market

1 What is the current state of the luxury fashion market in your jurisdiction?

The luxury fashion industry in Spain plays a significant role in the European and global market, but a closer look reveals that this significance must in fact be seen from three different angles: from the brand side; from the manufacturing side; and from the consumer side.

In relation to the brands, Spanish companies are among the world leaders in fast-fashion (with Inditex – of Zara fame – or Mango being the most notable Spanish players) but they are not part of the select group of the world's luxury brands. There are a number of well-known Spanish luxury brands, such as high-end leather and fashion group Loewe (part of French luxury group LVMH), but their significance in the global retail economy is largely outweighed by that of the low-cost fashion brands that have made Spain a global player.

From the perspective of manufacturing, many Spanish companies supply goods and products to the world's leading luxury and fashion brands or act as manufacturer for other groups. While textile confection, traditionally important in Spain, has largely moved away to other regions over the last twenty years (northern Africa, Turkey, Asia), the manufacturing of other consumer goods for international fashion and luxury brands (notably: shoes and leatherwear, as well as cosmetics and perfumery) continues to be important for the Spanish industry.

On the consumption side, Spain is of course a large and growing market, which does not go unnoticed to any important fashion or luxury brand. All the international brands are present in Spain, through their own brick-and-mortar stores, third-party multibrand retail points of sale, or direct-to-consumer online sales. They see how the Spanish customer shows potential to spend more on luxury and fashion, particularly now that a long period of economic downturn has come to an end for a large part of the population. That said, investment bankers, advisers and retail experts all agree that we can still expect a 'shake-up' in the Spanish retail sector, as there continues to be excess capacity, particularly in large department stores and fast-fashion franchisee networks. There is an expectation that, even after many restructurings and closures, a further reduction and rationalisation of certain retail networks will be seen in the mid-term. This is particularly true for certain retailers offering low and mid-priced products, and is less relevant for the high-end luxury and fashion sector, which is more stable in Spain overall.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

Spanish professionals and companies are involved in every step of the creation and supply of fashion luxury goods, from design to development and manufacturing, to supply and logistics or fulfilment, on to wholesale (business-to-business) and retail distribution (business-to-consumer), offline and online. To the extent that they operate their business in the territory of Spain, EU and Spanish legislation applies to their activities. There is, however, no overarching legal framework that applies to all aspects of the supply chain or that applies exclusively to the fashion industry in Spain.

On the retail side, Spain has been a relative latecomer to the e-commerce world, but has caught up quickly after most of the world's leading online retailers launched their local sites in Spain, most notably in the course of 2010 and 2011.

Spain's contract law system is comparable to that of most continental European jurisdictions and offers a robust product liability regime and warranty protection against defects. In addition, on the regulatory side, the consumer protection and retail trade regulations are well developed and directly influenced by the applicable EU Directives, as are e-commerce rules and data protection requirements.

The one particularity of the Spanish legal system is that while contract law and civil law more generally are a matter of national (state-wide) law, the protection of consumers and, to some extent, the regulation of trade, are delegated to the Spanish regions. This implies that a retailer who, for instance, wants to launch a product or a promotion in the Spanish market, needs to take into account not only the national rules but also the specificities of the regional legislation in the territory where the products are offered.

On the manufacturing, supply and distribution side, a variety of contractual arrangements apply. We often see Spanish companies acting as:

- suppliers of goods and raw materials to other manufacturers;
- suppliers of manufacturing and tolling services to other brands;
- distributors or agents for brands, in part or the whole of the Spanish market;
- franchisees or master franchisees of brands in part or the whole of the Spanish territory;
- franchisors of Spanish brands seeking international expansion, via third-party franchisees abroad;
- suppliers of logistics, fulfilment and warehousing services in Spain; and
- suppliers of ancillary support services in Spain (call centres, regional procurement or sales hubs, aftersales services, etc).

To the extent that the principle of 'freedom to contract' applies in Spanish contract law, each of these contractual arrangements can be tailor made and adjusted to the particular business need in each case. The only particularities that, in general terms, are worth pointing out in this context are:

- the application of a specific Law on Commercial Agency (Act 12/1992) in the case of agents – this law offers protection to commercial agents in Spain, in line with the EU rules on commercial agency;
- the absence of a specific distribution law in Spain (general rules of contract law apply, and, to a certain extent, the Law on Commercial Agency is applied by analogy in case of termination of the distributor);
- the application of the rules on franchise contracts under Spanish law (Royal Decree 201/2010); these are, however, very basic and not as sophisticated as those that can be found in other jurisdictions;
- specific legal and regulatory requirements that may apply for certain products (eg, cosmetics, jewellery, product labelling); and
- the need for specific regulatory consents and permits in the industrial context (eg, for transportation and logistics, for most manufacturing processes, etc).

In the context of supply of goods specifically, typically the parties contractually opt for Spanish law in the choice-of-law clause, and exclude expressly international rules or conventions on trade and supply.

Distribution and agency agreements

3 What legal framework governs distribution and agency agreements for fashion goods?

As described above in relation to the various layers of the supply and distribution chain, Spain is a country where agents and distributors have traditionally played an important role – particularly in the fashion business. International brands, including luxury fashion brands, heavily relied on commercial agents and wholesale distributors in Spain to cover the large market that Spain represents.

That said, it is expected that the role of commercial agents will reduce over time. After all, in a world where direct-to-store and direct-to-consumer is made much easier thanks to efficient online systems and low-cost logistics networks, many brands (and their financial backers) are starting to reconsider the use of agents, as their sales commissions represent a significant cost that in current times cannot always be justified.

We can therefore expect an increase in termination of agency agreements across Spain in the future, with the resulting discussions around end-of-contract compensation and related claims. A similar trend may appear in relation to distributors in Spain, particularly now that logistics across Europe has become so fluid.

As stated above, there is a specific agency law in Spain (Act 12/1992) that mirrors to a large extent the EU legislation on agency protection. There is, however, no specific law on distribution relations (unlike other EU countries such as Belgium) and the contract with distributors is, therefore, regulated by general contract law.

4 What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

The Spanish fashion sector offers a whole array of contractual arrangements, as described in question 2.

As parties are free to negotiate the terms of their collaboration, there may be in certain cases some variations on the typical contract structures (such as agency, distribution or franchise) and sometimes 'hybrid' contracts can be found, depending on the product or retail model at hand. But this is no different from what can be seen in other European jurisdictions – Spain does not offer any particularity in this regard.

While for more common fashion goods there are no specificities from a legal technical perspective in Spain (other than the fact that these products often rely on franchisee structures to allow for rapid store expansion), it is precisely the luxury brands – particularly jewellery, fashion, cosmetics and high-end perfumery – where the contractual environment is typically much more sophisticated and restricted. Selective distribution systems are often used in these cases. As in other EU jurisdictions, this system allows a supplier to have more control over the resale of its products, protecting its brand reputation and safeguarding quality and customer experience.

Import and export

5 Do any special import and export rules and restrictions apply to fashion goods?

No special rules apply in Spain for luxury and fashion goods specifically. As with other products, goods that come from outside the EU are subject to customs and import and export regulations. Goods that circulate within the EU benefit from much more flexibility, which has in turn prompted the appearance of EU-wide fulfilment centres from which various countries are served at the same time, as opposed to having a local fulfilment structure in each country.

It is worth mentioning that Spain has a large counterfeiting issue. Customs and IP lawyers, alongside law enforcement authorities, are often involved in freezing or seizing 'pirate' or counterfeit goods in Spanish ports and airports, in a constant battle against the 'copycat industry', which causes important losses for brands and manufacturers in Spain and Europe.

Corporate social responsibility and sustainability

6 What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

International standards and EU requirements apply in Spain. Operators in the Spanish fashion and luxury sector are subject to obligations that are similar to other countries, and large Spanish retail companies (particularly publicly traded ones such as Inditex or Cortefiel) have sophisticated policies in place for sustainable sourcing and corporate social responsibility more generally, in line with international expectations.

7 What occupational health and safety laws should fashion companies be aware of across their supply chains?

Depending on the segment of the fashion and luxury in which a company operates, health and safety issues can be important or not significant at all. Obviously, it is the manufacturing companies that face the highest challenges in complying with the high standard of health and safety expected under Spanish law, but this is not specific to the fashion industry and applies for all manufacturing sites across all industries in Spain. We therefore see no special requirements for the fashion and luxury industry specifically.

ONLINE RETAIL

Launch

8 | What legal framework governs the launch of an online fashion marketplace or store?

When a company launches an online store in Spain, the following topics need to be considered:

- sales restrictions (what products are prohibited or subject to limitations in Spain? For example, does any age rating apply to the products? Does the product contain any prohibited fabrics or protected components?);
- pricing restrictions (are any of the products subject to particular pricing requirements that limit my commercial strategy? This is unlikely to be the case in fashion and luxury goods, but, for instance, books are subject to a fixed price regime in Spain);
- adaptation to Spanish law of terms and conditions of use, terms and conditions of sale, privacy policy and cookie policy (can I deploy the terms that I generally use in other countries directly in Spain or do they need significant changes as a result of 'localisation'?);
- online payment means (what secured payment process do I want to offer to my customers, and do I want to offer instalment payment or consumer credit?);
- IP protection legislation (are the products, trademarks or domain names likely to infringe a third party's rights in Spain?);
- waste and packaging requirements (is the type of packaging that I use, or the products that I sell, subject to specific requirements or obligations under waste and environmental rules in Spain?); and
- specific Spanish and regional requirements for advertising, promotional campaigns and marketing generally (publicity, peer reviews, pricing display, discount offers, contests and other promotional activities).

The main bodies of law that are relevant in this context are: the Spanish Consumer Protection Law (Act RDL 1/2007), the Spanish Law on General Terms and Conditions (Act 7/1998), the Retail Trade Law (Act 7/1996), the Information Society Services Law also referred to as the E-Commerce Law (Act 34/2002), the General Advertising Law (Act 34/1988), the Payment Services Law (Act RDL 19/2018), the Payment Terms egislation (Act 3/2004 and related rules), the Unfair Competition Law (Act 3/1991), the EU-wide General Data Protection Regulation 2016/679 and the related Spanish legislation (Act 3/2018), and the relevant IP, environmental and sector-specific regulatory legislation that may apply in each case.

In certain matters (eg, consumer protection, retail trade) the regional requirements – for instance, those that apply in the regions of Madrid or Catalonia – should also be taken into consideration in addition to the national legislation mentioned above, depending on the regions where products are offered or promoted.

Furthermore, soft-law regulations from self-regulatory bodies such as Autocontrol (which regulates advertising generally) and Confianza Online (which provides rules for e-commerce) are also expected to be taken into consideration by retailers.

Sourcing and distribution

9 | How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

E-commerce in Spain is growing quickly, and the Spanish sourcing, distribution and logistics arrangements are adapting to it rapidly. That said, the evolution that can be seen in Spain is not different from what occurs in other European countries, nor is there any particularity – from a legal perspective – in fashion and luxury specifically, as compared to other industries in Spain.

Terms and conditions

10 | What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

Most terms and conditions (T&C) that are used in other EU countries can normally easily be implemented in Spain, with few adaptations. This is because the legal expectations, as well as the specific requirements, for instance in consumer protection in Spain, are aligned with EU-wide requirements (notably, the EU Consumer Rights Directive 2011/83). In overall terms, a retailer launching an online point-of-sale in Spain can use T&C that are substantially similar to the ones it uses in its other markets in the EU, provided that they are translated into Spanish (and in Catalan if the Catalan market is also addressed) and contain clear and unequivocal language and do not provide for imbalanced or abusive clauses. Having said that, prior to the roll-out of any T&C in Spain, a review from the perspective of Spanish consumer law (notably Act RDL 1/2007) and the Law on General Terms and Conditions (Act 7/1998) is recommended.

Tax

11 | Are online sales taxed differently than sales in retail stores in your jurisdiction?

VAT applies to products sold online as it does on those sold offline. The general VAT rate is 21 per cent and there are no particularities for fashion.

INTELLECTUAL PROPERTY

Design protection

12 | Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

Different, overlapping IP rights can apply in Spain in relation to the design of fashion and luxury products with the most notable one being design rights. The fashion and luxury goods, however, are not governed by a special product-specific set of rules, and IP rights are governed by the same rules as those that apply to other goods in Spain.

13 | What difficulties arise in obtaining IP protection for fashion goods?

The difficulties that may arise in Spain are not substantially different from those that companies may face in other jurisdictions. On the other hand, the legal issues relating to trademark protection, copyright and design rights, and ownership of works in Spain are similar to those that other industries face.

Brand protection

14 | How are luxury and fashion brands legally protected in your jurisdiction?

Brands can be protected and registered as trademarks before the Spanish Patents and Trademarks Office. Generally, any sign that allows to distinguish a product or service of an undertaking from those of another can be registered. In addition, brand owners can also register domain names containing their brand name (.es) and reserve a corporate name for their legal entity that includes the brand. Oppositions and prior reservations (legitimate or illegitimate) sometimes create difficulties in this process. A prior trademark, domain name and corporate name search is therefore advisable.

Licensing

15 | What rules, restrictions and best practices apply to IP licensing in the fashion industry?

There are no specific rules that apply to IP licensing in the fashion industry in Spain. The scope of the licence granted to a manufacturer, for example, will be critical but it will also be determined by whatever has been agreed on selective distribution (as referred to further in question 25).

Enforcement

16 | What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

The enforcement system in Spain is robust and reliable. Part of the courts show a high degree of specialisation in IP and it is recommendable to seek advice from specialist IP lawyers. On the other hand, the law enforcement authorities have experience in handling copycat and counterfeit cases, including the freezing or seizure at ports or trade fairs.

DATA PRIVACY AND SECURITY

Legislation

17 | What data privacy and security laws are most relevant to fashion and luxury companies?

The General Data Protection Regulation (GDPR) and Spanish data protection rules (including those contained in the Spanish e-commerce legislation that regulate matters such as, for example, the use of cookies) apply across Spain and across all industry sectors and are therefore no different in the fashion and luxury sector specifically. The harmonisation of privacy rules has now come to its highest level ever, as a result of GDPR, and therefore the differences between Spain and other EU countries in this field are less significant than before, although there are still some variations to be taken into account.

Compliance challenges

18 | What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

The increasingly sophisticated customers of retail brands generally and those of fashion and luxury companies in particular expect near-perfection not only in their customer experience but also in the handling of their personal data. Security and compliance in privacy therefore appear at the top of retailers' executive agenda, but this is no different in the fashion luxury sector or in Spain than it is in other industries or EU countries.

Innovative technologies

19 | What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

Artificial intelligence, facial and biometric recognition and other high-tech tools increasingly appear in Spain, on the back-end as well as on the consumer facing aspects of the luxury and fashion retail experience. Data-driven technologies increasingly coexist with other tech aspects of the retail world.

While Spanish consumers (and manufacturers) were arguably somewhat slow to jump on this trend several years ago, currently Spanish companies and consumers are very much used to, and in fact expect, the latest technology and IoT in the supply chain and in customer experience. This often poses legal challenges, as these technologies do not always find an immediate fit in existing legislation (eg, complex data protection issues, privacy-by-design, data protection impact assessments, information obligations, customer consent requirements, payment and credit regulations, etc) but this is not specific to Spain or the fashion and luxury industry.

Content personalisation and targeted advertising

20 | What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

Overall, the challenges are not unique to the fashion and luxury industry and are not specific for Spain. Arguably, the one item that offers more sensitivity in this sector is the fact that luxury brands typically offer a customer experience that is very personalised. Detailed preference profiles and customisation, on the one hand, and consumers' increasing mistrust of Big Data, offer high-end retailers specific legal challenges that require expert advice on data protection under the GDPR and Spanish privacy rules.

ADVERTISING AND MARKETING

Law and regulation

21 | What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

The fashion and luxury sector in Spain is subject to the advertising and marketing regulations that apply to consumer-facing companies generally (see question 8 for references to legislation and advertising soft law) in addition to the GDPR and Spanish privacy rules referred to above.

The only particularity in this industry is possibly that fashion companies are usually more engaged in 'season sales' promotions than other consumer goods sellers are. These season sales are subject to requirements that relate to price displays and advertising that are set out in the Spanish retail trade law (particularly articles 24 and following of Act 7/1996 and the related regional regulations), but while this was highly regulated in the past (with fixed periods within which season sales could be conducted, limited durations, etc), this was made more flexible as a result of legislative amendments in 2012 that aimed at giving Spanish retailers more freedom and competitiveness. The current legal framework offers, overall, flexibility and allows retailers to organise Christmas and summer sales, or even Black Friday promotions and other international retail trends, in a manner that is not subject to many rules or requirements – as long as consumers are given fair and clear information on the goods and prices offered.

Online marketing and social media

22 | What particular rules and regulations govern online marketing activities and how are such rules enforced?

The Spanish fashion and industry does not have specific online marketing rules, distinct from those that apply to retail generally.

That said, of particular interest for fashion and lifestyle companies is the fact that the Spanish Advertisers Association and the self-regulatory advertising body Autocontrol are developing a code of conduct around the use of social media influencers in the context of advertising and marketing, as a result of European industry recommendations. Autocontrol is also focusing on the effect of social media on advertising in its general advertising Code of Conduct, but these developments are still early-stage and are not 'hard law' and become only enforceable among members of Autocontrol.

For now, the only mandatory legislation that applies in this context is contained in the Spanish Information Society Services Law (E-commerce Law), the GDPR and Spanish privacy rules, the General Advertising Law, and the Unfair Competition Law (mentioned in question 8), with the practical effect being that the contents must be clearly identified as a commercial communication and that the advertiser must be identified.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 What product safety rules and standards apply to luxury and fashion goods?

In general, luxury and fashion goods do not have their own specific product safety legal regime. They fall under the EU General Product Safety Directive and other product-specific EU legislation that is not unique to Spain.

Product liability

24 What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

In Spain a consumer's product liability claim for luxury or fashion goods is governed by the general regime applicable to all consumer goods, which does not discriminate between one sector and another. There have been no recent cases that are particularly notable in terms of product liability litigation or enforcement in Spain specifically.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

The structuring and implementation of M&A and joint ventures in the Spanish luxury and fashion sector does not differ from what can be seen in similar transactions in the industry in other European countries. Possibly, the importance of store lease agreements for high-street retail networks in Spain may bring a buyer to structure a takeover of a retail business as a share acquisition rather than as an asset transfer (as the latter would imply an assignment of all contracts, including lease agreements, with the risk of rent increases pursuant to Spanish lease regulations). But we have seen both share deals and asset deals in the Spanish retail industry generally and the fashion and luxury sector in particular; there is therefore no 'one size fits all' approach for transactions in this industry.

Competition

26 What competition law provisions are particularly relevant for the luxury and fashion industry?

The fashion and luxury sector has taken a prominent role in many high-profile competition law cases at a European level (such as the Court of Justice of the European Union ruling in the *Coty* case or the *Pierre Fabre Dermo-Cosmétique* matter) but these are not specific to Spain. They are EU-wide cases that have created precedent case law and have had a direct influence on how selective distribution, e-commerce and pricing should be conducted in the EU generally, including Spain.

On the other hand, the regulatory focus of some national governments (such as in the UK, France and Germany) on e-commerce, abuse of dominant position and pricing in the retail industry has not (yet) been as intense in Spain, where the national competition authorities and retail trade regulators have been less persistent than in other countries.

One interesting development for retail in Spain though, is that the legislator has removed the general prohibition to sell products below their acquisition cost. Until recently, Spanish retail trade legislation (Act 7/1996) allowed retailers to freely set the retail price of the products they sold, but they could never go below the 'cost floor' (ie, the amount that the retailer paid for acquiring the product) save in exceptional circumstances such as liquidation sales. This limited the pricing strategy of many large retailers. This general prohibition was lifted in 2018. Accordingly, selling below cost is now allowed except if it harms fair competition or is misleading to consumers.

EMPLOYMENT AND LABOUR

Managing employment relationships

27 What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

The use of freelancers is not uncommon in the fashion industry, particularly in business segments where the use of self-employed workers is the norm (design, PR, imagery and photo shoots, etc). In most cases, however, these are 'real' freelancers who work at their own discretion and risk and do not act as quasi-employees under direct supervision of a fashion company. We therefore do not necessarily see a high risk of reclassification into employees in these specific cases.

On the other hand, fashion companies on all steps of the manufacturing and supply chain also often use interns and trainees. In Spain, the regulation of these positions is, however, not specific to the fashion industry (typically, an agreement must be signed with a university or school to allow its students to work at a company – and in the case of the fashion industry, this is often with design schools or industrial engineering institutes).

The one point which companies should pay attention to, however, is the ownership and assignment of any IP developments: if a brand works with freelancers or employees, it must ensure that any brands, designs, models, manufacturing processes or IT developments are clearly owned by the employer and not the individual. For employees, this is usually the case by operation of law (even if the employment contract is silent, Spanish employment and IP law provide that ownership of IP is for the employer) but for freelancers and self-employed workers, a specific IP assignment clause should be inserted in the contracts.

Trade unions

28 Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

There are no special rules in Spain relating to luxury and fashion companies and their relationships with trade unions or works councils. On this point this industry is subject to the same rules as other industry sectors in Spain (setting aside particularities of collective bargaining agreements that exist in certain manufacturing sectors; for example, textile manufacturing or fashion retail, at the level of the company, the province, the region or nationally – but this would relate to compensation, work categories, working time, and other granular aspects of work relations that are not relevant in the context of this chapter).

Immigration

29 Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

Not applicable.

UPDATE AND TRENDS

Trends and developments

30 What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

See answers to earlier questions where market trends and expectations have been described.

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MARKET SPOTLIGHT

State of the market

1 What is the current state of the luxury fashion market in your jurisdiction?

Many high-end UK fashion brands have suffered in recent years, partly as a result of the rising costs of prime store locations and competition from online-only retailers, such as ASOS and Boo Hoo. However, according to a report by Walpole, the trade body for the British luxury sector, sales from the UK luxury creative and cultural industries, including designer clothes and footwear, luxury jewellery, luxury eyewear and high-end beauty, have grown 49 per cent in the four years from 2013 to 2017. British luxury is now worth £48 billion to the British economy, with sales from luxury apparel and footwear accounting for nearly £6 billion in 2017. The report suggests that the British luxury sector will continue to grow rapidly in the medium term; however, this will be heavily dependent on Brexit, addressed further in question 30.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

Supply chains for fashion goods cover a series of elements ranging from the first conceptualisation of the product, through development and production, to the sale of the product, whether online or offline, to the end purchaser. As a result, there is no overarching legal framework that applies to all aspects of the supply chain or that applies exclusively to the fashion industry. Any supply chain is made up of a series of buyers, sellers and suppliers of both goods and services all entering into different types of contract. The impact of and application of the legal regime that applies to the supply of goods or services often depends on whether the transaction is between two businesses or a business and a consumer.

Contract law

The applicable contract law in England and Wales encompasses both statute and the common law and applies to all parts of the development, manufacture and supply of fashion goods. The basic principle is that contracting parties are free to contract as they wish, subject to some important protections for contracting parties, such as controls on the exclusion and limitation of liability arising from the supply of goods or services. The key sources of exposure to liability in supply chains are breach of contract, tort and breach of statutory requirements. In business-to-business relationships the Unfair Contract Terms Act 1977 prohibits the exclusion or limitation of liability for death or personal injury to a natural person or their estate resulting from negligence. This prohibition is replicated for business to consumer relationships in the Consumer Rights Act 2015. Other contractual restrictions on liability may be subject to reasonableness or fairness requirements.

Supply of goods or services

The supply of goods or services between businesses is subject to fairly light regulation. The supply of goods is primarily regulated by the Sale of Goods Act 1979 and the Sale and Supply of Goods and Services Act 1982 governs the supply of services. These statutory regimes cover the core aspects of the supply of goods or services, mainly by filling in any key gaps in supply contracts; for example, with implied terms. Most of the implied terms can be excluded completely or adopted in a modified format, although some are mandatory. For example, a term that tries to exclude or limit implied undertakings of title of goods is unenforceable. In comparison, the supply of goods and services to consumers is much more comprehensively controlled, in particular by the Consumer Rights Act 2015, although there is still some freedom of contract. The consumer law regime also fills gaps and implies terms into contracts with consumers as well as providing consumers with statutory protections. These protections include the quality of and fitness for purpose of goods or services and statutory remedies; for example, where goods or services are defective or not as described. There is also a broader legal framework encompassing the entire supply chain that gives consumers protection from defective goods. This framework is considered elsewhere in this chapter.

Contractual arrangements

The arrangements used in the fashion industry depend on which aspect of the supply chain is subject to a contract. Each type of contractual arrangement will usually have some boilerplate clauses that are common to many types of contract, some clauses that are specific to the type of contract and some clauses that are bespoke to the individual deal.

Supply agreements between businesses are often in writing, although they can also be oral or a mix of both. Ideally, though, these contracts take the form of a written agreement, signed by all parties (whether physically or electronically) that has deal-specific terms and that may also incorporate the standard terms and conditions of the supplier or purchaser. Alternatively, the parties may choose to contract just on the basis of one of the parties' standard terms and conditions. Very occasionally the parties may contract on the basis of the statutory implied terms only.

Distribution and agency agreements

3 | What legal framework governs distribution and agency agreements for fashion goods?

There is no dedicated legal framework for distribution agreements, such arrangements instead being subject to the general law that applies to supply agreements. There is a common law regime that applies to all agency arrangements and a statutory regime that applies to most commercial agency agreements generally but there aren't any specific agency laws that apply exclusively to fashion goods.

Common law agency rules

These are fairly basic rules that govern the relationship between agent and principal. The primary focus of these rules is to govern the power of the agent to bind and give rights to its principal when dealing with a third party (for example, when the agent enters into a contract on behalf of its principal). The common law rules tend to protect the principal rather than the agent.

Statutory commercial agency rules

The statutory rules are set out in the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053). These regulations apply to commercial agents (both sales and marketing) and give more protection to the agent than the principal, especially in comparison with the common law rules. They only apply to the relationship between a 'commercial agent' and its principal. A 'commercial agent' is 'a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the principal), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal'. These regulations apply to agents who sell or purchase goods on behalf of their principal, but not to services. The regulations set out the key duties of the agent and principal and provide key protections for commercial agents, such as the right to a payment upon the termination of the agency, minimum termination periods and the timing and payment of commission. Some of the regulations are mandatory and some may be derogated from, provided that it is not to the detriment of the agent.

4 | What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

Selective distribution systems are often a popular form of supply chain for suppliers of luxury goods such as perfume, high-end cosmetics and beauty products and fashion goods. This type of system allows a supplier to have more control over the resale of its products, minimising any devaluing of the value of its luxury brand. In a selective distribution system, the supplier only supplies specified (ie, selected) distributors who meet certain minimum criteria, such as: having financial stability and a minimum level of profitability; an approved business such as a retailer of luxury goods; suitable showrooms or sales premises; and the ability to display the goods in a suitable manner. In return, these distributors agree only to supply end users or other distributors or dealers within the approved network. These networks usually impose restrictions upon both the supplier and the distributor, primarily to protect the luxury status of the product, which inevitably can have implications for competition law. The competition law regime is considered further in question 26.

Import and export

5 | Do any special import and export rules and restrictions apply to fashion goods?

There are no special import and export rules and restrictions that apply to fashion goods. However, there are general import and export rules for raw materials, components or finished goods that may apply. Currently, import licences are not normally needed for the import of goods between the UK and other European Union (EU) countries, but a commodity code, which classifies goods for tax and regulations for importing goods from other EU countries may be needed, depending upon the nature of the goods. An EORI number is required to move goods in or out of the EU (including the UK) as well as the appropriate commodity code. An EORI number is a unique ID code used to track and register customs information in the EU. However, this may change post-Brexit.

Corporate social responsibility and sustainability

6 | What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

Corporate social responsibility and sustainability disclosures (and reporting) by companies are typically undertaken on a voluntary basis in the UK. However, in accordance with EU Directive 2014/95/EU, The Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016 do place obligations on certain organisations to include disclosures on environmental matters (including the impact of the company's business on the environment), social matters and respect for human rights in a Non-Financial Information Statement (NFIS). In particular, this requirement applies to any trading company, listed company, banking company, authorised insurance company or a company carrying on an insurance market activity, that is not a small or medium sized enterprise (SME) and has at least 500 employees (or is a parent company). The report must contain a description of policies pursued by the company, any due diligence processes implemented in respect of these policies and a description of principle risks in relation to these matters. Where an organisation meets these requirements, the NFIS for financial years commencing on or after 1 January 2017 should be reviewed to ensure compliance. In relation to the environment, there are various mandatory reporting requirements in relation to energy usage, greenhouse gas emissions and carbon efficiency that may be applicable, especially to larger and listed fashion companies in UK. Eligibility requirements vary by scheme and need to be considered according to business size, energy usage and operations on a company-by-company basis.

Modern slavery

The Modern Slavery Act 2015 is designed to combat modern slavery and, as well as imposing specific criminal offences on those directly undertaking modern slavery, human trafficking and exploitation, it also places a mandatory reporting obligation on certain companies carrying on business in the UK, in relation to their supply chains. The statement must be published on the organisation's website with a link to the statement in a prominent place on the homepage. Where this provision applies, the current statement, and previous statements starting from the financial year ending on or after 31 March 2015, should be reviewed as modern slavery may be a particular risk within the supply chain of fashion and clothing brands. As a matter of best practice, it should include information about policies in relation to modern slavery and human trafficking, risks and risk management, supply chains and due diligence undertaken on supply chains, and the effectiveness of such measures.

7 | What occupational health and safety laws should fashion companies be aware of across their supply chains?

All organisations in England and Wales are required to comply with the Health and Safety at Work etc Act 1973 (HSAWA) and specific requirements of subordinate legislation (which is often very industry- or activity-specific, including, for example, working at height and chemical usage). The general duties of the HSAWA place requirements on organisations to ensure an absence of risk to their employees and those who may be affected by their 'undertaking'. This is interpreted widely and means the business of the organisation. As such, a company may be liable for the actions or omissions of its contractors (for example, considering especially high-risk areas such as textile manufacturing and transportation) which could include those in its supply chain. In addition, any safety issues with products that arise could result in liability through the HSAWA. Potential liability under the HSAWA would need to be considered on a case-by-case basis. Failure to ensure an absence of risk so far as is reasonably practicable is a criminal offence liable to an unlimited fine.

ONLINE RETAIL

Launch

8 | What legal framework governs the launch of an online fashion marketplace or store?

There is no single legal framework that specifically governs the launch of an online fashion marketplace or store. Such a launch would be subject to several legal frameworks, taking into account whether it is a marketplace or single online store. Online sales targeted at UK consumers must comply with mandatory UK consumer laws. In many areas those mandatory laws currently reflect the provisions of EU legislation, including EU Directives 2011/83 on consumer rights, 1999/44 on guarantees and 29/2005 on unfair commercial practices.

The Electronic Commerce (EC Directive) Regulations 2002 require information service providers to provide certain information about themselves and about how contracts concluded through electronic means will be made; ensure that commercial communications are clearly identifiable as such and acknowledge receipt of an order placed through technological means without undue delay and by electronic means; and give the service recipient appropriate, effective and accessible technical means allowing them to identify and correct input errors prior to the placing of the order.

Marketplaces that provide search functionality to customers to find traders and via which third-party traders contract online with consumers are subject to some but not all of the legal regimes. Marketplaces may have some protection from the legal regime on the basis that they are online intermediaries, but certain acts by the online marketplace (such as promoting, or optimising the presentation of, its customers' advertisements) would result in it losing the protection of the intermediary exemption.

The EU Geoblocking Regulation 2018/302 prohibits certain online stores and marketplaces from blocking or limiting a customer's access to websites or other online interfaces for reasons related to the customer's nationality, place of residence or place of establishment.

Sourcing and distribution

9 | How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

E-commerce models do not generate specific sourcing or distribution arrangements. As mentioned above, where an e-commerce platform targets consumers in a specific market, products supplied must comply with mandatory laws in countries where these consumers reside. It is important, therefore, that suppliers are manufacturing and distributing products that are legally compliant with the laws applicable in countries to which products might be shipped.

Lead times can also be crucial – contractual arrangements with suppliers should ensure that products being supplied will be received in time to meet any delivery dates indicated to customers through the e-commerce platform.

Terms and conditions

10 | What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

The Consumer Rights Act 2015 is the key piece of consumer legislation for the supply of goods, services or digital content to consumers. It sets out a consumer's mandatory statutory rights. Although these rights automatically become terms of the contract with the consumer, most traders draft their terms and conditions to expressly replicate the statutory rights within their standard terms. The Act also gives the consumer a significant and comprehensive set of tiered remedies if the statutory rights are breached. The trader is prohibited from attempting to exclude or limit its liability for breaching such rights. The Act requires that contracts with consumers are fair to the consumer and transparent. It also sets out certain terms that are always deemed to be unfair and other terms that may be seen as unfair when used in a consumer contract. Unfair terms in consumer contracts are unenforceable.

In addition, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 specify a substantial amount of pre-contract information that must be provided to consumers, including the main characteristics of the goods, services or digital content, the identity of the trader and its contact details, the total price or how it will be calculated and the payment, delivery and performance arrangements. This information automatically becomes part of the contract with the consumer and must be complete and accurate. The regulations also give consumers who buy online a cooling off period during which they have the right to cancel the contract if they change their minds. It is common practice to expressly state that consumers have this right and how and when they can exercise it. These regulations also ban traders from charging consumers more than the basic rate for any trader telephone line used by a consumer to discuss an existing contract.

There are also rules that prohibit unfair commercial practices that are intended to make consumers enter into contracts that they wouldn't otherwise enter into and there are also rules that apply to the content and accessibility of an e-commerce website. As a result, it is common to have various sets of terms and conditions and policies for websites, in particular terms regarding the access to and use of the website, an acceptable use policy and a privacy and data protection policy, in addition to the all-important terms and conditions of sale.

Tax

11 | Are online sales taxed differently than sales in retail stores in your jurisdiction?

In short, they can be. Trading profits of a UK retail store, whether run by a UK or non-UK tax resident company, are subject to UK corporation tax, which currently is levied at 19 per cent. The same applies to trading profits earned from online sales made by a UK tax resident company, or one with a permanent establishment in the UK. This is not true, however, for the trading profits of an online retailer that is neither tax resident nor has a permanent establishment in the UK.

Given the above, a non-UK retailer that only has an online presence in UK (other than perhaps a warehouse or server) is likely to be in a better direct tax position than UK-based retail stores or online retailers. Anti-avoidance provisions may, however, still apply (eg, the UK's diverted profits tax). This situation, however, looks set to change.

First, the UK has proposed a 2 per cent digital services tax to have effect from April 2020. As currently drafted, this tax will apply, inter alia, to internet platforms that host online sellers of goods, including fashion. Certain thresholds would, however, need to be met (ie, annual group global revenues from digital services activities would need to exceed £500 million, and revenues attributable to the UK would need to exceed £25 million). It is not intended that the tax will apply to online sales made by a company on its own account. An alternative basis for charging can apply to companies with low profitability.

Second, the Organisation for Economic Co-operation and Development (OECD) has committed to delivering international consensus on a long-term plan for taxing the digital economy by the end of 2020. Details of the proposals were presented by the OECD/G20's Inclusive Framework of over 130 countries to the G20 finance ministers in June 2019, and the G7 finance ministers have agreed to the plan in principle. The proposals contemplate a solution based upon two 'pillars'. Pillar One will give countries where users or consumers are located greater taxing rights (applying to tech and non-tech business alike). Pillar Two would be a belt 'n' braces measure aimed at ensuring that profits are always taxed at a minimum rate somewhere, somewhat in line with measures introduced by the Trump administration in the United States in its Tax Cuts and Jobs Act.

INTELLECTUAL PROPERTY

Design protection

12 Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

Designs for fashion garments and accessories, such as clothes and handbags, are protected by multiple, overlapping intellectual property rights in the UK. However, the most relevant right is design rights. The UK currently has four separate design rights: UK registered and unregistered design rights and Community registered and unregistered design rights. Registered designs (both UK and Community) and Community unregistered design rights protect the appearance of the product, including the shape and any surface decoration, texture or colour. UK unregistered design rights protect the shape of a design but not any surface decoration. Post-Brexit, the UK will no longer be part of the Community design rights system. However, a new 'supplemental' UK unregistered design right, equivalent to the unregistered Community design, will apply to all designs first disclosed in the UK after Brexit. Obtaining registered trademark protection for the shape of a product is possible but difficult. It is necessary to show that the shape is distinctive and so far, the courts have been reluctant to find a shape mark sufficiently distinctive.

13 What difficulties arise in obtaining IP protection for fashion goods?

Three-dimensional designs such as fashion garments are generally not protected by copyright. To be protected as a copyright work the item must fall within the definition of an artistic work, specifically a 'work of artistic craftsmanship', and the UK courts have traditionally been reluctant to find that garments are protectable as artistic works. Surface decoration, such a pattern or print on the garment, may be protected as a copyright work, if it could be reproduced separately on any other work. However, surface decoration that is integral to the design of the garment, such as red stripes down the sleeves, is not protectable. If a fashion garment is protected by copyright as an artistic work then an action for unregistered design right infringement in relation to that design may not be brought. Otherwise, copyright and design rights may coexist.

Brand protection

14 How are luxury and fashion brands legally protected in your jurisdiction?

Brand names, including the names of designers, and logos are protectable as registered trademarks in the UK. Any sign that is 'capable of distinguishing the goods or services of one undertaking from another' is capable of registration. Unregistered trademark rights are also available through use but depend on establishing goodwill in the UK and on showing that the defendant has misrepresented its own goods and services as the goods and services of the claimant, which is difficult. Brand owners can also register their brands as .co.uk domain names in the UK.

Licensing

15 What rules, restrictions and best practices apply to IP licensing in the fashion industry?

There are no specific rules that apply to IP licensing in the fashion industry in the UK. The scope of the licence granted to a manufacturer, for example, will be critical but it will also be determined by whatever has been agreed on selective distribution (referred to further in question 26).

Enforcement

16 What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

The UK has a robust enforcement system, with a variety of specialist IP civil courts. In addition, the relevant law enforcement authorities (including the specialist Police IP Crime Unit) and criminal courts are highly sophisticated and very thorough in policing IP crime. Unlike in many other high-performing jurisdictions, criminal prosecutions in the UK are an attractive enforcement method in relation to IP crime: the police and Trading Standards carry out investigations at little or no cost to the rights owner, and their investigations can act as a deterrent. Rights holders can also apply for enforcement of their rights by customs at the UK border, to prevent infringing goods arriving in the UK from outside the UK.

DATA PRIVACY AND SECURITY

Legislation

17 What data privacy and security laws are most relevant to fashion and luxury companies?

In many respects, the key legal and regulatory considerations for fashion and luxury mirror those that impact retail more broadly. From a UK perspective, the now 16-month vintage EU General Data Protection Regulation (GDPR) and its local law cousin the UK Data Protection Act 2018 (DPA), remain key pillars of compliance.

In the world of marketing, the EU's e-privacy Directive, implemented in the UK as the Privacy and Electronic Communications Regulations (PECR), remains the standard for electronic direct marketing (read email, text messages, etc) and cookie (and other tracking technologies) compliance. The long proposed and yet to be finalised ePrivacy Regulation will eventually supersede PECR, and is set to substantively impact the world of cookies and marketing compliance.

In short, recent years have brought substantive legislative and regulatory developments in the privacy and data security space, and coming years are unlikely to slow this pace of change.

Compliance challenges

18 What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

Ensuring trust, lawfulness of data processing activities and acting within the expectations of customers represent essential components of compliance. The nature of the luxury customer base in particular demands robust (and clearly demonstrated) security measures and user designs that foreground customer control. As a business model built on responsiveness, ease and consistency, luxury retail would be well advised to consider how to map its core competencies into key areas of compliance.

Increasingly tech-literate and privacy-conscious luxury consumers want to both understand how an organisation will use their data and be empowered to exercise clear controls over this data. Addressing both obligations mandates careful consideration of technical and organisational measures.

Innovative technologies

19 What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

Deploying new technologies offers both opportunities and compliance challenges. Artificial intelligence (AI) and similar tools are beginning to appear in both back-end and consumer facing aspects of the luxury and fashion retail experience. From brand-aligned chat bots to AI-driven sales data insights, data-rich technologies are set to increasingly overlap with the worlds of fashion and luxury. Beyond the online space, integrating connected data capture into traditional retail (think customer demographics modelled through in-store cameras) poses novel compliance challenges. Irrespective of context, ensuring risk analysis remains part of any conversation of innovative technologies helps to ensure a 'baked-in' approach to compliance.

The GDPR provides Data Protection Impact Assessments (DPIAs) as a means to risk test new or significant developments of existing projects. DPIAs should be considered at the outset of any major project and are mandatory where a high risk to individuals is likely to arise as a result of the project or new technology. An effective DPIA involves balancing an assessment of (non-exhaustively) the nature, scope and necessity of a data processing project against the risks such processing might present and documenting any mitigating steps.

Luxury retail is a sector where the demand for innovation, especially in the context of customer profiling (both online and in-person) is especially acute. In this context, careful consideration should be given to how DPIAs can be built into design and development processes. A streamlined and well integrated DPIA process can assist both in meeting compliance and in being equipped to demonstrate compliance.

Content personalisation and targeted advertising

20 What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

With luxury retail's continued push toward personalisation and data-driven design, addressing the compliance obligation of transparency is likely to prove increasingly challenging. The GDPR formalises a detailed set of information that an organisation must make available on collection of personal data. At the same time, the ways in which, and purposes for which retail collects and processes and shares customer data cross-channel is set only to develop in both quantity and complexity. In this context, innovative approaches to communicating information to customers clearly and compliantly are increasingly a necessity. For luxury and fashion, the challenge of ensuring compliance while maintaining a brand-consistent and oftentimes international-friendly tone poses a particular test.

From a digital marketing perspective, the implementation of the GDPR means the importing of the GDPR standard of consent into electronic direct marketing and cookie compliance. As a practical impact, retailers will need to consider whether consents captured are suitably granular and otherwise compliant with the GDPR. In addition, with the ICO currently investigating the AdTech sector, these activities are under increased scrutiny by regulators and privacy campaigners.

Where data-driven profiling of individual customers results in automated decision making (a decision made by software without human input), further compliance considerations must be addressed. Further rules apply in addition where automated decisions result in a legal or similarly significant effect for an individual. As an example, the developing trend to offer buy now, pay later options for customers may involve significant automated decisions in relation to offering consumer credit.

High-end retail provides certain unique challenges around aligning privacy compliance with the luxury industry's established strength of truly personalised service. For a luxury retailer used to building a highly detailed preference profile of individual customers, the GDPR's data minimisation principle (in which data held is strictly limited to that necessary) may sit somewhat uncomfortably. In a climate of increasing regulatory interest, and consumer mistrust of behavioural monitoring and similar techniques, luxury retailers will need to carefully consider how the possible incentives of such activities align with both compliance and customer expectations.

ADVERTISING AND MARKETING

Law and regulation

21 What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

A core focus of the UK legal regime that applies to all advertising and marketing practices aimed at consumers is to ensure that adverts and marketing communications are clearly recognisable as such. In addition, there are strict information requirements and data protection rules with which advertisers must comply, particularly if the advertising is targeted or driven by the online behaviour of the recipient of the communication.

The Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) requires that all advertising, whatever format it uses, must be obviously identifiable as advertising. Key prohibitions that relate to advertising are, among others: misleading actions (such as publishing an advert that gives false information about the existence of a specific price advantage); and misleading omissions (such as publishing an advert that does not state the minimum duration of a contract).

Enforcement of these rules is by the UK public authorities and breach of the rules can be a criminal offence.

The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) also require that service providers must ensure that any commercial communication provided by them that constitutes or forms part of an information society service (which would include all advertising) is clearly identifiable as a commercial communication. These regulations are considered in more detail elsewhere in this chapter.

The UK advertising industry also has a self-regulating code, the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code). The code mainly governs online advertising and primary responsibility for observing the code falls on marketers. However, others involved in preparing and publishing marketing communications, such as agencies, publishers and other service suppliers are also subject to the code. The remit of the code is very wide, including:

- online advertising (including banner, pop-up and online video adverts);
- advertising and marketing communications by email, text and Bluetooth;
- advertorials;
- adverts distributed through web widgets;
- adverts on electronic kiosks and billboards;
- adverts in electronic games and games that feature in display advertisements.

General principles established by the CAP Code are that all advertisements:

- are legal, decent, honest;
- are not materially misleading;
- can only feature claims that are capable of objective substantiation; and
- must not exaggerate the capability and characteristics of a product.

There are also specific rules governing the use of comparative claims, advertising aimed at children, promotional activities and sustainability claims. The Advertising Standards Authority (ASA) can request that advertising that does not comply with the code is amended or withdrawn and can ask broadcasters and publishers to refuse advertising space. It will also publicise its rulings. The ASA can also refer persistent offenders to Ofcom and Trading Standards Services, which can bring legal action leading to fines, injunctions and further bad publicity.

Online marketing and social media

22 | What particular rules and regulations govern online marketing activities and how are such rules enforced?

Advertisers are responsible for ensuring that any third-party content that they 'adopt or incorporate' within their own marketing complies in full with the CAP Code and underlying legislation. Adoption and incorporation can range from requesting content from users and placing it on the advertiser's social media channel to retweeting, commenting on or even simply 'liking' a user's post.

Visible responses to questions posed to an advertiser on social media, as part of customer relationship management, could be considered within the remit of the CAP Code if they include claims that the ASA would consider to be advertising.

In addition, in 2019 the Competition and Markets Authority (CMA) published new consumer law compliance guidance for social media influencers, following an investigation into this area. Specific suggestions include, among others: disclosing any relationships with a brand over the past year (as well as any current relationship); using signposting such as 'Advertisement Feature', 'Advertisement Promotion' or #Ad, #Advert plus the 'Paid Partnership' tool on Instagram. The CMA acknowledges that what works will change as social media evolves and comments that this list is not prescriptive.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 | What product safety rules and standards apply to luxury and fashion goods?

In general, luxury and fashion goods do not have their own specific product safety legal regime. They fall under the EU General Product Safety Directive, which applies to all products that are intended for consumers (as implemented in the UK as the General Product Safety Regulations 2005). This Directive imposes a general requirement on producers 'to place only safe products on the market' (article 3). This contrasts with the position for other consumer products such as toys, which do have their own specific regime (eg, under the Toy Safety Directive 2009/48/EC). There are particular safety requirements for children's clothes and footwear, which items may fall within luxury and fashion goods for children. For example, the Nightwear (Safety) Regulations 1985/2043 prohibit the supply of children's nightwear that does not meet flammability performance requirements, and standard BS EN 14862:2014 aims to minimise the risk of accidental entrapment by cords or drawstrings on clothing intended for children up to age 14.

Product liability

24 | What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

In the UK, product liability claims for luxury and fashion goods are brought under the regime applicable to all consumer goods, which does not discriminate between one sector and another. Consumer contracts in the UK are governed by the Consumer Rights Act 2015; a consumer can make a product liability claim for breach of contract against the immediate supplier. The European Product Liability Directive 85/374/EEC was implemented in the UK as the Consumer Protection Act 1987, under which strict liability claims can also be brought against the producer of defective products for damage caused by the defect. Further, a product liability claim can be made as an action in negligence, typically against the manufacturer of a defective product.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 | Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

Recognising and retaining talent and ensuring that adequate due diligence is undertaken on the significant intellectual property are fundamental to transactions in the luxury fashion industry. When entering into such transactions, a company needs to think strategically and identify the talent and ensure that they are adequately incentivised so that the company can maintain, and preferably enhance, the brand. In the context of M&A, common tools used to retain and incentivise talent are earn-outs, deferred consideration and sweet equity. In the context of a joint venture, providing the talent with equity will deliver this objective. The inclusion of these forms of incentives inevitably results in the parties discussing what controls the talent will require over the business going forwards so that the talent can ensure delivery of their agreed incentive package. The company will need to strike a balance between the controls they can properly cede to the talent and those controls it should retain to enable proper integration of the brand and to ensure that identified synergies with the buyer's current operations are delivered.

The use of restrictive covenants provided by the talent in the sale documentation will protect the brand following the transaction. For example, imposing a restrictive covenant on a founder of a brand who is planning to exit the business entirely following the transaction from competing in the same market will prevent the founder from replicating what makes the brand unique elsewhere. Such restrictive covenants may also be supplemented by restrictions that safeguard or ringfence IP rights (eg, in the founder's name) and prevent the solicitation of employees (again ensuring talent is retained in the brand), customers, suppliers and manufacturers for an enforceable period of time, so that these relationships can be established with the company.

Competition

26 | What competition law provisions are particularly relevant for the luxury and fashion industry?

Competition law is applicable to the fashion and luxury goods sector just as it is to any other sector. UK and (for the moment at least) EU competition law governs companies' activities in UK markets in relation to mergers, restrictive practices and, where a party occupies a 'dominant' market position, unilateral firm conduct.

However, insofar as it impacts the fashion industry, there is currently a notable regulatory focus on restrictive distribution and retail arrangements – ones potentially contrary to the EU and UK requirements on restrictive agreements (namely, article 101 TFEU and the UK equivalent, Chapter 1 CA98). In particular, there is an intense debate about what should (or should not) be permissible in terms of contractual restraints in an online context, with heightened concerns about the increased use of provisions that might hinder cross-border online trade or otherwise disrupt the benefits of e-commerce (in ways ultimately detrimental to consumers and EU Single Market imperatives).

From the perspective of the fashion sector, there are a number of issues that are relevant, including: (i) resale price maintenance (RPM) or vertical price-fixing which, on the basis of minimum or fixed pricing requirements or pressures, inhibits downstream distributors or resellers from determining their own resale prices; and (ii) restrictions that exclude or limit cross-border trade within the EU Single Market – a construct that is intended to enable consumers to purchase products in other EU member states and take advantage of price differentials between them.

However, the issue likely of greatest relevance to the fashion and luxury product industries is 'selective distribution'. Suppliers and manufacturers typically employ selective distribution to maintain an element of control over how their products are distributed – a system of distribution in which the supplier undertakes to sell the contract goods or services only to authorised distributors who meet specified criteria (which can be 'qualitative' or 'quantitative' in nature). In turn, the authorised distributors undertake not to sell outside of the authorised network other than to end customers.

The immediate competition law concerns arising from selective distribution are clear: restrictions on selling outside the system to unauthorised distributors may result in a reduction in intra-brand competition, foreclosure of certain types of distributors and facilitation of collusion between suppliers or buyers. Yet despite these concerns, 'qualitative selective distribution' is justified on the ground that it increases competition around non-price, qualitative factors (eg, service quality) as recognised and acknowledged by the EU Court of Justice. Therefore (and notwithstanding inherent restrictions of competition within selective distribution systems), purely 'qualitative selective distribution' will fall outside of competition law rules altogether where certain case law requirements are met; namely, those set out in the 1977 *Metro* judgment (case 26/76 *Metro SB-SB-Großmärkte v Commission* and known as the Metro criteria).

However, concerns arose as to how far suppliers could go in terms of controlling the activities of their authorised resellers; in particular, whether they could restrict them from freely employing online sales channels to resell the contract products and whether use of selective distribution would be justified in the context of luxury products (and protection of a luxury image). In the 2011 ruling in *Pierre Fabre Dermo-Cosmétique* (case C-439/09), the Court of Justice confirmed that an absolute ban on sales over the internet was unlawful. The court's findings in the subsequent *Coty* case (case C-230/16) confirm that suppliers of luxury products, while not permitted to impose absolute prohibitions on online resale, are able (whether assessed under article 101(1) TFEU or the requirements of the Vertical Block Exemption Regulation) to impose online standards to preserve a luxury brand's image that are equivalent to, or at least consistent with, the kind of requirements they might legally impose offline.

These principles derived from EU law will continue to apply in the UK after Brexit.

EMPLOYMENT AND LABOUR

Managing employment relationships

27 | What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

Labour relationships fall into one of three different categories: employees, workers and self-employed. Employees have a full set of employment rights, including protection against unfair dismissal, the right to a statutory redundancy payment, and the right to family related leave such as maternity or paternity leave. Workers have more limited rights than employees, but are entitled to receive the national minimum wage, statutory annual leave and protection against discrimination. The self-employed typically have very few rights.

Freelancers and interns will often be classified as workers not employees, particularly if the employer is not obliged to offer work and the individual is not obliged to accept work that is offered, as will be the case for those engaged on zero hours contracts. However, if freelancers genuinely run businesses on their own account, they could be classified as self-employed.

Labour relationships will typically be governed by an employment contract (employees), a worker contract (workers) or a consultancy or contractor arrangement (the self-employed). However, the type of contract is not determinative of the nature of the relationship. Employment tribunals can look beyond the contractual arrangements to how the relationship operates in practice when deciding whether someone is an employee, a worker or genuinely self-employed.

Trade unions

28 | Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

There are no special rules relating to fashion companies and their relationships with trade unions or works councils. Under normal principles, an employer can recognise a trade union voluntarily. There is also a complex statutory recognition process that an independent trade union can use to force an employer with more than 20 workers to recognise it.

An application for statutory recognition is admissible if at least 10 per cent of workers in the proposed bargaining unit are union members and a majority of workers in the bargaining unit are likely to favour union recognition. A secret ballot will usually be held to check that there is the necessary level of support. A union will be recognised if a majority of those voting and at least 40 percent of the workers in the bargaining unit vote in favour of recognition. If an application for statutory recognition is successful, the employer will be obliged to bargain collectively with the union on pay, hours and holidays.

Works councils are not common in the UK but an undertaking with 50 or more employees can be forced to set one up if a request is made by 10 per cent (two per cent from April 2020) of employees. If an employer has a statutory works council it must inform and consult employees about specified matters, including the development of employment within the undertaking.

Immigration

29 Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

This is a highly specialised, fast-moving area that will be particularly impacted by Brexit. Specific advice should be sought from a specialist firm in relation to any questions on immigration law considerations for fashion companies.

UPDATE AND TRENDS

Trends and developments

30 What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

As mentioned at the beginning of the chapter, the future prospects of the UK luxury fashion industry depend on the terms on which the UK leaves the EU, including whether the UK exits with no special deal governing its trading arrangements with the EU. Any changes in tariffs and non-tariff barriers (eg, health and safety regulations) as a result of Brexit will impact exporters of high-end goods, and importers of materials and components from the EU. Leaving the EU is also likely to result in a reduction in the number of EU nationals currently working in the industry, from skilled workers in the garment factories to workers on shop floors. The UK luxury fashion industry will also face increased risk from the wider trade environment and protectionist approach of other countries, such as the United States.

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MARKET SPOTLIGHT

State of the market

1 What is the current state of the luxury fashion market in your jurisdiction?

The luxury fashion market in the United States, long the largest luxury fashion market in the world, now vies with China for that title, with estimates setting sales revenues for the luxury fashion market in the US somewhere between US$20 billion and US$25 billion last year. In the past several years, a strong economy has driven sales, while tariffs and a strong dollar – which has a negative impact on purchases by foreign tourists – have presented challenges. Major market players include LVMH, PVH Ralph Lauren, Hugo Boss and Giorgio Armani, but relative newcomers like M Gemi, Goop and Everlane as well as smaller brands such as Drunk Elephant continue to disrupt the market. Further disrupting the market are the online-only retailers such as Amazon and ASOS, which provide a vast online platform for selling fashion products while collecting valuable consumer data and adopting evolving technologies, such as artificial intelligence and social media platforms, to spur additional growth. These technologies are themselves redefining the luxury fashion market in the US and abroad, with consumers demanding more personalised customer experience and greater access to their brands online, including social media and mobile shopping. And this trend towards the use of all things digital to consume luxury fashion shows no signs of stopping.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

In the United States, development of designs is largely governed by federal statutes governing copyrights, trademarks and patents, which we discuss in greater detail below. In addition to the federal statutory framework, a retailer will enter into contracts with its designers and creative professionals to clearly provide for the ownership of designs and other intellectual property developed by the individuals in the course of their employment or services. A retailer's development contracts should protect a brand's confidential information and trade secrets, as well as include an assignment to the brand owner by the designer or creative profession of intellectual property created in connection with their work for the brand, and recite that such work constitutes a 'work made for hire' under the US Copyright Act.

Manufacturing of luxury and fashion goods is governed by statutory and common law considerations as well as contractual provisions. Statutory considerations include compliance with: (i) federal and state laws governing the materials used in manufacturing, such as the Consumer Product Safety Improvement Act of 2008 and state laws governing plastic content; (ii) state laws governing the sales of goods (such as the Uniform Commercial Code); and (iii) state and federal laws around sales and distribution methods. State laws are not uniform. Even the Uniform Commercial Code, despite its name, is just a general name for similar, but not identical, laws that have been adopted by the various states based on a common model. Some states, like California, have enacted relatively stringent laws governing issues from product composition to labelling to labour practices of suppliers. For example, if a brand sells products via an e-commerce platform in the United States, it is likely subject to various disclosure requirements under California state law, such as Proposition 65 (Prop 65) (requiring certain disclosures or warnings on packaging) and the California Electronic Commerce Act of 1984 (requiring certain disclosures to e-commerce consumers). The California Transparency in Supply Chain Act (CTSCA), which requires that large retailers and manufacturers provide consumers with certain disclosures with respect to steps they have taken to remove slavery and human trafficking from their supply chains, is triggered by doing business in the state and meeting a certain minimum worldwide income. Other states have enacted similar laws regulating their supply chains. In addressing these requirements, manufacturers and marketers of luxury goods generally comply with the standards of the most stringent jurisdictions.

Distribution and agency agreements

3 What legal framework governs distribution and agency agreements for fashion goods?

Distribution arrangements are primarily governed by the specific terms of the contractual arrangement with a brand's distributors, and not surprisingly, brands predominately structure their distribution agreements to drive sales and value. For example, a brand may grant distribution rights for a specific geography, for online versus offline channels, full price versus off-price, etc. Further, state laws can impose limitations on a manufacturer's ability to terminate a distributor, although in the United States, state laws governing the termination of distributors are less stringent than in many other jurisdictions.

Agency is generally governed by common-law concepts in the United States, and agency relationships should identify the scope of the agent's authority on behalf of the brand. However, agents or sales representatives are further protected by statute in many US states. Among other things, these laws may require brands to clearly describe and promptly pay a sales representative's earnings and to set forth the terms of the arrangement in writing.

4 What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

Luxury goods derive value in part from scarcity and brand reputation; therefore, exclusivity in distribution channels and brand protection are key. Luxury fashion goods are most commonly distributed to end customers through both online and brick-and-mortar channels. Further, brands may have their own retail operations through which they reach customers or may sell products through one or more third-party retailers.

When selling through third party retailers, it is important to include contractual provisions relating to exclusivity and brand protection. Some examples of contractual provisions that usually apply in luxury fashion distribution agreements include:

- grants of exclusivity for a particular retail channel (eg, brick and mortar versus online), market (eg, a particular geography) or segment of the market (eg, women's apparel versus men's apparel), or category of goods (eg, footwear, eyewear, cosmetics);
- restrictive covenants, which are closely related to grants of exclusivity, and include non-competition, non-solicitation and pricing protections;
- trademark or brand licences and licence restrictions;
- additional brand protection provisions including quality control mechanisms and audit rights, anti-dumping or disposal of goods provisions;
- terms relating to promotion (eg, obligations to devote specific amounts to marketing campaigns and to undertake particular efforts to market products); and
- sales targets or minimum volume requirements.

Import and export

5 Do any special import and export rules and restrictions apply to fashion goods?

When a shipment reaches the United States, the importer of record (ie, the owner, purchaser or licensed customs broker) must file entry documents with Customs and Border Protection (CBP) at the port of entry. The importer of record must use 'reasonable care' due diligence in making entry. In addition, the entry must be accompanied by evidence that a bond has been posted with Customs to cover any potential duties, taxes and charges.

Entry of goods may be made by a non-resident individual or partnership, or by a foreign corporation, through a US agent. A foreign corporation in whose name merchandise is entered must have a resident agent in the state where the port of entry is located who is authorised to accept service of process.

A foreign corporation may issue a power of attorney to a regular employee, customs broker, partner or corporation officer to act in the United States for the non-resident employer.

All importers must ensure that products imported into the US are properly labelled to include the products' country of origin in a conspicuous location, that any label appears in English, and if the labeling is obscured by packaging, that the information is also included on the packaging of the product. Finally, textile and apparel articles imported into the United States are required to be labelled with: (i) fibre content (there are specific rules for fibre names, such as pima cotton, or merino wool); (ii) country of origin; and (3) name of the importer, distributor, retailer or foreign manufacturer.

Corporate social responsibility and sustainability

6 What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

United States laws relating to social responsibility and sustainability fall into two main categories: those that prohibit or sanction certain practices and those that require disclosure.

There are relatively few laws impacting luxury goods that fall into the first category: laws prohibiting or sanctioning certain practices. Various federal and state laws regulate labour and safety practices with the US and prohibit the importation of goods produced by forced or slave labour outside of the US. The CPSA and Food and Drug Administration regulations (with respect to cosmetics) prohibit the use of certain materials. But more of these laws are expected, particularly at the state level, in coming years. Companies manufacturing in the United States should monitor laws working their way through state legislatures that, if enacted, will require the states to limit carbon emissions, necessarily putting pressure on manufacturers. Companies with a presence in the United States can also face liability under the Alien Tort Claims Act for human rights impacts that occur extraterritorially and throughout the business's value chain.

More laws govern the disclosure of sustainability practices. For almost a decade, companies with securities listed on a US exchange have had to report on the use of certain minerals on the basis that such minerals originate in conflict zones. In recent years, the United States Securities and Exchange Commission has signalled a decreased interest in enforcing these reporting requirements, and the fashion industry has been among the least compliant. State laws like Prop 65 and the CTSTA also impose disclosure obligations. Companies that make sustainability claims are subject to federal and state unfair advertising laws. Fashion companies making such claims need to be aware of compliance and obligations and consider the systems that will have to be put in place to substantiate their claims. Disclosure of sustainable or responsible practices must be correct and supportable, as they are open to challenge by regulators and customers alike.

7 What occupational health and safety laws should fashion companies be aware of across their supply chains?

Fashion companies face particular challenges in complying with health and safety laws. Companies manufacturing in the US are subject to state and federal wage and hour and occupational safety laws. Lack of compliance with these laws has been the subject of numerous investigations and lawsuits, particularly in California, where much of the US-based luxury fashion manufacturing is done.

Because of the widespread outsourcing of manufacturing in the industry, much of it abroad, many fashion companies address supply chain occupational health and safety concerns through certifications, codes of conduct and brand standards. Although, as noted above, there are state and federal laws addressing the use of child and forced labour and US companies have been subjected to class action litigation in the US arising out of foreign safety and health practices, the primary drivers of fashion companies' compliance efforts have been external pressure by non-governmental organisations, consumers and investors and corporate responsibility programmes. Several US companies have signed on to the Apparel and Footwear Supply Chain Transparency Pledge, pursuant to which participating companies disclose the location, ownership and other relevant information about all of their manufacturing sites. Many companies have recognised the commercial benefits of being able to promote socially responsible manufacturing practices. Any claims about responsible practices are subject to the Federal Trade

Commission requirements (and similar state law requirements) that advertising and promotional materials be truthful, not misleading and, where appropriate, backed up by data.

ONLINE RETAIL

Launch

8 What legal framework governs the launch of an online fashion marketplace or store?

In the United States, there is no singular or specific law or directive governing electronic commerce (e-commerce) by retailers, fashion brands or any other seller of goods or services via the internet. Rather, relevant US e-commerce law is drawn from the various federal and state laws that govern retail or consumer transactions, as well as laws relating to the digital sphere generally. Retailers considering the launch of an online marketplace should review applicable state and federal laws governing contract formation, unfair business practices and false advertising, labelling requirements, checkout and payment, gift cards, shipping and returns, warranties and customer communications. E-commerce retailers should also consider best practices and guidance drawn from enforcement actions taken by federal and state regulators and the outcomes of civil litigation brought by consumers.

Subject to local modifications, all 50 US states have adopted the Uniform Commercial Code (UCC), article 2 of which sets forth legal requirements applicable to contracts for the sale of goods. To satisfy the adequate notice requirement, e-commerce retailers should ensure that any transaction terms are clear and conspicuous to customers using the online marketplace. Generally, in order for a valid contract to be formed between an e-commerce retailer and a customer, the customer must have the capacity to assent and adequate notice of the key terms applicable to an offer. E-commerce retailers may rely on electronic forms of assent, such as online check boxes or click-through mechanisms, under the Electronic Signatures in Global and National Commerce Act (ESIGN).

A combination of state and federal consumer protection laws also affect the enforceability of e-commerce terms and conditions (such as those covering warranties, returns and other forms of customer recourse), which form the basis of a contract for the electronic sale of goods. In the US, the Federal Trade Commission (FTC) may take enforcement actions against e-commerce retailers who use terms that are likely to mislead consumers and affect their decisions. The prohibition against deceptive practices applies to all retail transaction terms, including warranties, return policies and advertising claims. E-commerce retailers should also consider statutory limitations on communicating with customers, including federal laws such as the CAN-SPAM Act and the Telephone Consumer Protection Act.

Sourcing and distribution

9 How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

E-commerce retailers with brick-and-mortar operations should ensure that contractual arrangements adequately account for sales in the in-person and online environments. Exclusivity terms and restrictive covenants in distribution agreements, for example, should be carefully drafted to avoid broadening or limiting the intended scope of the arrangement. Bifurcated frameworks for e-commerce versus brick-and-mortar sourcing and distribution arrangements may be advantageous for retailers in this respect. Differentiated frameworks allow retailers and manufacturers to allocate exclusive distribution rights between online and brick-and-mortar storefronts. A bifurcated framework also creates benefits for e-commerce retailers with both off- and full-price websites, such as excluding distribution rights for off-price websites alone or vice versa.

Likewise, sourcing arrangements can vary considerably in an e-commerce context. E-commerce retailers can take advantage of drop-ship sourcing arrangements, where manufacturers ship products directly to customers rather than to the retailer's warehouse or brick-and-mortar storefront. Drop-ship arrangements both reduce supply chain responsibilities for retailers and offer potential legal benefits, such as reduced tax liability. E-commerce retailers should consider these varying arrangements and contractual frameworks to maximise operational efficiency while minimising the risk of legal liability or unintended outcomes.

While e-commerce retailers must adhere to the same sourcing and distribution laws as their brick-and-mortar counterparts, a retailer's compliance with such laws may differ in an e-commerce context based upon the challenges of making disclosures in the digital forum, where space and messaging are dictated by the boundaries of digital sales pages. For this reason, e-commerce retailers should place product material disclosures clearly and conspicuously on the online product listing.

Terms and conditions

10 What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

The most important factors to consider when drafting e-commerce terms and conditions are: (i) which types of product are being sold online and to whom; (ii) how this product is made; and (iii) where the product will be sold. These factors inform which laws are triggered and corresponding disclosure requirements.

Where the product is a luxury good intended for personal, rather than commercial use, at the federal level the Magnuson-Moss Act requires disclosures regarding the warranty terms offered by the seller. Additionally, under the various state versions of the UCC, certain implied warranties are automatically included in any sale of consumer goods, unless the seller effectively and conspicuously states in the terms and conditions that the products are sold 'as-is'. These implied warranties include the implied warranty of merchantability, the implied warranties of fitness for a particular purpose, title and non-infringement.

Some states have adopted statutes requiring that manufacturers provide certain warranties. E-commerce sellers should also note that terms and conditions that are particularly one-sided may be regarded as unfair and unenforceable under US law, especially if the customer does not have adequate notice of the terms. Finally, retailers consider including arbitration clauses and class action waivers in their terms and conditions for US customers given the litigiousness of the US consumer base. We note that at a high level, such terms are generally enforceable if they are not unconscionable (for example, imposing prohibitive costs on the customer or providing that arbitration must occur in a distant venue). E-commerce terms and conditions often also include a policy under the Digital Millennium Copyright Act.

Tax

11 Are online sales taxed differently than sales in retail stores in your jurisdiction?

In general, VAT works in a similar way to normal taxation on the sales of goods. For sales taxes in the US, these applied when buying and having it shipped to the same jurisdiction (eg, if I buy something in NYC and have it shipped to a NYC address). It is also interesting to highlight that again because of the Organization for Economic Cooperation and Development's framework for Base Erosion and Profit Shifting, many jurisdictions are thinking about introducing a digital tax. This is designed to tax companies that do not have a physical presence in a jurisdiction; so, for example, you could sell clothes accessing a US site to European customers. The idea is to charge businesses a flat tax based on percentage of sales in any jurisdiction for online sales.

Furthermore, when selling from one jurisdiction to another, customs and duties might apply (eg, one could buy a handbag from a US site and have it shipped to the UK, but if the value exceeds the limit (which for luxury goods is more likely) the customer would be subject to duties when collecting the item in the UK). In general, companies use a disclaimer when allowing shipment to other countries to state that the customer might be subject to duties and is the one to bear these costs. In some cases where the business has warehouses in different locations, the website acts as a billing entity, but the sale happens between the local entity that holds the stock and the customer, and, therefore, it is no longer an international sale.

INTELLECTUAL PROPERTY

Design protection

12 | Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

Despite several failed efforts to extend copyright protection specifically to fashion designs at the federal level, the most recent being in 2011/2012 with the proposed Innovative Design Protection and Piracy Prevention Act, there is currently no comprehensive protection afforded to fashion designs in the United States. Instead, various aspects of fashion designs are protected in the United States through an amalgamation of intellectual protection rights in the United States, including copyright, trademark, trade dress, design patent and patent rights, which may or may not overlap.

Copyright protection

In general, US copyright law considers all clothing items, no matter how impractical, creative, or ornate, to be functional in nature, and thus not subject to copyright protection. Thus, the cut, colour, shape or dimensions of a particular garment – and the garment as a whole – are not protected by copyright law. Further, while sketches of fashion designs are protected by copyright under US law, copyright protection extends only to the particular expression of the design (ie, the sketch), not the underlying idea of the fashion design itself.

However, copyright protection may extend to particular aspects of a fashion design. For instance, fabric patterns or prints may be capable of copyright protection if they reflect sufficient original expression (ie, Hermès scarf designs). Patches or design features stamped on or woven into the fabric or textile of a particular garment or fashion item may also be subject to copyright protection if they are 'conceptually separable' from the underlying useful article.

Finally, purely decorative articles that have no useful function, such as jewellery, handbag clasps, belt buckles designs, etc may be subject to copyright protection if they are considered sufficiently original by the Copyright Office.

Trade mark/trade dress protection

In the fashion context, trademark protection may extend to any logo, label or name. Thus, trademark protection is available to protect designer names (eg, Alexander Wang, Marc Jacobs) and brand names (eg, Chanel, Hermès), brand logos (eg, Polo Ponies, Lacoste alligators), and designer labels (eg, Wrangler jeans red tag). A particular colour (eg, Tiffany Blue or UPS brown) may also receive trademark protection upon a showing of secondary meaning by the trademark applicant; that is, evidence that demonstrates that the relevant consumers identify the colour in question with a single source of the associated goods.

Similarly, trade dress protection can be used to protect patterns, prints, single or multiple colours, specific product features, and even the overall design or configuration of a product, assuming that the product feature or design is not functional and the owner can demonstrate that consumers have come to recognise that feature or configuration as identifying the source of the goods. For example, Louboutin's red-soles are subject to trademark protection, Hermès' and Birkin's configurations for their handbags are subject to trademark protection, as are Bottega Veneta's distinct woven pattern, Louis Vuitton's Épi weft-and-warp texture, and Louis Vuitton's LV, Chanel's CC and Dior's CD monogram logos.

Design patent protection

Design patents protect the purely ornamental or decorative features or aspects of functional, useful items. For example, the decorative hardware on handbags and the ornamental soles of shoes are two examples of items that have been protected by US design patents in the fashion world.

Patent protection

Patents, in contrast to copyrights, trademarks and design patents, expressly protect new, novel, non-obvious, useful articles. Because most clothing items cannot really be considered 'new', patent protection generally does not extend to garments. The exception to this rule, of course, are fashion items that have some new useful function, such as high-performance fabrics that wick away sweat or regulate body temperature, or other protective gear such as hazmat suits, Kevlar, space suits, etc. Further, patent protection may be available to new, novel and non-obvious types of clasps, zippers or other fasteners. Finally, patent protection has historically extended to foundational garments such as lingerie and support items like Wonderbras and Spanx.

13 | What difficulties arise in obtaining IP protection for fashion goods?

Each of the applicable types of intellectual property rights above has some limitations and drawbacks in terms of protecting fashion goods. As noted above, although copyright protection automatically inures upon creation of the work in a fixed medium of expression, the scope of copyright protection in the fashion design context is quite limited.

Trade marks and trade dress protection, while potentially unlimited in duration, is also somewhat restricted in scope, and often requires substantial investment in advertising and promotion, and a lengthy time on the market, to generate the degree of consumer recognition required to qualify for protection. This is particularly true for product configurations and single colour marks, which cannot receive trademark protection without first proving secondary meaning. Further, trademark and trade dress protection can be easily lost through lack of enforcement in the face of widespread copying – an issue common in the fashion world.

In addition to having limited application in the fashion world, patent protection is often expensive and time-consuming to obtain, with the process costing thousands of dollars and often taking years to achieve registration. Further, the duration of patent protection is finite – 20 years from the date of filing of the patent application. Design patents can be a more practical option for protection for key pieces in a fashion portfolio, given their lower cost and shorter period to issuance (several months rather than several years).

Brand protection

14 | How are luxury and fashion brands legally protected in your jurisdiction?

The names and logos of luxury and fashion brands are generally protected in the United States by trademark law, as discussed above. Because trademark law in the United States is based on use of a mark in commerce, a trademark holder need not obtain a registration to qualify a mark for protection. The US recognises the concept of 'common-law rights' derived from being the first to use a particular mark in commerce in connection with particular goods or services. Nonetheless, there are significant evidentiary benefits to obtaining a federal trademark registration, including setting forth a presumption that the mark is valid and protectable and empowering US Customs and Border Protection to block counterfeiting goods.:

Trade marks owners who rely on common law trademark rights are required to demonstrate priority, validity, exclusivity and protectability of the mark, the scope and extent of its use, the acquisition of secondary meaning, and the lack of functionality of the mark.

Fashion and luxury brands can also protect their names by acquiring the corresponding national domain names (ccTLDs, that is, .us), generic top-level domains called gTLDs (such as .com or .org) as well as new gTLDs such as .club or .vip or .fashion or .sucks, which incorporate the name or mark, as well as TLDs that include confusingly similar names or marks, even if they do not plan to use them, to prevent third parties from doing so.

Licensing

15 | What rules, restrictions and best practices apply to IP licensing in the fashion industry?

When licensing IP in the fashion industry, it is important to maintain the image and reputation that the brand has established. A licensor must strike a balance between protecting its most valuable assets and incentivising its licensee to pursue opportunities to gain market share for the brand. At the most basic level, a licensor should consider to whom it is licensing and whether the prospective licensee's values align with the image and reputation of the brand; a thorough diligence process is advised. The scope of the licence grant should be narrowly tailored to prevent undesired use of the brand's intellectual property. The licensor should consider whether to require the payment of a royalty and if so, how such royalty should be structured; a royalty should be reasonable and should not be a disincentive for the licensee to pursue sales of products making use of the licensed IP or to prioritise other products. Royalty calculations and payments should also be practical.

Brands should also impose reasonable brand protection mechanisms and ensure that they are afforded oversight over the licensee's activities, including quality control provisions and audit and inspection rights, and anti-dumping or disposal of goods provisions. Thought should be given to the enforcement, prosecution and maintenance of the licensed intellectual property; these terms may vary depending on whether a licence is exclusive or non-exclusive, but generally the licensor should have the right to control IP enforcement activity and the goodwill generated from use of the licensed IP should inure to the benefit of the licensor. Further, thought should be given to the end of the licensing relationship, including with respect to transition, wind-down or sell-off periods, disposal of products bearing or making use of the licensed intellectual property, and the return or destruction of confidential information.

Enforcement

16 | What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

Depending on the types of intellectual property protection in its portfolio, a rights holder may assert claims of trademark or trade dress infringement, patent infringement or copyright infringement in federal court to obtain both monetary and injunctive relief, in the event that enforcement is necessary.

Trade mark and patent owners also have the option of opposing the registration of infringing trademarks or patents before the Trademark Trial and Appeal Board and Patent Trial and Appeal Board, respectively. However, while an opposition before one of these administrative tribunals is generally quicker and less expensive than federal court litigation, successful opposition before these administrative tribunals will only prevent would-be infringers from obtaining registrations, it will not prevent them from using the mark or offering the product in commerce, nor will a favourable judgment result in any form of monetary remuneration.

Trade mark owners may also be able to protect their marks against online infringement (ie, use of a trademark in a domain name) by filing a Uniform Doman Name Dispute Resolution complaint against the infringer with ICANN (Internet Corporation for Assigned Names and Numbers, a global multi-stakeholder organisation that was created by the US government and its Department of Commerce), to get the domain name cancelled or re-assigned, provided the following conditions are met: (i) the domain name registered by the domain name registrant is identical or confusingly similar to a trademark or service mark in which the complainant (the person or entity bringing the complaint) has rights; (ii) the domain name registrant has no rights or legitimate interests in respect of the domain name in question; and (iii) the domain name has been registered and is being used in bad faith. This administrative proceeding is usually faster and quicker than filing a claim in federal court.

In the event that an infringer is actually counterfeiting a trademark owner's goods, the rights holder may assert both civil and criminal claims under The Trademark Counterfeiting Act of 1984, codified at 18 US Code section 2320, The Anti-counterfeiting Consumer Act of 1996, and the Lanham Act, section 1116. The penalties for counterfeiters are quite steep and can result in fines of US$2 million (for individual) or US$5 million (for corporations) or imprisonment for up to 10 years.

Finally, trademark and copyright holders can also enlist the aid of US Customs and Border Protection to block or detain imports of infringing or counterfeit items once they have recorded their trademark and copyright holdings with Customs.

DATA PRIVACY AND SECURITY

Legislation

17 | What data privacy and security laws are most relevant to fashion and luxury companies?

Fashion and luxury companies are subject to a myriad of state and federal data privacy and security laws in the US. In the retail space, a number of states, best exemplified by California's Song-Beverly Act, restrict personal information collection in connection with check and credit card purchases. A handful of states, again led by California, have required that companies with websites or apps have privacy policies with specified disclosures. California is again at the vanguard of increasing privacy regulation, with the California Consumer Privacy Act (CCPA) and associated regulations taking effect in 2020. The CCPA increases transparency requirements and gives consumers a right to opt out of sales of their personal information, while affording consumers new rights to access and delete their personal information.

The FTC uses its general enforcement authority over unfair or deceptive trade practices to police against potential misuse of personal data, as do state Attorneys General (AGs) under 'Little FTC Acts'. This enforcement can implicate personalisation and advertising strategies that may rely on a wide array of information, such as location, biometrics, transaction data and supplemental information from third parties. The CAN-SPAM Act, Telephone Consumer Protection Act, and the FTC's Telemarketing Sales Rule, along with state telemarketing laws, are also relevant to retailers' marketing activities.

On the security side, the FTC frequently uses its unfair trade practice authority to police unreasonable data security practices that put consumers' personal information at risk. A number of states also have enacted laws focused on 'reasonable' security for sensitive personal information, including payment card information, while a small number of states, such as Massachusetts, have developed detailed and specific data security requirements that companies must follow through a written information security programme. All 50 states have data breach notification laws that require notification to affected individuals where certain of their personal information has been compromised, frequently with reporting to state authorities. The Fair Credit Reporting Act mandates the truncation credit card information on receipts and appropriate disposal of information.

Compliance challenges

18 What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

Luxury and fashion companies are challenged by the resources required to stay abreast of increasingly complicated and varied state and federal privacy and data security laws. New consumer rights are upending the traditional ways of addressing privacy issues. Luxury and fashion companies thrive by understanding consumer sentiment and purchasing trends. Such information enables personalisation of services to a customer base that appreciates tailored services. The best way for luxury and fashion companies to achieve this understanding of their customer base is by collecting and analysing large amounts of data, including from third parties. These inputs are part of the 'big data' trend that enables better insights into consumers.

Luxury and fashion companies may hold the data they collect in different systems and databases that are used for different purposes. For example, there could be different systems for online, brand-owned stores, or in-store counters at third-party multi-brand retailers (eg, a luxury brand's counter at a department store). There may also be different systems for different activities; for example, email versus text message outreach. Historically, these different systems and data flows did not create compliance issues. However, privacy laws such as the CCPA require new and more extensive privacy policy disclosures such as the sources, uses and sharing of personal information required, affording consumers the right to the specific pieces of personal information businesses hold about them and to have their personal information deleted. All of these rights mean that it is now vital for companies to be able to track data flows for compliance. Such mapping may require retaining third-party resources to assist. Understanding and overseeing compliance with the CCPA and the expanding array of privacy laws may require new personnel as well.

Similarly, norms around reasonable data security are constantly evolving just as threats to the security of personal information expand. As with privacy, keeping abreast of changes in legal requirements, evolving threats, and how to appropriately operationalise an information security programme requires ever more resources, in budget and personnel. While big data in some cases is the key to greater personalisation and a contributor to revenue, it simultaneously requires ever more devotion of resources towards creating and developing sufficient safeguards and an adequate security programme that recognises cybersecurity as an enterprise risk issue.

Innovative technologies

19 What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

Dating back to the advent of radio and then television, luxury and fashion retailers have always leveraged new technologies to market products and services. Today, in-store sensors and Wi-Fi offer the potential to track consumers through stores to determine optimal traffic flows, facial recognition can help recognise existing customers and feed relevant information to sales associates and even measure a customer's mood and sentiment, and artificial intelligence and machine learning offer the opportunity for incredible insights into consumer preferences based on big data sets.

New and increasing privacy regulation in the US can inhibit luxury and fashion retailers' and their customers' ability to benefit from such retailers' use of these and other developing technologies. At least three states, most notably Illinois given its private right of action, have biometric privacy laws that require certain disclosures regarding collection and use of biometric information and affirmative opt-in before a retailer can collect it from an individual. Biometric data used for facial recognition technologies, when tied to an individual, is also considered sensitive personal information that triggers data breach notification laws in some states. Similarly, luxury and fashion retailers should be transparent about their data collection and use practices and any tracking. It is also appropriate to develop guidelines for using AI and machine learning to avoid discriminatory practices.

Content personalisation and targeted advertising

20 What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

The CCPA exemplifies an evolving focus on business transparency about data practices and the individual control over his or her personal information. The CCPA upends online behavioural advertising models. For example, if a website owner enables third-party tracking cookies to operate on its site and those cookies contribute the retargeting of an individual with a brand ad on a third-party site, data is transferred across different entities in the ecosystem. Under the CCPA, the exchange of data about a California resident across third parties may very well be a sale of personal information by the website owner. This means that luxury and fashion companies may need, as of 1 January 2020, the CCPA effective date to have a 'do not sell' link on their websites that is able to limit recipients' use of any data for reasons that are not merely to benefit the publisher. Luxury and fashion brands may not wish to signal to their target consumers that they sell their data.

Luxury and fashion brands do not merely need to develop CCPA compliance measures, but also strategies to engage with reputable third-party adtech companies. Using third parties that offer opt-outs in adherence with established industry self-regulatory regimes like the Network Advertising Initiative or Digital Advertising Alliance guidelines is responsible and appropriate. For CCPA compliance, brands should assess the Interactive Advertising Bureau's (IAB) proposed California Consumer Privacy Act Compliance Framework for Publishers and Technology Companies (the Framework). The draft Framework is designed to help participants comply with the CCPA. It is yet to be seen how widely accepted the IAB Framework will be, but luxury and fashion brands should monitor its development.

Luxury and fashion brands engaging in targeted behavioural advertising should otherwise be considering how to leverage cookie banners or cookie management tools to help with CCPA compliance. It will also be important for luxury and fashion brands to carefully inventory their relationships with third parties operating on their websites and mobile apps and to transparently disclose those relationships and other data collection practices in their privacy policies.

ADVERTISING AND MARKETING

Law and regulation

21 What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

The FTC has broad authority to prohibit deceptive advertising and other marketing practices, and unfair business practices. An advertisement is deceptive if it contains misrepresentation (or omission) that is likely to mislead a reasonable consumer. Historically, the FTC has relied on case-by-case enforcement to convey how it applies its authority. In more recent years, the FTC has published a series of guides that explain how its legal authority would be interpreted in a given area; including, 'Green claims' or environmental marketing, disclosing information via the internet, and the use of testimonials and endorsements to promote a product, as just a few examples.

Online marketing and social media

22 What particular rules and regulations govern online marketing activities and how are such rules enforced?

Social media platforms provide dynamic and constantly evolving ways for luxury goods marketers to connect and create relationships with valued customers and prospective consumers. There are many obvious differences in how messaging is executed when comparing traditional TV, print and other conventional media versus popular social media platforms such as Facebook, Twitter and YouTube. Importantly, the consumer protection or deceptive advertising principles enforced by the FTC apply to social media although it can sometimes be challenging to determine how best to apply the FTC's principles to a tweet, for example. The FTC has issued guidance and taken many enforcement actions in recent years, providing useful information on how the FTC applies its long-standing mandate to new forms of consumer engagement such as social media. For example, the FTC guidance on the use of testimonials only allows use of a testimonial if any claims conveyed can be substantiated for the typical user – a claim true only for the individual featured in an ad is not sufficient. The FTC also requires that a blogger, YouTube personality or other endorser disclose clearly a commercial relationship between the marketer and the individual highlighting a product on a social media platform. Thus, FTC guidance and recent enforcement actions should be considered part of the 'rules of the road' for brands advertising via social media channels.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 What product safety rules and standards apply to luxury and fashion goods?

Luxury and fashion goods are regulated by the US Consumer Product Safety Commission (CPSC) as 'consumer products'. Some consumer products are regulated by category with specific labelling or safety parameters mandated. Products that are intended for children 12 years or younger are subject to a specific set of requirements. Certain classes of products must be tested, and must be accompanied by a certificate when imported or when manufactured in the US. Generally, when no mandatory or voluntary standard adopted by the CPSC exists, products must be safe and not pose a serious hazard based on foreseeable use or misuse. The CPSC's website is an invaluable resource for gaining a sense of how the Commission operates and also provides detailed information on how specific products are regulated (www.cpsc.gov).

Perhaps the most significant is the legal requirement that a manufacturer, importer, distributor or retailer has a mandatory duty to report an unsafe product. The most common trigger is the existence of a 'defect' that may rise to a 'substantial product hazard', both are defined terms of art. It is important for consumer products companies to develop an internal monitoring system of consumer complaints or other reports that may suggest a product is potentially unsafe. Identifying and elevating appropriate information for a careful evaluation is essential to ensure ongoing compliance with the CPSC reporting requirements. The CPSC may impose substantial civil penalties when a company, after the fact, is determined to have failed to report in a timely fashion when it was required to do so.

Companies should be prepared to conduct a recall (when warranted) when they report to the CPSC. The CPSC has very specific parameters around a recall or other corrective action plan. The CPSC must review and approve such plans before implemented by a firm. The CPSC maintains a fast-track programme where the question of whether a product is defective is deferred when the company agrees to quickly recall the product (typically within 20 days of reporting).

Product liability

24 What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

There is no uniform product liability regime in the United States as to luxury and fashion goods, or any other particular industry's products. Instead, each state has its own product liability law, some set forth in statutes while others through common law. Product liability claims are typically brought under negligence, strict liability or warranty theories. Additionally, almost every state has a consumer protection statute that aims to protect consumers from fraud and deceptive marketing and sales practices. Many state consumer protection statutes provide for enhanced penalties to be awarded to successful consumers, going so far as to award legal fees and punitive damages against manufacturers and others found liable under the state's statute. Any entity in the supply chain, including manufacturers, retailers, distributors and importers can be held liable depending on the theory of liability.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

The US has no local ownership requirements.

Companies entering into joint ventures or acquiring companies in the luxury fashion industry will want to conduct thorough diligence on the target's intellectual property, ensuring that the target has clear rights to the brand and any relevant domain names. One of the risks of acquiring one of these 'heritage brands' is the potential decrease in value once the founder is no longer associated with the company.

In addition, one issue that often arises in the M&A context for luxury and fashion brands relates to the buyer's right to continue to use the brand name where the brand is the name of a living person. Often, complex licensing structures must be put into place with respect to trademark and rights to publicity, particularly where these rights are acquired by a buyer and thereafter must be licensed back to the individual designer. A transfer of these rights also raises interesting questions regarding the individual designer's ability to engage in new commercial ventures that would necessarily require him or her to appear in public and to use his or her name and likeness.

Other areas of focus for buyer due diligence include privacy and cybersecurity, advertising compliance (including social influencers), labelling and country of origin, supply chain and, if the target has significant US retail operations, real estate, employment and immigration and consumer finance.

Much of the M&A activity in the retail sector over the past several years has involved the acquisition of technology and online platforms, a trend that is expected to continue as brick-and-mortar stores face increased pressure and more manufacturers sell direct to consumers.

Competition

26 What competition law provisions are particularly relevant for the luxury and fashion industry?

There are two principal antitrust issues in the US to which the industry should pay particular attention when it comes to proper distribution and pricing practices: (i) vertical resale price agreements between a supplier and a reseller; and (ii) vertical agreements that do not directly affect resale price, but could nonetheless harm competition in distribution channels. Specifically, minimum resale price maintenance (RPM) creates a floor on resale prices to promote dealer services by protecting minimum retail profit margins, whereas maximum RPM creates a ceiling on resale prices to prevent retailers from gaining unreasonable margins at the supplier's expense.

Although both types of RPM agreements can be subject to antitrust review, minimum RPM agreements in particular could receive an elevated level of scrutiny – particularly when a supplier possesses sufficient market power, or other suppliers in the same industry also have instituted similar RPM agreements. Generally, federal antitrust laws have made RPM agreements less risky in recent years, because these agreements are no longer deemed per se illegal, but evaluated under a 'rule of reason' standard. In a rule of reason analysis, actual or potential anticompetitive effects must be balanced against any procompetitive benefits. In contrast, however, several states – including California and New Jersey – continue to hold minimum RPMs as per se unlawful. Therefore, it is important to analyse each RPM agreement to evaluate whether it still has the potential to harm competition in your particular industry under a rule of reason, and also ascertain whether certain state laws could continue to make your RPM agreements per se unlawful.

Aside from RPM agreements, a supplier could also enter into a range of 'non-price' vertical arrangements with its reseller, including, but not limited to, exclusive distribution, territorial or customer restrictions, and a refusal to deal with competitors, among others. Such restrictions could be seen as an attempt to make entry by other competitors more costly, time-consuming, and inefficient than it would have been in the absence of such restrictions. In general, these non-price vertical agreements raise less significant antitrust concerns than price-related agreements and are relatively common. Nevertheless, if a supplier or a reseller has significant power in its own market, antitrust due diligence should be performed to assess whether a non-price vertical agreement could foreclose a substantial portion of that market from actual or potential competitors. As a general rule of thumb, US courts rarely condemn vertical non-price restrictions when the resulting foreclosure is less than 20 per cent of the market.

EMPLOYMENT AND LABOUR

Managing employment relationships

27 What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

Like most employees, fashion industry employees are generally employed 'at will', which means the employer and employee can terminate the relationship at any time with or without notice. At-will employment is governed by both federal and state labour and employment laws, which vary substantially across jurisdictions. That said, there are several employment issues likely to be of interest to fashion retailers.

State laws concerning the use of freelancers or independent contractors are constantly evolving. Relatively new laws in California, New York and New Jersey, for example, make it more difficult for fashion houses to engage freelancers (independent contractors) without classifying them as employees. In addition, a federal circuit court in New York recently held that a fashion employer had misclassified its 'fit models' (used by fashion houses to test the fit of clothing) as freelancers and should have classified them as employees.

Another US employment law issue that is somewhat unique to fashion companies arises when fashion houses seek to hire people who have a certain 'look'. Such considerations are not per se illegal, but must be done carefully and tactfully so as not to violate laws that prohibit discrimination on the basis of age, sex, race or disability.

Fashion houses should also be aware that the relationship between them and their retailers—such as department stores that install brand-specific counters or 'shop in shops' —could potentially raise issues under the 'joint employment' doctrine, which could render one entity liable for the employment law violations by the other. Whether that theory applies is highly fact-dependent and depends on the level of control that one entity has over the other's employees, but this 'joint employment' doctrine has been and can be used to bring a non-employing entity into court for employment claims such as unpaid wages, discrimination or harassment.

Finally, fashion companies should take note of enforceability issues with respect to restrictive covenants such as non-disclosure, non-competition or non-solicitation agreements. While non-disclosure agreements are widely enforceable, the enforceability of non-competition agreements varies: in some states, non-competition agreements are entirely unenforceable as against public policy; in others, they are enforceable but only if reasonable and narrowly tailored to protect legitimate business interests.

Trade unions

28 Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

In the United States, fashion industry employees are not typically represented by trade unions.

Immigration

29 **Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?**

Fashion houses seeking to move talent across borders should be aware of the three most common visas that may suit their purpose.

The most basic of these is the H-1B visa. The H-1B visa is for individuals with advanced degrees who wish to work in a 'specialty occupation'. Those with particularly extraordinary talent may qualify for a variant of the H-1B known as the H-1B3. This variant is subject to additional limitations. First, the barrier to entry is even higher than with an ordinary H-1B, requiring not only that the applicant be specialised, but that they be 'prominent' as well. Prominence means a 'high level of achievement as evidenced by a degree of skill and recognition substantially above that ordinarily encountered . . . The person must be renowned, leading or well known'. Ordinary skilled and unskilled workers do not meet these criteria, and many models or other fashion-industry talent might not either. Moreover, the general H-1B visa category can apply to a wide range of fields. This means that H-1B3 applicants from the fashion industry compete for the same number of limited visas, with only 65,000 total H-1B visas available per fiscal year.

Subject to the highest evidentiary threshold of the three, the O-1 visa category is available only for persons of 'extraordinary ability' as demonstrated by sustained national or international acclaim. However, it is not subject to the same caps as H-1B visas.

UPDATE AND TRENDS

Trends and developments

30 **What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?**

The US luxury fashion industry continues to be driven by the global trends of digitalisation, diversification, personalisation and consolidation. Luxury customers are increasingly willing to shop online, with e-commerce growing and the US shoppers contributing a substantial portion of the e-commerce luxury market. This has put new pressures on supply chains, as customers demand ever faster delivery. Further, the luxury fashion market is skewing more heavily toward younger and more diverse customers, and brands are adapting to the demands of a younger market. Generations Y and Z accounted for 47 per cent of luxury consumers in 2018. The efforts of luxury fashion brands to reach younger buyers are evident in their efforts to adopt emerging technologies, utilise social media platforms to drive growth and focus on sustainability and corporate responsibility. Luxury brands always offered a greater level of personalisation than was offered in the general market, but the general market trend towards personalisation, whether in the customisation of products, tailoring of product experiences or curating of a collection of products, is particularly pronounced in the luxury market. Finally, luxury brands are continuing to consolidate with luxury conglomerates continuing to acquire brands, independent brands continuing to scale through acquisitions and investment activities, and brands teaming up with e-platform providers or geographically complementary players.

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