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News from Around the World
United States

Judith Thorman
Sr. Vice President, Government Relations & Public Policy
International Franchise Association
Federal Legislation: Pro-Growth Policy Platform

- Protect Franchise Business Model
- Comprehensive Tax Reform
- Health Care
- Workforce Policy
- Access to Credit
- Support Veterans as Franchise Owners
Tax Reform

• Remove Uncertainty
• Seek Comprehensive Reform
• Extend Business Tax Provisions
Health Care

• Supreme Court Decision
  June 29

• Regulatory Implementation:
  – Labor
  – Treasury/IRS
  – Health Human Services
Workforce Policy

- Ambush Elections
- Employee Rights Poster
- Recess Appointments
- Companion Exemption
Access to Credit

• Small Business Administration:
  – Loan Guarantees
  – Appropriations

• Dodd-Frank Regulations
State Government Relations

- So-Called “Fair Franchising” Bills
- Independent Contractor Bills
- Goal: Prevent Government Intrusion
So-Called “Fair Franchising” Bills

• California AB 2305
• Massachusetts SB 1843
• Vermont HB 694
California: Strategy & Lessons Learned

- IFA implemented a comprehensive strategy including lobbying, communications, coalition building, grassroots and research.
- Legislators are reluctant to interfere in franchise relationships.
- Legislators need more education on the franchise business model from franchisors and franchisees.
Independent Contractor Bills

- Delaware (TBD)
- Georgia HB 548
- Massachusetts HB 3513
- Rhode Island SB 2527
Proactive Plan for Independent Contractor Legislation

• American Legislative Exchange Council (ALEC) Resolution
  – Franchisees are not employees

• Georgia House Bill 548 signed into law

• IFA plans to seek enactment of similar legislation in four to five states in 2013
Recent Developments in Canadian Franchising Law

Judy A. Rost
Alexander Holburn Beaudin & Lang LLP
Overview

New Franchising Legislation in Canada
  • New Brunswick
  • Manitoba

Relevant Canadian Case Law
  • Ontario Statutory Disclosure Exemption
  • Waiver of Class Action Clauses
  • Workers Compensation Board Coverage of Franchisee
  • Tim Hortons Always Fresh
New Franchising Legislation in Canada

New Brunswick

- *Franchises Act* and two associate regulations:
  - the *Mediation Regulation*
  - the *Disclosure Regulation*
- Came into force February 1, 2011
New Franchising Legislation in Canada

Manitoba

• *Franchise Act* (Manitoba) will become effective October 1, 2012

• Draft regulations (not yet in force) would allow franchisors to provide disclosure information to franchisees in sequential parts
Ontario Court Upholds Reliance on Statutory Disclosure Exemption

• In *Suncor* Ontario Court of Appeal confirmed no document disclosure necessary where *Arthur Wishart Act “one year no franchise fee”* exemption applies

*TA & K Enterprises v. Suncor Energy Products Inc.*, 2011 ONCA 613 (CanLII)
Relevant Canadian Case Law

Waiver of Class Action Clauses

- Case law suggests an arbitration clause in a franchise agreement is not likely to prevent a class action in Canada
- No specific franchise cases on this issue to date

*Seidel v. Telus Communications Inc.* [2011] 1 SCR 531
Relevant Canadian Case Law

Franchisor responsibility for Workers Compensation Board Coverage of Franchisee

- Manitoba Appeal Commission likens franchisees to employees, not independent contractors
- Decision should alert franchisors to pay attention to degree of control over both the operations and flow of money of their franchisees

Manitoba Appeal Commission Public Decision No. 99/201
Relevant Canadian Case Law

Tim Hortons Always Fresh

- Judge ruled Always Fresh Conversion and Lunch Menu programs do not breach franchise agreement or statutory requirements
- Decision upholds franchisor’s right to amend its franchising system and profit from product distribution

*Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252
Franchising Developments in Russia

Dr. Natalya Babenkova
Noerr
Franchising: Positive Changes in Legal Regulation in Russia

- Business-friendly changes to the Russian Civil Code regarding franchise agreements became effective in October 2011
- Market entry becomes easier for non-Russian companies intending to conduct franchise operations in Russia
Resale price maintenance and non-compete provisions

- Now franchisors may set fixed, minimum or maximum resale prices
- Franchisor may bar franchisee from entering into a franchise agreement with any of the franchisor’s actual or potential competitors, and from selling similar goods or services under third-party brands
First refusal right

- After the franchise agreement ends, if the franchisor wants a new franchise agreement under new terms, it must offer the former franchisee first refusal rights under those new terms.
- If they cannot agree on the new terms, the franchisor may offer a third party the same new terms.
- Only if the franchisor fails to offer the former franchisee a renewal under the exact same terms as the prior franchise agreement, and instead offers those same terms to a third party, can the former franchisee demand that all rights and obligations that arise under the new agreement with the third party be transferred to it, and demand compensation for losses.
Franchisor’s right to terminate franchise agreement

- Franchisor may terminate the franchise agreement if the franchisee breaches by:
  - failing to meet quality standards
  - deviating from instructions regarding intellectual property, or
  - failing to timely pay money due

- **One-bite rule:** Franchisee must be given one opportunity to cure. If franchisee does so, then franchisor may terminate only if the same breach recurs within a year
Registration requirements remain in force

• In Russia, all franchise agreements still must be registered with the **Patent and Trademark Office** (Rospatent) to be legally valid

• A franchise agreement may be submitted for registration only after the underlying trademark has been registered in Russia

• Rospatent reviews all prospective franchise agreements for substantive legal compliance

• Registration can take **up to two months**
Franchisor liability remains in force

• The franchisor and franchisee are still **jointly and severally liable** for defects in goods produced by the franchisee under the franchise agreement.

• The franchisor is still **secondarily liable** for defects in goods sold and services rendered by the franchisee pursuant to the franchise agreement, even if the franchisor has no direct control over the franchisee's actions.
有关中国特许经营的最新发展：
政策，法规以及司法 2011-2012

CHINA FRANCHISE UPDATE:
POLICY, REGULATORY
AND JUDICIAL DEVELOPMENTS
2011-2012

Paul Jones

Jones & Co. 钟保禄律师事务所 Джоунс и Ко.
政策 - Policy

关于 ‘十二五’ 期间促进商业特许经营健康发展的指导意见” “Guidance on the Promotion of the Healthy Development of the Commercial Franchising in accordance with the Five Year Plan – Jan 10, 2012

• Greater emphasis on enforcement of registration and annual report requirements

• Working on revising the 商业特许经营管理条例 or regulations
修订后的法规 – Revised Regulations

商业特许经营备案管理办法 (Commercial Franchise Registration Administrative Measures) in effect February 1, 2012

• Article 6 – must now submit original copy of first franchise agreement

• Article 8 – Now only three changes to report annually:
  • Franchisor’s basic registration information
  • Information about the business resources, including trademarks
  • Information regarding all locations in China
修订后的法规 – Revised Regulations

商业特许经营信息披露管理办法 (Commercial Franchise Information Disclosure Administrative Measures) April 1, 2012

- Article 5(6)(1) NEW - The specific content, delivery and implementation methods of the operational guidance, including site selection, premises decor, store management, advertising and promotion and product configuration etc.

- Article 5(8)(2) REVISED - Estimated gross sales etc. are no longer permitted. The figures disclosed must be actual results.

- Article 7 – NEW - protection of the franchisor’s trade secrets and confidential information from disclosure by prospective franchisees and terminated franchisees
在法院的维权 – Enforcement in the Courts
案例 - Cases - Definition of a Franchise

黄云飞诉被告诗尼格（北京）国际品牌管理有限公司 (Huang Yunfei vs. Shinige (Beijing) International Brand Management Ltd - November 17, 2011)

The court finds that according to the “Commercial Franchise Administrative Regulations”, it is the basic characteristic of franchise that franchisors license franchisees to use franchisors’ business resources, franchisors collect royalties and franchisees operate the franchise business under a unified model.

In this case, Boluode licenses Li Zuoju to use its business resources including related products of the “Various Attractions” brand, the trademark, the product packaging design etc. and charges Li Zuoju a deposit, royalties and other fees.

Also in the so-called “Sales Agency Agreement”, there are provisions about unified management and training.

Even though this so-called “Sales Agency Agreement” sets out the sales relationship between the two parties, we think it has the basic characteristics of a franchise agreement and it should be treated as a franchise agreement.
According to Article 24 and 25 of the “Commercial Franchise Administrative Regulations”, in terms of the franchisors who do not meet the 2+1 requirement and fail to register with relevant government commercial authority, the relevant government commercial authority can request them to correct the mistakes and fine them.

According to the second paragraph of Article 7 and Article 8 of the Commercial Franchise Administrative Regulations, and the “Beijing Higher Court Instruction Opinion regarding Several Questions of the Application of Law in Franchise Agreement Disputes”, a franchisors’ failure to register with relevant government commercial authority or failure to meet the 2+1 requirement generally will not affect the validity of the franchise agreement.
案例 – Cases

The court holds the opinion that, according to Article 23 of the “Commercial Franchise Administrative Regulations”, the information provided by the franchisor to the franchisee shall be true, accurate and complete and shall not conceal any relevant information, or provide any false information.

When judging whether a franchisor is fraudulent, we should take the following factors into account: the relevance of the information the franchisor conceals, the degree to which the false information and exaggerated business resources affect the purpose of the agreement, and the degree to which the above mentioned information or business resources are from the true information, and the effect of the conduct on the conclusion and enforcement of the agreement, etc.)
Even though Yu Ai brought the case to the court to terminate the agreement on August 15, 2011, which was almost four months after the agreement was concluded, considering the facts that neither of the two parties started to perform the agreement after its conclusion, and Yu Ai did not actually use the business resources of Boluode, this four-month period should be regarded as a reasonable period to exercise the right to terminate the franchise agreement unilaterally according to relevant provisions of “Commercial Franchise Administrative Regulations.”
提问？- Questions？
Developments in Brazil

Flávia Amaral
Trench, Rossi e Watanabe Advogados
Associated with Baker & McKenzie International
Franchising in Brazil

• Franchising grew 17% in 2011 and is expected to grow 15% in 2012

• Current Franchise Law (#8,955/94):
  – Disclosure law only
  – No minimum trading required before franchising
  – No language requirements
Franchising in Brazil

• Draft Bill to revoke # 8,955/94 released February 15, 2012.

• Among other changes:
  – Suggests the franchise business/trademark/concept needs to exist for at least 2 years before franchises are granted in Brazil
  – FOC will need to be in portuguese
  – Adds new disclosure items (eg minimum purchase requirements)
Changes in Indonesian Franchise Regulation: Just What We Didn’t Need

Philip Zeidman
DLA Piper