NEGOTIATING INTERNATIONAL FRANCHISE AGREEMENTS

WHAT TO DISCLOSE WHEN THERE IS NO DISCLOSURE LAW?
NEGOTIATING INTERNATIONAL FRANCHISE AGREEMENTS

I. Territory

• Rights of first refusal
• Definition of “Territory”
  – Geopolitics (e.g. border disputes) may favor particular language instead of a traditional (and out of date) map
II. Term and Renewal

• Duration
• Conditions for Renewal
• Impact of commercial agency laws and other local laws
III. Fees/Other Revenue Sources

- Upfront fees
- Royalties
- Service fees
- Mark-up on products sold to franchisees
- Advertising/marketing funds
- Other
IV. Scope of Grant

- Exclusive right to the brand
- Limited to specific channels
- E-Commerce
- Wholesale
- Mobile applications
V. Minimum Performance Requirements

- Development schedule
- Minimum purchases/sales
- Metrics for satisfaction of requirements
- Consequences of failure to meet requirements
- Other
VI. Sourcing

- From franchisor
- From approved suppliers
- Terms of supply
- Fees/rebates
- Local antitrust considerations
VII. Non-Compete

- Scope of activity
- Geographic scope
- Duration
VIII. Customer Data

• Who has access
• Legal restrictions on sharing customer data
IX. Transfer Restrictions

- Public franchisee vs. private franchisee
- Special considerations for private equity transactions
- Enforcement issues
X. Termination

• Curable and non-curable grounds for termination
• Post-termination covenants
• Impact of local laws
XI. Extra-Territorial Application of US Law

- OFAC/SDN Considerations
- FCPA
- Effect of export controls and anti-boycott laws
WHAT TO DISCLOSE WHEN THERE IS NO DISCLOSURE LAW

General obligation of disclosure in contract negotiations

• *Culpa in contrahendo* (i.e. fault or liability in concluding a contract)
• Good faith
• Mostly in civil law countries
How to know what to disclose?

• Prospective franchisee’s level of sophistication
• “Mom and Pop” vs. large multi-brand franchisee
• Special considerations if franchisor is privately held
• Guidelines identified by local franchise association (if any)
Where *culpa in contrahendo* applies

- Germany
- Austria
- Colombia
- Czech Republic
- Hungary
- Poland
“Good faith” disclosure obligation

• Chile
• Netherlands
No Particular Disclosure Obligation

• Hong Kong
• India
• Ireland
• Singapore
• Thailand
• United Arab Emirates
But, what to disclose?

• Case-by-case assessment
• How sophisticated is the prospect?
  – Franchise experience?
  – Sophisticated advisors?
• Language barrier?
• Confidentiality considerations
Possible Disclosure Items

• The franchisor
• Relevant intellectual property
• Relevant information that the franchisor has, but the prospect does not
• Sample franchise agreement
What About Financial Projections?

• Germany: If the prospect wants projections, it has the burden of developing them.
• However, the franchisor probably should provide any relevant and reliable information it has to enable the prospect to develop its own projections.
A Debt of Gratitude

The author wishes to offer sincere thanks to the lawyers listed below from around the world who participated in the survey which formed the basis of this paper and the presentation on this topic at the 2016 Annual Convention of the International Franchise Association.
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