



Franchise

in 30 jurisdictions worldwide

2014

Contributing editor: Philip F Zeidman



Published by
Getting the Deal Through
in association with:

Adams & Adams
Advocare Law Office
Anderson Mōri & Tomotsune
Ashurst LLP
AZB & Partners
Bengzon Negre Untalan Intellectual Property Attorneys
Bersay & Associés
DBB
De Grave De Mōnnink Spliet Advocaten
DLA Piper LLP (US)
DLA Piper (Thailand) Limited
Dr Sylvia Freygnier, LLM Rechtsanwältin
Ella Cheong (Hong Kong & Beijing)
Field Fisher Waterhouse LLP
Gonzalez Calvillo SC
Koyuncuoglu & Koksal Law Firm
Lapointe Rosenstein Marchand Melançon LLP
Makarim & Taira S
Mason Sier Turnbull
Meyerlustenberger Lachenal
Noerr LLP
Noerr sro
Plesner Law Firm
Rödl & Partner
Stewart Germann Law Office
Tilleke & Gibbins
Triana, Uribe & Michelsen
TSMP Law Corporation
Wong Jin Nee & Teo
Yust Law Firm



Franchise 2014

Contributing editor

Philip F Zeidman
DLA Piper LLP (US)

Publisher

Gideon Robertson

Business development managers

Alan Lee
George Ingledew
Dan White

Account manager

Megan Friedman

Trainee account managers

Cady Atkinson
Joseph Rush
Dominique Destrée
Emma Chowdhury

Media coordinator

Parween Bains

Administrative coordinator

Sophie Hickey

Trainee research coordinator

Robin Synnot

Marketing manager (subscriptions)

Rachel Nurse
subscriptions@gettingthedealthrough.com

Head of editorial production

Adam Myers

Production coordinator

Lydia Gerges

Senior production editor

Jonathan Cowie

Subeditor

Claire Ancell

Director

Callum Campbell

Managing director

Richard Davey

Franchise 2014

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2013

No photocopying: copyright licences
do not apply.

First published 2006
8th edition

ISSN 1752-3338

The information provided in this
publication is general and may not apply
in a specific situation. Legal advice should
always be sought before taking any legal
action based on the information provided.
This information is not intended to
create, nor does receipt of it constitute, a
lawyer-client relationship. The publishers
and authors accept no responsibility for
any acts or omissions contained herein.
Although the information provided is
accurate as of August 2013, be advised
that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law
Business
Research

| | |
|--|------------|
| Introduction Philip F Zeidman <i>DLA Piper LLP (US)</i> | 3 |
| Australia Philip Colman and John Sier <i>Mason Sier Turnbull</i> | 5 |
| Austria Sylvia Freygner and Philipp von Schrader <i>Dr Sylvia Freygner, LLM Rechtsanwältin</i> | 13 |
| Belgium Pierre Demolin, Véronique Demolin, Benoit Simpelaere and Leonard Hawkes <i>DBB</i> | 20 |
| Canada Bruno Floriani and Marvin Liebman <i>Lapointe Rosenstein Marchand Melançon LLP</i> | 25 |
| Colombia Juan Carlos Uribe and Juliana Barrios <i>Triana, Uribe & Michelsen</i> | 34 |
| Czech Republic Barbara Kusak and Halka Pavlíková <i>Noerr sro</i> | 40 |
| Denmark Jacob Ørskov Rasmussen, Gitte Holtsø and Anna Gentszsch <i>Plesner Law Firm</i> | 48 |
| Finland Patrick Lindgren <i>Advocare Law Office</i> | 55 |
| France Emmanuel Schulte <i>Bersay & Associés</i> | 62 |
| Germany Karsten Metzloff and Tom Billing <i>Noerr LLP</i> | 69 |
| Hong Kong Ella Cheong <i>Ella Cheong (Hong Kong & Beijing)</i> | 76 |
| India Abhijit Joshi, Kunal Doshi and Rishika Harish <i>AZB & Partners</i> | 81 |
| Indonesia Galinar R Kartakusuma and Reagan Roy Teguh <i>Makarim & Taira S</i> | 87 |
| Italy Roberto Pera and Filippo Maria Catenacci <i>Rödl & Partner</i> | 95 |
| Japan Etsuko Hara <i>Anderson Mōri & Tomotsune</i> | 103 |
| Malaysia Jin Nee Wong <i>Wong Jin Nee & Teo</i> | 109 |
| Mexico Jorge Mondragon <i>Gonzalez Calvillo SC</i> | 116 |
| Netherlands Tessa de Mönnink <i>De Grave De Mönnink Spliet Advocaten</i> | 123 |
| New Zealand Stewart Germann <i>Stewart Germann Law Office</i> | 130 |
| Philippines Ferdinand M Negre and Jasmine L Solivas-Dayacap <i>Bengzon Negre Untalan Intellectual Property Attorneys</i> | 135 |
| Russia Evgeny Zhilin, Anna Kotova-Smolenskaya and Denis Shumskiy <i>Yust Law Firm</i> | 141 |
| Singapore Rhonda Hare and Alison Tonges <i>Ashurst LLP</i> Stefanie Yuen Thio and Dayne Ho <i>TSMP Law Corporation</i> | 146 |
| South Africa Eugene Honey <i>Adams & Adams</i> | 152 |
| Switzerland Martin Ammann and Christophe Rapin <i>Meyerlustenberger Lachenal</i> | 159 |
| Thailand Chanvitaya Suvarnapunya and Pattama Jarupunphol <i>DLA Piper (Thailand) Limited</i> | 166 |
| Turkey Hikmet Koyuncuoglu and Seza Ceren Aktas <i>Koyuncuoglu & Koksal Law Firm</i> | 172 |
| Ukraine Mansur Pour Rafsendjani and Volodymyr Yakubovskyy <i>Noerr LLP</i> | 178 |
| United Kingdom Chris Wormald and David Bond <i>Field Fisher Waterhouse LLP</i> | 184 |
| United States Michael G Brennan and Philip F Zeidman <i>DLA Piper LLP (US)</i> | 190 |
| Vietnam Thom Thi Mai Nguyen and Huong Thi Thanh Nguyen <i>Tilleke & Gibbins</i> | 200 |

Japan

Etsuko Hara

Anderson Mōri & Tomotsune

Overview

1 What forms of business entities are relevant to the typical franchisor?

The most typical franchisors are organised in the form of a joint-stock company.

2 What laws and agencies govern the formation of business entities?

The formation of joint-stock companies in Japan is governed by the Companies Act (Act No. 86, 2005) and administered by the Ministry of Justice.

3 Provide an overview of the requirements for forming and maintaining a business entity.

The formation of a joint-stock company requires articles of incorporation and other incorporation documents to be prepared and registered at a competent legal affairs bureau. After incorporation, it is necessary to prepare financial statements etc, and to hold a shareholders' meeting each year.

4 What restrictions apply to foreign business entities and foreign investment?

Foreign business entities must register their representatives in Japan in order to conduct business continuously in the country. Once registered, they can carry out business in the same way as domestic entities. In addition, foreign investment is regulated by the Foreign Exchange and Foreign Trade Act (Act No. 228 of 1949 – FEFTA). Industry-specific laws may also apply, depending on the business sector of the foreign entities.

5 Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

Franchisors in the form of joint-stock companies need to pay corporate tax, corporate enterprise tax, corporate inhabitant tax and consumption tax. Depending on the nature of the assets held by a franchisor, property tax and automobile tax may also be payable. Foreign businesses' and individuals' income sourced in Japan is generally subject to Japanese taxation.

6 Are there any relevant labour and employment considerations for typical franchisors? What is the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor? What can be done to reduce this risk?

Labour regulations generally apply to franchisors, especially with regard to the relationship between franchisors and their respective employees. Nevertheless, in a typical franchise arrangement, a franchisee and the employees of a franchisee are not considered to be

employees of the franchisor. To avoid the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor, a franchisor needs to structure the franchise relationship so that the franchisee is an independent entity, and needs to clearly explain the independent nature of the franchise relationship with the franchisee. In addition, if a franchisor is involved in the hiring process of employees of the franchisee, it should explain its position and make it clear to the prospective employees that the employer will be the franchisee, not the franchisor. Breach of labour regulations may result in penalties including imprisonment.

7 How are trademarks and know-how protected?

Franchisors can register trademarks to protect such marks from infringing use. Nevertheless, there is no registration system per se for know-how. Know-how that falls within the scope of registrable types of intellectual property, such as patents, designs or copyrights, may be registered accordingly. In addition, if the know-how falls within the scope of a 'trade secret' under the Unfair Competition Prevention Act (Act No. 47 of 1993), it will be protected against any acts constituting unfair competition.

8 What are the relevant aspects of the real estate market and real estate law?

In general, a franchisee leases real estate for its operations directly from a property owner. Disputes may arise when the lessor tries to increase the rent or terminate or refuse to renew the lease agreement. In such situations, protection would be available to the franchisee under the Land Lease and Building Lease Act (Act No. 90, 1991) and the doctrine of the destruction of a relationship of mutual trust (see question 28).

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

There is no uniform definition of a franchise in Japan. Nevertheless, there are three relevant definitions with regard to franchise businesses. Firstly, the Medium and Small Retail Commerce Promotion Act (Law No. 110 of 1973 – MSRCPA) defines a 'chain business' as a business that, pursuant to an agreement with uniform terms and conditions, continuously sells or acts as an agent for sales of products and provides guidance regarding management, and primarily targets medium and small retailers. In addition, a 'specified chain business' is defined as 'any chain business the agreement for which includes clauses which permit its members to use certain trademarks, trade names or any other signs, and collects joining fees, deposits or any other money from the member when becoming a member'. If a franchise business falls under this definition, the regulations of the MSRCPA apply.

Secondly, the Guidelines Concerning the Franchise System (Franchise Guidelines) under the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947 – Antimonopoly Act) provides the following:

The franchise system is defined in many ways. However, the franchise system is generally considered to be a form of business in which the head office provides the member with the right to use a specific trademark and trade name, and provides coordinated control, guidance, and supports for the member's business and its management. The head office may provide support in relation to the selling of commodities and the provision of services. In return, the member pays the head office.

Thirdly, the Japan Franchise Association (JFA) defines a franchise as:

A continuing relationship between one business concern (called a Franchisor) and another business concern (called a Franchisee) where a Franchisor and a Franchisee enter into a contractual agreement, the Franchisor granting the Franchisee the right to use the signs representing the Franchisor's business, which signs include the Franchisor's logo, service mark, trade name and others as well as the Franchisor's management know-how, and to conduct the product sales and other businesses which bear the same image as the Franchisor's; the Franchisee paying the consideration to the Franchisor in return, providing the fund required for the business, and operating the business under the Franchisor's guidance and assistance.

10 Which laws and government agencies regulate the offer and sale of franchises?

If the franchise business falls within the scope of a specified chain business, the MSRPCA regulates the disclosure obligations related to the offer and sale of franchises. The Ministry of Economy, Trade and Industry, as well as other Ministries, depending on the products sold by the franchise business, have overall responsibility in this regard.

From the perspective of competition law, the Franchise Guidelines regulate the offer and sale of franchises in connection with the Antimonopoly Act, and the Fair Trade Commission has overall responsibility in this regard.

The JFA has also implemented voluntary rules, such as the Japan Franchise Association Code of Ethics and the Voluntary Standard Regarding Disclosure and Explanation of Information to Prospective Franchisees.

11 Describe the relevant requirements of these laws and agencies.

Under the MSRPCA, franchisors whose businesses fall under the definition of a specified chain business are required to provide a written document that describes prescribed items and to explain the contents of the written documents prior to executing a franchise agreement with prospective franchisees.

The Franchise Guidelines require franchisors to disclose sufficient and accurate information to prospective franchisees.

12 What are the exemptions and exclusions from any franchise laws and regulations?

There are no exemptions under the MSRPCA or the Franchise Guidelines. Nevertheless, if a franchisor's business does not fall within the definition of a franchise under such laws or regulations, those laws or regulations will not apply.

13 Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

There is no such requirement in general, except for those provided in the MSRPCA and the Franchise Guidelines. If the industry of the franchise is regulated by industry-specific laws, it is necessary to check those regulations.

14 Are there any laws, regulations or government policies that restrict the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers?

The Franchise Guidelines require a franchisor, when recruiting a franchisee, to disclose sufficient information to the franchisee in order to avoid any misunderstandings about the business by the franchisor. However, there are no restrictions on or requirements as to the number of franchises or franchisees or the number held by a single franchisee.

15 In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

In the case of a sub-franchise, the relationship between the sub-franchisor and the franchisee needs to be analysed; if it falls within the definition of a specified chain business under the MSRPCA, the sub-franchisor owes a disclosure obligation. In such a case, the information relating to the sub-franchisor must be disclosed. The relationship between the franchisor and the sub-franchisor must also be analysed; if it too falls within the definition of a franchise, the franchisor has a disclosure obligation as well.

16 What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?

Under the MSRPCA, when a franchisor intends to negotiate a franchise agreement with a prospective franchisee, the franchisor must provide written documents describing the prescribed items and explain the contents of the written documents to prospective franchisees. There are no regulations regarding the frequency of updating disclosures.

17 What information must the disclosure document contain?

Under the MSRPCA, the following information is required to be disclosed by the franchisor to the franchisee (MSRPCA article 11, Enforcement Regulation (ER), articles 10 and 11):

- Information regarding the franchisor, including:
 - the name and address of the franchisor, number of full-time employees and, if the franchisor is a company, the title and names of officers;
 - the amount of capital, names of the principal shareholders (those holding more than 10 per cent of the shares directly or indirectly) and, if the franchisor is conducting another business, the type of business;
 - the name of any entity of which the franchisor holds a majority of the voting shares;
 - the balance sheet and profit and loss statement, or other documents equivalent to these with regard to the past three business years of the franchisor's business;
 - the date on which the franchisor began its specified chain business;
 - the number of litigation cases in which the franchisor is the plaintiff and a franchisee or ex-franchisee is the defendant with regard to the franchise agreement and vice versa during the past five business years;

- business hours, business days and regular or irregular closing days of franchisees' stores;
 - if there is a provision stipulating whether the franchisor will engage in or allow other franchisees to engage in business operations conducting the same or similar retail business near the shops of the franchisee and, if there is such a provision, the contents of the provision;
 - whether there is a provision that prohibits or restricts the ability of franchisees to conduct businesses, such as prohibiting them from joining other specified chain businesses or from being employed with similar businesses, either during or after termination or expiration of the agreement, and, if there is such a provision, the contents of the provision;
 - whether there is a provision that prohibits or restricts disclosure of information that the franchisee may know regarding the specified chain business during or after termination or expiration of the agreement, and, if there is such a provision, the contents of such provision;
 - if the franchisees need to remit all or part of the sale proceeds periodically, the timing and method thereof;
 - if the franchisor lends or arranges to lend money to franchisees, the interest rate or the method of calculating the rate and any other conditions of the lending or arranging of lending;
 - if the franchisor adds interest to all or part of the remaining amount after setting off the rights and obligations which accrue in connection with a transaction with the franchisor during a certain period, the interest rate or the method of calculating the rate and any other conditions;
 - if the franchisor imposes on franchisees a special obligation regarding the structure or interior or exterior of stores of franchisees, the contents of the obligation; and
 - the amount of money or the method of calculating the amount of money that accrues when the franchisor or a franchisee violates the agreement;
 - information with regard to the initial fee, deposit or any other money that the franchisor will collect at the time when the prospective franchisee becomes a franchisee. Such information must specify:
 - the amount of money to be paid or the method of calculating the amount;
 - the nature of the money to be collected, such as whether it is an initial fee, deposit, equipment fee, etc;
 - the timing of payment;
 - the method of collection; and
 - whether the money will be refunded or not, and the conditions applicable to such refund;
 - information with regard to the type of products that are sold or arranged to be sold to the franchisees and the method of payment for such products;
 - information with regard to management instruction, specifying whether there will be training or a seminar when joining, the content thereof, and the method of continuous management instruction to franchisees and how many times such instruction will be conducted;
 - information with regard to the trademark, trade name, and any other matters regarding the indication of the business name that will be permitted to be used. In addition, if there are any terms and conditions with regard to the use of the indication of the business name, the content thereof must be provided;
 - information with regard to the duration of the agreement and renewal and termination of the agreement, specifying:
 - the duration of the agreement;
 - the conditions and procedure to renew the agreement;
 - the requirements and procedures to terminate the agreement; and
 - the amount of compensatory damages that will accrue on termination of the agreement or the methods to calculate the amount, and the content of any other obligation;
 - information with regard to changes in the number of franchisees' stores during the most recent three business years, specifying:
 - the number of franchisees' stores as at the last day of each business year;
 - the number of franchisees' stores that newly started operations during each business year;
 - the number of franchisees' stores whose franchise agreements have been terminated during each business year; and
 - the number of franchisees' stores whose franchise agreements were renewed during each business year and the number of franchisees' stores whose franchise agreements were not renewed during each year; and
 - information with regard to any periodic payments, specifying:
 - the amount of money to be paid periodically or the method of calculating the amount of money to be paid periodically;
 - the nature of the payment, such as whether it is a royalty for the use of the business name, a consulting fee, etc;
 - the timing of payment; and
 - the method of collection of the payment.
-
- 18** Is there any obligation for continuing disclosure?
- The MSRCPA and the Franchise Guidelines do not provide any continuing disclosure obligation on current franchisees.
-
- 19** How do the relevant government agencies enforce the disclosure requirements?
- The Ministry of Economy, Trade and Industry and the relevant ministry which administers the distribution of the specific products sold by the franchise business have the authority to enforce the disclosure obligation under the MSRCPA. They may issue a recommendation to comply to a franchisor that does not comply with disclosure obligations under the MSRCPA (paragraph 1, article 12), and if the franchisor does not follow the recommendation, the minister may disclose such fact to the public (paragraph 2, article 12).
-
- 20** What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?
- No special remedy exists for franchisees under the MSRCPA regarding violations of disclosure requirements. Therefore, unless otherwise provided in the franchise agreement, franchisees need to base any claims for damages on the general principles of contract under the Civil Code (Act No. 89, 1896). In the event of fraudulent disclosure of information, franchisees can rescind the franchise agreement (Civil Code, article 96). If there is a material misunderstanding about the franchise agreement, the franchisee can claim that the franchise agreement is void (Civil Code, article 95).
- If damage has been caused by the violation of the disclosure requirement, franchisees may bring a claim for damages based on contract theory or tort theory (Civil Code, articles 415 and 709). A violation of the disclosure requirement under the MSRCPA can establish the element of illegality required to bring a tort claim. There is no formula to calculate damages, but damages are recognised provided the violations are an actual and proximate cause of the damages.

- 21** In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

As discussed in question 15, a franchisor or a sub-franchisor whose business falls within the definition of a specified chain business will owe disclosure obligations, and any party who owes such obligations shall be responsible for any breach thereof. Generally, individual officers, directors and employees of the franchisor or the sub-franchisor are not exposed to liability. Nevertheless, if there are breaches of the duty of care or fault on the part of these individuals, they may face liability accordingly. In addition, there is a risk that a franchisee will name these individuals as defendants in a suit against the franchisor or the sub-franchisor to seek recovery of damages from them.

- 22** In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

See question 20.

- 23** Other than franchise-specific rules on what disclosures a franchisor should make to a potential franchisee or a franchisee should make to a sub franchisee regarding predecessors, litigation, trademarks, fees etc, are there any general rules on pre-sale disclosure that might apply to such transactions?

There are no such general obligations, except for those provided in the MSRCPA and the Franchise Guidelines. If the relevant industry pertaining to the business undertaken by the franchise is regulated by industry-specific laws, it is necessary to check such regulations, and if a party is a listed company, timely disclosure obligations and other disclosure obligations under the securities regulations would apply.

- 24** What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under the franchise sales disclosure laws?

See question 20. In addition, franchisees may claim that a franchisor is violating the Franchise Guidelines, and thus also violating the Antimonopoly Act.

Legal restrictions on the terms of franchise contracts and the relationship between parties in a franchise relationship

- 25** Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

There are no specific laws regulating the ongoing relationship between franchisors and franchisees.

- 26** Do other laws affect the franchise relationship?

Various laws affect the franchise relationship. From a competition law perspective, the Antimonopoly Act is relevant. The Franchise Guidelines and the Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act (11 July 1991, the Distribution Guidelines) specify what kinds of activities are problematic under the Antimonopoly Act. The Trademark Act (Act No. 127 of 1959), the Unfair Competition Prevention Act (Act No. 47 of 1933), the Act on Specified Commercial Transactions (Act No.

57 of 1976) and other laws are relevant in the areas of intellectual property, know-how and advertisements. As described in questions 20 and 36, the general obligations under the Civil Code often affect the franchise relationship, especially when there is neither a specific law nor a clause in the agreement addressing a particular issue.

- 27** Do other government or trade association policies affect the franchise relationship?

There are voluntary rules, such as the Code of Ethics, prepared by the JFA. If a franchisor is a member of the JFA, its voluntary rules are an important consideration in the franchise relationship.

- 28** In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

Usually, the franchise agreement lists the circumstances in which the franchisor may terminate a franchise relationship. In addition, if the franchisor and the franchisee mutually agree, the franchisor may also terminate a franchise relationship.

If there is no clause in the franchise agreement regarding the termination, the franchisor may terminate the franchise agreement prior to the expiration of the term of the agreement if the franchisee violates the franchise agreement (Civil Code, articles 541 to 543). Nevertheless, because franchise agreements are usually continuous long-term agreements, it can be expected that courts will be more reluctant to terminate such agreements, when compared to normal agreements. On this point, it may be useful to refer to the doctrine of the destruction of a mutual trust relationship, which has been established in the area of lease agreements that are also generally considered as continuous agreements. With regard to lease agreements, a lessor's ability to terminate a lease agreement is limited to the case that the mutual trust relationship is destroyed because of the lessee's violation of the agreement (Supreme Court, 28 July 1964, 21 April 1966). This means that a lessor may not terminate a lease agreement even if the lessee is violating it, provided that the violation is not sufficiently material to destroy the mutual trust relationship. In many cases, this doctrine is applied or considered by the court to restrict a franchisor's ability to terminate a franchise relationship.

- 29** In what circumstances may a franchisee terminate a franchise relationship?

Usually, the franchise agreement regulates the circumstances in which a franchisee may terminate a franchise relationship. In addition, the franchisee may terminate a franchise relationship due to mutual agreement with the franchisor. In cases where there is no clause in the franchise agreement, the same considerations apply as those relating to termination by the franchisor. However, in general, the necessity of protecting a franchisee is stronger than the necessity of protecting a franchisor, because a franchisee's business is generally dependent upon the franchise relationship.

- 30** May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

Provisions in the franchise agreement generally determine whether a franchisor may refuse to renew the franchise agreement with the franchisee. In cases where the franchise agreement states that it will not be renewed unless otherwise agreed to between the parties, the franchisor may generally refuse to renew. On the other hand, in cases where the franchise agreement states that it will be renewed automatically unless either party notifies otherwise, it is unclear in which circumstances the franchisor may refuse to renew. On this point, there is a case in which a court required 'compelling circumstances

which make it difficult to continue the agreement for a franchisor to be able to refuse to renew a continuous agreement (*Hokka Hokka Tei* case, Nagoya District Court, 31 August 1998).

- 31** May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

By so stipulating in a franchise agreement, a franchisor may restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity. As to the transfer of a franchise, a franchise agreement usually requires the franchisor's consent for the franchisee to transfer its franchise under the agreement. When a party to an agreement is going to transfer its status or obligations under the agreement, the other party's consent must be obtained. Therefore, even if there is no clause in the franchise agreement requiring consent for transfer, the franchisor's consent is still necessary.

As to the transfer of an ownership interest in a franchisee entity, the owner of an ownership interest in a franchisee entity is generally free to transfer its ownership interest. Any covenant that prohibits the owner to transfer an ownership interest in a franchisee is not enforceable against the owner unless the owner is also a party to the franchise agreement. However, the franchise agreement may indirectly restrict the transfer of an ownership interest in a franchisee entity by requiring the franchisor's consent or by making the transfer of an ownership interest a termination event.

- 32** Are there laws or regulations affecting the nature, amount or payment of fees?

There is no specific limitation on the amount or payment of fees. But if such fees are unreasonably high, the obligation to pay such fees may be deemed void because it may be construed as an abuse of dominant bargaining position (Designation of Unfair Trade Practice (Designation of UTP), item 14, Antimonopoly Act, article 19) or as against good public order and customs (Civil Code, article 90).

- 33** Are there restrictions on the amount of interest that can be charged on overdue payments?

For interest on loans from a franchisor to a franchisee, the restriction on interest under the Interest Rate Limitation Act (Act No. 100 of 1954) applies. However, if the overdue payment is not in connection with a loan, there is no specific restriction on the amount of interest. If the interest charged is unreasonably high, however, it can be held to be void for the reasons stated in question 32.

- 34** Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

There are no restrictions on currency.

- 35** Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants are generally enforceable. If a franchisee breaches confidentiality covenants, a franchisor may ask for compensation for the damages caused by such violation or ask for a preliminary injunction to avoid any damages in advance.

- 36** Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

Under the Civil Code, there is a general duty to act in good faith (article 1). In addition, if an agreement is unreasonably advantageous to one party, it can be deemed void because it is against good public policy (Civil Code, article 90). These clauses affect franchise relationships in various ways. One area where the duty to act in good faith under article 1 of the Civil Code plays an important role is with regard to the franchisor's obligation to disclose information. A court has construed that a franchisor has an obligation to provide prospective franchisees with accurate and adequate information so that they can make decisions (Fukuoka High Court, 31 January 2006, *Shin Shin Do* case, Kyoto District Court, 1 October 1991). In addition, courts use article 90 to limit liquidated damages.

For example, in the *Honke Kamadoya* case (Kobe District Court, 20 July 1992), a court stated that liquidated damages of an amount equal to 60 months' loyalty payment were significantly out of balance with the expected amount of damages; consequently the liquidated damages were void to the extent that they went beyond a reasonable amount of damages because such amount was against good public policy (Civil Code, article 90).

- 37** Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

In principle, a franchisee would not be protected as a consumer for the purpose of consumer protection laws because the franchisee is doing business. For example, the Consumer Contract Act (Act No. 61 of 2000) defines a 'consumer' as any natural person excluding a natural person who becomes a party to a commercial contract to engage in commercial endeavours. Nevertheless, as demonstrated by the courts' inclination to protect franchisees (see question 28), depending on the case, franchisees could be protected by interpretations of the Civil Code or other consumer protection laws.

ANDERSON MŌRI & TOMOTSUNE

Etsuko Hara

etsuko.hara@amt-law.com

Akasaka K-Tower
2-7, Motoakasaka 1-chome
Minato-ku
Tokyo 107-0051
Japan

Tel: +81 3 6888 1000
Fax: +81 3 6888 3103
www.amt-law.com/en

38 Must disclosure documents and franchise agreements be in the language of your country?

There is no clear requirement that disclosure documents need to be in Japanese, but since the disclosure obligation is imposed so that prospective franchisees have sufficient information and understand the franchise well, it is prudent to prepare such documents in Japanese. There is no requirement that franchise agreements should be in Japanese.

39 What restrictions are there on provisions in franchise contracts?

The most important restrictions on provisions in franchise agreements are the restrictions imposed by the Antimonopoly Act. Under the Distribution Guidelines, a provision that assigns a specific area to each distributor and restricts the distributor from selling outside each area (exclusive territory) may be illegal, depending on how powerful the franchisor is in the relevant market. In addition, any other restriction on territory or customers may be problematic under the Antimonopoly Act (see question 40). The Franchise Guidelines also specify restrictions which could be problematic, including restrictions on suppliers or bargain sales and restrictions on trade after termination of an agreement.

As stated above, the restriction on liquidated damages may be void or reduced if it is construed as against good public policy and customs (Civil Code, article 90).

40 Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

As stated in the answer to question 39, the Antimonopoly Act is relevant to the typical franchise agreement. The Franchise Guidelines and the Distribution Guidelines describe what kind of activities or restrictions are problematic under the Antimonopoly Act. First of all, the Franchise Guidelines require franchisors to disclose sufficient and accurate information when they are soliciting prospective franchisees, otherwise their actions can be deemed to be deceptive customer inducement that is illegal as it falls into the category of unfair trade practice (Designation of UTP, item 8). In addition, the Franchise Guidelines regulate transactions between franchisors and franchisees. They state that it could be an abuse of a dominant bargaining position (Antimonopoly Act, article 2, paragraph 9, item 5) to limit parties with whom franchisees can make transactions, to compel franchisees to buy a designated amount of goods, to restrict the ability of the franchisees to offer discounts to their customers or to restrict competitive activities after the termination of a franchise agreement. It also states what kind of items should be considered in

connection with tie-in sales (Designation of UTP, item 10), dealing on restrictive terms (Designation of UTP, item 13), and resale price restriction (Antimonopoly Act, article 2, paragraph 9, item 4).

If the restrictions on unfair trade practices under the Antimonopoly Act are violated, the Fair Trade Commission can order the breaching party to cease and desist from the activity, to delete the clauses concerned from the agreement and to take any other measures necessary to eliminate such activities (Antimonopoly Act, article 20). Some of the categories, such as abuse of dominant bargaining position and resale price restrictions, could be subject to surcharges (Antimonopoly Act, article 20-5).

41 Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

A dispute regarding a franchise relationship will be brought to one of the district courts. In every prefecture, one or more district courts exist. Decisions by district courts may be appealed to a competent High Court, and then to the Supreme Court. In addition to litigation in a courtroom, arbitration is possible if the parties agree.

42 Describe the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction.

Foreign franchisors' principal advantage in choosing arbitration is that the proceedings can be conducted in English or any other language as agreed in the franchise agreement. In addition, considering that international franchise agreements tend to be governed by laws other than the laws of Japan, arbitrators may be more familiar with such governing laws than Japanese judges. The principal disadvantage of arbitration is the generally higher costs due to fees for the arbitrators, and the fact that the number of arbitrators who are familiar with franchise laws in countries other than Japan and who know the business practices of franchises may be limited.

43 In what respects, if at all, are foreign franchisors treated differently from domestic franchisors?

Because of certain restrictions on foreign business entities and foreign investment (see question 4), foreign franchisors could face different regulations. For example, certain technical licences could be subject to a regulatory filing under the FEFTA, depending on the contents of the licence. In addition, if the industry of the franchise is regulated by specific laws, such laws may treat foreign franchisors differently.

GETTING THE DEAL THROUGH®

Annual volumes published on:

- Acquisition Finance
- Air Transport
- Anti-Corruption Regulation
- Anti-Money Laundering
- Arbitration
- Asset Recovery
- Banking Regulation
- Cartel Regulation
- Climate Regulation
- Construction
- Copyright
- Corporate Governance
- Corporate Immigration
- Data Protection and Privacy
- Dispute Resolution
- Dominance
- e-Commerce
- Electricity Regulation
- Enforcement of Foreign Judgments
- Environment
- Foreign Investment Review
- Franchise
- Gas Regulation
- Insurance & Reinsurance
- Intellectual Property & Antitrust
- Labour & Employment
- Licensing
- Life Sciences
- Mediation
- Merger Control
- Mergers & Acquisitions
- Mining
- Oil Regulation
- Outsourcing
- Patents
- Pensions & Retirement Plans
- Pharmaceutical Antitrust
- Private Antitrust Litigation
- Private Client
- Private Equity
- Product Liability
- Product Recall
- Project Finance
- Public Procurement
- Real Estate
- Restructuring & Insolvency
- Right of Publicity
- Securities Finance
- Shipbuilding
- Shipping
- Tax Controversy
- Tax on Inbound Investment
- Telecoms and Media
- Trade & Customs
- Trademarks
- Vertical Agreements



For more information or to purchase books, please visit:
www.gettingthedealthrough.com



Franchising®
 Building local businesses,
 one opportunity at a time.



Strategic research partners of the ABA International section



THE QUEEN'S AWARDS
 FOR ENTERPRISE:
 2012



The Official Research Partner of the International Bar Association