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Editor’s Note

Welcome back to the International Commercial Transactions, Franchising and Distribution Committee Newsletter!

In this edition, we’ll travel across the globe with current topics in four different countries. We are very excited about our authors’ contributions and hope you find the articles compelling and valuable.

As many of you know, this was our (Marco’s and Andrea’s) first time editing the newsletter. This year, we offered some new ideas, such as the co-authoring network and article topic pool. We will continue to offer these ( - and hopefully more ideas - ) for future editions. For those of you who had a great idea and would have liked to submit an article but were too busy to meet the deadline, please do send us your articles and we’ll publish them in the next issue.

We warmly welcome your feedback – on the newsletter and any other ideas you may have for the committee. Your ideas, suggestions, and participation are what make this committee great, and we hope to hear from you.

In sum, here is our impression of our first time editing the newsletter - we are incredibly inspired by (and grateful for) the participation and passion of our committee members. Thank you to our authors, committee leadership, and all of you involved in this committee. We greatly value the time, expertise, and enthusiasm you bring to the committee and look forward to working with you all in the future.

See you in Tokyo!

Marco Cozza and Andrea Gregory, Co-Editors
June 22, 2016

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(2015-2016)

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BRAZIL’S NEW MEDIATION FRAMEWORK

By Nelson Felipe Kheirallah Filho

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BRAZIL'S NEW MEDIATION FRAMEWORK

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Brazil recently enacted legislation that -- many believe -- will enhance and help consolidate the use of mediation as a go-to method to settle disputes. These are the Mediation Law (Law no. 13.140/2015) and the new Code of Civil Procedure (Law no. 13.105/2015).

The Mediation Law came into force on December 26, 2015 and, in a nutshell, addresses: i) extrajudicial mediation; ii) judicial mediation; and iii) mediation involving public law entities.

Under the Mediation Law, any dispute involving disposable rights, or non-disposable but settable rights, may be mediated.

The mediator for extrajudicial mediation may be any person that is capable, trusted by the parties and qualified to perform mediation. The mediator for judicial mediation must have majored from an accredited higher education institution at least two years prior to engaging as a mediator and obtained training from approved schools or institutions for mediators.

All information revealed during the mediation proceedings is kept confidential, and may only be disclosed under very specific situations. Further, the mediator may not be appointed arbitrator or enrolled as witness in arbitral or judicial proceedings connected to disputes where s/he acted as a mediator.

For extrajudicial mediation, the parties will follow the dispositions set forth in their agreement, which must at least stipulate timeframe for, and place of, their first mediation meeting, criteria to choose mediator(s), and penalty for failing to attend the first mediation meeting. The Mediation Law fills in the gaps in case any of these essential dispositions are missing from the parties’ agreement.

Once the parties agree to mediate, judicial or arbitral proceedings are stayed.

Judicial mediation, in turn, is addressed by both the Mediation Law and the Brazilian new Code of Civil Procedure. The new Code of Civil Procedure -- which came into force in March 18, 2016 -- provides for mediation hearing in the early stages of lawsuits and regulates the activities of mediators, among other issues.

The court will schedule the mediation hearing after the claim is filed. Mediation proceedings will last up to 60 days as of the first meeting, which may be extended if the parties so require.

If mediation fails, the process will follow its normal course. However, if the dispute is settled during mediation, it may be judicially enforced.

By passing these laws, legislators expect a significant decrease in the number of lawsuits filed with the Judiciary, as well as early stage and in course judicial settlements for those cases where claims have already been filed.

Being a relatively cheap and swift method to resolve conflicts, parties should be stimulated to seek non-litigious and rapid composition to their disputes through mediation, which will aid in unlogging the overflowing judicial system and providing efficient and satisfactory outcome to all involved.

* * *

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With the increasing number of franchisors from the United States offering restaurant franchise opportunities in the People’s Republic of China (“PRC”), knowing the Chinese industry rules in the restaurant business helps franchisors better understand the industry and reduce the risks posed by new franchisees.

While some requirements are national, other requirements are provincial. If you know the business place of your potential franchisee, a law firm familiar with China can prepare a list of specific provincial requirements.

1. Catering Service License
A Catering Service License is the most important license for a restaurant. Franchisees must obtain such licenses in accordance with the Administrative Measures for the Licensing of Catering Services (Order No. 70/2010). China Food and Drug Administration (“CFDA”) and local food and drug administrative departments administer the licensing of catering services. A Catering Service License is valid for three years and may be renewed.

2. Pollutant Discharge License
Provinces in the PRC publish their own provincial regulations that govern the Administration of Pollutant Discharge Licenses. Entities in the province that discharge pollution shall submit applications to obtain the license to the competent Environment Protection Bureau in the province.

3. Fire protection review and approval
After the construction and decoration of the restaurant is completed, the franchisee needs to apply for fire protection review and approval from the local fire department. The fire department will come to the restaurant and conduct an inspection. Franchisees should cooperate and make improvements according to their guidance. See Fire Control Law of the People’s Republic of China, 2009.

4. Business License
(equivalent to Articles of Incorporation)
The franchisee then should submit its Catering Service License and Pollutant Discharge License to the local Industry and Commerce Bureau and obtain the Business License. Subject to provincial regulations, some bureaus may require the franchisee to bring the lease agreement and the national ID of the individual submitting the application. See Rules of the People's Republic of China for Business Entity Registration Administration, 2014 amended.

5. Organizational Code
According to Measures for the Administration of Organization Codes (Order No. 110/2008), organizations legally formed in China shall apply for registration of their organization codes. To register the organization code, an organization shall apply to the Quality and Technical Supervision department within 30 days from the date of formation.

6. Tax Registration
Within 30 days of the receipt of Business License, franchisee shall report to local tax bureau and obtain a tax registration number. See Administrative Measure for Tax Registration (Order No. 07/2003).

7. “san zheng he yi” reform in China
Commencing from October 1st, 2015, the Chinese government started to combine the Business License, Certificate of Organization Code, and the Certificate of Taxation Registration into one document. This will ease and simplify registration regulations for Franchisees.

The franchisee may require other approvals such as obtaining Health Certificates for employees, Alcohol Circulation Registration, Price Audits, City Appearance Examination, etc.

A foreign franchisor should consider preparing a checklist of the requirements for its franchisees and monitoring their progress to prevent embarrassments to their reputation in the PRC.

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THE FRENCH CONTRACT LAW REFORM

By Christophe Héry

The French decree no. 2016-131 of 10 February 2016 substantially amends French contract law. Beyond entirely renumbering the French Civil Code’s articles, the reform incorporates many case-law principles into statutory law and sometimes even enacts truly innovative solutions. The new rules will apply to all contracts subject to the special legal regimes applicable to specific contracts (sale, leases, distribution or commercial agency, etc.).

The Main Changes Regarding Contract Formation

The decree introduces the (imperative) good faith principle which will combine with the (also imperative) new general duty to inform, under which each party must advise the other of any decisive information in regards to the other party’s consent.

The decree adds the notion of economic duress to the list of vitiating mistakes, for which the victim will need to prove that they are dependent on their contractor and that the latter is guilty of a decisive abuse and has obtained an excessive advantage as a result.

Concerning master agreements (e.g. distribution or procurement) or services agreements, the parties can henceforth decide that the price will be set unilaterally by one party provided that that party can justify the set price. The other parties can sue for damages or the contract’s dissolution if that power is misused.

The law also gives a general definition of adhesion contracts (i.e., a contract whose general terms and conditions are set in advance by one party and are not subject to negotiation). Now any clause in a contract of adhesion that creates a material imbalance between the rights and obligations of the parties is deemed invalid.

The Main Changes Regarding Contract Performance

The decree states that any clause that strips the debtor’s chief obligation of its substance is deemed invalid. Another novelty is the introduction of the so-called “unforeseeable changes theory” into French contract law (i.e., an unforeseeable change in circumstances as a result of which performing the contract becomes excessively onerous for one of the parties who had not agreed to bear such a risk). In that case, according to the article 1195 (new) of the French Civil Code, the parties may renegotiate the contract or agree jointly to terminate it or even jointly apply to the court for an adaptation of the contract. Failing agreement within a reasonable timeframe, either party may ask the court to revise or terminate the contract.

Where a contract is voidable but the cause for avoidance no longer exists, either party may formally ask the other party to sue for avoidance within six months. If the other party fails to take action before the deadline expires, the contract will be deemed to have been confirmed.

In brief, lawyers should have in mind that:

- The reform will apply to all contracts entered into on or after 01 October 2016. It is unclear whether it will also apply to ongoing contracts that are formally amended or renewed.
- Although many contract law principles have been elevated to (domestic) public policy status, many other statutory provisions may be amended by the parties provided they act in good faith and the contract remains balanced.
- Courts enjoy broader powers to uphold or adapt contracts, which will undoubtedly lead parties to consider mediation and arbitration.
- Nowhere in the decree does it say whether the new rules constitute overriding mandatory rules for international contracts, but they probably do not.

* * *

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THE FUTURE OF FRANCHISING IN CUBA

By Karin M. Paparelli

In 2014, Cuba’s foreign investing laws were rewritten to attract investors with stronger guarantees, tax incentives, and greater protection against expropriation. To attract international franchisors, however, these laws must be accompanied by economic stability, skilled labor, intellectual property protection, limited government involvement, and access to impartial dispute resolution.

**Economic Stability**

Economic stability in central banking and currency (Cuba presently operates under a dual currency system), as well as transparency in capital markets is essential to boost investor confidence. All of these areas are targeted for reform in Cuba. While Cuba offers an exciting new market for established brands, disposable income is limited among the local population. The 3.5 million tourists who visited in 2015, however, may provide a healthy market for consumer goods, restaurant and hospitality based franchises.

**Franchise Labor**

Availability of local labor is a factor, however, in Cuba this may not be an issue due to the ever-increasing number of newly incubated entrepreneurs. Today’s entrepreneurs could serve as tomorrow’s franchisees, since franchising, through its use of operation manuals and franchisee’s training programs, provides excellent ready-made opportunities for developing nations.

**Intellectual Property Protection**

Potential investors will find Cuban trademark law employs the International Classification of Products and Services for the Registration of Trademarks, and is on par with other nations. Cuba is also a first to file country allowing for a ten-year registration period. New marks should be registered now in anticipation of future trade.

**Government Involvement**

Government involvement is another valid concern for franchisors thinking of expanding into Cuba. While direct and wholly owned foreign investments are permitted in Cuba, presently only joint ventures with licensing rights exist. These arrangements have been met with mixed results, some profitable and amiable and others, such as Pain De Paris, Unilever, and Coral Capital Group, dissolving amid hostility. The ability to remit profits back to the franchisor is a key factor that should be thoroughly assessed before moving into any frontier market.

**International Dispute Resolution**

International dispute resolution usually begins in Cuban national courts, however, the method chosen is open to the contracting parties and includes choice of law provisions, bilateral investment treaties, and international arbitration. The Cuban Constitution prefers that disputes be submitted to the Cuban Court of International Arbitration, which is the default method if the parties do not designate alternate dispute resolution. International Arbitration and BITs combined seem to provide the best option for dispute resolution in Cuba today.

**Conclusion**

Reforming Cuba’s foreign investing law in 2014 was a significant step toward creating opportunities for franchising; however, it was merely a first step. As Cuba prepares for future development laws legitimizing franchising should be a front-runner to welcoming foreign franchisors. Given Cuba’s proximity to the U.S. and the likelihood of an influx of American franchise brands, one recommendation is to include pre-disclosures and registration in the franchise laws.

Cuba is actively seeking foreign investors. As the concerns discussed above are addressed and resolved, it is reasonable to expect these investors will include franchisors in the not-too-distant future.

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End Notes to The Future of Franchising in Cuba


8 Cuba Emprende Foundation (Jun. 10, 2015) http://www.cubaemprendefoundation.org. Proyecto Cuba Emprende offers training and advisory services to Cuban entrepreneurs who wish to start or improve a small business in order to contribute to the development of an entrepreneurial culture, social progress and to improve the quality of their lives. Id.


13 Id.

14 Id.


16 Paparelli, supra note ii, at 47-50. Success stories include: Nestle, Sol Mio, and Sherritt International Hotels.


19 International Commercial Arbitration, Cuba, see http://www.cepec.cu/en/arbitration


22 Id.