Newsletter of the
INTERNATIONAL CONTRACTS COMMITTEE
(formerly the International Commercial Transactions, Franchising and Distribution Committee)
Fall 2017

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Editor’s Note

Although this newsletter is coming a bit later than usual, I hope you will find it is worth the wait. This edition has some great contributions from our members in Brazil and France – covering issues from foreign investment, employment and agency to expectations under a new French president. A huge thank you to our contributors – this newsletter would not be possible without you!

Andrea Gregory, Editor
September 26, 2017

Committee Leadership
(2017-2018)

Co-Chairs: Andrea Gregory (andrea.gregory@hoganlovells.com)
William Johnson (wjohns19@slu.edu)

Immediate Past Chairs: Adrian Lucio Furman and Eduardo Benavides

Vice Chairs: Francisca Brodrick, Chunghwan Choi, Marco Cozza, Andrew Danas, Caroline Esche, Patrick Goudreau, Christophe Hery, Dirk Loycke, Daniel McGlynn, Ireneo Reus III, Peter Winship, Carlos Eduardo de Lima

Steering Group: Rafael Pereyra Zorraquin Sr.
Welcome to the 2017-2018 ABA committee year! This will certainly be an exciting and transformative year.

First, our committee name has changed to the International Contracts Committee. We believe this new title more accurately portrays the breadth of our members’ experience and will help refresh our committee. Our revised description is:

This committee focuses on issues relating to the full range of international business transactions, including fundamentals; international sales of goods and services; issues pertaining to the interpretation and application of conventions relating to cross-border transactions, including the United Nations Convention on Contracts for the International Sale of Goods (the “CISG”); cross-border leasing and sale and leaseback transactions; international distributor and agency agreements; franchising; technology transfer, financing and payment in international acquisitions; legal opinions in different jurisdictions including standards of liability, insurance, applicable law, and jurisdiction; and developments in foreign corporate and financial law.

Second, we send a deep thank you to Adrian Furman and Eduardo Benavides for their gracious leadership as co-chairs of our committee over the past few years. We are sad to see Adrian and Eduardo leave these positions, and we consider it a privilege to pick up where they left off.

So who are your new co-chairs?

- William Johnson is a returning co-chair. We are excited to have his deep experience with the committee to help guide us through the year.

- Andrea Gregory is new to the role. We look forward to her bringing a new energy and fresh perspective to our committee.

As your new co-chairs, we look forward to working with each of you to help grow and expand this committee. Our goal is to help foster an active committee, provide insightful materials, and offer networking and other opportunities to our members.

Please let us know your recommendations on how we can make this committee shine. We warmly welcome anyone interested in helping with committee activities to reach out, and would love to have you on board!

Upcoming Activities

Kick-Off Call - On October 20, 2017 at 11:30am, we will kick off our regular monthly committee calls. We encourage everyone to dial in and either actively participate or just listen. We will circulate the agenda and dial-in information through the ListServe.

We aim to include a substantive topic in each call to give our members an opportunity to present and learn about new issues around the world and about each other, so please reach out if you would like to host one of our calls.

2017 Fall Meeting – The SIL’s Fall Meeting will take place at the JW Marriott Marquis in Miami, Florida from October 24-27, 2017. Our committee is co-sponsoring the following presentations:

- Accessing the Americas: Contracts of Distributorship in the Global Economy of the American Hemisphere (Wednesday, October 25, 2017: 4:30-6pm)
- Public Procurement in Brazil and the U.S.: The Effective Use of Leniency and Deferred Prosecution Agreements (Thursday, October 26, 2017: 9-10:30am)
- Arbitrator and Mediator in the Same Arbitration: A Devilish or Smart Combination? (Friday, October 27, 2017: 9-10:30am)
- Make Whole Provision: A Rational Hedge Against Falling Rates or a Shining Example of Corporate Creed? (Friday, October 27, 2017: 2:30-4pm)

Please also join us for our committee breakfast at the Fall Conference, which we are hosting on:

Thursday, October 26, 2017 at 7:30am:

Year In Review – We will soon be reaching out to solicit contributions for our committee’s submission to the Section of International Law’s Year in Review publication. Please reach out if you would like to contribute – we would love to hear from you!

Andrea Gregory, Co-Chair
William Johnson, Co-Chair
NATURAL PERSONS NEED NOT APPLY:

NEW RULING ON EIRELI LAW ALLOWS FOR SOLE PROPRIETORSHIP OF BRAZILIAN LOCAL SUBSIDIARIES BY FOREIGN LEGAL ENTITIES

By Nelson Felipe Kheirallah Filho and Shervin Naimi

Up until 2012, all legal entities in Brazil were required to have at least two (2) shareholders, irrespective of the way in which shares were distributed in the local company; mandatory shared ownership was seen as a way to ensure personal liability under Brazilian law.¹

As such, foreign investors opening a local business with two or more shareholders often entailed placing overwhelming controlling interest of the subsidiary in the hands of a multinational company’s HQ or other holding company, and placing a token share under the name of another foreign subsidiary in order to comply with the formal legal requirement. This created a costly redundancy of getting documentation legalized overseas and in Brazil,² not to mention duplicating other mandatory tasks, such as providing Brazilian IDs³ prior to opening the business and pursuing consent from both shareholders whenever approval was required for further corporate acts related to the local business.⁴

Once Law No. 12,441/11 was enacted,⁵ creating the EIRELI (Empresa Individual de Responsabilidade Limitada – freely translated as Limited Liability Sole Proprietorship), many foreign investors were excited by the prospect of opening a local business in Brazil with a single shareholder.

However, that excitement was short lived. Normative Ruling No. 117/2011 required natural persons (as opposed to legal entities) to be the owners of EIRELIs. This interpretation mirrored the Department of Business Registration and Integration’s (“DREI’s”) interpretation of Law No. 12,441/11⁶. As such, unfortunately, legal entities were not permitted to own an EIRELI.⁷

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¹ Title II, Book II, of the Brazilian Civil Code, Law 10,406, enacted on January 10, 2002.
² According to Item 1.1 of Normative Ruling No. 26, enacted on September 10, 2014, every foreign shareholder had to provide its own set of documents comprised of bylaws, certificate of existence and power of attorney (to a local representative), all of which had to be notarized, legalized by the local Brazilian consulate, translated into Portuguese and registered with a Brazilian notary. The greater the number of foreign shareholders, the greater the number of documents that had to undergo this process.
³ All shareholders of a Brazilian entity are required to secure Brazilian IDs (called CNPJ), irrespective of nationality. The law does not forbid foreign-owned entities, as long as CNPJ is duly secured.
⁴ Article 1076 of the Brazilian Civil Code sets the required shareholders’ voting quorum to approve corporate acts. Quorums range from 51% to 75%.
⁵ Enacted on July 11, 2011.
⁶ Normative Ruling No. 117, enacted on November 22, 2011, later replaced by Normative Ruling No. 10, enacted on December 05, 2013.
⁷ “The EIRELI can be owned by [...] a foreign or national legal entity.”
That is, until this year. Pursuant to Item 1.2.5 of Annex V of Normative Ruling 38/2017, DREI’s former interpretation was amended to include both natural persons and legal entities as potential owners of EIRELIs. From May 2, 2017 onwards, legal entities can also be the sole shareholders of an EIRELI, thus eliminating the crippling bureaucracy stemming from the prior application of the law.

By waiving the restriction previously imposed on EIRELIs, along with other measures recently carried out by the local authorities, the Brazilian government is showing signs of accommodating corporate needs as part of a broader plan to ease corporate restrictions and positively impact local entrepreneurs and foreign investors alike.

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Shervin Naimi (shervin.naimi@cerqueiraleite.com.br) graduated from Fundação Armando Álvares Penteado Law School in 2016, in Brazil. Shevin has participated in the Willem C. Vis Moot on International Commercial Arbitration as Speaker (2013), Coach of FAAP Law School Team (2017) and as Arbitrator (2015, 2016 and 2017 – CAM-CCBC Pre-Moot). He is currently member of the corporate practice at Cerqueira Leite Advogados Associados, a SãoPaulo-based law firm (www.cerqueiraleite.com.br).

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For instance, as of January 2017 the Brazilian Central Bank system that registers foreign direct investment (called “RDE-IED”) has been significantly simplified in terms of use and documentation required to register a foreign capital contribution; as of August 2016 Brazil became a member to the Hague Apostille Convention (which abolishes the requirement of legalization for foreign public documents); the filing process at the state Boards of Trade is becoming fully digitalized, thus facilitating registration; the time period for securing local permits is being gradually reduced.
WHEN FRENCH EMPLOYMENT LAW MEETS FRANCHISE AND AGENCY CONTRACTS

By Christophe Héry

Franchise Contracts and Labor Law

The new social dialogue committee ("SDC") created by the French Employment Act will impact the organization of franchise networks.

Certain franchise networks, which may include those operated from abroad, must now deal with the constraints incurred by the Employment Act (dated 08 August 2016) (the “Act”) and its Decree (dated May 4, 2017, and effective as of May 7, 2017), relating to the creation of an employee forum for the whole franchise network.

Scope of the SDC

The new SDC concerns franchise agreements including “clauses that have an impact on work organization and conditions in franchisee businesses,”¹⁰ but the Act does not define such clauses. It will therefore be necessary to conduct an employment audit of franchise agreements to identify such clauses and assess their impact.

For franchise systems including such clauses, the Act calls for an SDC in franchise networks that have 300 or more employees in France. It seems that this 300 figure does not include the franchisor’s employees or the employees of operators that are not bound to the network’s head by a franchise agreement (e.g., operators bound by a trademark licensing contract).¹⁰

A three-stage implementation

Even where the legal requirements are met, franchisors are under no obligation to set up an SDC spontaneously.¹¹ However, once a trade union has called for an SDC to be set up, the franchisor does have an obligation to take part in the negotiations initiated by that trade, to check with all the franchisees whether the number of employees in its network reaches the 300 threshold, and to set up a “negotiation forum” made up of representatives of employees (trade unions) and of employers (franchisor and franchisees).

The negotiations with trade unions and franchisees will end, within six months, in an agreement subject to the consent of the franchisor, trade union(s) and at least of 30% of the franchisees (representing 30% of the employees of the network). This agreement shall define the SDC’s composition, how its members are designated, their term of office, the frequency of meetings, if and how many hours employees may dedicate to the committee, the material or financial means required for the committee to fulfill its purpose, and how running and meeting costs and representatives’ travel and subsistence expenses are handled, among other things.¹² If agreement cannot be reached, the Decree imposes the creation of the SDC with several strict and minimum provisions.

Once set up, internal rules define precisely how the SDC is to function.¹³

A rather limited impact

The SDC does not have the authority to investigate cases or to issue binding rulings, but the SDC must be kept informed of franchisees joining or leaving the network and “of the franchisor’s decisions liable to impact the volume and structure of staff, working time, or the employment, work, and vocational training conditions of the franchisees’ employees.”¹⁴ The social dialogue committee may also make suggestions for improving such conditions throughout the network.¹⁵

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¹² Article 64 I of the French Act no. 2016-1088 and article 3 I of the French decree no. 2017-773
¹³ Article 64 I 2° of the French Act no. 2016-1088
¹⁴ Article 64 I of the French Act no. 2016-1088 (translated by the author from French into English).
¹⁵ Article 64 I of the French Act no. 2016-1088.

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⁹ Article 64 I of the French Act no. 2016-1088
¹⁰ Article 64 I of the French Act no. 2016-1088
¹¹ Article 64 I of the French Act no. 2016-1088 and articles 1 and 2 of the French decree no. 2017-773
Agency Contracts and Labor Law

The French Supreme Court confirmed in two recent rulings the fine line beyond which a commercial agency contract may be redefined as employment contract.

Although commercial agents (who are independent from the principal) are presumed not to be employees, French courts may redefine a commercial agency contract (with a natural person) as an employment contract if evidence reveals that a relationship of subordination exists.

In the first case decided on 26 Sept. 2016, the Court found a relationship of subordination because “the agents’ activity was carried out within a specific department as evidenced by the desk and computer provided, the imposed sectorization which only the company could modify, a duty to report on their activities by producing their agendas and a weekly report, regular on-call duty at the agency and mandatory meetings, checks and penalties.”

In the second case decided on 16 Nov. 2016, the Court again identified a relationship of subordination on the grounds that the purported agent’s name was listed as a staff member and the agent’s business cards made no mention of the agent’s position as a commercial agent.

Taken separately, each of the factors identified by the Court is likely not enough to justify redefining the commercial agency contract as an employment contract. However, to minimize the risk of having commercial agency contracts redefined as employment contracts, principals should treat their commercial agents differently from their salaried employees, especially with regard to the information principals provide to their agents and employees (e.g., franchise confidential information and methodology) and how principals require their agents and employees to represent themselves with third parties (e.g., business card, e-mail address).

Even so, in practice, it can be a very fine line between what is acceptable for a commercial agent and what might characterize an employer-employee relationship, as recent French court of appeal decisions show. The two courts, called upon to determine similar facts (whether a commercial agent who had to remain on call at the principal’s premises in order to meet prospects should or should not have their agency contract redefined as an employment contract), issued contrasting rulings, although they both proceeded to analyze whether the agent was still free to organize its activity as it saw fit (i.e., here, whether the commercial agent’s presence on the principal’s premises was simply a recommendation or was mandatory). So this fine line does exist, but finding it can be tricky…

The main consequences of the commercial agency contract being redefined as an employment contract are the payment of the social contributions by the employer and the payment of redundancy indemnity at the end of the employment contract.

As a side note, there is less risk of having a commercial agency contract redefined as an employment contract when the commercial agent is a legal entity (instead of a natural person) because a legal entity cannot be an employee.

* * *

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16 Cour de cassation, ch. soc., 09/26/2016, 15-10105 (translated by the author from French into English).
17 Cour de cassation, ch. soc., 11/16/2017, 15-10111.
WHAT TO EXPECT FOR FRANCHISING IN FRANCE UNDER
THE NEW FRENCH PRESIDENT M. MACRON

By Olivia Gast

France always has been very friendly to franchising, where it is very dynamic: the average number of new points of sale per network, +7, has been stable since 2009. There were 1,834 franchise networks in France on January 1st, 2016 (up 2% since 2015). In 2016, franchising in France was about half retail and half services, 14% in the region of Paris and 86% in provinces. 39% of franchisors have less than 20 points of sale, 18% have more than 100. About half of France’s franchisors had a revenue under 10 million euros, 9% above 100 million euros, and 23% between 10 to 99 million euros.

What can be expected for the future of France’s franchising industry following M. Emmanuel Macron’s election as the new President of the French Republic? He is a young (39), business-oriented (managed the Rothschild & Cie Bank) president who speaks perfect English. Further, he’s a proven coalition builder: he created his own, moderate, political party (“En Marche!”) that attracted members from both of France’s main political parties, focused on inclusivity and pragmatism as opposed to rigid ideology, and use of social media. For some, Macron embodies a certain hope for change and freedom in France.

As Minister for Economy, Industry and Digital Affairs, Macron authored what some consider a very important, business-friendly law in 2015 (but it was not that franchisor-friendly). The “Macron Law” makes significant changes that have implications on franchising agreements. (1) The biggest of which are the obligations to make all agreements related to a franchise agreement end on the same date. In practice, this can create a challenge in negotiations and is not particularly friendly to franchisors because franchisors now need to take it into account that termination of one of the agreements implies termination of all the others. (2) The Macron Law also applies EU rules, restraining franchisors from preventing franchisees from changing brands after the end of the agreement and from imposing restrictive post-term clauses.

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2 Id. at page 19.
3 Id. at page 6.
4 Id. at page 7.
5 Id. at page 22.
8 Emmanuel Macron, En Marche!, https://en-marche.fr/emmanuel-macron.
of Commerce applies the EU regulations\textsuperscript{14} to French Law stating four conditions to allow the exemption in post-contractual non-compete clauses.\textsuperscript{15} However, this can be bypassed by franchisors by taking shares in franchisee companies and imposing non-competes within the franchisee companies’ governing documents. (3) Finally, when invoicing, the agreed period to settle sums has been limited to a maximum of 60 days (or if contractually agreed, 45 days).\textsuperscript{16} Each of these changes under the Macron Law is an additional restriction on franchisors, and is more franchisee-friendly. Nonetheless, franchisors continue to find their way in navigating through these new legal requirements.

Although the Macron Law was very hard to pass in 2015, with a difficult Parliament, now that Macron was elected President and managed to get a sufficient majority at the Parliament elections (June 18\textsuperscript{th}, 2017), he might be able to “free the business energies” as he wanted to,\textsuperscript{17} which means to give more freedom and simplicity to business people and is expected to benefit the economy and therefore the franchise world. Business people did become more optimistic after his election.\textsuperscript{18} Now, the question remains: will he do what is necessary to revive the French economy, and will that be enough? To be continued…

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\textsuperscript{14} See Article 5, §3 of EU Regulation n°330/2010 of April 2010 about vertical deals and concerted practices.

\textsuperscript{15} Supra note 13.


\textsuperscript{17} Emmanuel Macron, Twitter (Nov. 16, 2016), https://twitter.com/EmmanuelMacron/status/798970752804323328.