

THE FRANCHISE LAW
REVIEW

EIGHTH EDITION

Editor
Mark Abell

THE LAWREVIEWS

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REVIEW

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PREFACE

Since the publication of the seventh edition of *The Franchise Law Review*, the major economic and geopolitical developments that we would expect to have a significant impact on world trade have been dwarfed by the impact of the coronavirus pandemic. Covid-19 has had a devastating effect on the global economy and despite the advent of vaccines and the roll-out of national vaccination programmes, it is likely to continue to do so for some time to come. Through all this, however, the apparently inexorable march towards the globalisation of commerce has continued unabated. While there have been some economic bright spots, the global economy continues to underperform and concerns persist about the stability of the US economy.

As a consequence, businesses are often presented with little choice but to look to more vibrant markets in Asia, the Middle East and Africa for their future growth. At the same time, South–South trade is on the increase, perhaps at the expense of its North–South counterpart. All of this, coupled with the unstable wider geopolitical landscape, presents business with only one near certainty: there will be continued deleveraging of businesses in the coming years and, thus, growing barriers to international growth for many of them. All but the most substantial and well-structured of such businesses may find themselves facing not only significant difficulties through reduced access to funding for investment in their foreign ventures, but also challenges arising from their lack of managerial experience and bandwidth.

Franchising, in its various forms, continues to present businesses with one way of achieving profitable and successful international growth without the need for either substantial capital investment or a broad managerial infrastructure. In sectors as diverse as food and beverages, retail, hospitality, education, healthcare and financial services, franchising continues to be a popular catalyst for international commerce and makes a strong and effective contribution to world trade. We are even seeing governments turning to it as an effective strategy for the future of the welfare state as social franchising gains still more traction as a way of achieving key social objectives.

Given the positive role that franchising can play in the world economy, it is important that legal practitioners have an appropriate understanding of how it is regulated around the globe. This book provides an introduction to the basic elements of international franchising and an overview of the way that it is regulated in 29 jurisdictions.

As will be apparent from the chapters of this book, there continues to be no homogenous approach to the regulation of franchising around the world. Some countries specifically regulate particular aspects of the franchising relationship. Of these, a number try to ensure an appropriate level of pre-contractual hygiene, while others focus instead on imposing mandatory terms upon the franchise relationship. Some do both. In certain countries, there is a requirement to register certain documents in a public register. Others restrict the manner

in which third parties can be involved in helping franchisors meet potential franchisees. No two countries regulate franchising in the same way. Even those countries that have a well-developed regulatory environment seem unable to resist the temptation to continually develop and change their approaches – as was well illustrated by changes to the Australian regulations in the recent past. The unstoppable march towards franchise regulation continues, with countries such as Argentina, which previously had not specifically regulated franchising, adopting franchise-specific laws in the past year or so.

Many countries do not have franchise-specific legislation but nevertheless strictly regulate certain aspects of the franchise relationship through the complex interplay of more general legal concepts such as antitrust law, intellectual property rights and the doctrine of good faith. This heterogeneous approach to the regulation of franchising presents yet another barrier to the use of franchising as a catalyst for international growth.

While this book certainly does not present readers with the complete answer to all the questions they may have about franchising in all the countries covered – that would require far more pages than it is possible to include in this one volume – it does seek to provide the reader with a high-level understanding of the challenges involved in international franchising in the first section, and then, in the second section, explains how these basic themes are reflected in the regulatory environment within each of the countries covered. I should extend my thanks to all of those who have helped with the preparation of this book, in particular Caroline Flambard and Nick Green, who have invested a great deal of time and effort in making it a work of which all those involved can be proud. It is hoped that this publication will prove to be a useful and often-consulted guide to all those involved in international franchising, but needless to say it is not a substitute for taking expert advice from practitioners qualified in the relevant jurisdiction.

Mark Abell

Bird & Bird LLP

London

January 2021

FRANCE

*Raphaël Mellerio*¹

I INTRODUCTION

Franchising is a well-established marketing system in France, and has constantly developed since the 1960s. Today, it is perceived as one of the few sectors creating jobs, despite recurring difficult economic conditions. The French press regularly contains recruitment advertisements for new franchisees (in particular through the French Observatoire de la Franchise) and certain trade fairs (such as Franchise Expo Paris) take place at least once a year.

Based on recent statistics from the French Franchising Federation,² franchising accounts for a total turnover in France of €68 billion, covering 78,218 franchised outlets within 2,049 networks and employing directly and indirectly 757,852 people. France is the biggest market for franchising in Europe by the number of networks. International franchisors (for the greatest part of US origin) account for about 10 per cent of the total. Six business sectors represent about 70 per cent of the franchising turnover in France: food retail, personal and household equipment, hotels, fast food restaurants and hairdressing. Most of the networks are mixed, which means they combine the franchisor's own outlets and the franchisees'.

While there are no dedicated government organisations, the French Ministry of the Economy keeps a close eye on the development of distribution networks (including franchising), in particular when it comes to food retail distribution, which is highly concentrated in France.³

Approximately 180 significant franchisors are members of the French Franchising Federation, which represents approximately 45 per cent of the franchised outlets in France. Its role is to promote and support franchised networks in their development in France and abroad. The services offered to its members include documentation, training, legal assistance, mediation, etc. The French Franchising Federation founded the European Franchise Federation in 1972.

1 Raphaël Mellerio is a partner at Aramis.

2 Source: www.franchise-fff.com/franchise/chiffres-cles/les-chiffres-cles-en-france.html (figures for 2019).

3 Six retailers (operating through four central purchasing organisations) account for about 85 per cent of the market in France: Carrefour, Auchan, Casino, Leclerc, Intermarché and Système U.

II MARKET ENTRY

i Restrictions

Because of the absence of specific regulations on franchising in France, there are no restrictions on the development of a foreign franchisor's network in the French market, including by way of master franchising, which is often used in practice. Similarly, there is no impediment to the foreign franchisor taking a stake in the capital of the franchisee and obtaining veto rights in relation to certain decisions affecting the management of the franchised business. If the franchisor intends to develop the franchised network only from its home country, it will make sure not to create a permanent establishment in France (arising from a branch, offices, employees or the appointment of an agent acting on behalf of the franchisor). Franchisees and master franchisees are considered by French courts as the owners of their clientele (at least at local level), which allows them to enter into lease agreements giving them security of tenure.

ii Foreign exchange and tax

Foreign exchange control disappeared a long time ago in France and the French legislation on foreign investments (applicable to certain protected activities such as defence) is of no relevance in the context of franchising. As regards taxation, corporate franchisees located in France are subject to corporate income tax and all other applicable taxes.

III INTELLECTUAL PROPERTY

i Brand search

To be effective against third parties, trademarks need to be registered at the appropriate intellectual property (IP) offices: nationally at the National Institute of Industrial Property in France (INPI), at EC level with the European Union Intellectual Property Office (EUIPO), or worldwide with the World Intellectual Property Organization. Trademark clearance searches can easily be performed using the online trademark databases, updated by the IP offices, to assess the availability of trademarks and prevent infringement of third parties' rights. These databases also allow verification of the status of registration of trademarks, their ownership, the existence of registered licences and sometimes oppositions made by third parties. Company names may also be included in clearance searches thanks to the online commercial registry database. As concerns designs, even though online databases are also available, clearance searches require dedicated tools. Certain forms or fittings may not be protected by registered trademarks or designs, in which case French rules on copyright may apply. As copyrights are not registered in France, searching third parties' rights is far more complicated.

ii Brand protection

Whatever the IP office involved, the registration process follows the same main steps, namely (1) filing and payment of the fee, (2) publication by the relevant IP office of the trademark or design on a special bulletin, (3) examination of the filing request and possible oppositions by third parties and (4) provided the oppositions are rejected by the relevant office and the filing complies with the examination requirements, formal registration of the filed trademark or design. The process takes at least five months at the INPI and 26 weeks at the EUIPO (provided no oppositions are filed).

iii Enforcement

Franchise agreements typically let the franchisor take any action that it deems necessary to protect its distinctive signs, whether through court actions or interim measures. This derives from applicable Association Française de Normalisation (known as AFNOR) norms in France and from the European Code of Ethics for Franchising, whereby the franchisor must allow the franchisee to peacefully enjoy the right to use the relevant distinctive signs. If the franchisor does not take appropriate steps to protect this right, despite an official written request by the franchisee, the franchisee may sue third parties on grounds of trademark infringement (and may also request the seizure of counterfeit products). Furthermore, any franchisee is entitled to start legal proceedings on grounds of unfair competition.

iv Data protection, cybercrime, social media and e-commerce

French data protection legislation applies to any 'data controllers'⁴ that are (1) either located in France, (2) or located in a country that is not a Member State of the European Union but use processing means on French territory.

Pursuant to this legislation, franchisors or franchisees have to comply with numerous obligations, such as providing the data subjects (e.g., consumers) with specific information and filing declarations with the French data protection authority, the Commission Nationale de l'Informatique et des Libertés (CNIL). Some specific uses of personal data may be subject to prior authorisation by the CNIL. This is particularly the case where data is transferred to an entity located outside the European Union. Since May 2018, the EU General Data Protection Regulation has been in force in France.

Failure to comply with this legislation may lead to sanctions by both the CNIL and French criminal courts.

Cybercrime, social media and e-commerce are subject to general laws, such as criminal law, contract law, data protection law, consumer law, etc. Some specific provisions related to e-commerce have been implemented into French law by the EU Directive on electronic commerce dated 8 June 2000.

IV FRANCHISE LAW

i Legislation

Although franchising is a well-established distribution system in France, there is no specific legislation governing franchising. This is strange for a country that is used to producing numerous laws on many different business subjects. As stated by a minister over 30 years ago, this is because legislating on franchising would risk 'weakening its dynamic and evolving features'.⁵

Consequently, franchising is subject to general EU and French laws governing distribution, including competition laws (in particular EC Regulation No. 330/2010 of 20 April 2010 on vertical restraints).

An area in which French legislators have dealt with franchising is in relation to pre-contractual disclosure, which is described below (known as the Doubin Law of 1989, the

4 Article 3 of the French Data Protection Law (No. 78-17 of 6 January 1978) defines a data controller as the legal person who decides on the purpose and means of the processing.

5 Ministerial response No. 8419, JO Débats, December 1986, p. 5032.

provisions of which are set out in Article L330-3 of the French Commercial Code). Franchising is not mentioned as such in the Law (which may apply to other distribution methods as well) but it is at the centre of this Law. More recently, the French parliament adopted the law on growth and business (known as the Macron Law), which contains certain provisions regarding cross-termination in the context of franchising, as well as non-compete clauses.

ii Pre-contractual disclosure

Article L330-3 of the French Commercial Code requires any party who makes available to another person a trade name, trademark or trade sign in consideration of an exclusivity or quasi-exclusivity commitment by the other party, to provide to that other party at least 20 days before the execution of a contract a document giving accurate information allowing the other party to make an informed commitment. Because a franchisor will in most cases require the franchisee to trade under its distinctive signs on an exclusive basis and sometimes by procuring most of its products or services from the franchisor or parties designated by the franchisor, this provision applies almost systematically to franchising transactions.

The franchisor's pre-contractual information obligation is the subject of extensive case law in France, in circumstances where the franchisee's business is unsuccessful and the franchisee alleges that he or she has been misled by the franchisor on the financial prospects of the franchised business. According to the Doubin Law, the franchisor is required to give a presentation on the state and development perspectives of the relevant market. In cases where the franchisee complains about the lack of forecast figures, French courts tend to adopt the following approach: the law does not require the franchisor to provide a local market survey and a forecast income statement to the franchisee. However, if the franchisor does provide a market survey and forecast figures to the franchisee to allow it to build its business plan, the information must be fair and accurate.

Where a court considers that the lack of (or inaccuracy of) information has deceived the franchisee (which will often be the case where the actual turnover is significantly below the forecast figures, for example by more than 30 per cent), it may hold the franchise agreement as null and void and in some cases find the franchisor liable for damages, if the latter has committed misrepresentation. If the misrepresentation of the franchisor or the error of the franchisee cannot be demonstrated, a judge may nonetheless grant damages to the franchisee for the loss suffered (covering the costs and investments incurred by the franchisee but not the profit he or she was expecting to make on the basis of the figures provided by the franchisor). This will be the case particularly where the franchisee has become bankrupt because of a structurally loss-making business.

iii Registration

No specific registration requirement applies to companies solely on the basis that they are franchisees. However, depending on the business they are involved in, they may be subject to certain regulatory constraints (such as special permits to be obtained in certain professions, e.g., restaurants and travel agencies). It is for the franchisee to apply for such permits, with the assistance of the franchisor if necessary.

iv Mandatory clauses

To constitute a franchise agreement under French law, the agreement needs to provide for three essential obligations on the part of the franchisor, namely (1) the licensing of intellectual property rights to the franchisee, (2) the provision of substantial know-how, and

(3) the supply of commercial and technical assistance by the franchisor. The franchisee's obligations may be more or less detailed (bearing in mind agreements subject to French law are traditionally shorter than English ones) but should include at a minimum the financial conditions, including the entry fee and the franchise royalty payable by the franchisee.

v Guarantees and protection

There are various ways in which a franchisor may secure the payments due by the franchisee. The French Civil Code provides for various kinds of personal guarantees, such as letter of comfort, surety and first demand guarantee. Such guarantees may be issued by the parent company of the franchisee or by a financial institution. From a protection point of view, the franchisor is much better off with a first demand bank guarantee, which can be enforced by the franchisor subject to the conditions set out in the guarantee itself, and the guarantor may not raise objections in relation to the underlying franchising agreement. It is obviously preferable that the guarantor be located in a country where the enforcement of a foreign judgment can realistically be obtained in a timely manner.

V TAX

i Franchisor tax liabilities

If established in France, franchisors are liable to all taxes applicable to businesses in France (including corporate income tax at a standard rate of 28–31 per cent).⁶ All revenues generated from the licensing of trademarks and know-how and the provision of training services will constitute taxable income. As already mentioned, franchisors wishing to remain outside France must avoid creating a permanent establishment in France.

ii Franchisee tax liabilities

Save in exceptional circumstances (see Section VI.iii), a franchisee is deemed for tax purposes to be an independent party having title to its clientele. Accordingly, it is subject to applicable taxes in France. All amounts paid to the franchisor (including the entry fee, the franchise royalty and payments for the supply of goods) are normally tax deductible. However, in some circumstances, a master franchisee may have to account for licensed IP rights as an asset and consequently may not be entitled to deduct royalties paid to the franchisor for tax purposes.

iii Tax-efficient structures

To the extent franchisors are generally part of large groups of companies, certain tax-efficient structures generally involve lodging IP rights (trademarks in particular) in countries where tax amortisation of such rights is possible (e.g., in the Netherlands or Switzerland). The know-how, the commercial and technical assistance, and the goods or services that are required for the performance of the franchised business may be made available by other companies of the group. Where the franchisor and the franchisee are located in different countries, close attention must be given to the provisions of the applicable tax treaty between

⁶ The 2021 Finance Bill submitted by the current government confirms the continuing reduction of the corporate income tax rate. For companies generating a turnover lower than €250 million, the standard corporate income tax (CIT) rate was reduced to 26.5 per cent from 1 January 2021. For all companies irrespective of their size and turnover, the standard rate of CIT will be 25 per cent from 1 January 2022.

those countries, if any. Generally, franchising agreements include ‘gross-up’ clauses to allow the franchisor to receive the exact net amount, as if no withholding tax in the franchisee’s country applied.

VI IMPACT OF GENERAL LAW

i Good faith and guarantees

The law of contracts in France (which has been subject to a wide-ranging reform, effective as from 1 October 2016) is based on some general but essential principles, such as the binding force of contracts and the duty of good faith. According to Article 1103 of the French Civil Code, legally formed agreements are as binding as law between the parties. Article 1104 adds that, as a matter of public policy, contracts must be negotiated, formed and performed in good faith. Article 1194 adds that agreements commit the parties not only to what is stated in them, but also to all consequences derived from equity, custom and the law. In most contractual disputes, these texts are often referred to by the parties (among others), and French courts have on the basis of these principles built up a set of rules for the performance of contracts (e.g., the duty of information and the obligation to warn the other party of certain risks). This is why franchising agreements (like other distribution agreements governed by French law) are often shorter than contracts governed by English or US law, as the parties may rely on implied obligations, beyond what is stated precisely in the agreement. With the recent reform of contract law, good faith gives rise to the right of a party to request the revision of an agreement in the event of an unforeseen change of circumstances (Article 1195 of the Civil Code). In such a case, the judge may not only terminate the agreement, but also revise it, which provides for a potentially high level of judicial interference. However, as the new Article 1195 is not a public policy provision, the parties may expressly derogate from it.

Finally, the new Article 1171 of the Civil Code provides that ‘in a preformulated standard agreement, any non-negotiable clause which is defined in advance by one of the parties and creates a significant imbalance between the rights and obligations of the parties to an agreement is deemed null and void. The determination of the significant imbalance does not relate to the main object of the agreement or the adequacy of the price to the performance.’ As franchise agreements will most probably be viewed as preformulated standard agreements because of the traditionally limited scope of negotiation on the contract terms, it remains to be seen whether judges will use this text to set aside or restrict the application of, for example, exclusion of liability, exclusivity and non-compete clauses.

ii Agency distributor model

Based on EU legislation, a person can be considered as an agent if it is entitled to negotiate and, as the case may be, conclude agreements in the name and on behalf of its principal. Since the agent is not the owner of the clientele, who purchase products or services from the principal, it is entitled to a termination indemnity or compensation upon the expiry or the termination of the agency agreement. If the franchisee (like any other distributor) buys products from the franchisor (or an affiliate of the franchisor) and resells them in its shops or outlets, it may not qualify as an agent. It is therefore rare to see cases where the franchisee has successfully been requalified as an agent, with the consequence that, for the time being, under French law the franchisee is not entitled to any indemnity upon expiry or termination of the agreement (see Section VI.vii).

A closer model to franchising is distribution (including selective distribution) that does not require the licensing of intellectual property rights or the provision of know-how (simply the sale of products and marketing support by the supplier to the distributor). However, the distinction between franchisee and distributor has little impact when it comes to the termination of the agreement and the consequences arising therefrom.

iii Employment law

The application of French employment law to franchisees is another issue highly debated in the courts, with numerous decisions on the subject. There are two ways a franchisee may benefit from protective employment laws in France: one is to demonstrate that despite being called a 'franchisee', he or she is in fact an employee working under the constant authority of the franchisor, who has the power to give orders and instructions, control performance and impose sanctions on the franchisee;⁷ another way, that does not require the demonstration of the existence of the employee's subordination to the employer, is by fulfilling the conditions set out in Article L7321-2 of the French Labour Code, namely (1) the franchisee sells products that are supplied exclusively or quasi-exclusively by the same company, (2) it conducts its activity in premises that are provided or approved by such a company, and (3) at prices and conditions imposed by the same company.

Finally, the franchisor may be held liable to the employees of its franchisees if it behaves as the *de facto* manager of the franchised business, interfering in such a way as to leave no real autonomy to the franchisee.⁸

The application of French labour law to a franchising agreement has serious implications as the franchisor, who in such circumstances will be deemed to be the employer, will be liable to the 'franchisee' for past wages, paid holiday and, in the event of termination, may have to pay indemnities for redundancy and paid holiday, not to mention the repayment of the entry fee and training costs. In addition, all such sums being subject to social security contributions, the franchisor could be requested by social security bodies to pay the related employer's contributions.

iv Consumer protection

To our knowledge, there is no example in French case law of a franchisee being held to be a consumer. This is because the criterion that is widely used by French courts to consider someone as a consumer is that he or she acts for the satisfaction of his or her personal needs (and not those of a business). Consequently, franchisees do not benefit from the protective provisions of French consumer law (covering all sorts of issues, such as the extent of the duty of information owed to the consumer, the extent of the statutory warranties in relation to products, the absence of automatic renewal of contracts, etc.).

In the interests of consumer protection, pursuant to Article A441-1 of the French Commercial Code, the franchisee is required to inform consumers that it acts as an independent undertaking. This information must appear on all information documents (including advertising) as well as both inside and outside the franchised outlet.

7 Court of Cassation, Labour Section, 18 January 2012, No. 10-16342.

8 Court of Cassation, Commercial Section, 9 November 1993, No. 91-18351.

v Competition law

One of the laws that has the greatest impact on franchising contracts is certainly competition law. This is because franchising networks (and the inherent vertical restraints, such as exclusivity and non-compete) are sometimes critical in the organisation of the sale of products or services in some sectors of the French economy. In that respect, the French Competition Authority and French courts apply consistently the EU rules derived from EU Regulation No. 330/2010 and its Guidelines. While price-fixing and restrictions on passive sales are *per se* prohibited practices, non-compete clauses are assessed on a case-by-case basis depending on the relevant economic sector and the ability of the franchisee to develop a business independently of the franchisor. Competition law has also led the French Competition Authority⁹ to identify distinctive features for food retail distribution, including for franchised hypermarkets and supermarkets, where some contractual clauses may be forbidden while they are admitted in other sectors.

vi Restrictive covenants

Restrictive covenants applicable throughout the duration of the agreement give rise to little debate before French courts. Decisions are generally in line with the provisions of EU Regulation No. 330/2010, in particular in relation to purchasing exclusivity and non-compete obligations, which are viewed as essential to preserve the identity and reputation of the franchise network. A recent survey indicates that most franchising agreements have a duration of five years (aligned with the duration of the non-compete obligation as provided for in the Block Exemption Regulation), and some go to seven years.¹⁰

vii Termination

Although the termination of franchise agreements is often a hot topic for practitioners and legal commentators, the case law of the French Court of Cassation is at present stable, based on general principles of contract law: while a fixed-term contract may not be terminated prior to its term (unless one of the parties has committed a material breach of its obligations), an indefinite term agreement may be terminated at any time by either party, provided a reasonable notice is granted by the terminating party and that termination is not abusive. Despite numerous arguments raised by franchisees based on their situation of economic dependency in relation to the franchisors upon the expiry of the franchise agreement, the franchisee is not entitled to any compensation or indemnity for loss of business, provided termination is neither abusive nor sudden.

After a lengthy parliamentary debate, the above-mentioned Macron Law of 6 August 2015 has introduced the principle whereby a franchise agreement and its related agreements 'whose common purpose is the operation of one or several retail outlets and include clauses that are likely to limit the freedom of the outlet's operator to carry on its business' must all have the same expiry date. Therefore, if one of the agreements terminates, this shall cause the termination of all other agreements on the same date. The parliamentary debates do not shed much light on what is meant by 'related' or 'ancillary' agreements in this context. The general intention is to avoid franchisees remaining bound by multiple

9 Opinion No. 10-A-26 of 7 December 2010 of the French Competition Authority.

10 Annual Franchise Survey: Summary of Results 2015 (conducted by CSA for Banque Populaire and the French Franchising Federation).

agreements relating to the operation of the sale outlets if their franchise has terminated, for instance under supply agreements for goods or equipment with the franchisor or some of its affiliates.

Except in the specific sector of food retail distribution (see Section VII), French courts will generally enforce these principles, as well as franchisees' post-term obligations, despite the fact that the franchisee may find itself in a difficult economic situation upon leaving the franchise network. This position is derived from the well-established principle whereby the franchisee owns its clientele (at least at local level, because of the investments and risks it has taken) and is therefore to be clearly distinguished from an agent, who has no goodwill.

As far as post-term non-compete clauses are concerned, one generally looks at the criteria for block exemption as set out in Article 5, Paragraph 3 of EU Regulation No. 330/2010 (including the one-year limitation). If these conditions are not fulfilled, a French court will apply the general conditions required for the validity of a non-compete clause under French law, namely it must be limited in time and geographic scope, it must be justified to protect the interests of the franchisor and proportionate to those interests (however, please refer to Section VII in relation to the Macron Law). Despite some franchisees' attempts to include another condition that applies to employment contracts (i.e., the need for the non-compete clause to include financial compensation), French courts have so far resisted making this addition. In practice, this means that non-compete clauses are often enforced in France as long as they meet the above requirements. Moreover, French courts tend to differentiate traditional non-compete clauses (the object of which is to prohibit the conduct of a business similar to that of the franchise network) from non-reaffiliation clauses (which simply restrict the freedom of the franchisee to join a competing franchise network).¹¹ As the latter is less restrictive on the franchisee than a non-compete clause, it is more widely admitted in court, except in sectors where belonging to a network is decisive given the structure of the market (for example, in the food retail or car rental businesses).¹²

Furthermore, under the Macron Law, post-term non-compete clauses in franchising agreements are void unless they meet the four conditions contained in the Block Exemption Regulation (including the one-year limitation). Therefore, following the Macron Law, courts are likely to be more restrictive than they used to in their assessment of the legality of non-compete clauses (in particular in relation to their duration).

Finally, the franchisor is also generally granted a pre-emption right over the shares of the franchisee or its business, subject to paying the price that a third party offers or may offer (on the basis of a willing seller and a willing buyer), and is generally entitled to take over the business and assets of the franchisee (including the lease). Again, subject to specific constraints applicable to the food retail distribution sector (see Section VII), such clauses are perfectly legitimate and it is common for shareholders of the franchisee and the franchisor to enter into a shareholders' agreement setting out certain veto rights for the franchisor. Similarly, if the franchisee is a master franchisee, the takeover by the franchisor of the contracts with the sub-franchisees (in the event of termination of the master franchise agreement) is generally provided for in the sub-franchise agreements and is normally enforceable.

11 Court of Cassation, Commercial Section, 28 September 2010, No. 09-13.888, Bull. Civ. IV, No. 145 – Commercial Section, 31 January 2012, No. 11-11.071.

12 Court of Cassation, Commercial Section, 18 December 2012, No. 11-27.068.

viii Anti-corruption and anti-terrorism regulation

Anti-corruption and anti-terrorism legislation is contained in the French Criminal Code. The anti-corruption provisions, which have recently been strengthened in line with the US Foreign Corrupt Practices Act and the UK Bribery Act,¹³ apply to both the public and the private sector and they do not raise specific issues in relation to franchising.

ix Dispute resolution

Disputes in relation to franchise agreements do not give rise to significant differences from the settlement of disputes in relation to other types of distribution agreements.

However, because the relationships between the parties are generally governed by a set of agreements, including not only the franchise agreement, but also a supply agreement, a services agreement, sometimes a shareholders' agreement, etc., and the fact that these agreements are very much intertwined, it is generally recommended to provide for an amicable mediation or conciliation mechanism to avoid long and often inconclusive litigation. Following the recommendations of various professional organisations, including the International Chamber of Commerce (ICC) and the Paris Chamber of Commerce, there is now in France growing awareness of and interest in alternative dispute resolution (ADR) systems. Where an agreement provides for mediation or conciliation (prior to litigation), French courts now reject any judicial claim if the parties have not previously exhausted the mediation or conciliation process.

Recent statistics indicate that among the ADR systems, mediation is the most common in franchising disputes; various organisations (including the French Franchising Federation and the ICC) offer a forum for mediation that gives rise to a quick outcome (approximately two to three months to reach a positive or negative conclusion), ensures the confidentiality of the discussions and costs little.

Franchisors have an interest in opting for a unified way of dealing with disputes with their franchisees, either through arbitration or via litigation before a designated local court (often those of Paris or the local court of the head office of the franchisor). Apart from the benefit of confidentiality, arbitration will give rise to quicker decisions than in French courts; normal judicial proceedings in front of first instance courts in France tend to last approximately 18 months.

Pending any lawsuit on the merits of a case, it is possible to refer to French courts for interim measures, even if the parties have incorporated an arbitration clause in their agreement. However, as recent decisions indicate, this presupposes that the case has not already been referred to the arbitration tribunal by either party. Interim measures may be granted by the President of the Commercial Court in situations of urgency or to prevent an imminent peril. Interim measures may include an interim payment to the damaged party if the existence of the underlying obligation is not seriously challenged, or even the mandatory performance of the relevant obligation.

Finally, French courts will give effect to a choice of law clause designating a foreign law. This is, however, subject to the application of mandatory provisions of public interest under French law (for instance, where the franchisee is subject to insolvency proceedings).

13 Law No. 2016-1691 of 9 December 2016 relating to transparency, the fight against corruption and economic modernisation, known as the Sapin II Law.

VII CURRENT DEVELOPMENTS

Several decisions rendered by the Court of Cassation and the Paris Court of Appeal in 2012 and 2013 show the importance given to antitrust considerations when deciding on the legality of certain clauses or mechanisms included in franchise agreements: in the food retail sector, courts have ruled out the application of veto rights of a major retailer in the franchisee's decisions, the obligation of the franchisee to source food products (other than private-label products) exclusively from the franchisor (or companies in its group) and a post-term non-compete commitment by the franchisee.¹⁴

Although these decisions are very specific to the organisation of food retail distribution in France, they remind us that any contractual clauses or shareholder mechanisms included in franchise agreements and ancillary agreements are always subject to an analysis of their impact on the affected market of goods and services, and may be set aside if they breach applicable competition laws.

More recently, at the heart of the covid-19 crisis, the interactions between franchisors and franchisees have focused primarily on:

- a* the concerted application of special government measures, such as the generous system of 'partial unemployment' (allowing employers to obtain reimbursement from the state of 70 per cent of the gross salaries paid during the period to their employees, and 100 per cent for low wages, up to a relatively high monthly threshold); state-guaranteed bank loans until 30 June 2021 (for which, *inter alia*, no repayment is due in the first year of the loan); and penalty-free deferrals of (and in some cases exemptions from) tax and social security contributions for businesses;
- b* coordination in the negotiations with lessors of premises: the government has enacted special measures for very small businesses leading to a full exemption from rent obligations for a set period. This special regime does not prevent tenants from negotiating directly with their landlords (whether these are the franchisors or third parties) for a deferral of, or even an exemption from, rent obligations regardless of whether the business falls within the special regime; and
- c* temporary contractual waivers, such as partial exemptions from royalty charges and fees over a defined period, setting aside minimum sales targets and rescheduling payments for the future.

¹⁴ Court of Cassation, Commercial Section, 30 May 2012, No. 11-18024; Paris Court of Appeal, 3 April 2013, No. 10-24013.

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