

Franchise

in 32 jurisdictions worldwide

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South Africa

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Overview

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

The two most common business entities are companies and close corporations. Incorporation proceedings are relatively straightforward with regard to both of these types of entities. A private limited liability company may have between one and 50 shareholders. External companies can also be registered.

The registration formalities for close corporations are much simpler than for companies. Members of a close corporation must be natural persons and there may be no more than 10 members. These entities have been designed for small businesses and would generally not be appropriate for large or medium-sized foreign investors.

A new Companies Act has been passed and this will come into operation in 2010, which will update certain aspects of the law regarding company formation.

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

The registrar of companies and the registrar of close corporations deal with the registration of companies and close corporations at the South African Companies and Close Corporations Office (Companies Office). The relevant Acts that govern these entities are the Companies Act and the Close Corporations Act.

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

Incorporation proceedings in South Africa are relatively straightforward. A private company (designated by the term '(Proprietary) Limited') must have at least one shareholder, but may have no more than 50. There is no restriction on foreign shareholding levels. Share certificates in respect of shares purchased by foreigners should be endorsed non-resident for exchange control purposes. There is no minimum capital requirement.

The first shareholders of a company are the persons who subscribe to the memorandum and articles of association of the company. For each new company, a memorandum and articles of association must be submitted to the registrar of companies, together with certain other statutory forms.

In the ordinary course of events, incorporation takes approximately two to three weeks from a name being reserved, but in special circumstances, it can be effected in a shorter time. On registration, the registrar will issue a certificate of incorporation and a certificate to commence business. Only when the latter certificate has been issued may the company commence business. However, it is possible for pre-incorporation contracts to be concluded by persons acting as trustees for the company to be formed. Any such contract must be in writing, must be disclosed in the memorandum of association and must be ratified by the company on incorporation.

There is no requirement that directors must be South African citizens or residents. A return must be filed in respect of each director stating his or her nationality and place of residence. All companies have to make an annual return for each financial year. Every company is obliged to have an annual audit and have audited financial statements prepared.

The registration formalities for close corporations are much simpler than for companies. Members of a close corporation must be natural persons and there may be no more than 10 members. They are not required to have audited accounts prepared. An annual return must be filed with the registrar of companies. These entities have been designed for small businesses (a close corporation is cheaper and quicker to establish and maintain) and would generally not be appropriate for large or medium-sized foreign investors.

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

There are a number of ways in which investments may be made by a foreigner or foreign-owned company in South Africa, such as:

- the most common procedure is to form a company in South Africa. This may be wholly owned or held jointly with other local or foreign shareholders. The formed company can then become engaged in business by setting up a 'greenfield' operation, buying an existing business or setting up in partnership or joint venture with a South African person or company;
- the investor can buy, or take over, all or some of the shares in an existing private company that has already established a business or will establish a business. Such shares can be held directly by the foreign investor. There is no restriction on foreign shareholding levels. Share certificates in respect of shares purchased by foreigners should be endorsed non-resident for exchange control purposes. There is no minimum capital requirement;
- the investor can set up a branch office. If the investor is a company or corporation this will involve registering the branch as an external company in terms of the South African Companies Act;
- the investor can form a joint venture with a South African entity, either through a South African subsidiary or directly in partnership;
- the investor can set up a close corporation;
- the investor can set up a business trust; or
- the investor can form a partnership with another investor or with a South African person. The investor can also establish a business of his, her or its own as a sole proprietor. Partnerships and sole proprietors do not enjoy limited liability in South Africa.

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

On 1 January 2001, South Africa moved from a source-based income tax system to a residence-based income tax system. The new system entails that South African residents get taxed on their worldwide income, as opposed to the old system, where income was taxed from a source within or deemed to be within South Africa.

Tax consists of direct taxes (corporate and individual) as well as certain indirect taxes, including value added tax (VAT), stamp duty, uncertificated securities tax, etc.

The corporate rate of tax for companies and close corporations is currently 29 per cent.

Secondary tax on companies (STC) of 12.5 per cent is paid on dividends declared by any resident company. The combined effect of the corporate tax rate and STC is that companies that distribute the greater portion of their profits by way of dividends are effectively taxed at a rate of 36.89 per cent.

The current VAT rate is 14 per cent, and VAT is payable on the supply of goods and rendering of services by a South African-registered VAT vendor on goods imported into South Africa. Any person (including corporations) carrying on a business in South Africa, and whose business taxable supplies exceed the threshold of 300,000 rand (excluding VAT) per annum, is expected to register as a VAT vendor.

Dividends declared by local companies are exempt from tax. Dividends declared by foreign companies with shareholders resident in South Africa are taxable.

A withholding tax of 12 per cent is levied on royalties. The withholding tax on royalties or similar payments is not payable where the royalty is paid to a non-resident company, where the royalty is derived from any trade carried on through a branch or agency in South Africa and the amount of the royalty is subject to tax in South Africa, or where the royalty is paid to a person (other than a person whose place of residence is in a neighbouring country) in respect of the use of any printed publication of any copyright. Royalties payable to a non-resident from a South African source are subject to a withholding tax of 12 per cent.

Capital gains tax (CGT) became effective on 1 October 2001. The maximum CGT rate is 10 per cent for individuals, 14.5 per cent for companies and close corporations, and 20 per cent for trusts.

- 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?

Employment in South Africa is regulated by the law of contract and by statute. There is a network of legislation providing minimum protection for employees out of which employers and employees may not contract. This legislation is found in a number of Acts that regulate, inter alia, maximum hours of work, overtime rates, minimum periods of annual leave, notice of termination, organisational rights in respect of trade unions, strike law, rights and responsibilities of employers and workers in the event of retrenchments, insolvency and transfers of businesses, protection from unfair dismissal and the prohibition of unfair discrimination.

It is extremely unlikely that a franchisee or an employee of a franchisee could be deemed an employee of the franchisor, as the franchisor and franchisee corporate entities are completely separate. Only if the franchisor did something different, such as entering into an employment contract with the franchisee or an employee of a franchisee which would engender, suggest or imply an employer–employee relationship, could this risk arise. In the ordinary course of a typical franchisor–franchisee relationship, where they are contracted by a way of a franchise or licence agreement, the franchisee or the employees of the franchisee will not be deemed employees of the franchisor.

- 7 How are trademarks and know-how protected?

Trademarks are regulated by the Trade Marks Act 1993. The Act is administered by the registrar of trademarks, based in Pretoria, who controls the register of trademarks. The Act allows for the registration of trademarks capable of distinguishing the goods or services of a person in respect of which they are registered, or proposed to be registered, from the goods or services of another person either generally or (if applicable) subject to limitations.

Trademarks are registered for 10 years, but may on application be renewed for an unlimited number of 10-year periods. The Act makes provision for the protection of well-known international marks. Some protection is also provided for unregistered trademarks under the common law relating to unlawful competition and ‘passing off’.

Know-how and trade secrets are protected under the common-law principles pertaining to unlawful competition. There are no registration formalities, but the information must in fact be secret in the sense that it is only known on a confidential basis to a limited circle of people, and must be of economic value to the trader in his business. An action for damages for unlawful competition must be brought within three years of the infringement becoming known to the plaintiff. In the case of ongoing infringement, proceedings for an injunction may be brought for as long as the infringement continues.

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

South Africa has an advanced land registration system in place. Title registration is possible because each registered unit of land is surveyed and represented on a diagram or general plan. South Africa has an accurately beacons boundary system.

In addition to the conventional title deed registration system, there is also a sectional title system in place to cater for larger buildings, such as blocks of flats and commercial property complexes, similar to condominium development in many other countries. Each major regional centre in South Africa has a Deeds Registry Office covering all land in the region and controlled by a registrar of deeds.

A person domiciled in another country is free to acquire immovable property in South Africa.

An external company may also acquire immovable property in South Africa, provided the company registers its memorandum and articles of association in the Companies Office.

Laws and agencies that regulate the offer and sale of franchises

- 9 What is the legal definition of a franchise?

South Africa’s new Consumer Protection Act, which is due to come into operation in October 2010, defines a franchise agreement as follows:

an agreement between two parties, being the franchisor and franchisee, respectively –

- a) *In which, for consideration paid, or to be paid, by the franchisee to the franchisor, the franchisor grants the franchisee the right to carry on business within all or a specific part of the Republic under a system or marketing plan substantially determined or controlled by the franchisor or an associate of the franchisor;*
- b) *Under which the operation of the business of the franchisee will be substantially or materially associated with advertising schemes or programmes or one or more trade marks, commercial symbols or logos or any similar marketing, branding, labelling or devices, or any combination of such schemes, programmes or devices, that are conducted, owned, used or licensed by the franchisor or an associate of the franchisor; and*

- c) *That governs the business relationship between the franchisor and the franchisee, including the relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisor or an associate of the franchisor.*

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

Foreign persons are free to conclude franchising agreements with local persons. The new Consumer Protection Act will deal with certain aspects of franchising. It introduces aspects such as equity, reasonableness and no unjust prices. Franchising is also regulated by common law.

The new Consumer Protection Act will introduce certain formalities to entering into a franchise agreement. Section 7 of the act states that a franchise agreement must:

- be in writing and signed by or on behalf of the franchisee;
- include any prescribed information or address any prescribed categories of information, such as disclosure which is due to be published in regulations; and
- be in clear and understandable language.

The act also states that a franchisee may cancel a franchise agreement without cost or penalty within ten business days of signing such agreement by giving written notice to the franchisor, and that the minister may prescribe information to be set out in franchise agreements, either generally or within specific categories or industries. These regulations are due to be published later in 2010.

Most contracts tend to be subject to South African law, but there is no general bar to any foreign law serving as the governing law as long as there is some nexus between the law and the contract. The parties are free to agree on which court will have jurisdiction or, alternatively, agree that any disputes will be referred to mediation or arbitration. In short, to an extent the parties have the scope to regulate their relationship as they see fit.

11 Describe the relevant requirements of these laws and agencies.

See question 10.

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

See question 10.

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

There is no law or regulation currently in place (other than the Consumer Protection Act) creating a requirement that must be met before a franchisor may offer franchises.

14 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?

FASA, which is a voluntary membership, non-profit organisation, requires that a disclosure document be furnished to the prospective franchisee or sub-franchisee by the entity with whom they are contracting. It would be reasonable to disclose at least that a franchisor-sub-franchisor or franchisor-master franchisee relationship exists.

Disclosure requirements are due to be published in the regulations to the Consumer Protection Act during the latter half of 2010.

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

There is currently no compliance procedure for making pre-contractual disclosure in force in South Africa.

FASA requires that disclosure be made to the prospective franchisee or sub-franchisee at least 14 days prior to entering into the franchise agreement. FASA requires that the franchisor's disclosure document be updated annually.

16 What information must the disclosure document contain?

In accordance with FASA requirements, the disclosure document must be furnished to a prospective franchisee 10 business days prior to the signature of the franchise agreement. It should set out salient features, characteristics and details of the franchise operation.

Its primary purpose is to ensure that the prospective franchisee receives sound and adequate information so as to place it in a position where it is able to properly assess the franchise operation and make an informed decision regarding whether to enter into the franchise agreement or not.

Contents

A disclosure document should include the following:

- the name, address and contact details of the franchisor and of the franchisor's contact person;
- the names and details of the franchisor's shareholders and senior employees;
- the background, history, development and structure of the franchisor;
- a description of the main services and products of the franchisor, as well as important success factors;
- details of the franchisor's initial and ongoing support and training;
- outline or list of contents of the operations manual;
- total investment required, including a breakdown thereof, setting out, where relevant, the franchise royalty and administration fees and costs, as well as details of initial working capital required;
- a short feasibility study;
- name, address and contact details of other franchisees;
- details of any past and present financial difficulties of the franchisor and franchisees;
- full details, requisites, equipment, layout and proposed sites for an average franchise outlet; and
- a summary of the franchise agreement.

Regulations to the Consumer Protection Act are due to be published soon. They are intended to set out the necessary disclosure requirements and other requirements in relation to franchising.

17 Is there any obligation for continuing disclosure?

Regulations to the Consumer Protection Act are due to be published soon. It is anticipated that upfront disclosure will be a primary focus.

18 How do the relevant government agencies enforce the disclosure requirements?

Regulations to the Consumer Protection Act are due to be published soon. It is anticipated that these will provide for disclosure and other franchise-related requirements.

- 19 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?

The new Consumer Protection Act deals with certain aspects of franchising. Disclosure requirements are due to be published in regulations in the latter half of 2010. At this stage there are no government agencies dealing with the enforcement of disclosure requirements. It is, however, possible to cancel a contract and claim damages on the basis of fraudulent, negligent or innocent misrepresentation or non-disclosure.

- 20 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?

See question 19. A director or member of a corporate entity can be held personally liable in certain instances: for example, if it trades recklessly with the corporate entity.

- 21 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?

The new Consumer Protection Act deals with, inter alia, reasonableness, equity and avoidance of unjust prices. It will regulate certain aspects of franchising and is regulated by the common law. FASA has a code of ethics and business practices, which can be found at www.fasa.co.za.

- 22 Are there any general obligations for pre-sale disclosure that would cover franchise transactions?

The new Consumer Protection Act will deal with certain aspects of franchising, with the view of ensuring reasonableness, equity and avoidance of unjust prices. Disclosure requirements will be set out in the regulations of the Consumer Protection Act.

- 23 What other 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?

The Consumer Protection Act will assist with aspects such as fraud, misrepresentation, equity and reasonableness. There are, however, remedies under common law for fraudulent, negligent or innocent non-disclosure or misrepresentation, which include cancellation, damages or both.

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

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

See question 10.

- 25 Do other laws affect the franchise relationship?

In accordance with section 3 of the Competition Act, this act applies to all economic activity within, or having an effect within, South Africa. The act aims to promote and maintain competition in South

Africa through provisions relating to merger control, restrictive practices and the abuse of dominance. However, the objects of the legislation are not merely limited to the promotion of competition but include public interest objectives, such as ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the economy.

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

See question 25.

- 27 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?

The new Consumer Protection Act will regulate certain aspects of franchising, including, inter alia, reasonableness, equity and avoidance of unjust prices. It is also regulated by common law. The rights and obligations of the parties would be set out primarily in the franchise agreement.

Certain formalities are set out in the Consumer Protection Act, as mentioned above. Franchise agreements must be in writing and signed by or on behalf of the franchisee. Legal firms are able to provide all necessary assistance. Most contracts tend to be subject to South African law, but there is generally no bar to any foreign law serving as the governing law as long as there is some nexus between the law and the contract. The parties are free to agree on the court that will have jurisdiction or, alternatively, agree that any disputes will be referred to arbitration. In short, to an extent, parties have scope to regulate their relationship as they deem fit, as long as the provisions of the Consumer Protection Act are complied with.

- 28 In what circumstances may a franchisee terminate a franchise relationship?

The new Consumer Protection Act, which deals with certain aspects of franchising, introduces, inter alia, reasonableness, equity and avoidance of unjust prices. Franchising is also regulated by common law. The rights and obligations of the parties would primarily be those reflected in their written agreement.

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

See question 28.

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

Yes. The franchisor should insert appropriate provisions into the franchise agreement.

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

The new Consumer Protection Act will deal with certain aspects of franchising, including, inter alia, reasonableness, equity and avoidance of unjust prices. It is also regulated by common law. In most instances reasonable market-related provisions are inserted.

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

South Africa's Usury Act regulates the maximum amount of interest that may be charged on overdue accounts from time to time.

Update and trends

Key franchising aspects of the Consumer Protection Act

Unprepared or weaker franchisors, in particular those who do not subscribe to competent franchisor practices or who fail to provide reasonable value to their franchisees, might find themselves vulnerable to a variety of difficulties when the Consumer Protection Act comes into operation in October 2010.

The act's definition of a franchise agreement is fairly broad and may well extend not only to full business concept franchise agreements, but also to license, agency and distribution agreements, creating a risk not only for the franchise industry but also to any relationship or contract which falls within this broad definition.

The franchise agreement must be in writing and signed by or on behalf of the franchisee. It must also include prescribed information, such as information which would generally be found in a disclosure document, and must be stated in plain and understandable language. The disclosure requirements will be set out in the regulations, which should be published in mid-2010. The regulations are likely to set out additional information which will be necessary in relation to certain categories of information or industries.

There is a 10-day cooling off period during which a franchisee may cancel a franchise agreement, without cost or penalty, by simply giving notice to the franchisor.

The general effective date of the act will be on or around 24 October 2010. In terms of the transitional provisions, the act will not apply to pre-existing franchise agreements as at that date. It appears, however, that it will apply to any franchise agreements renewed thereafter. From its effective date, the act will probably apply to at least some transactions entered into between the franchisor and franchisee in relation to the sale of products or provision of services.

The Consumer Protection Act is in the nature of a consumer bill of rights and includes many key concepts, such as the rights to equality; privacy; choice; disclosure and information; fair and responsible marketing; honest dealing and fair agreements; fair value, good quality and safety and suppliers' accountability. Some of this will be briefly outlined below.

With regard to the right of choice, section 13 of the act provides that a supplier (franchisor) must not require, as a condition of offering to supply or supplying any goods or services or as a condition of entering into an agreement, the consumer to:

- purchase any other goods or services from that supplier;
- enter into any additional agreement with the same or another supplier; or
- agree to purchase any goods or services from a designated third party;

unless the supplier can show that the convenience to the consumer in bundling the goods and services outweighs the consumer's limitation of choice, or the bundling of these goods or services appears to result in economic benefit to consumers. It is a defence to any contravention of this section if the goods or services are reasonably related to the franchisor's branded products or services. This phrase is not particularly clear. It is suggested that consideration be given to, for example, providing for core and non-core products and services in franchise agreements. The core products or services would be the primary, unique or most important products or services related to the brand or franchise. 'Reasonably related' to the brand is not defined; a brief justification or explanation of how the products are unique, important and related to the brand might reduce any vulnerability.

With regard to the aforementioned key concepts of the act, the following should be noted:

- A person must not use physical force, coercion, undue influence, pressure or unfair tactics in the marketing or supply of goods and services.
- A supplier must not by words or conduct express or imply a false, misleading or deceptive representation concerning a material fact or fail to correct an apparent misapprehension.
- A supplier must also not supply goods and services at manifestly unfair, unreasonable or unjust prices, or require a consumer to waive any rights including terms that are unjust, unfair or unreasonable.

- A term or condition will be unfair, unreasonable or unjust if it is excessively one-sided or inequitable, or if the consumer relied on a false, misleading or deceptive representation, or notice of an onerous or unusual clause was not given.
- The consumer's attention must be drawn to any limitation of liability of the supplier, assumption of risk of the consumer, any indemnity and any fact acknowledged by the consumer.
- Any provision of an unusual character or nature, or the presence of which is not reasonably to be expected, must be notified to the consumer.

The powers of a court or tribunal to ensure fair and just conduct, terms and conditions are substantial. If such a court or tribunal determines that a transaction or an agreement is in whole or in part unconscionable, unreasonable or unjust, the court may make an order it considers fair and reasonable in the circumstances, including the restoration of money or property to the consumer and compensation to the consumer for losses or expenses in relation to the transaction, and order the supplier to cease any such practice.

A court may also make an order severing any part of an agreement, provision or notice or, if it is reasonable to do so, alter it to render it lawful. It may also declare the entire agreement, provision or notice void as from the date it took effect, and may make any order that is just or reasonable in the circumstances.

As a result, franchisors should:

- keep a full document trail and record of all communications with franchisees;
- ensure that all communications and dealings with the franchisees are true, accurate, fair and reasonable;
- require a franchisee to do a proper assessment on the location – the franchisor should do the same;
- choose franchisees very carefully and complete and sign the franchise agreement properly;
- also point out any unusual or onerous clauses, and wait for the ten-day cooling-off period to lapse before doing anything further;
- honour obligations in terms of the franchise agreement, as well as all representations made by its employees, as well as those set out in the disclosure document;
- support and encourage the franchisee to perform as soon as possible, so as to avoid difficulties; and
- provide good quality products and services promptly at reasonable prices, as every statement, representation, non-disclosure, action or inaction may be relevant to legal proceedings at a later stage.

It is also very important to note that circumstances, provisions or terms of an agreement which are reasonable at the time of signature of the agreement may become unreasonable or unjust at a later time. As a result the franchisors should, on an ongoing basis, have an awareness of and comply with the provisions of the Act.

It is further recommended that franchisors audit their franchise agreements and disclosure documents for compliance regarding the following:

- the general franchise provisions of the Act;
- the industry and activity specific requirements to be set out in the regulations; and
- ensuring that the disclosure document is accurate, sufficiently comprehensive, reasonable and fair.

Franchisors now have a very important opportunity to get their houses in order so as to reduce any vulnerabilities and ensure their survival. Weak franchisors may not survive. If franchisors do not take the opportunity to refine their franchise business models and become competent franchisors providing quality products and services promptly at reasonable prices, and otherwise deal with the franchisees in a fair, reasonable and equitable manner, it is likely that difficulties will arise.

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

South Africa's exchange control provisions regulate payments to foreign franchisors. Application for exchange control approval is in

most instances a fairly straightforward process and is primarily dealt with by leading banks. If difficulties arise, assistance can be sought from a law firm.

34 Are confidentiality covenants in franchise agreements enforceable?

Yes. Confidentiality and non-disclosure covenants and agreements are enforceable in South African law.

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

The new Consumer Protection Act introduces concepts such as, inter alia, equity, reasonableness and avoidance of unjust prices. These principles are similar to acting in good faith. South African common law also provides remedies for fraudulent, negligent and innocent misrepresentation and non-disclosure prior to entering into agreements. Certain actions may also be *contra bonos mores*.

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

The Consumer Protection Act coming into operation in October 2010 will treat franchisees as consumers. See 'Update and Trends'.

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

The regulations due to be published in the latter part of 2010 for the new Consumer Protection Act are intended to deal with disclosure requirements. We would be inclined to recommend, at least for practicality purposes, that these documents should be in English, as it is the primary business language in South Africa.

38 What restrictions are there on provisions in franchise contracts?

In accordance with section 3 of the Competition Act, the act applies to all economic activity within, or having an effect within, South Africa. The Competition Act aims to promote and maintain competition in South Africa through provisions relating to merger control, restrictive practices and abuse of dominance. However, the objects of the legislation are not merely limited to the promotion of competition but include public interest objectives, such as ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the economy.

The concerns of the Competition Commission include horizontal and vertical relationship collusion, retail price maintenance, exclusive territories, exclusive dealing, tying of products and intellectual property rights.

The Competition Commission, which enforces the provisions of the Competition Act, recognises the nature and contribution of franchising. It also recognises that franchise agreements are not

necessarily anti-competitive, despite the provisions of the Competition Act, and that there may in fact be efficiency, technology and pro-competitive benefits. It is essential that franchisors do not dictate minimum prices and minimum discounts to franchisees.

The new Consumer Protection Act provides that franchise agreements must be drafted in clear and understandable language.

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

See question 38.

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

South Africa has an independent High Court judiciary drawn principally from the ranks of senior advocates (barristers), attorneys (solicitors) and academics. At present, there is a split bar divided between attorneys and advocates, but attorneys can acquire the right of appearance in the High Court. Both branches of the profession are well established and competent. There is an established and sophisticated hierarchy of courts, namely:

- magistrates' courts in each town and city with limited jurisdiction, for example up to certain amounts;
- High Courts with territorial jurisdiction over provinces or parts of provinces and the power to adjudicate, generally, on all disputes, plus certain appeal functions;
- the Supreme Court of Appeal, which sits in Bloemfontein, exercising appellate jurisdiction over all the High Courts; and
- the Constitutional Court, which sits in Johannesburg and has both original and appellate jurisdiction on constitutional matters.

The High Courts and the Supreme Court of Appeal may make an order concerning the constitutional validity of an act of parliament, provincial legislation or administrative conduct of the government, but an order invalidating the legislation of parliament must be confirmed by the Constitutional Court.

Alternative forms of dispute resolution have become increasingly popular. Arbitration is governed by the Arbitration Act 1965.

Professional bodies specialising in arbitration services and alternative dispute resolution have been formed and are used extensively, particularly in labour-related matters. All building and engineering contracts can and generally should contain clauses providing for mediation and arbitration.

Parties are free to agree on a governing law and to the jurisdiction of international arbitration forums such as the ICC and LCIA. FASA provides a mediation service, primarily to its members.

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The Franchise Association of South Africa is in the process of developing an ADR system, which will include negotiations, mediation and arbitration.

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

The advantages of arbitration include that if properly managed, it can be quicker and less expensive than litigation in the courts. Another significant advantage is the ability to choose a good arbitrator who may be a specialist in the subject matter of the dispute.

The parties also have far greater control of the time, place and process to be followed in an arbitration than they do in court proceedings. However, arbitration proceedings can be more expensive, because the costs of the arbitrator also need to be paid for, and if the parties do not cooperate, difficulties and delays could arise.

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

Foreigners are generally not treated differently. However, various statutes or aspects would be relevant and need to be dealt with, such as exchange control regulations and tax.

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