



Bird & Bird & Internationalising your Franchise

Webinar Series Part 3: Italy, France & Morocco

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Introduction



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Lourdes is head of the corporate and M&A team in the Madrid office and has combined expertise in franchising/corporate and commercial matters having assisted many clients in their internationalization.

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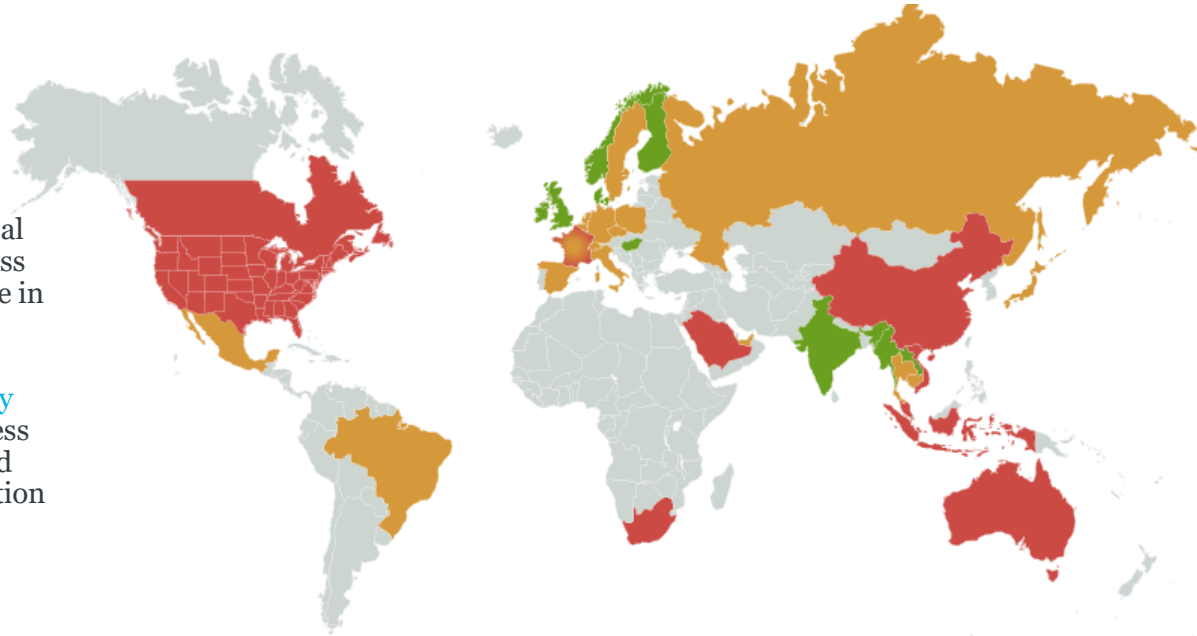
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Diana is part of the corporate and M&A team in the Madrid office and has extensive experience in advising franchisors and franchisees in their local and international expansion.

Bird&Bird & International Franchising

- With more than 1,300 lawyers across a network of [29 offices in Europe, the Middle East and Asia Pacific](#), Bird & Bird is able to provide growing businesses with on the ground support through our international offices.
- With [franchise experts in each of our international offices](#), together with our global network of specialist franchise counsel across the Americas and Africa, we can you operate in a range of sectors to achieve their growth objectives via franchising or distribution.
- We also work with Bird & Bird's [consultancy arm, OXYGY](#), to support clients with business projects that require a range of skills beyond pure legal issues including internationalisation support.
- You can access our [online international franchise laws tracker](#), which provides a comparison of franchise laws across the jurisdictions in which we have offices or work with local franchising experts.



[Access online our International Franchise Laws Tracker](#)

What you need to consider

- How to structure your franchise or distribution model
- Whether you may need a sophisticated hybrid strategies to support your global expansion
- Whether you may need the drafting and negotiation of core franchise, distribution and legal documentation
- What are the international franchise market entry regulations applicable
- Whether you may need support with ongoing franchise and distribution network management
- Whether you need exit planning as well as strategic acquisitions and disposals
- How to implement risk management including how to avoid and handle disputes

You may also need to take into consideration other key related areas such as:

- Brand management
- Advertising and social media
- Use of technology and data
- Corporate structures
- Competition
- E-commerce and m-commerce
- Employment and immigration
- Real estate
- Tax matters

Our webinar series

Welcome to our webinar series in partnership with the Spanish Association of Franchisors:

UK, The Netherlands & Poland: Wednesday 15 September

Australia & China: Wednesday 13 October

Italy, France & Morocco: Wednesday 27 October

India & Middle East: Thursday 11 November



Today's speakers - I

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Today's speakers - II

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Franchising in Italy



An Introduction to Franchising in Italy

Franchising Basics (1)

Normative reference:

- Law no. 129/2004 (the “Italian Franchising Act” or “IFA”);
- Ministerial Decree no. 204/2005.

Franchising Basics (2)

Pre-contractual disclosure requirements (art. 4 IFA)

- **When:** at least 30 days before signing the franchise agreement (“FA”),
- **What:**
 1. a copy of the franchise agreement to be executed, including the following annexes:
 - a) the main data relating to the franchisor;
 - b) the indication of the trademarks used in the franchising system;
 - c) a brief description of the franchising activity;
 - d) a list of the franchisees currently operating in the franchising system and of franchisor's direct points of sale;
 - e) a year-by-year indication of the changes in the number of franchisees, together with the indication of their location in the last three years, or starting from the starting date of franchisor's activity (if it is started by less than three years);
 - f) a brief description of any judicial or arbitration proceedings brought against the franchisor and closed in the last three years that concern the franchising system.
 2. any data and information which the franchisee deems necessary or useful for the purposes of entering into the FA;
 3. necessity to test the commercial formula on the market.

Franchising Basics (3)

Simplified pre-contractual requirements (article 2 of the Ministerial Decree no. 204/2005)

operating only if

- (i) the franchisee before entering into the FA operated exclusively outside of Italy, and
- (ii) FA is governed by Italian law

Note: it is argued that these “simplified” requirements apply until franchisor presence in Italy allows it to comply with the “standard” pre-contractual requirements (i.e. approx. 3 years from the entry into Italian market)

- **When:** at least 30 days before signing the FA,
- **What:** a copy of the FA to be executed, together with:
 - a) annexes 1.a), 1.b), 1.c) above (see Slide 3);
 - b) a State-by-State list of the number of operative franchisees and of franchisor's direct points of sale;
 - c) at franchisee's request, a list indicating the location of at least 20 operative franchisees (or where the total number of franchisees is of lower than 20, the full list);
 - d) a year-by-year and State-by-State indication of the changes in the number of franchisees, together with the indication of their location in the last three calendar years or starting from the starting date of franchisor's activity (if it is started by less than three years);
 - e) a brief description of any judicial/arbitration proceedings closed with a final decision/award in the three calendar years preceding the expiry of the 30 days term before signing of the FA.

Franchising Basics (4)

Mandatory clauses to be included in a FA (art. 3 IFA)

- a) the indication of the amount of the investments (including entry fees);
- b) the indication of the method of calculation and payment of royalties (including any possible minimum revenue to be achieved by franchisee);
- c) the scope of any possible geographical exclusivity;
- d) the description of the know-how provided by the franchisor;
- e) the indication of any possible methods to recognize the know-how provided by the franchisee;
- f) the indication of the characteristics of the services offered by the franchisee (i.e. technical and commercial assistance, design, installation, training);
- g) the conditions for renewal, termination or any possible assignment of the franchising agreement itself.

FA minimum duration (art. 3 IFA)

- three years.

Form of the FA (art. 3 IFA)

- written form is required.

Franchising Basics (5)

Registration requirements

- no general obligation to register;
- registration only "in case of use" and if all contractual provisions are subject to VAT, with the application of registration tax in a fixed amount (€ 200).

Sanctions in case of breach of disclosure requirements (art. 8 IFA)

- in case of provision of false information, the franchisee may ask for the cancellation of the FA.

Are IFA norms mandatory?

- **predominant interpretation:** IFA provisions are not mandatory;
- **minority interpretation:** some of IFA provisions are deemed to be mandatory (i.e. norms on minimum term, written form, mandatory content, pre-contractual obligations)
this interpretation is based on:
 - the analysis of the purpose of IFA (i.e. necessity to protect the franchisee);
 - the necessity to avoid the parties' selection of a legislation lacking regulation of FA.

Interaction between FA and operations manual

- no additional requirements/prescriptions;
- practically, know how is usually included in the operations manual.

Focus on IFA art. 1 - Economic and juridical independency of franchising parties

Some indexes

- running of business at franchisee own risk;
- being independent when making business decisions;
- autonomy in business strategies selection;
- lack of control or interference by franchisor.

Consequence of lack of economic and juridical independence

- lack of franchising agreement "concrete cause"

As the case may be:

- contract invalidity;
- inapplicability of IFA;
- possible application of norms on economic dependency.

Focus on - Economic dependency (and its abuse)

- **Nomative reference**

→ Law n. 192/1998, art. 9 (protecting suppliers as weaker contractual parties)

- **When does economic dependency occur?**

→ disparity of rights and obligations between the parties;

→ lack of chances to find satisfactory alternatives on the market.

- **When does an abuse occur?**

→ imposition of burdensome conditions;

→ arbitrary interruption of contractual relationship;

→ refusal to sell or buy from weaker party.

- **Which are the legal consequences?**

→ invalidity of clauses, contracts, pacts constituting an abuse (Note: risk of contract invalidity);

→ liquidation of damages;

→ sanctions by the Italian Competition Authority.

Franchising in France



How is franchising regulated in France

Definition

No statutory definition of franchise agreements under French law.

However, case law and legal literature consider that a franchise agreement is a contract by which the franchisor makes available to the franchisee know-how, a trademark and provides the franchisee with permanent assistance, whether technical or commercial, to enable it to be able to repeat the franchisor's success. For a contract to qualify as a franchise agreement, 3 main elements shall be gathered, i.e:

- the provision of know-how,
- the licensing of a trademark or distinctive signs, and
- permanent/ongoing technical or commercial assistance by the franchisor.

General commercial and contract law governs Franchise agreements.

Pre-contractual disclosure requirements

L330-3 of the French Commercial Code

Article L330-3 of the French Commercial Code (Doubin Law) requires that information is disclosed prior to the signing of the agreement in a pre-contractual disclosure document (“**PDD**”) to be provided 20 days before the signing of the agreement.

This Article applies **in addition** to the general pre-contractual duty to disclose relevant information covered by Article 1112-1 of the French Civil Code. Usually, the amount of information provided in the PDD is sufficient to comply with this general pre-contractual duty.

However, if the Franchisor has information it considers important regarding the agreement to be signed with future franchisee and not covered by the PDD, it shall disclose them to the future franchisee.

French case law is still uncertain as to whether this pre-contractual disclosure requirement shall be considered as public policy or not but – considering that it is quite easy to prepare and that costs are usually reasonable – we recommend that such obligation is complied with.

Pre-contractual disclosure requirements

Content

Content of the PDD:

- Basic information regarding the franchisor: (i) address of the Franchisor's head office, the nature of its activities, (ii) legal form, (iii) identity of the manager(s), (iv) the amount of the Franchisor's capital (v) registration number at the corporate and trade register, (vi) banking references.
- Information concerning the franchisor's trademark(s)
- Information on the creation, history and evolution of the franchisor and its network
- National (French territory) and local (catchment areas) market reports -usually provided by third party providers
- Annual accounts for the last two fiscal years
- Description of the network including information on other franchisees operating in the network and/or other stores operated under another model
- Description of the main terms of the proposed franchise agreement
- Nature of the expenses required to start operating the business

Pre-contractual disclosure requirements

Practical considerations

It is recommended that the franchisor organises an internal PDD update process

The electronically signed PDD : such format may facilitate the delivery of the PDD to the candidate since this is done by dematerialized way. They then avoid the inconveniences linked to the delivery of PDD in paper format: printing of PDD in several copies, often voluminous; long process of signature and initials on each page of the PDD.

In addition, electronic signature platforms make it possible to date-stamp the signature of the PDD by preserving proof of the date of issue and the content of the PDD, which is decisive in the event of litigation, when the network head has to provide this proof.

Finally, these solutions make it possible to apply literal proof to the handing over of the PDD, a legal fact that can be proven by any means, which constitutes a perfect mode of proof in that it binds both the judge and the parties.

What registration requirements are there in France to operate a Franchise network ?

No registration requirements in France

What are the sanctions if disclosure/ registration requirements are not complied with?

Criminal fine of up to 15.000 € per breach (therefore per agreement signed without PDD)

In case of litigation, the agreement can be declared void in case the franchisee demonstrates that it would not have entered into the agreement if he had had complete information regarding the franchisor and the network

Also, the franchisee can obtain damages if it demonstrates that the lack of information regarding the franchisor and the network resulted in a loss for the franchisee.

Mandatory local laws

Pre-disclosure requirements

Article L330-3 of the French Commercial Code (Doubin Law) requires that information is disclosed prior to the signing of the agreement in a pre-contractual disclosure document (“PDD”).

Mandatory local laws

Significant imbalanced provisions

Article L 442-6, I, 2° of the French Commercial Code - which is a mandatory public policy provision (applicable even where the agreement is governed by a foreign law) – provides that business entities are prohibited “to subject, or attempt to subject, a trading partner to obligations creating a significant imbalance in the rights and obligations of the parties”.

In addition to obtaining the nullification of the clause, the licensee would also be entitled to claim damages where it can demonstrate that the enforcement thereof adversely affected its business.

Such damages would not be limited by the liability cap as such a claim is not considered as a contractual claim but as a claim based on mandatory statutory provisions. Therefore it is usually recommended to have - as much as possible (and to the extent it does not harm the Franchisor) bilateral provisions rather than unilateral.

Or if they cannot be made bilateral, substantiate the provision in order to objectively justify it.

Mandatory local laws

Abusive termination of commercial relationship

Regardless of the provisions included in the Agreement, French regulation on abusive termination of established commercial relationships may apply.

Case law assesses the length of the notice period based on the circumstances surrounding the termination and the simplistic approach consisting in granting one month's notice per year of the relationship is not always followed by the French courts.

More specifically, the conditions for terminating established commercial relationships are governed by Article L.442-1 of the French Commercial Code (formerly L.442-6 of the French Commercial Code), which prohibits the termination of relationships without reasonable notice. The reasonable notice period is assessed by taking into account the duration of the commercial relationship and the circumstances surrounding it, in particular :

- The existence of a possible economic dependence of the ousted partner, at the time of the termination, in particular with regard to the turnover achieved;
-
- The execution by the ousted partner of specific material and/or human investments dedicated to its partner, which would not be likely to be allocated to the execution of other contracts;
- The existence of a legitimate hope that the relationship would last over time.

How does the franchise agreement interact with the operations manual?

Franchising Basics

Operations manual are usually considered as part of the contractual whole and is a key element (i) as it contains part of the know-how of the franchisor and therefore of the agreement's consideration and (ii) contains material obligations for the franchisee as it will have to adapt with the organizational measures contained in it. Also, this operations manual is a means for the franchisor to have the agreement evolve without amending material rights and obligations of the parties.

Parties may not amend the agreement unilaterally but case law considers that the franchisor must have some room for manoeuvre in order to make its network evolve throughout the years

Franchisor may decide to bring changes in the organization of the network and the general brand policy, enhance the know-how of the of the whole franchise network, add new products, (e.g. new recipe) or change the name of the brand to the extent the content of the initial amendment is not altered.

However, material obligations under the agreement should not be artificially excluded from the scope of the agreement by including them in the manual since they outreach the mere organizational power of the franchisor. Therefore, whereas the operations manual can in principle be amended by franchisor – giving sufficient notice to the franchisee in case of important amendment - franchisor shall not include in this operations manual material obligations and state at the same time in the agreement that the operations manual can be amended at any time.

Hot Topic : main findings of the investigation of the French economic regulation authority (DGCCRF) in the fast-food franchise market

DGCCRF Findings	Comment
Most of franchise agreements are pre-established contracts with little room for negotiation.	Usually in the absence of negotiation or where there is little room for negotiation, courts tend to stand on the weaker party's side in case of litigation and interpret the agreement in favour of the franchisee.
Some contracts require the franchisee to pay a royalty, a new entrance fee or a renewal fee without sufficient consideration.	When drafting the agreement, it is therefore key to substantiate payment of royalty by stating to what service/know how from the franchisor such royalty is paid.
Several agreements provided clauses giving the franchisor the right to unilaterally modify the franchise agreement or to terminate it early.	These provisions are usually considered as significantly imbalanced and therefore unenforceable. This does not mean that the franchisor cannot change anything - see below concerning relationship with operations manual.

Hot Topic : main findings of the investigation of the French economic regulation authority (DGCCRF) in the fast-food franchise market

DGCCRF Findings	Comment
Several agreements provided clauses giving the franchisor unlimited and unrestricted access to the franchisee's computer data.	Such access must be contractually defined and substantiated so that it is limited to what is strictly necessary for the execution of the agreement by both parties.
Clauses requiring the franchisee to pay disproportionate penalties in the event of failure to comply with certain contractual provisions;	Penalties shall be proportionate. For instance the franchisor can define these penalties by calculating the damage likely to be suffered in case of breach from the franchisee resulting in a penalty.
Several agreements provide that only the English version of the agreement shall be binding.	These provisions are usually considered as significantly imbalanced notably when the franchisee is a small company or an individual. When contracting with large franchisees, these provisions should not be considered as an issue.

Franchising in Morocco



Franchising in Morocco

Franchise regulation

No specific legal framework for franchising in Morocco.

- Relationship between the parties is essentially governed by the franchise agreement and ordinary law.

Pre-contractual information

- Moroccan legislation doesn't cover the pre-contractual information of the franchisee.
- However, the Moroccan Franchise Federation, founded in 2002, has adopted a code of ethics (with a similar in content to its European equivalent), providing for pre-contractual information to be given to the franchisee.
- Such code of ethics has no legal force.

Franchising in Morocco

Franchise regulation

Enforcement of the franchising contract

Pursuant to article 230 of the Law of Obligations and Contracts (*Dahir des Obligations et des Contrats*,) :

"Contractual obligations validly entered into take the place of law for those who have made them, and can only be revoked by their mutual consent or in the cases provided for by law" .

Termination of the franchising contract

There is no legal notice of termination of the commercial relationship between franchisor and franchisee.

- In case of fixed-term contract: In view of the principle of the binding nature of the contract, when it is concluded for a fixed term, each party shall perform it until the end of the term, unless it is terminated subject to the notice period provided for in the contract.
- In case of open-ended contract: In view of the principle of the prohibition of perpetual commitments, either party is free to terminate an open-ended contract at any time. The supplier is entitled to terminate a distribution contract at any time, unless the circumstances of the termination are considered abusive.

Franchising in Morocco

Franchise regulation

Foreign exchange regulation

Pursuant to article 56 of the the General Instruction of the Foreign Exchange Office (*l'Instruction Générale de l'Office des Changes*), the payment by the local Moroccan franchisee to the foreign franchisor of the franchise

- (i) guaranteed minimum fees and
- (ii) entry fees

requires the prior approval of the Moroccan foreign exchange administration (*l'Office des Changes*).

Franchising in Morocco

Other material law

IP and trademark regulation

Trademark is mainly regulated by law n°17-97 on the protection of industrial property (the "**PIP Law**").

Broad scope of application	"Any invention may be the subject of an industrial property title issued by the body responsible for industrial property" (article 16 of the PIP Law)
Definition of the trademark or service mark	Trademark or service mark is defined as "a sign capable of graphic representation" including (a) names in all forms and (b) figurative signs (article 133 of the PIP Law)
Ownership of the trademark	The ownership of the trademark is acquired by its registration with the Moroccan Office of Industrial and Commercial Property (OMPIC).
Protection of the trademark	<ul style="list-style-type: none">• Possibility of obtaining the seizure or destruction of products offered for sale or services provided in violation of property rights.• Penalty of three months to one year's imprisonment for counterfeiting with a fine of 100,000 to 1,000,000 dirhams (article 225 of the PIP Law).• Penalty of two to six months' imprisonment in case of fraudulent imitation of a trademark likely to mislead the buyer or use of a fraudulently imitated trademark, as well as a fine of 50,000 to 500,000 dirhams (article 226 of the PIP Law)

Franchising in Morocco

Other material law

Competition regulation

Competition is mainly regulated by law n°06-99 on freedom of competition and prices (the "Competition Law").

Broad scope of application	Competition Law applies to (a) all natural or legal persons, whether or not they have their headquarters or establishments in Morocco, where their operations or conduct have an effect on competition in the Moroccan market or a substantial part thereof; (b) all production, distribution and service activities; (c) public persons outside the exercise of their prerogatives of public authority or public service mission; (d) export agreement.
Protection of competition market	<ul style="list-style-type: none">• Protection against "concerted actions, prohibited agreements, understandings or express/ tacit coalitions" (article 6 of the Competition Law)• Protection against dominant position or economic dependence (article 7 of the Competition Law)
New status of the Competition Council	The Competition Council has the status of "independent administrative body responsible for ensuring transparency and fairness in economic relations" (article 166 of Dahir No. 1-11-91 of 27 Sha'ban 1432)

Franchising in Morocco

What to expect

No changes to current regulations are expected

Thank you & Bird & Bird

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Upcoming webinars in the series:

India & Middle East: Thursday 11 November

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