

## **Contrat d'agent commercial et contrat de franchise**

### **CONTRAT D'AGENT COMMERCIAL ET CONTRAT DE FRANCHISE**

Un décret de 1958 a créé un statut particulier et très protecteur en droit de la distribution : le statut de l'agent commercial. Le contrat de franchise a pour objet la réitération du savoir-faire du franchiseur alors que dans le contrat d'agent commercial, l'agent agit au nom et pour le compte du mandant mais se trouve tout de même associé à sa réussite économique par le biais de l'indemnité de fin de contrat.

#### **Définition du contrat d'agent commercial**

L'agent commercial est un mandataire indépendant qui a pour fonction de négocier et éventuellement conclure des contrats au nom et pour le compte du mandant.

La négociation est un élément essentiel de ce statut puisqu'une fonction technique (assistance, conseil, transmission des commandes...) est insuffisante à le voir s'appliquer.

#### **Similitudes entre contrat d'agent commercial et contrat de franchise**

Comme dans le contrat de franchise, une obligation d'exclusivité peut être prévue au contrat.

A l'image du franchisé, l'agent commercial est indépendant et ne doit pas être subordonné à son mandant sous peine d'être requalifié en salarié. Toutefois, seul le franchisé est un commerçant inscrit au registre du commerce et des sociétés (RCS).

#### **Les avantages et les inconvénients pour le franchisé**

##### **Les avantages**

Le franchisé qui est un commerçant indépendant inscrit au RCS et non un mandataire comme l'agent commercial et est donc propriétaire de la clientèle. Dès lors, il est propriétaire de son fonds de commerce et peut le céder en toute liberté.

De plus, la rentabilité de l'activité du franchisé, reposant en partie sur le savoir-faire du franchiseur semble moins aléatoire que les commissions de l'agent commercial engendrés par ses seules compétences en matière de négociation et de vente.

##### **Les inconvénients**

Le franchisé ne pourra pas prétendre à l'indemnité de fin de contrat applicable à l'agent commercial (qui correspond en moyenne à deux années de rémunération).

Le droit d'entrée (redevance initiale forfaitaire) qui est relativement élevé et l'existence de royalties périodiques peuvent freiner un éventuel candidat à la franchise.

#### **La question de la requalification du contrat**

##### **La requalification du contrat de franchise en contrat d'agent commercial**

Dans la célèbre affaire Chattawak, une société franchisée s'est ainsi vu appliquer le statut de l'agent commercial,

les juges ayant considéré que la société n'agissait pas en son nom mais au nom du franchiseur (Cour d'Appel de Paris 9 avril 2009).

Les juges de la Cour de cassation ont toutefois écarté cette requalification au motif qu'en l'espèce, l'agent commercial ne pouvait être propriétaire de la clientèle, du fonds de commerce et bénéficiaire du statut des baux commerciaux. En effet, cela caractérise les attributs du commerçant, statut incompatible avec celui d'agent commercial (Cour de cassation, chambre commerciale 29 juin 2010).

### **La requalification du contrat d'agent commercial en contrat de franchise**

Une telle requalification est plus rare mais une Cour d'Appel (CA Nîmes Chambre civile 14 février 2006) a eu l'occasion de considérer que le versement d'un droit d'entrée était incompatible avec le statut d'agent commercial et conduisait à l'application du régime de la franchise et ce, d'autant plus que le contrat en l'espèce prévoyait notamment l'utilisation de la marque et la fourniture d'un savoir-faire.

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## **La clause de formation permanente dans le contrat de franchise**

### **LA CLAUSE DE FORMATION PERMANENTE DANS LE CONTRAT DE FRANCHISE**

Il est très fréquent de rencontrer une clause de formation permanente au sein d'un contrat de franchise.

En effet, le contrat de franchise est un contrat de transmission de savoir-faire qui implique obligatoirement une phase de formation initiale. Le savoir-faire et par conséquent la formation sont ainsi des éléments centraux de ce contrat.

Certains contrats de franchise peuvent ainsi prévoir par une clause, une formation dite «permanente» ou «continue» permettant au franchisé de suivre les évolutions du savoir-faire. Cela permet ainsi au franchisé de mettre à jour ses connaissances et ses compétences afin d'homogénéiser le réseau de franchise.

#### **Définition de la clause de formation permanente dans le contrat de franchise**

La clause de formation permanente est une clause du contrat de franchise offrant au franchisé, durant toute la durée du contrat, l'accès à des sessions de formation lui permettant d'être à jour des évolutions du savoir-faire ou même d'améliorer certaines de ses compétences.

Une telle clause dans un contrat de franchise fait donc peser une obligation de formation à la charge du franchiseur et au profit du franchisé. La majorité des réseaux de franchise prévoit une telle clause dans ses contrats puisque le franchiseur a l'obligation de maintenir son savoir-faire tout au long du contrat, ce qui peut le conduire à des améliorations ou des évolutions.

### **Les précautions à prendre en matière de clause de formation permanente**

Le franchisé doit être très vigilant en présence d'une clause de formation permanente, clause extrêmement importante dans un contrat de franchise. La rédaction de cette dernière doit ainsi être très précise afin que la formation offerte soit réellement utile et nécessaire pour le franchisé.

Dès lors, il peut être intéressant pour le franchisé de voir apparaître certains éléments au sein de cette clause tels que :

- Le coût de la formation (mais surtout qui doit supporter ce coût)
- Le bénéficiaire de la formation : le franchisé et/ou ses salariés
- Le calendrier des sessions de formation ou leur fréquence
- La durée des sessions de formation
- Le contenu de la formation : objet des sessions (découverte d'un nouveau produit, d'une nouvelle norme de sécurité, d'une nouvelle technique, réactualisation des connaissances...)
- Le lieu : chez le franchisé, école de formation dédiée, séminaire à l'étranger...
- Le caractère obligatoire ou facultatif de la formation

Le franchisé doit garder en tête qu'il est très important de quantifier le contenu de la formation permanente offerte par le réseau mais surtout l'intérêt qu'elle peut lui apporter. Elle peut alors être un élément de choix lorsqu'il hésite entre deux réseaux de franchise.

Le franchisé doit également être vigilant sur le fait que si parfois, le franchiseur finance lui-même la formation et prend même en charge les frais annexes, cela n'est pas toujours le cas. Ainsi, les frais annexes sont la plupart du temps à la charge des franchisés et il convient de leur conseiller de les budgéter.

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**An overview of Laws Governing Franchise Agreements in Egypt**

## **An overview of Laws Governing Franchise Agreements in Egypt**

Egypt does not currently have a specific law dealing with franchising. The franchising agreement being not governed by any direct Egyptian law is primarily governed by the Contracts law (Civil Code no. 13/48).

### **The laws relevant to franchise agreements**

The relevant principles protecting the franchisor and applicable to the contracts would be found in several laws:

- Protection of the Intellectual property rights (trade marks, copyrights, industrial designs and confidential know-how) would be covered under the law for Protection of Intellectual Property (Law No. 82 of 2002, the Copyrights Law No. 354/54, the Trade Mark Law No. 57/39, the Law in respect of Patents, the Industrial Designs and Models No. 132/49.)
- The Commercial Code (No. 17/99) would also come into play as the relationship would have aspects of commercial agency. It also deals with particular requirements in case of technology transfer.
- There would be taxes imposed on the royalties, under the Taxation Law, but these may be subject to any existing double taxation treaties.

### **Applicability of French law and eligibility of French jurisdictions**

- French Law may be applied, but would be overridden by mandatory provisions of Egyptian Law. If the relationship is characterized as one where there is “technology transfer” then Egyptian Law will have to apply (Commercial Code requirement).
- It would be difficult to exclude the jurisdiction of Egyptian Courts as the contract is being performed in Egypt. Moreover, if characterized as a “technology transfer” agreement, the jurisdiction would lie with the Egyptian courts.

### **The Code of Ethics**

The Code of Ethics, to which EFDA’ members shall adhere, is another important self-regulation. It aims at establishing the framework for the implementation of best practices to the franchise relationships and activities of the EFDA members.

It is not intended to replace any Egyptian legislation that may apply to the franchise business but to support full compliance with, and vigorous enforcement of, all applicable Laws and Regulations.

According to the Code of Ethics:

- All prospective members of EFDA must agree to be bound by the Code before they are considered for membership. The Code conducts part of the membership agreement between EFDA and its member.
- The franchisor shall have operated a business concept with success, for a reasonable time and in at least one pilot unit before starting its franchise network.
- The franchisors shall make their best effort to resolve all controversies, disputes or claims arising with its franchisees with good faith and good will through fair and reasonable direct communication and negotiation. The franchisor shall give written notice to its individual franchisees of any contractual breach and, where appropriate, grant reasonable time to remedy default. Failing this, consideration should be given to arbitration or to the competent jurisdiction.

### **The Bilateral Conventions between the French Republic and the Republic of Egypt**

A tax treaty has been signed in Paris on the 19<sup>th</sup> of June, 1980.

A convention on Mutual Judicial Cooperation has been signed in Paris on the 15<sup>th</sup> of March, 1982.

## **The Cairo Regional Centre for International Commercial Arbitration (the CRCICA)**

The Cairo Regional Centre for International Commercial Arbitration is an independent non-profit international organization. Pursuant to the Headquarters Agreement, the Cairo Centre and its branches enjoy all the privileges and immunities of independent international organizations in Egypt.

The leading principle of the Cairo Centre aims at contributing to, and enriching the progress of the economic development scheme in both Asian and African Countries. In this regard, specialized services are being constantly and consistently provided to prevent or help settle trade and investment disputes, through fair operations of expeditious and economical procedures. This constitutes a wholly integral dispute-resolution mechanism which employs various effective processes of arbitration. It includes also Alternative Dispute Resolution techniques (ADR) such as conciliation, mediation and technical expertise.

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## **Existe-t-il une loi spécifique sur la franchise au Québec ?**

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Selon la section 92(13) de la Loi Constitutionnelle canadienne de 1867, les provinces possèdent l'autorité exclusive pour **légiférer** sur "la propriété et les droits civils dans la province." Ce pouvoir est étendu, les matières d'obligations civiles y sont comprises et, notamment, le franchisage.

Au vu du développement considérable des réseaux de franchises, certaines provinces canadiennes ont d'ores et déjà adopté des lois spécifiques sur le franchisage. Il s'agit de l'Alberta, l'Ontario, l'Île du Prince Édouard et le Nouveau-Brunswick.

En effet, la **Conférence pour l'harmonisation des lois au Canada** a rédigée une loi intitulée « **La Loi uniforme sur les franchises** » (et ses règlements) sur le contenu d'un Document d'Information. Les provinces ont le choix d'adopter cette loi pour leur province, d'adopter une version amendée de cette loi ou de rédiger et adopter leur propre loi sur le franchisage.

Dans les autres provinces (sauf le Québec), un système de droit commun existe (jugements des tribunaux de Common Law) et s'applique aux relations commerciales.

Au Québec, les dispositions législatives contenues dans le Code civil du Québec s'appliquent aux relations commerciales (**Loi sur les compagnies L.R.Q., chapitre C-38**). Les principales dispositions appliquées au franchisage sont la notion du **contrat d'adhésion**, les **obligations implicites** de parties qui contractent et l'obligation de parties contractantes d'agir de **bonne foi**.

Il existe aussi, comme dans les autres provinces, d'autres lois et règlements fédéraux, provinciaux et municipaux qui s'appliquent à des domaines qui touchent le franchisage (la propriété intellectuelle, la compétition, la protection du consommateur, la vente d'entreprise, les valeurs mobilières, l'immatriculation de compagnies, la construction, la publicité, les renseignements personnels, etc.).

En ce qui concerne les obligations implicites, l'arrêt Provigo (**Provigo distribution c. Supermarché A.R.G. inc. (CA), 1998**) est la référence en la matière. Cet arrêt aborde les règles de la bonne foi, les règles applicables au contrat d'adhésion, ainsi que des obligations implicites d'un franchiseur envers ses franchisés. Ces obligations implicites peuvent être qualifiées de supplétives car elles complètent le contrat de franchise sans y être écrites. Elles peuvent même avoir pour effet de rendre une clause au contrat de franchise inapplicable puisque certaines de ces règles sont d'ordre public et ne peuvent être exclues par contrat.

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## **The Franchise in Ecuador**

### **THE FRANCHISE IN ECUADOR**

Ecuador has a territorial extension of 283,561km<sup>2</sup> with a population of more than 14 million people.

According to its constitution, Ecuador is a democratic republic. Its capital is Quito, which is house of the federal government.

Ecuador has the eighth biggest economy in South America, with a gross domestic product of 65,490 millions of dollars, inflation of 1.14% and an unemployment rate of 8%.

The franchise began to acquire relevance in 1997. Ecuador's market, in franchise terms, is mainly composed of domestic companies, being foreign companies the exception.

## **GOVERNING LAW**

There is no law that regulates the franchise in Ecuador; consequently the main source of obligations in a franchisor-franchisee relation is the franchise contract itself.

Ecuadorian legislation is very poor on the matter of Industrial/Intellectual property. The Industrial Property Law, as mentioned above, does not regulate the franchise, not even the license for using a trademark.

Nevertheless the Industrial Property Law, its decree and the decree of the Ecuadorian Institute of Industrial Property, regulate certain matters that are related to the franchise.

There is only a small reference of the license for using a trademark in article 220, which enounces a penalty consisting in the cancelation of the registration. (For not using the trademark three years before)

The Decree of the Ecuadorian Institute of Industrial Property, in article 100, establishes the obligation of inscribing the license or sub license contract. In order to do it, said inscription must be made in accordance with the principles contained in the Industrial Property Law and its Decree.

Article 103 of the Decree has importance significance, because it enounces that there is no need of legalizing documents coming from abroad in order to register the contract. A certification from the persons that have made said document will suffice.

Finally, we must mention that there is a franchise association in Ecuador named "Asociación Ecuatoriana de Franquicias". In their internet page there is a section for putting ads in order to obtain franchisees in Ecuador.

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## **Principaux apports de la loi uniforme sur les franchises au Canada**

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Cette nouvelle loi, rédigée par la Conférence pour l'harmonisation des lois au Canada se présente comme un choix pour les provinces canadiennes. S'agissant d'une loi cadre, son adoption par les provinces peut passer par la rédaction de leur propre loi sur le franchisage.

L'apport principal de la loi uniforme concerne l'obligation de divulgation du document d'information. En effet, à la

différence du D.I.P. couramment utilisé en France, le document d'information, selon la loi canadienne, n'est pas une obligation précontractuelle. Ainsi, cette nouvelle loi accorde un délai de 14 jours (à compter de la signature du contrat de franchise ou du premier versement du franchisé au franchiseur) pour que le franchiseur divulgue le document d'information.

En deuxième lieu, le contenu du document d'information est également fixé par la loi uniforme. Le document d'information doit contenir notamment :

- Les états financiers prescrits
- Des copies de tous les projets de contrat de franchisage et d'entente relative à la franchise que doit signer le franchisé éventuel
- Les déclarations prescrites qui visent à permettre au franchisé éventuel de prendre des décisions éclairées en matière de placement
- Les autres renseignements prescrits
- Les copies des autres documents prescrits

En outre, le document d'information fait état de tous les faits importants, en plus des déclarations, des documents et des renseignements. En cas de changement important, le franchiseur doit en notifier au franchisé avant la signature du contrat de franchise ou avant le premier versement exécuté par le franchisé.

La loi uniforme dispose également sur le droit de résolution accordé aux franchisés. Ainsi, le franchisé peut résoudre le contrat dans les 60 jours après avoir reçu le document d'information, si le franchiseur ne lui a pas remis ce document dans le délai exigé ou si un changement important ne lui a pas été communiqué. Si le franchiseur ne lui a jamais remis le document d'information, le franchisé peut résoudre dans un délai de deux ans.

Les provinces qui ont déjà adopté cette loi (l'Alberta, l'Ontario, l'Île du Prince Edouard et le Nouveau Brunswick) autorisent un franchiseur dont la juridiction exige également la divulgation d'un document d'information, de procéder ainsi pourvu que tous les éléments du document d'information exigés par la nouvelle loi de franchise soient inclus.

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## **The Franchise in Bolivia**

### **THE FRANCHISE IN BOLIVIA**



Bolivia is a country with great possibilities for the development of franchises in virtue of its general growth and development potential. There are a lot of economy sectors that have very little concurrence and with great commercial opportunities. In the last years there have been many changes in Bolivia, like for the example, the construction of malls, a major presence of foreigners and the increase of the purchase power of the Bolivian people.

The power and size of the trademark of the franchise does not assure its success in Bolivia, like for example, Mc Donald's after opening its first franchise in 1997 had to close just in 2002. The facility to adapt and modify to the circumstances in the country would be the main quality of a successful franchise.

Argentinean franchises are the ones with a major presence in the Bolivian market, followed by American franchises.

Some of the main franchises in Bolivia are: Muaa, Lolita, Dulces Jessen, United Colors of Benetton, Burger King, Havana, London Tie, Subway, Totto and Sweet.

Although there are many benefits for franchising, there are as well some disadvantages like for instance the excessive corruption in customs; making it very common the missing of merchandise or its substitution. This has led to many franchises to receive its merchandise via Chile, but because of the limited infrastructure in Bolivia, the duration of this route is approximately one and a half month. This should be taken into account when assuring a reception of the merchandises in time.

It is also worth mentioning the existing 35% tariff on textile products that enter Bolivia, via Europe.

There is no specific franchise law in Bolivia, so the main source of obligations in a franchise relation is the franchise contract itself. Nevertheless there is a Trademarks law and also, since Bolivia is part of the Andean Community, the decision 486 in the matter of Intellectual Property of the Andean Community, has full validity and applicability.

## **TRADEMARKS LAW**

The Trademarks Law (Ley de Marcas) in Bolivia, specifically article 12, establishes the general requirements for registering a trademark in the Industrial Property Office of Bolivia.

Article 18 establishes the obligation to renew the register of the Trademark every 10 (ten) years and if the power of attorney to do it was given in France, it will have to be properly legitimized.

## **DECISION 486 IN THE MATTER OF INTELLECTUAL PROPERTY**

As mentioned above, Bolivia is part of the Andean Community along with Colombia, Ecuador and Peru. This Community has established many laws in diverse matters, one of them being Intellectual Property. (Decision 486)

Most of its content has been established in the Trademarks Law of Bolivia, except for:

- A disposition that allows the owner of a trademark to license its use to other persons. Said license must be registered in the corresponding Intellectual Property office of the member country, in this case being the Industrial Property Office of Bolivia.
- The time of response of said office is 15 (fifteen) days maximum. If the request is missing some requirements, the office will notify the interested, so that in a period of 70 (seventy) days following the notification, they can make the necessary amendments.
- The consequence mentioned in the law of failure to register the license is that said license wouldn't be

opposable to third parties, making it impossible to sub-license with other parties.

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## **Franchising in Taiwan**

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### **I. Taiwan: general Information**

The Republic of China (ROC), more commonly known as Taiwan, is a sovereign state located in East Asia whose capital city is Taipei. With a total area of 36,191 km<sup>2</sup> and an estimated population of 23 million inhabitants, the ROC governs the island of Taiwan as well as other minor islands (Penghu, Matsu, Kinmen ...).

### **II. Taiwanese economy**

Taiwan is a dynamic and developed country whose industry is mainly based on high technology. People's Republic of China is the main trading partner of Taiwan, followed by the US, the EU and Japan. With a total GDP of \$ 418.206 billion in 2010, Taiwan is the 24<sup>th</sup> largest economy in the world. Chain of stores and franchises play an important role in the development of Taiwan's economy and represented 48% of the turnover of the retail and food sector in 2008, i.e. NT\$ 1,7 trillion. The Taiwanese distribution network is characterized by the strong presence of convenience stores and shopping centers.

### **III. Franchise legislation in Taiwan**

Since there is currently no specific law governing franchising in Taiwan, the relationships between franchisors and franchisees are regulated by the franchise agreements. However, the validity and the enforcement of such agreements remain governed by the Fair Trade Act of 2010 which deals with trading order and fair competition matters. Besides, the Fair Trade Commission (FTC) adopted specific guidelines regarding franchising which have been amended in 2009.

These "*Disposal Directions (Guidelines) on the Disclosure of Information by Franchisors*" aim to "*ensure fair competition in franchise business and to avoid concealment by franchisors of important information during recruitment of franchisees*" (Article 1). According to Article 4, the franchisor shall provide written information to the prospective franchisee 10 days before they enter into contracts, including:

1. The name of the franchiser's enterprise and the date on which it began franchising operations.
2. The names and relevant business experiences of the responsible person and the chief management personnel of the franchiser.

3. The franchise fees and other charges collected by the franchiser before the entry into the franchising contracts and duration of the franchising contracts, including their types of fees, amounts, methods of collection and conditions for refunds.
4. The intellectual property rights including trademarks, patents, copyrights and so on that the franchiser authorizes the usage to the franchisee, in regard to the time that the intellectual property rights are filed or granted, the content and duration of the rights, plus the scope and any restriction of the authorization to the franchisee.
5. The content and methods of management assistance, training guidance and so forth to be provided by the franchiser to the franchisee.
6. The franchiser's management program concerning the franchisee's areas of operation with those of other franchisees or directly operated stores.
7. All the other franchisees' names and business addresses of the franchiser in the city or county where the franchisee will be located, as well as, within the last accounting year, the statistic data number of other franchisees and terminated numbers of the franchising contracts with the franchiser in the whole country and also the city or county where the franchisee will be located.
8. Within duration of the franchise contract, the restrictions over the business relationship between the franchiser and the franchisee in their operations of business.
9. Conditions and resolved means to modify, terminate and/or rescind the franchise contract.

Article 5 of the Guidelines provides that the franchisor must give the prospective franchisee a period of 5 days to review the proposed contract before signing such agreement.

Any violation of the Guidelines by a franchisor involving concealment or delaying disclosure of important information is considered as a violation of Article 24 of the Fair Trade Act if it is clearly unfair to the prospective franchisee and sufficient to affect the trading order of the franchising operations. According to Article 41, such an infringement may lead to corrective measures ordered by the FTC, administrative penalties (up to NT\$ 25,000,000) or a claim for compensation of damages (up to 3 times of the amount of the damages proven in case of an intentional infringement).

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## **Franchising in Canada**

### **FRANCHISE IN CANADA**

World's second largest country, Canada shares the longest common border with the United States to the South and Northwest. It counts a total population of 32 million, including 812,000 in its capital, Ottawa. Population growth is from immigration and, to a lesser extent, natural growth. There are 43 ethnic origins, the largest being English (21%), followed by French (15.8%), Scottish (15.2%), Irish (13.9%), German (10.2%), Italian (5%), Chinese (4%), Ukrainian (3.6%), and First Nations (3.5%).

As a federation comprising ten provinces and three territories, Canada functions within a framework of a federal

system of parliamentary government and a constitutional monarchy, with Queen Elizabeth II as its head of state. It is a bilingual and multicultural country, with both English and French as official languages, both at the federal level and in the province of New Brunswick.

Many of the country's legislative practices derive from the unwritten conventions of unwritten conventions and precedents set by the United Kingdom's Westminster parliament. Thus, Canadian legal system has its foundation in the British common law system, inherited from being a former colony of the United Kingdom and later a member of the Commonwealth of Nations. Quebec, however, still retains a civil system for issues of private law. Both legal systems are subject to the Constitution of Canada.

## **Economy in Canada**

Technologically advanced and industrialized, Canada has a diversified economy reliant upon its abundant natural resources and upon trade. It is one of the world's wealthiest nations, with a high per capita income. As one of the world's top ten trading nations, it is also a mixed market, ranking lower than the U.S. but higher than most western European nations. Since the early 1990s, the Canadian economy has been growing rapidly, with low unemployment (7.77%) and large government surpluses on the federal level.

In the past century, the growth of the manufacturing, mining, and service sectors has transformed the nation from a largely rural economy into one primarily industrial and urban. As with other first world nations, the economy is dominated by the service industry, which employs about three quarters of Canadians.

## **A franchise system not unified**

It is estimated that there are approximately 1,300 franchise systems operating in Canada, and approximately 78,000 franchise units across Canada. Close to 45% of all retail sales in Canada, particularly in the food service industry, are made through franchised businesses.

Franchisors operating are subject to both federal and provincial law, which may vary from province to province. The province with the most notable differences is Quebec. Quebec is predominantly French-speaking, and while the majority of Canada is governed by the common law, all contractual relationships in Quebec are governed by its Civil Code.

The average term of a franchise agreement in Canada is five years. However, franchise agreements come in several fixed periods including 10 and 20 years.

As the largest provincial economy in the country, Ontario has greater franchise business activity than any other province and inaugurated its first comprehensive law dealing with franchising in the province in 2001, with the Arthur Wishart Act. Actually, Ontario modeled its legislation on the Alberta Franchises Act, which went into effect on November 1, 1995.

Thereby, Alberta and Ontario are one of the few provinces to have specific Franchise Acts, which, in substance, are very similar. They provide for full disclosure of relevant facts and offer additional protection to prospective franchisees.

If the franchisor is operating in Alberta or Ontario, if the prospective franchisee is a resident of those provinces, or has a permanent residence in those provinces, the franchisor is required to provide with a copy of their disclosure document at least 14 days before the signing of any agreement relating to the franchise, or the payment of any consideration relating to the franchise, whichever is earlier.

Both Acts require the franchisor to provide details of any earnings claims information used by the franchisor,

including material assumptions underlying its preparation and presentation

There is no legislation similar to Ontario's Arthur Wishart Act in Quebec and therefore no prescribed disclosure requirements. Instead, in Quebec, the Civil Code imposes an implicit obligation on parties to a franchise contract to deal with each other in good faith. This includes the requirement to act in good faith during negotiations and in drawing up franchise agreements. Franchisors have indeed a duty, which flows from the general duty to act in good faith, to inform the franchisee of any relevant information he is aware of that would affect the franchisee's decision to enter a franchise agreement. In return, franchisees have a duty to become informed and obtain relevant professional advice before they enter a franchise agreement. This obligation is similar to the common law duty of fair dealing and good faith in other provinces. This duty also extends to the performance of contractual obligations and to the termination of the contract.

Joining Alberta and Ontario, Prince Edward Island became in 2000 the 3rd Canadian province to enact franchise-specific legislation. Prince Edward Island's legislation is substantially similar to the legislation in the other two provinces.

Lastly, the province of New Brunswick introduced Bill 41 (Franchises Act) into its legislature, in 2007. It is quite similar to the franchise legislation already in place in Ontario, Alberta and Prince Edward Island and, like those laws, has three essential components to it, namely: a Duty of Fair Dealing, a Right for Franchisees to Associate and an Obligation for Franchisors to Provide Pre-sale Disclosure.

Concerning franchise legislation in the province of British Columbia and the province of Manitoba, there is no specific franchise legislative initiative. Constitutionally, the federal government does not have jurisdiction to legislate franchising for the country as a whole.

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## **Franchising in Tunisia**

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#### **I. Tunisia: essential data**

Located in northern Africa, Tunisia is a state, which sits in the north east of Maghreb; 162,155 km<sup>2</sup> of its territory are limited on the west by Algeria, on the southeast by Libya and on the north by the Mediterranean Sea. The country has a 1,300 km long coastline and is separated from Sicily by 140 km. 99% of the Tunisian population is Muslim, and the country is also populated by small Jewish and Christian communities. Tunisia appears as one of the most westernized countries of this region, and the practice of Islam is moderate. The country enjoys a dual culture thanks to a widespread use of the French language and an easy access to the western media, whose

impact tends however to diminish. In 2009, Tunisia counted 10.4 million inhabitants. The position of women in the society is an exception in this region. Women's rights are almost the same as men's.

Independent since 1956, Tunisia is a Republic with a presidential regime. It pursues an economic and social policy characterized by the articulation of progressive liberalization and economic planning. This system has a strong political and social stability and the country enjoys economic performance, which make Tunisia one of the most developed countries in Africa and the Mediterranean region.

## **II. Economy in Tunisia and the retail trade**

In spite of the difficult international situation, Tunisia registered in 2009 an economic growth of 3.1%, compared to 4.6% in 2008. This rate is expected to reach 4% in 2010 and 4.5% in 2011. However, in the next years the country might have to face the consequences of the fall of the European demand, which could have a damaging impact on the production and exports of automobile components and clothing goods. The main challenge for the Tunisian economy is to reach a sufficient growth level in order to provide jobs for young graduates, whose unemployment rate stood at 19% in 2008.

On the international level, Tunisia has signed the founding agreements of the World Trade Organization such as the GATT and the General Agreement on Trade in Services. On a European level, Tunisia joined in 1985 the Barcelona Euromed process through a partnership agreement with the European Union. This process aims to create a free trade area by the year 2010 between the EU and all Mediterranean countries parties to this agreement. On the regional level, Tunisia signed in 2004 with Egypt, Jordan and Morocco the agreement of Agadir, which plans to abolish tariffs on industrial, agricultural produce and grocery.

In Tunisia, the concept of franchising emerged in the Eighties during the important movement of liberalization of the economy and the opening-up to international trade.

However, franchising, which was only governed by contract law, did not enjoy a specific legal regime before the recent promulgation of act n° 2009-69 on 08/12/2009 (August 12<sup>th</sup>, 2009). Indeed, franchising had no official recognition and only existed under various forms and names (trademark licences, partnership agreements, technical support agreement...). This is mainly due to the fact that franchisees located in Tunisia were not legally authorized to pay royalties to foreign franchisors, as such payments were deemed as capital evasion, and were thus considered as a breach of the currency change regulation. Besides, access to distribution, wholesale, retail and non-tourist catering activities, is limited to foreigners because they have to obtain a special authorization (so called "business card") card from the Trade Ministry, which, is rarely issued. Such regulations could explain why McDonald's never managed to enter the Tunisian market.

## **III. The new regulation of franchising in Tunisia**

Act n°2009-69, passed on August 12<sup>th</sup>, 2009, relating to retailing, grants franchising an official recognition and status. Chapter V of the Act is dedicated to franchising and only contains four articles, which set out general principles and refer to application decrees. The only legally restrictive obligations are those who require the execution of a written contract and state that a disclosure document must be provided to prospective franchisees 20 days before the execution of any agreement. However, the law does not set out the contents of said disclosure document. Furthermore, the new act does not address the issue pertaining to exclusivity undertakings, although such provisions are one of the cornerstones of franchising. Besides, it has to be noted that although the act deals with franchising, it only governs retail franchising as the law concerns the distribution trade.

Another question concerns the scope of the new law, especially in respect of foreign franchising businesses.

Indeed, the law remains silent about the nationality of the parties to a franchise agreement. This may be interpreted as meaning that foreigners are not exempted from the obligation to obtain a business card as required by decree n°61-14 of August 30<sup>th</sup> 1961. According to that rule, every non Tunisian person, corporation, company or entity, must seek and obtain from the Trade Ministry an authorization, commonly called “business card”, prior to the beginning of any business activity. The same rule applies to any every person of Tunisian nationality wishing to represent a foreign trademark in Tunisia.

Therefore, it is necessary to await the implementation of the corresponding decrees to enforce the new act in order to ascertain the existence of a real legal system of franchising in Tunisia. Such decrees are expected to be issued very shortly.

In any case, this new act must be highly welcomed as its represents the outcome of a process which started as early as the Nineties. This new law states the new approach of the Tunisian authorities towards franchising, and does undoubtedly aim at encouraging this kind of trade practice that has considerably developed elsewhere in the world.

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