

# HYUNDAI condamné pour résiliation abusive de contrats de distribution

ARTICLE

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## Getting the Deal through: Distribution and Agency

Article written by Gilles Menguy for the publication Getting the Deal Through: Distribution and Agency

getting the deal through

Law stated as of 26 février 2018

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## The Legal System in New Zealand

New Zealand has a common legal system based on the British model with an independent judiciary. New Zealand is rated second (one point behind Denmark) for freedom from corruption by Transparency International. New Zealand enjoys a stable democracy with a proportional representation voting system which tends to produce coalition governments. The two major parties, which would generally lead a coalition government, are National at the conservative end of the spectrum and Labour at the liberal end. New Zealand is an independent sovereign state and a member of the British Commonwealth of Nations. The British sovereign is the titular Head of State and is represented in New Zealand by a Governor-General.

Parliament is triennially democratically elected. New Zealand does not have a written constitution. All legislation is passed by a single chamber, the House of Representatives, which is the highest law-making body in the country.

In 1993, New Zealanders voted to change their electoral system from “First Past the Post” to a “Mixed Member Proportional” representation system.

The law is developed from case law (the decisions of the courts) and from statutes enacted by the New Zealand Parliament. Case law may be superseded by statute.

Legislative power is vested in Parliament, which usually comprises 121 members in the House of Representatives. Elections are held every three years.

The New Zealand court system follows a basic pyramid structure, with the ultimate authority being the Supreme Court. The majority of cases are heard in the District Court, with the High Court hearing some important cases (as statutorily defined). Some cases may go to the Court of Appeal or the Supreme Court in certain circumstances. A decision by a higher court is binding on the lower courts. There are specialist courts and tribunals, such as the Employment Court, the Taxation Review Authority and the Environment Court.

Gilles Menguy - Avocat à la Cour

gmenguy@gm-avocats.com

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## French Presence in New Zealand

France is New Zealand's third-largest individual trading partner within the European Union. Top exports to France include sheepmeat, medical apparatus, fish and sheepskin while top imports into New Zealand include aircraft, vehicles, machinery and wine. Imports from France dominate the two-way trade representing.

While many New Zealanders recognise French brands such as L'Oreal, Veolia and Danone, there are many other smaller businesses joining the French New Zealand Chamber of Commerce (FNZCCI) to expand their operations in New Zealand.

However, for the moment, French franchises do not yet have a notable presence in New Zealand, despite the implantation of other international franchise systems. New Zealand has welcomed overseas franchise systems from countries such as Australia, UK, USA, Canada, South Africa and Asian countries.

France has had diplomatic relations with New Zealand since August 1945.

France also provides a significant source of investment into New Zealand, particularly in the wine industry which includes Veuve Clicquot and Deutz. Yoplait is a very well-known yoghurt brand in the New Zealand agri-food sector. Investment have also been made in New Zealand's transport and communications sector by Alcatel, Alstom and in the waste management sector by ONYX.

French tourists are on the rise in New Zealand. There was a 13% increase in French visitors in the year 2014 compared to the previous year and the number of young French people coming to New Zealand has increased exponentially in the last two decades with 115 people recorded in 2000 under the Working Holiday Scheme to 8000 in 2014.

The Education Cooperation Agreement signed in September 2013 strengthens educational ties between France and New Zealand. It promotes student and teacher exchanges and the learning of the two respective languages of the countries.

French is still the most popular foreign language of choice in New Zealand.

In 1991, the New Zealand-France Friendship fund which provides for cultural, literary and educational exchanges was established following the Rainbow Warrior incident.

Gilles Menguy - Avocat à la Cour

gmenguy@gm-avocats.com

## Franchising in New Zealand

New Zealand is a country with the most franchise systems per capita in the world. According to the 2017 Franchising New Zealand survey, there are 630 franchise brands with 37,000 franchisees for a population of 4.6 million, giving it the title of the country with the most franchises in the world per capita. The franchise systems come from all over the world with 70% of them being local franchise systems. Furthermore, franchising in New Zealand is developing at a very fast rate and growing year by year thanks to a very positive climate towards franchising which has developed over the last decade. An estimated 7% of small businesses are franchises

New Zealand is a country with a consistent policy of deregulation, making it one of the best places in the world to do business. In line with this policy, in New Zealand there are no particular laws in relation to franchising, differing from Australia which requires a mandatory disclosure regime.

Franchising in New Zealand accounts for an annual turnover of over \$18 billion. The number of systems and outlets has seen a growth of between 15-20% per year for the last few years and is a trend which continues to grow.

The Franchise Association of New Zealand (FANZ) was formed in 1996 and exists to promote franchising in New Zealand and to help both franchisors and franchisees excel in their business pursuits. The association has over 210 members of which approximately 145 are franchisor members. Members are required to abide by a Code of Practice and the Code of Ethics which aims to encourage best practice throughout franchising and demonstrates a positive will to self-regulate within the sector.

The Code applies to all members including franchisors, franchisees or affiliates such as accountants, lawyers and consultants and all new members of the FANZ will be accepted on the condition that they agree to be bound by the code of membership.

Foreign franchisors typically enter New Zealand by way of a master franchise agreement owing to the small size of the country. However, Australian franchise systems have used the direct franchising method in New Zealand, using a subsidiary company incorporated in New Zealand.

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## Doing Business in New Zealand

New Zealand is currently ranked first of 189 countries by the World Bank for ease of doing business, meaning it is the country with the best regulatory environment for starting and operating an enterprise. New Zealand has a deregulated, decentralised economy directly exposed to international competition. Over the past three decades, successive New Zealand Governments have reformed New Zealand's trade rules by removing many barriers to imports, ending most subsidies, and ensuring that the rules relating to overseas investment are designed to encourage productive overseas investment in New Zealand.

New Zealand's economic freedom score is 84.2 which makes it the 3<sup>rd</sup> freest in the 2018 index.

The OECD Economic Survey of New Zealand 2017 notes that "the country has experienced robust economic growth since 2012, buoyed by record levels of inward migration and strong terms of trade. The government budget

is near balance, and external deficits are considerably smaller than in past expansions”.

The gross domestic product of New Zealand (GDP) is 186.4 billion (USD) making it the 53<sup>rd</sup> largest national economy in the world. New Zealand had a real GDP growth of 3.5% in 2017.

The New Zealand economy is trade-oriented. Primary sector exports contribute to over 50% of export earnings, such as dairy, meat, wood, fruit and vegetables. Services, especially tourism, are also a key source of export revenue. New Zealand also has developing industries in export education, boat building, IT, horticulture, wine and film. The level of imports closely matches exports and comprises mostly raw materials and capital equipment or industry. New Zealand is committed to the reduction of worldwide trade barriers. Tariffs in New Zealand have been systematically reduced, and import quotas eliminated.

The government has worked to negotiate free trade agreements with major trading partners including Australia, Brunei, Chile, China, Malaysia, Singapore and Thailand. New Zealand’s largest export markets are Australia and China, followed by the US, Japan and Korea. China is the main import source, followed by Australia, the US, Japan and Malaysia.

Four main avenues are open to overseas entities wishing to set up a business in New Zealand such as:

- trading directly, registering as an overseas company (i.e. as a branch);
- forming a subsidiary company;
- merging with or taking over an existing New Zealand company, or
- entering a limited partnership. If entering into business with a third party, the usual structures of joint ventures (both incorporated and unincorporated), partnerships and limited partnerships are all available.

New Zealand resident companies are taxed on their worldwide income, and non-resident companies (including branches) are taxed on New Zealand-sourced income.

The New Zealand corporate income tax rate is 28%.

Gilles Menguy – Avocat à la Cour

gmenguy@gm-avocats.com

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## Article for Franchising in France: overview

Franchising Global Guide – France – Gilles Menguy – 24 August 2016

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## Franchising in Macau

### FRANCHISING IN MACAU

Along with Hong Kong, Macau is one of the two special administrative regions of China. Officially called the “Macao Special Administrative Region of the People’s Republic of China”, this peninsula is composed of two islands of a total area of 29,5 km<sup>2</sup> and a population estimated to 544,600 inhabitants. The PRC governs the territory’s defense and foreign affairs while Macau keeps its own legal system and currency, among others.

Portuguese traders administered the region during several centuries until the transfer of sovereignty to the PRC on 20 December 1999. Nowadays, Macau is a dynamic region whose economy is based on tourism and clothing industry. It keeps important trade relations with Europe and Portuguese-speaking countries and is a founding member of the WTO. The World Bank classifies Macau as a high income economy (GDP per capita of \$39,800 in 2009).

Franchising in Macau is regulated by Title VIII of the Macau Commercial Code (MCC) which defines a franchise agreement as *“that by which one of the parties, against a direct or indirect payment, grants to the other, in a certain zone and in a stable manner, the right to produce and or to sell certain goods or services under his entrepreneurial image, according to his know-how, with his technical assistance, and subject to his control”*.

Article 680 provides the list of the information the franchisor has to deliver in writing to a prospective franchisee, including information about:

- the franchisor: identification, annual accounts, judicial proceedings...
- the franchise network: detailed description, composition of the network, profitability, incidence of bankruptcies;
- the franchisee: profile of the ideal franchisee, necessity and extent of the franchisee’s personal and direct participation in the exercise of the franchise ;
- the monetary obligations: initial investment needed, amount of the royalties...;
- the professional experience gained, the know-how and entrepreneurial methods ;
- the services rendered by the franchisor;
- the template of the franchise contract and its appendixes.

The MCC does not provide a specific rule on how many days the disclosure must predate the signature of the contract but only requires a disclosure “with adequate advance”. However, the franchisor should be careful since the franchisee will be tempted to allege that the disclosure was not adequately early. Any failure to provide the information entitles the franchisee to demand the annulment of the contract.

The franchise agreement has to be concluded in writing and any time limit agreed by the parties cannot be shorter than 3 years. As to the respective obligations of the parties, articles 686 and seq. of the MCC provide a general duty of good faith and fair dealing. This franchisor shall in particular:

- grant the franchisee the use of the Intellectual Property rights and know-how associated with the franchise and ensure peaceful enjoyment of those rights,

- ensure constant updating of his know-how,
- provide training,
- conduct advertising of the network at international and regional levels
- ensure the supply of the goods necessary to run the franchise ,
- compensate any post-term non-compete obligation,
- timely inform the franchisee of any material alterations in the running of the franchise.

In return, the franchisee is obliged to pay royalties and follow the instructions regarding equipment and premises. He also has to submit change of location or advertising campaigns to the approval of the franchisor, maintain the minimum volume of sale required and report to the franchisor any breach or misuse of the Intellectual Property right.

The MCC also contains provisions regarding the transfer of contractual position, giving to the franchisor a right of pre-emption in case of transfer of the franchisee's enterprise. Besides, when the contract is terminated for reasons not imputable to the franchisee, the franchisor has to repurchase goods not sold or allow the franchisee to keep using the Intellectual Property rights and the know-how granted.

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Gilles Menguy

Avocat & Solicitor

gmenguy@gm-avocats.com

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## **Le droit d'entrée dans le contrat de franchise**

### **LE DROIT D'ENTREE DANS LE CONTRAT DE FRANCHISE**

On parle de droit d'entrée ou de «redevance initiale forfaitaire» pour désigner la somme que doit s'acquitter un franchisé lorsqu'il souhaite intégrer un réseau de franchise.

Le droit d'entrée se distingue des redevances périodiques ultérieures. Si le droit d'entrée est en principe forfaitaire, il peut parfois également être proportionnel : en fonction de la taille de la clientèle ou du nombre de mètres carrés de l'établissement par exemple.

#### **Définition du droit d'entrée dans le contrat de franchise**

Juridiquement, le droit d'entrée est la contrepartie de l'accès au savoir-faire du franchiseur et à sa marque par le

franchisé mais aussi aux services dont bénéficie ce dernier lors de la conclusion du contrat de franchise (l'assistance initiale à l'ouverture). Pour résumer, il s'agit de la contrepartie des avantages procurés par le franchiseur au moment de l'entrée dans le réseau.

Il rémunère donc les services initialement rendus par le franchiseur alors que les redevances périodiques ou «royalties» rémunèrent quant à elles les services rendus pendant la durée du contrat comme l'assistance, la formation permanente...

## **Les règles usuelles de calcul du droit d'entrée**

Le calcul du droit d'entrée est variable selon les réseaux de franchise. Toutefois, il s'avère que le montant moyen des droits d'entrée est de l'ordre de 11 500 euros.

Il est d'usage que le droit d'entrée couvre les frais qu'a, au préalable, supporté le franchiseur lors de la mise en place de son réseau et qu'il va supporter lors de la conclusion du contrat de franchise.

Il convient de rappeler que la clause relative au droit d'entrée peut être négociée même si cela est parfois rare en pratique.

Pour résumer, plusieurs éléments influencent le calcul du droit d'entrée :

- La notoriété de l'enseigne
- L'assistance initiale à l'ouverture
- Le montant des redevances périodiques
- Le savoir-faire
- Le montant des dépenses engagées au préalable par le franchiseur et le nombre de contrat de franchise espérés afin d'obtenir un amortissement des frais engagés initialement
- Le montant du droit d'entrée pratiqué par les concurrents
- La rentabilité espérée de l'exploitation
- La superficie de l'établissement

## **Les précautions à prendre en matière de droit d'entrée**

Le droit d'entrée est en général exigé une seule fois au moment de la signature du contrat de franchise et peut varier d'un réseau de franchise à un autre. Certains concepts de franchise exigent un droit d'entrée additionnel au moment du renouvellement du contrat de franchise.

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**Gilles Menguy**

**Avocat & Solicitor, GM Avocats**

**gmenguy@gm-avocats.com**

## Tout savoir sur le FDD américain

### TOUT SAVOIR SUR LE FDD AMERICAIN

#### Item 1 : *“The Franchisor, and any Parents, Predecessors, and Affiliates.”*

Aux USA, tout franchiseur doit communiquer au candidat franchisé un document d'information précontractuelle dénommé FDD, a minima 14 jours avant la signature du contrat de franchise. Ce document est gouverné par la loi fédérale qui précise dans un grand détail le contenu légal de ce document.

Le FDD doit contenir 23 sections, dénommées « items ». L'item 1 du FDD est le premier item de la liste est porte sur une présentation détaillée du franchiseur.

#### Le texte

Le texte est le suivant :

1. *The name and principal business address of the franchisor; any parents; and any affiliates that offer franchises in any line of business or provide products or services to the franchisees of the franchisor.*
2. *The name and principal business address of any predecessors during the 10-year period immediately before the close of the franchisor's most recent fiscal year.*
3. *The name that the franchisor uses and any names it intends to use to conduct business.*
4. *The identity and principal business address of the franchisor's agent for service of process.*
5. *The type of business organization used by the franchisor (for example, corporation, partnership) and the state in which it was organized.*
6. *The following information about the franchisor's business and the franchises offered:*
  - *Whether the franchisor operates businesses of the type being franchised.*
  - *The franchisor's other business activities.*
  - *The business the franchisee will conduct.*
  - *The general market for the product or service the franchisee will offer. In describing the general market, consider factors such as whether the market is developed or developing, whether the goods will be sold primarily to a certain group, and whether sales are seasonal.*
  - *In general terms, any laws or regulations specific to the industry in which the franchise business operates.*
  - *A general description of the competition.*
7. *The prior business experience of the franchisor; any predecessors listed in Item 1, Instruction (2); and any affiliates that offer franchises in any line of business or provide products or services to the franchisees of the franchisor, including:*
  - *The length of time each has conducted the type of business the franchisee will operate.*
  - *The length of time each has offered franchises providing the type of business the franchisee will operate.*
  - *Whether each has offered franchises in other lines of business. If so, include:*
    - *A description of each other line of business.*



- *The number of franchises sold in each other line of business.*
- *The length of time each has offered franchises in each other line of business.*

## **Commentaire de texte**

L'item 1 du FDD est composé de trois séries d'informations.

La première série d'informations est relative à l'identité de la société franchiseur. Le FDD exige d'aller dans un grand détail : forme sociale du franchiseur, adresse du siège social, nom et adresse de filiales.

La seconde série d'informations concerne d'une part l'historique du franchiseur et la présentation du concept de franchise, d'autre part les éventuels autres concepts de franchise que celui proposé dans le cadre du FDD.

Ainsi, doit notamment figurer dans le FDD ce qui suit : l'historique de l'évolution de la société franchiseur sur les 10 dernières années, les éventuelles autres sociétés du franchiseur, la description de du concept proposé en franchise, l'exploitation éventuelle par le franchiseur de concept de franchises dans d'autres secteurs d'activité.

La troisième série d'informations porte sur un descriptif de l'état général du marché concerné par le concept, l'état de la réglementation qui lui est applicable et l'état de la concurrence.

En somme, cet item 1 correspond à une fiche d'informations complète ayant pour but de présenter le franchiseur de manière aussi complète que possible.

## **Conseils pratiques**

Trop souvent le candidat franchisé s'abstient de poser des questions au franchiseur.

Le principal conseil est de poser toutes les questions auxquelles le candidat franchisé pourrait penser, ce par écrit, et discuter avec le franchiseur des réponses apportées.

Il est essentiel que le candidat franchisé comprenne à qui il a affaire et avec lequel il partagera pour plusieurs années une activité sous enseigne.

**Septembre 2015**

**Gilles Menguy**

**Avocat & Solicitor, GM Avocats**

**[gmenguy@gm-avocats.com](mailto:gmenguy@gm-avocats.com)**