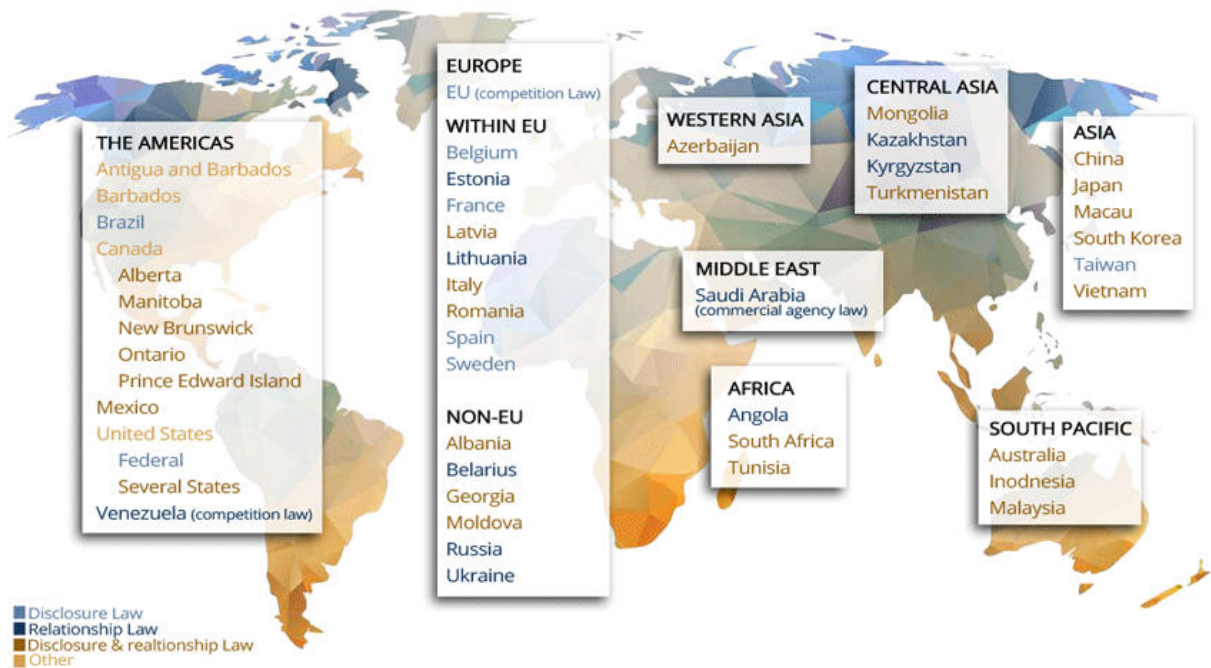




INTERNATIONAL RESOURCES ABSTRACT

Laws and agencies that regulate the offer and sale of franchises



BRAZIL



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

The INPI is the government entity responsible for matters involving industrial property rights, examination of trademark applications, issuance of letters patent, certification of licensing agreements involving industrial property rights, and registration of domestic and cross-border franchise agreements. The offer and sale of franchises is regulated by:

- the Franchise Law, with respect to disclosure requirements;
- the Industrial Property Law, which concerns the trademarks involved; and
- INPI Normative Act No. 135/1997 with respect to filing requirements and procedures.

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

While cross-border franchise agreements must be registered with the INPI, domestic franchise contracts may be registered with the INPI at the option of the parties.

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

No, currently not (see 'Update and trends').

Are there any laws, regulations or government policies that restrict the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers?

A sub-franchisor must make pre-sale disclosures. The Franchise Law likens the terms 'franchisor' and 'franchisee' to 'sub-franchisor' and 'sub-franchisee'. To that end, all obligations imposed by the Law on the franchisor are imposed on the sub-franchisor as well.

There is no specific disclosure requirement from a sub-franchisor pertaining to the relationship between it and the franchisor. Nevertheless, some of the disclosures required to be made will inevitably include information about the franchisor.

See 'Update and trends' for more details on disclosure requirements.

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 subfranchisor?

The Franchise Law determines that franchisees must receive the FDD at least 10 days before they execute a definitive or preliminary franchise agreement, or pay any fees to franchisor or to any company or person related to the franchisor. The Law does not provide for an updating obligation.



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Is there any obligation for continuing disclosure?

Except for the parties' general obligation to deal with each other in good faith, there is no specific legal obligation for continuing disclosure.

How do the relevant government agencies enforce the disclosure requirements?

Brazilian governmental bodies with jurisdiction over franchise agreements (ie, the INPI and BACEN, as the case may be) do not have specific powers to enforce disclosure requirements. In case of breach, franchisees shall turn to courts or arbitration.

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 offer and sale of franchises in Brazil is also affected mainly by the general principles of contracts' and obligations' civil law. As to other agencies or industry codes, the Brazilian Franchising Association has a strong presence in franchise-related matters and has an Ethics Code in place that applies to all of its associates. The Brazilian Franchising Association is not an official or governmental entity.

Do other laws affect the franchise relationship?

No. The ongoing relationship between franchisor and franchisee shall be regulated by the franchise agreement and general principles of Brazilian law in all material aspects that may affect such relationship (ie, civil, criminal, tax, etc).



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Update and trends

The House of Representatives is currently reviewing Bill of Law No. 3234/2012, which intends to revoke and replace the Franchise Law. The most significant changes proposed are:

- ⌚ amending the definition of franchise to explicitly state that it does not characterise a consumer relation, nor formation of an economic group;
- ⌚ amending and extending the list of disclosure items to include, among others:
- ⌚ information on franchisees, sub-franchisees and subfranchisors which left the network over the preceding 24 months (as opposed to 12 currently required);
- ⌚ rules on territorial competition between land-owned and franchised units;
- ⌚ rules on ownership transfer or succession, if any;
- ⌚ contract term and renewal conditions;
- ⌚ situations in which penalties, fines or damages are applied and the amounts thereof;
- ⌚ whether minimum purchase quotas – from franchisor or from third parties – are required;
- ⌚ whether a franchisee may – and if so, under which conditions – refuse goods or services required by the franchisor;
- ⌚ the network consumer price policy, rules for amendment thereof, and whether franchisor's own network is bound by the same policy or not;
- ⌚ whether there is a board or association of franchisees and, if so, what their functions, powers and mechanisms of representation are, as well as management powers and governance rules;
- ⌚ rules limiting competition between franchisor and franchisees and between franchisees during the life of the agreement, detailing territorial scope and duration of the restriction; and
- ⌚ in case of sub-franchises, a sub-franchisor shall inform the term of the master franchise contract, conditions for renewal, territorial scope, targets for opening units and rules of transfer or succession.
- ⌚ requiring that a franchise shall only be offered after the franchised business concept, the company name or brand, have been explored in Brazil or abroad, by the franchisor, a related company, or another company in the same economic group, for at least two years (subject to nullity of the contract and franchisee's right to claim refund of payments duly adjusted for inflation);
- ⌚ allowing public companies, mixed capital (public/private) companies, and entities directly or indirectly controlled by the government to adopt the franchise system in their operations;
- ⌚ expressly requiring franchise contracts that produce legal effects only in Brazil to be governed by Brazilian law, while cross-border agreements will be subject to the same rule unless the parties expressly agree otherwise;
- ⌚ determining that the foreign party shall permanently maintain a qualified attorney resident in Brazil, with powers to represent such party administratively and judicially, including for purposes of receiving summons;
- ⌚ expressly allowing the parties to elect arbitration for dispute resolution purposes;
- ⌚ expressly requiring franchise contracts that produce legal effects in Brazil to be written in Portuguese;
- ⌚ allowing both franchisor or franchisee to promote the applicable renewal enforcement claims vis-à-vis the owner of the property in cases where the franchisor sublets to a franchisee the real estate property where the franchise store is located; and
- ⌚ allowing the rent payable by franchisee to franchisor (in cases where franchise sublets the real property from franchisor) to be higher than the rent payable by franchisor to the owner of the property as long as the possibility is disclosed in the FDD and in the franchise agreement, and the surplus payable by the franchisee is not an excessive burden to the franchisee.