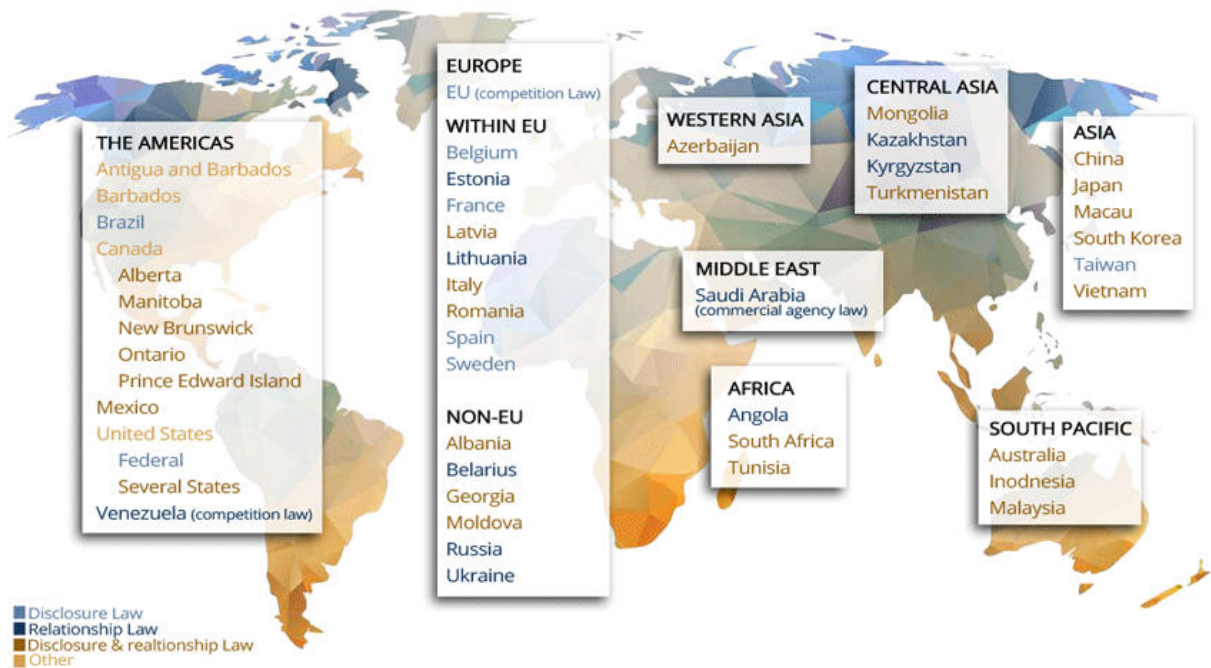




INTERNATIONAL RESOURCES ABSTRACT

Laws and agencies that regulate the offer and sale of franchises



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

Foreign persons are free to conclude franchising agreements with local persons. Franchising is regulated by common law. In addition, the new Consumer Protection Act deals with certain aspects of franchising.

It introduces aspects such as equity, reasonableness and no unjust prices.

In terms of the new Consumer Protection Act there are certain formalities to entering into a franchise agreement. Under section 7 of this Act a franchise agreement must:

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

Furthermore, a franchisee may cancel a franchise agreement without cost or penalty within 10 business days of signing said agreement by giving written notice to the franchisor, and the minister may prescribe information to be set out in franchise agreements either generally or within specific categories or industries. Regulations were published and came into force on 1 April 2011.

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

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

See previous question.

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

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

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?

With regard to the recruitment of franchisees, there are black empowerment laws and policies in place, particularly for South African entities in terms of which certain benefits can be derived if there are black franchisees. There are no restrictions on requirements relating to the number of franchisees or the number of franchises, held by a single franchisee, or in respect of their locations.



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There is also no restriction generally regarding the local content of goods and services purchased by franchisors or franchisees. Foreign investment is encouraged and there is no legislation preventing foreign investment into South African, including in relation to the franchise industry. There is also no yearly growth requirement for a franchise system.

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?

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

According to the Consumer Protection Act regulations, if the franchise agreement is related to a master franchisee, the master franchisee's identity must be disclosed. The parties to a franchise agreement are described as a franchisor and franchisee. In terms of the disclosure requirements, every franchisor must provide the prospective franchisee with a disclosure document, dated and signed by an authorised officer of the franchisor, at least 14 days prior to the signing of a franchise agreement. Both a master franchise agreement and a sub franchise agreement will fall within the definition of a franchise agreement. It is our understanding that in each agreement, it is the person or entity granting the rights, who is obliged to provide a disclosure document.

Is there any obligation for continuing disclosure?

No.

How do the relevant government agencies enforce the disclosure requirements?

The Consumer Protection Act and its regulations came into operation on 1 April 2011, and it is not yet entirely clear how the Consumer Protection Commission would enforce the disclosure requirements.

A claim process and related provisions have been published.

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?

Common law applies to all contracts entered into and in relation to which South African law applies. Key concepts of the new Consumer Protection Act include reasonableness, equity and no unjust prices.



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It is also necessary in terms of the CPA regulations to include provisions in the contract which relate to assignment of rights. The leading franchise association in South Africa is the Franchise Association of South Africa (FASA), which can be found at www.fasa.co.za.

Do other laws affect the franchise relationship?

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