

# Franchise

*Contributing editor*  
**Philip F Zeidman**



2019

GETTING THE  
DEAL THROUGH 

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# Franchise 2019

*Contributing editor*  
**Philip F Zeidman**  
DLA Piper LLP (US)

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# Preface

## Franchise 2019

### Thirteenth edition

**Getting the Deal Through** is delighted to publish the thirteenth edition of *Franchise*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the Netherlands, Poland and Ukraine.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Philip F Zeidman of DLA Piper LLP (US), for his continued assistance with this volume.

GETTING THE  
DEAL THROUGH 

London  
July 2018

# United Kingdom

**Damian Humphrey and John Chambers**

**Ashtons Legal**

## Overview

### 1 What forms of business entities are relevant to the typical franchisor?

In the United Kingdom, it is usual for a franchisor to operate as a limited liability company. This is also true for most substantial businesses operating outside of the franchising sector. A company is a separate legal entity, distinct from its shareholders, which enables it to enter into contracts in its own name.

A franchisor may also operate as a limited liability partnership (LLP). An LLP combines the flexible structure of a partnership with the benefits of limited liability for its members. Like a company, an LLP has a legal personality separate from that of its members, one of which must be a natural person.

The franchisor may also operate as a sole trader or as an unlimited partnership. Unlike an LLP, an unlimited partnership is not a distinct legal entity from its partners and therefore its partners are jointly and severally responsible for the business' debts and liabilities.

### 2 What laws and agencies govern the formation of business entities?

Companies are formed under and governed by the Companies Act 2006 and LLPs are formed under and governed by the Limited Liability Partnership Act 2000. Unlimited partnerships are governed by the Partnership Act 1890.

### 3 Provide an overview of the requirements for forming and maintaining a business entity.

Companies must be registered at Companies House. In order to incorporate a company, those looking to set one up will need to pick a suitable company name, identify an address that will act as the registered office address of the company, have at least one director that is a natural person, and have at least one shareholder. Companies also need to adopt a set of articles of association, which are the written rules that will govern the running of the company and relationship between the shareholders. Companies generally use standard model articles, but these can be tailored to the company's structure or business. Once incorporated, Companies House will issue an incorporation certificate and company number. A set of company books must be maintained that detail certain information about the company and should be updated to reflect any changes. Certain changes and information will need to be filed at Companies House, including confirmation statements (detailing the shareholders) and company accounts.

Limited liability partnerships must also be registered at Companies House. They are also required to file annual confirmation statements, annual accounts and update Companies House of any changes to its membership or registered office address. There is no specific requirement within the Limited Liability Partnerships Act 2000 for an LLP to have an LLP agreement. In the absence of such an agreement, the governance of the LLP is detailed in the default provisions set out in the Limited Liability Partnerships Regulations 2001. It is unlikely that the default provisions set out in those Regulations would be adequate for the governance of most modern LLPs.

Partnerships are not registered at Companies House, and are deemed to have been formed once they satisfy the definition of a partnership under the Partnership Act 1890. The governance of a

partnership is detailed in that Act, except where the provisions of the Act have been amended by any partnership agreement entered into between the partners. As with LLPs, it is unlikely that the provisions set out in the Act would be adequate for the governance of most modern partnerships.

### 4 What restrictions apply to foreign business entities and foreign investment?

The United Kingdom is a popular destination for foreign businesses seeking to expand overseas. Business regulation in the United Kingdom is relatively light-touch, as evidenced by its approach to franchising (see responses below).

The Department for International Trade promotes foreign businesses trading in the United Kingdom and encourages investment from overseas. In general, there are no restrictions on ownership by foreigners of UK assets and foreign businesses and individuals are allowed to be both shareholders and directors in UK companies. UK immigration laws highlight how foreign investment is encouraged, allowing individuals from overseas to apply for visas based on their investment into certain UK companies.

### 5 Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

UK resident companies are required to pay corporation tax on their worldwide profits. Companies are taxed based upon their accounting reference period, and can choose when their accounting period ends. Companies are required to file their annual accounts with a tax return with HM Revenue and Customs (HMRC) within 12 months of the accounting reference period. The accounts must also be filed with Companies House (there is reduced disclosure for smaller companies), and therefore the accounts become a matter of public record.

A non-resident company will not be liable to tax merely as a result of trading with UK businesses. However, when a non-resident company is trading through a permanent establishment in the United Kingdom (or is controlled from the United Kingdom), it will be subject to corporation tax on the profits made by that permanent establishment. Any corporation tax suffered in the United Kingdom by a non-resident company may be reduced or eliminated as a result of a relevant double tax treaty (DTT). In some cases, accounts from the permanent establishment are also required to be filed at Companies House.

Where a franchisor establishes a UK resident subsidiary that company will be taxed in its own right, as set out above.

LLPs are not subject to corporation tax, but members, as with partners in a partnership, will be taxed individually.

The tax year for individuals ends on 5 April and an individual is taxed on the profits of his or her accounts year ending in the tax year. He or she can choose when his or her accounting year ends. The accounts are required to be filed with a tax return with HMRC on 31 January following the end of the tax year.

Individuals are now subject to a statutory residency test that determines if that person is resident in the United Kingdom or not. The test is based on both the number of days of physical location in the United Kingdom and some further connection factors.

An individual resident in the United Kingdom is taxed on his or her worldwide profits and capital gains (although in some cases resident

but non-domiciled individuals may only be taxed on profits remitted to the United Kingdom). As a general rule, individuals who are non-resident in the United Kingdom will be liable to income tax on profits arising in the United Kingdom. However, the DTT with the country in which they reside will determine which country has the taxing rights and any income tax suffered in the United Kingdom is likely to be relievable against tax in their domestic country in accordance with the DTT.

A non-resident company or individual generating royalties, licence fees and interest in the United Kingdom may suffer a withholding tax on that income retained and paid to HMRC by the paying company. The DTT between the United Kingdom and the company's or individual's country of residence may reduce the rate of the withholding tax. The non-resident may be able to recover this withholding tax against their own domestic tax.

The franchise agreement therefore should stipulate whether the franchisee is obliged to gross up any payment or cooperate with the franchisor in recovering any sums paid to HMRC (where appropriate) under any DTT.

## **6 Are there any relevant labour and employment considerations for typical franchisors?**

There are a number of employment law duties and discrimination protections that franchisors must be mindful of (some are 'time served' protections and others are 'day one' employee rights).

The employment disputes environment had become relatively benign because, five years ago, the government introduced a fee to be paid to progress an employment claim in the tribunal system. However, this fee was quashed by the Supreme Court last year and the number of claims has risen sharply in consequence.

In addition to this, there are a range of business immigration controls for franchisors to consider for any employees of the franchisor who are non-EU nationals and, with the United Kingdom due to withdraw from the EU in 2019, it remains to be seen what the arrangements will be for EU nationals going forward too.

The area of employment status has been a fast moving area of case law development in recent years, and it is entirely possible, if the relationship is not structured and documented correctly, for a relationship described as franchisor and franchisee to be deemed to be one of employer and employee or engaged worker (see 'Update and trends').

There have also been legal challenges in the use and perceived abuse of 'zero hours' contracts whereby workers are not entitled to any specified number of hours' work.

## **7 How are trademarks and know-how protected?**

Trademarks in relation to goods or services can be registered at the Intellectual Property Office (IPO) as a UK mark or at the European Union Intellectual Property Office as a community mark.

Anyone considering franchising in the United Kingdom should ensure that its trademarks are registerable as the registration of the trademark normally gives the owner the exclusive right to prevent others from using the mark and there is a market expectation that any trademark being licensed is registered or at the very least in the process of being registered.

The registration of trademarks at the IPO is a relatively simple and inexpensive process so long as no opposition to the registration is logged.

However, where a franchisor has either not yet registered yet or cannot register a trademark, then the franchisor may have a claim for 'passing off' if a competitor imitates the goods and services it offers in such a way that the public believes them to be those of the franchisor. A claim will be successful if there is goodwill and a reputation attached to the goods or services it offers and the franchisor has suffered a loss.

Know-how relating to the franchise system will invariably be detailed in the manual. It cannot be protected by registration and is therefore protected through the franchise agreement. The franchise agreement will contain a requirement on the franchisee to keep any know-how and other confidential information belonging to the franchisor confidential both during and after the currency of the franchise agreement.

## **8 What are the relevant aspects of the real estate market and real estate law?**

Property law in England and Wales is based on the common law system and as such proprietary interests in land derive from either freehold or leasehold interests. How the property from which the franchise business operates is occupied usually depends on the franchisor's business model, and it is crucial that the agreements to occupy any premises dovetail with the franchise agreement where necessary.

It is common for a franchisee to take a direct lease, in which case the franchisor may require step-in rights, which can be exercised in the event of default by the franchisee, including termination of the franchise agreement. These would allow the franchisor to take on the franchisee's rights and obligations under the lease.

Where the premises is critical to the success of the franchise, the franchisor may take a head-lease and grant a sub-lease to its franchisee. This allows the franchisor to have some element of control over the premises, but comes with an increased risk in the event of default by the franchisee.

If the franchisor owns the freehold itself and grants a direct lease to its franchisee or is granting a sub-lease to the franchisee, it is crucial that the security of tenure provisions otherwise conferred by the Landlord and Tenant Act 1954 are excluded. This legislation does not apply in Scotland, where they have a different real estate system.

## **Laws and agencies that regulate the offer and sale of franchises**

### **9 What is the legal definition of a franchise?**

The British Franchising Association's (BFA's) Code of Ethics incorporates the European Franchise Federation's European Code of Ethics for Franchising, which only applies to BFA members.

There is no legal definition of franchising under UK law, and as such is an indication of the absence of regulation in the sector.

However, the Code of Ethics defines franchising as:

*[A] system of marketing goods or services and/or technology which is based upon a close and ongoing collaboration between legally and financially separate and independent undertakings, the franchisor and its individual franchisees, whereby the franchisor grants to its individual franchisees the right, and imposes the obligation, to conduct a business in accordance with the franchisor's concept.*

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

There are no government agencies or specific legislation that regulate the offer and sale of franchises.

However, the Code of Ethics, although not legally binding, places an obligation on franchisors to disclose certain information to franchisees (see question 17).

When conducting its offer and presale process, the franchisor must be careful to ensure it does not become subject to a claim for misrepresentation (see question 24).

Franchising arrangements may well be subject to the Trading Schemes Act 1996 and Trading Schemes Regulations 1997, which were enacted to tighten up the existing legislation regulating pyramid selling through trading schemes, namely the Fair Trading Act 1973. Franchisors must be mindful of the legislation owing to its broad drafting.

### **11 Describe the relevant requirements of these laws and agencies.**

The Trading Schemes Regulations 1997 (the Regulations) do not place a prohibition on trading schemes. However, in the event that the franchising relationship is considered a trading scheme, then the Regulations place obligations on franchisors in relation to advertising, as well as imposing contractual requirements, including a cooling off period. These requirements would make franchising an unattractive business model.

A franchisor can ensure that it is exempt from the legislation by either operating as a single tier, namely by having one level of franchisee or by being, and making certain that all the franchisees (and all other relevant participants) are, VAT registered.

If the franchisor is unable to benefit from one of the exemptions and subsequently breaches the legislation, it may become subject



to criminal sanctions or the franchisor may find itself subject to civil claims from a franchisee for breach of its statutory duties. In addition, any obligation on the franchisee to pay fees to the franchisor will be unenforceable.

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

Not applicable, as there are no franchise-specific laws or regulations.

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

There are no specific laws or regulations.

The Code of Ethics requires that, prior to franchising, the franchisor has operated a least one pilot unit, has the rights to use its brand and provides its franchisees with initial training and continuing assistance.

It is important to note that where, as part of the process of offering and subsequently awarding the franchise, the franchisor requires the franchisee to pay a deposit, the Code of Ethics requires that the deposit is refundable, subject to the retention of any quantifiable directly related expenses.

**14 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?**

No, there are no such laws, regulations or government policies.

However, the Code of Ethics states that the franchisor shall only select and accept franchisees who appear to possess the basic skills, education, personal qualities and financial resources to carry on the franchise business.

**15 What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?**

There is no legal requirement to disclose information to a prospective franchisee.

The Code of Ethics requires that franchisees are provided with a copy of the present Code of Ethics, and with a full and accurate written disclosure of all information material to the franchise relationship within a reasonable time prior to execution of the franchise agreement. This should include the business and financial position of the franchisor, the people involved in the franchisor business, the franchise proposition, the franchisees, the financial projections and the contract.

Even where a franchisor is not a member of the BFA, it should consider preparing some form of disclosure document to give to prospective franchisees to enable it to give accurate and consistent responses to due diligence enquiries.

**16 In the case of a sub-franchising structure, who must make presale 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 sub-franchisor?**

There is no legal requirement to disclose information to a prospective sub-franchisee. However, the same advice regarding pre-contract disclosures given in question 15 would apply to sub-franchisors. It is advisable for the sub-franchisor to clearly explain its relationship with the franchisor to its prospective franchisees.

**17 What information must the disclosure document contain?**

There are no legal disclosure requirements in the United Kingdom.

**18 Is there any obligation for continuing disclosure?**

No.

**19 How do the relevant government agencies enforce the disclosure requirements?**

Not applicable. However, the BFA may take steps to expel a member in the event of serious breach of the Code of Ethics, including its disclosure requirements.

**20 What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?**

Not applicable, but see question 24.

**21 In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?**

Not applicable, but see question 24.

**22 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 subsequent sale of franchises will be subject to general principles of contract and tort law, and therefore the laws relating to misrepresentation will offer protection to franchisees (see question 24). The parties must be mindful of the concept of caveat emptor (buyer beware) and therefore carry out an appropriate level of due diligence. The concept of culpa in contrahendo, common in civil jurisdictions, placing a duty to negotiate with care, which could extend to making pre-contract disclosures, does not apply. Nor is there, as the law currently stands, a general implied duty of good faith (see question 36).

**23 Other than franchise-specific rules on what disclosures a franchisor should make to a potential franchisee or a franchisee should make to a sub-franchisee regarding predecessors, litigation, trademarks, fees, etc, are there any general rules on presale disclosure that might apply to such transactions?**

There are no specific rules of presale disclosures, but see question 15.

**24 What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under franchise sales disclosure laws?**

A franchisor may find itself the subject of a claim for misrepresentation. Such a claim would arise where the franchisor has made an untrue statement of fact that has subsequently induced the franchisee to enter into a franchise contract. This would typically be some form of earnings claim, with little basis in fact. Depending on the circumstances in which the statement is made, the franchisor may then be subject to a claim for one or more of innocent, negligent or fraudulent misrepresentation. Such statement can be made either orally or in writing. In the case of a successful claim for misrepresentation, depending on the facts, the franchisee will be able to rescind the agreement or, where it has suffered loss, claim for damages, or both.

The franchisor will invariably insert provisions into the franchise agreement to restrict or exclude liability for misrepresentation. The effectiveness of such clauses is subject to both statute and common law. Where a clause seeks to limit liability for misrepresentation, it would be subject to the test of reasonableness under the Unfair Contracts Terms Act 1977. Any clauses seeking to restrict or exclude liability from fraudulent misrepresentation will be ineffective. Recent case law suggests that the courts are reluctant to allow franchisors to benefit from such provisions, and, as such, should ensure that they are careful and organised about the information provided to franchisees rather than solely relying on exclusion or limitation of liability clauses.

**Legal restrictions on the terms of franchise contracts and the relationship between parties in a franchise relationship**

**25 Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?**

There are no specific laws that govern the ongoing relationship between the franchisor and the franchisee.

### Update and trends

#### Brexit

The government continues to negotiate the terms of Brexit following the UK vote to leave the EU on 23 June 2016 and the subsequent triggering of article 50 on 29 March 2017. Accordingly, the practical effect of Brexit is largely unknown. The negotiations relate to Britain's future relationship with the EU once the United Kingdom leaves and one of the key elements of this revolves around its economic relationship, namely, the terms on which it continues to trade with the EU and whether it will be free to enter separate trade agreements with other countries outside of the EU's existing trade agreements.

How this will affect EU laws that have been enacted into domestic legislation, and how EU laws that have direct effect will be dealt with, remains to be seen.

#### The gig economy

Employment status and the effect of the 'gig economy' is an area of great interest and dynamic change in UK employment law. There has been a slew of cases considering whether self-employed individuals are in fact considered workers, giving the individuals concerned important employment law rights such as an entitlement to a national minimum wage and paid holiday.

There is also some discussion in the franchising sector that interpretation of recent case law could extend to some franchisees being considered workers rather than being self-employed.

#### The BFA and arbitration

The BFA is considering whether to impose a mandatory arbitration scheme on its members, and if introduced could have an effect on its membership, as a result of some members not wishing to restrict how they deal with disputes with their franchisees.

The rights and obligations of the parties are governed by the franchise agreement, the enforceability of which is subject to the general principles of contract law. As highlighted previously, provisions in the franchise agreement that seek to exclude or limit liability will be subject to a test of reasonableness under the Unfair Contract Terms Act 1977. Owing to the iniquity of the parties' bargaining positions, courts will generally favour franchisees. Furthermore, restrictive covenants will only be enforceable to the extent that they go no further than are necessary to protect the franchisor's legitimate business interests. However, recent case law makes it clear that well drafted post-term restrictive covenants for one year may be enforceable.

### 26 Do other laws affect the franchise relationship?

Although not specifically governing the franchise relationship, where franchisors wish to obtain and store data about their franchisees' customers, the new General Data Protection Regulations (GDPR), which stipulate how data is processed, apply both to franchisors and their networks. Certain organisations are required to appoint a data protection officer. In the event of data breaches, there is a requirement to notify the Information Commissioner's Office, which is the UK independent body set up to uphold information rights. The breaching organisation may also be subject to substantial fines.

Franchisors should also consider the Privacy and Electronic Communications Regulations, which sit alongside GDPR and give individuals privacy rights in relation to electronic communications.

### 27 Do other government or trade association policies affect the franchise relationship?

The BFA is the main voluntary self-regulatory body in the franchise sector. The aim of the BFA is to promote ethical franchising in the United Kingdom. Accordingly, its members agree to be bound by the Code of Ethics which, at its core, promotes fair dealing between the franchisor and the franchisee.

### 28 In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

The circumstances in which a franchisor may terminate the franchise relationship are detailed in the franchise agreement. Typically, there is a right to terminate the franchise agreement with immediate effect

if the franchisee ceases to operate the business, brings the brand into disrepute, commits a criminal offence, is the subject of an insolvent event or proceedings, in the case of repeated breaches of the franchise agreement or a failure to remedy a breach within an agreed time frame.

The franchisor also has the right at common law to terminate the franchise agreement in the event of a repudiatory breach of it by the franchisee. A repudiatory breach is essentially a breach that goes to the core of the contract and deprives the innocent party of its benefit.

### 29 In what circumstances may a franchisee terminate a franchise relationship?

Generally, a franchise agreement will not contain any express provisions allowing the franchisee to terminate it prior to the expiry of its term. However, the franchisee has the right at common law to terminate the franchise agreement in the event of a repudiatory breach of it by the franchisor.

### 30 May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

There are no laws stipulating whether and on what terms the franchisor must renew the franchise agreement. Furthermore, there is no requirement under the Code of Ethics that there must be a renewal of the franchise agreement.

The basis of renewal is a contractual one and the franchise agreement will set out conditions that must be met for the franchisor to agree to renew it. These will typically include a requirement that the franchisee is not in breach of the agreement, pays a renewal or administration fee and undertakes any required updating of its business operations or premises.

### 31 May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

A franchisor can and normally does restrict such transfers. The franchise agreement usually stipulates that the franchisor's consent to any transfer is required, which will be given subject to certain conditions being met. These conditions include the franchisor being satisfied that the purchaser is a suitable candidate as a franchisee and the franchisee paying all sums owed to the franchisor, as well as certain costs associated with the transfer process. These provisions normally contain a right of pre-emption in favour of the franchisor, allowing it to buy the franchise business from the franchisee.

### 32 Are there laws or regulations affecting the nature, amount or payment of fees?

There are no such laws or regulations.

### 33 Are there restrictions on the amount of interest that can be charged on overdue payments?

A franchisor may impose interest on overdue payments, and this is typically specified in the franchise agreement. However, a franchisor must be wary that if the rate of interest is too high it may be considered a penalty clause and therefore unenforceable.

Where no express provision is included in the franchise agreement, the default rate pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 shall apply and currently stands at 8 per cent above the Bank of England base rate.

### 34 Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

Generally, there are no such laws or restrictions. However, in the event that a franchisor is operating in a country on which the United Kingdom has imposed financial sanctions, then restrictions may apply.

### 35 Are confidentiality covenants in franchise agreements enforceable?

Yes.



**36 Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?**

As the law currently stands, there are no legal obligations on franchisors and franchisees to act in good faith towards each other. Case law on this was for some time unsettled. In *Yam Seng Pte Ltd v International Trade Corporation Ltd* (2013), the courts commented on the importance of recognising the concept of good faith in 'relational contracts', including franchise agreements. However, in *Carewatch Care Services Ltd v Focus Caring Services Ltd* (2014), dismissing an argument from the franchisee that the franchise agreement contained an implied term that the franchisor and franchisee act in good faith towards each other, the courts took the view that, as the franchise agreement contained detailed terms dealing with all aspects of the franchise relationship, it was not necessary to imply any further terms.

However, the Code of Ethics requires parties to a franchise agreement to exercise fairness in their dealings with each other and to resolve complaints, grievances and disputes with good faith.

**37 Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?**

Franchisees are not currently treated in law as consumers, but see 'Update and trends'.

**38 Must disclosure documents and franchise agreements be in the language of your country?**

There is no such legal requirement. However, the Code of Ethics requires that the franchise agreement is translated into the language of the franchisee's country and in which the franchisee is competent.

**39 What restrictions are there on provisions in franchise contracts?**

There are no laws that specifically restrict provisions in franchise agreements. As highlighted previously, the enforceability of certain provisions will be subject to general laws and principles.

The Code of Ethics stipulates certain provisions that should not be included in franchise agreements. By way of example, a blanket 'time of the essence' provision would be in breach of the Code of Conduct.

**40 Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?**

Article 101 of the Treaty of the Functioning of the European Union (article 101) prohibits agreements that affect trade between member states and have as their object or affect the prevention, restriction or distortion of competition within the EU. This is enacted into domestic legislation through the Competition Act 1998.

As to whether a franchise agreement falls within the scope of article 101 will depend on a number of factors including the relevant market share of the parties to it. In practice, most franchisors draft their agreements so that they benefit from the safe harbour of falling within the Vertical Restraints Block Exemption (Block Exemption). A five-year

initial term is common in franchise agreements, so that the non-compete provisions contained within it do not fall outside the benefit of the Block Exemption. If the franchise agreement falls within its terms, it will be exempt from article 101. The test of relevant market share is also pertinent to the application of the Block Exemption.

Furthermore, any 'hard core restrictions' contained in the franchise agreement will lead to the exclusion of the franchise agreement from the scope of the application of the Block Exemption. These include an obligation on franchisees to sell their goods and services for a minimum price (resale price maintenance) or restrictions on franchisees from responding to unsolicited requests from customers to provide goods or services outside an agreed territory (passive sales). Restrictions on passive sales also prevent franchisors from prohibiting franchisees from operating their own websites, but not on requiring that such websites meet certain specifications.

Competition issues are regulated domestically by the Competition and Markets Authority. Sanctions include financial penalties or the voiding of provisions within the franchise agreement.

**41 Describe the court system. What types of dispute resolution procedures are available relevant to franchising?**

The United Kingdom is made up of more than one legal jurisdiction, with England and Wales along with Scotland being the largest two jurisdictions. Civil claims proceed differently in each jurisdiction, although the burden of proof is the same, namely the balance of probabilities. In England and Wales, a franchisor would be expected to follow a pre-action protocol prior to commencing proceedings. A claim would be heard in either a local county court or the High Court. The High Court will ordinarily only hear claims with particular complexity, high value or cross-jurisdictional elements. Claims in Scotland proceed in the local sheriff court or in the Court of Session. Unlike in England and Wales, a claim can be commenced without the need to follow a pre-action protocol.

There is a strong emphasis on resolving disputes without resorting to litigation, and different forms of alternative dispute resolution, such as mediation, are encouraged. Unreasonably refusing to engage in alternative dispute resolution can result in a party being punished in costs, regardless of whether they are the successful party at court. The BFA runs a mediation and arbitration scheme to resolve franchise disputes. It is common for franchise agreements to contain provisions requiring the parties to consider mediation before commencing proceedings, or that disputes are to be resolved by way of arbitration, rather than through the courts.

**42 Describe the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction.**

The advantages of arbitration in the United Kingdom are similar to most jurisdictions, in that it generally offers a speedier and less costly alternative to court proceedings, hearings are confidential to the parties and if the matter has particularly technical points an arbitrator with relevant expertise can be selected. The London Court of International

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Arbitration is recognised as a world-leading institution. The United Kingdom is a signatory to the New York Convention, allowing for enforcement of arbitral awards through convention protocols.

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**43 In what respects, if at all, are foreign franchisors treated differently from domestic franchisors?**

Foreign franchisors are treated in the same way as domestic franchisors.

## *Getting the Deal Through*

Acquisition Finance	Enforcement of Foreign Judgments	Pharmaceutical Antitrust
Advertising & Marketing	Environment & Climate Regulation	Ports & Terminals
Agribusiness	Equity Derivatives	Private Antitrust Litigation
Air Transport	Executive Compensation & Employee Benefits	Private Banking & Wealth Management
Anti-Corruption Regulation	Financial Services Compliance	Private Client
Anti-Money Laundering	Financial Services Litigation	Private Equity
Appeals	Fintech	Private M&A
Arbitration	Foreign Investment Review	Product Liability
Art Law	Franchise	Product Recall
Asset Recovery	Fund Management	Project Finance
Automotive	Gaming	Public M&A
Aviation Finance & Leasing	Gas Regulation	Public-Private Partnerships
Aviation Liability	Government Investigations	Public Procurement
Banking Regulation	Government Relations	Real Estate
Cartel Regulation	Healthcare Enforcement & Litigation	Real Estate M&A
Class Actions	High-Yield Debt	Renewable Energy
Cloud Computing	Initial Public Offerings	Restructuring & Insolvency
Commercial Contracts	Insurance & Reinsurance	Right of Publicity
Competition Compliance	Insurance Litigation	Risk & Compliance Management
Complex Commercial Litigation	Intellectual Property & Antitrust	Securities Finance
Construction	Investment Treaty Arbitration	Securities Litigation
Copyright	Islamic Finance & Markets	Shareholder Activism & Engagement
Corporate Governance	Joint Ventures	Ship Finance
Corporate Immigration	Labour & Employment	Shipbuilding
Corporate Reorganisations	Legal Privilege & Professional Secrecy	Shipping
Cybersecurity	Licensing	State Aid
Data Protection & Privacy	Life Sciences	Structured Finance & Securitisation
Debt Capital Markets	Loans & Secured Financing	Tax Controversy
Dispute Resolution	Mediation	Tax on Inbound Investment
Distribution & Agency	Merger Control	Telecoms & Media
Domains & Domain Names	Mining	Trade & Customs
Dominance	Oil Regulation	Trademarks
e-Commerce	Outsourcing	Transfer Pricing
Electricity Regulation	Patents	Vertical Agreements
Energy Disputes	Pensions & Retirement Plans	

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