

THE FRANCHISE LAW
REVIEW

SIXTH EDITION

Editor
Mark Abell

THE LAWREVIEWS

THE
FRANCHISE LAW
REVIEW

SIXTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in February 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Mark Abell

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Sophie Emberson, Katie Hodgetts

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Gavin Jordan

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Robbie Kelly

SUBEDITOR

Anne Borthwick

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom

by Law Business Research Ltd, London

87 Lancaster Road, London, W11 1QQ, UK

© 2019 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of January 2019, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-002-8

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARAMIS

ATIEH ASSOCIATES LAW FIRM

BASHAM, RINGE Y CORREA, SC

BECCAR VARELA

BIRD & BIRD

CHANCERY CHAMBERS

DANNEMANN SIEMSEN ADVOGADOS

DBS LAW, CORPORATE LEGAL ADVISERS

DESCHKA KLEIN DAUM LAWYERS

GORODISSKY & PARTNERS

GRATA LAW FIRM LLP

HANNES SNELLMAN ADVOKATBYRÅ AB

HOGAN LOVELLS (SOUTH AFRICA) INC

JONES & CO

K&K ADVOCATES

KENNEDY VAN DER LAAN

LADM LAWYERS

MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

MST LAWYERS

NIXON PEABODY LLP

NOBLES

PLESNER LAW FIRM

PORZIO, RIOS, GARCIA

STEWART GERMAN LAW OFFICE

TAY & PARTNERS

WORKBUZZ

YOON & YANG LLC

CONTENTS

PREFACE.....	ix
<i>Mark Abell</i>	
Chapter 1 WHAT IS FRANCHISING?	1
<i>Mark Abell</i>	
Chapter 2 FRANCHISING AS PART OF AN INTERNATIONAL MULTICHANNEL STRATEGY	3
<i>Mark Abell</i>	
Chapter 3 THE REGULATION OF FRANCHISING AROUND THE WORLD.....	8
<i>Mark Abell</i>	
Chapter 4 SUSTAINING RELATIONSHIPS	27
<i>Steven Frost and Mark Abell</i>	
Chapter 5 INTELLECTUAL PROPERTY.....	34
<i>Allan Poulter and Robert Williams</i>	
Chapter 6 DATA PROTECTION.....	40
<i>Ruth Boardman, Francis Aldhouse and Elizabeth Upton</i>	
Chapter 7 TAX CONSIDERATIONS.....	47
<i>Zoe Feller</i>	
Chapter 8 TRADE SECRETS AND FRANCHISING.....	98
<i>James Froud and Mark Abell</i>	
Chapter 9 FRANCHISEES AS CONSUMERS.....	106
<i>Jiri Jaeger and Frederik Born</i>	
Chapter 10 RESOLVING INTERNATIONAL FRANCHISE DISPUTES.....	115
<i>Victoria Hobbs</i>	

Chapter 11	E-COMMERCE AND FRANCHISING.....	127
	<i>Ben Hughes</i>	
Chapter 12	THE COMPETITION LAW OF THE EUROPEAN UNION	133
	<i>Mark Abell</i>	
Chapter 13	THE IMPACT OF BREXIT ON FRANCHISING.....	140
	<i>Mark Abell</i>	
Chapter 14	EDITOR'S GLOBAL OVERVIEW	144
	<i>Mark Abell</i>	
Chapter 15	AFRICA OVERVIEW	152
	<i>Nick Green</i>	
Chapter 16	GCC OVERVIEW	157
	<i>Melissa Murray</i>	
Chapter 17	ARGENTINA.....	168
	<i>Florencia Rosati and Gustavo Papeschi</i>	
Chapter 18	AUSTRALIA.....	184
	<i>Philip Colman</i>	
Chapter 19	AUSTRIA.....	206
	<i>Eckhard Flohr and Alfons Umschaden</i>	
Chapter 20	BARBADOS	221
	<i>Giles A M Carmichael</i>	
Chapter 21	BRAZIL.....	230
	<i>Luiz Henrique O do Amaral, Cândida Ribeiro Caffé, Rafael Atab de Araujo, Luciana Gonçalves Bassani, Mariana Reis Abenza, Fernanda Souto Pacheco and Juliana Bussade Monteiro de Barros</i>	
Chapter 22	CANADA.....	249
	<i>Paul Jones and Katya Logunov (Stepanishcheva)</i>	
Chapter 23	CHILE.....	260
	<i>Cristóbal Porzio</i>	

Chapter 24	CHINA..... <i>Sven-Michael Werner</i>	273
Chapter 25	CZECH REPUBLIC <i>Vojtěch Chloupek</i>	285
Chapter 26	DENMARK..... <i>Jacob Ørskov Rasmussen</i>	296
Chapter 27	FRANCE..... <i>Raphaël Mellerio</i>	310
Chapter 28	GERMANY..... <i>Stefan Münch, Alexander Duisberg, Markus Körner and Michael Gaßner</i>	321
Chapter 29	HONG KONG <i>Michelle Chan</i>	329
Chapter 30	HUNGARY..... <i>Péter Rippel-Szabó, Bettina Kövecses and Zsófia Ottóffy</i>	339
Chapter 31	INDIA <i>Nipun Gupta and Divya Sharma</i>	353
Chapter 32	INDONESIA..... <i>Risti Wulansari</i>	365
Chapter 33	IRAN <i>Shelley Nadler and Farid Kani</i>	381
Chapter 34	ITALY <i>Claudia Ricciardi</i>	391
Chapter 35	KAZAKHSTAN <i>Nick Green and Saule Akhmetova</i>	404
Chapter 36	KOREA <i>Jason Sangoh Jeon, Jin Woo Hwang and Seung Hyeon Sung</i>	415
Chapter 37	MALAYSIA <i>Lee Lin Li and Chong Kah Yee</i>	426

Chapter 38	MEXICO	451
	<i>Eduardo Kleinberg</i>	
Chapter 39	NETHERLANDS	463
	<i>Martine de Koning</i>	
Chapter 40	NEW ZEALAND	483
	<i>Stewart Germann</i>	
Chapter 41	POLAND	497
	<i>Kuba Ruiz</i>	
Chapter 42	PORTUGAL	509
	<i>Magda Fernandes, José Maria Montenegro, Vasco Stilwell d'Andrade, Dzhamil Oda and Diogo Pinto</i>	
Chapter 43	RUSSIA	524
	<i>Sergey Medvedev</i>	
Chapter 44	SAUDI ARABIA	541
	<i>Melissa Murray</i>	
Chapter 45	SINGAPORE	549
	<i>Lorraine Anne Tay and Just Wang</i>	
Chapter 46	SOUTH AFRICA	563
	<i>Ian Jacobsberg</i>	
Chapter 47	SWEDEN	576
	<i>Elisabeth Vestin and Sara Heikfolk</i>	
Chapter 48	UKRAINE	588
	<i>Volodymyr Yakubovskyy and Graeme Payne</i>	
Chapter 49	UNITED KINGDOM	599
	<i>Graeme Payne</i>	
Chapter 50	UNITED STATES	624
	<i>Steven Feirman, Daniel Deane, Andrew Loewinger, Keri McWilliams, Arthur Pressman and Kendal Tyre</i>	

Chapter 51	DISPUTE RESOLUTION APPENDIX	645
	<i>Beatriz Díaz de Escauriaza</i>	
Appendix 1	ABOUT THE AUTHORS.....	647
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	677

PREFACE

Since the publication of the fifth edition of *The Franchise Law Review*, there have been yet more major economic and geopolitical developments that have had a significant impact on world trade; the Sino-American trade war, the renewal of Iranian sanctions and Brexit being only three of these. Through all this, however, the apparently inexorable march towards the globalisation of commerce has continued unabated. Despite the slow emergence of a few economic bright spots, the global economy is not performing as well as it might, and there are concerns that the US economy may be approaching a crash.

As a consequence, businesses are often presented with little choice but to look to more vibrant markets in Asia, the Middle East and Africa for their future growth. At the same time, South–South trade is on the increase, perhaps at the expense of its North–South counterpart. All of this, coupled with the unstable wider geopolitical landscape, presents business with only one near certainty: there will be continued deleveraging of businesses in the coming years and, thus, growing barriers to international growth for many of them. All but the most substantial and well-structured of such businesses may find themselves facing not only significant difficulties through reduced access to funding for investment in their foreign ventures, but also challenges arising from their lack of managerial experience and bandwidth.

Franchising, in its various forms, continues to present businesses with one way of achieving profitable and successful international growth without the need for either substantial capital investment or a broad managerial infrastructure. In sectors as diverse as food and beverages, retail, hospitality, education, healthcare and financial services, franchising continues to be a popular catalyst for international commerce and makes a strong and effective contribution to world trade. We are even seeing governments turning to it as an effective strategy for the future of the welfare state as social franchising gains still more traction as a way of achieving key social objectives.

Given the positive role that franchising can play in the world economy, it is important that legal practitioners have an appropriate understanding of how it is regulated around the globe. This book provides an introduction to the basic elements of international franchising and an overview of the way that it is regulated in 37 jurisdictions.

As will be apparent from the chapters of this book, there continues to be no homogenous approach to the regulation of franchising around the world. Some countries specifically regulate particular aspects of the franchising relationship. Of these, a number try to ensure an appropriate level of pre-contractual hygiene, while others focus instead on imposing mandatory terms upon the franchise relationship. Some do both. In certain countries, there is a requirement to register certain documents in a public register. Others restrict the manner in which third parties can be involved in helping franchisors meet potential franchisees. No two countries regulate franchising in the same way. Even those countries that have

a well-developed regulatory environment seem unable to resist the temptation to continually develop and change their approaches – as is well illustrated by the recent changes to the Australian regulations. The inexorable march towards franchise regulation continues, with countries such as Argentina, which previously had not specifically regulated franchising, adopting franchise-specific laws over the past 12 months.

Many countries do not have franchise-specific legislation but nevertheless strictly regulate certain aspects of the franchise relationship through the complex interplay of more general legal concepts such as antitrust law, intellectual property rights and the doctrine of good faith. This heterogeneous approach to the regulation of franchising presents yet another barrier to the use of franchising as a catalyst for international growth.

While this book certainly does not present readers with the complete answer to all the questions they may have about franchising in all the countries covered – that would require far more pages than it is possible to include in this one volume – it does seek to provide the reader with a high-level understanding of the challenges involved in international franchising in the first section, and then, in the second section, explains how these basic themes are reflected in the regulatory environment within each of the countries covered. I should extend my thanks to all of those who have helped with the preparation of this book, in particular Caroline Flambard and Nick Green, who have invested a great deal of time and effort in making it a work of which all those involved can be proud. It is hoped that this publication will prove to be a useful and often-consulted guide to all those involved in international franchising, but needless to say it is not a substitute for taking expert advice from practitioners qualified in the relevant jurisdiction.

Mark Abell

Bird & Bird LLP

London

January 2019

BARBADOS

*Giles A M Carmichael*¹

I INTRODUCTION

In 1978, 12 years after the grant of political independence, Barbados in a declaration of its positive interest in itself, proclaimed the island open for business and as such a number of franchises were established. These franchises included the Hilton (1978), the Holiday Inn (1979), Kentucky Fried Chicken (1979), Coca-Cola and Sprite (1978). Today the franchise sector has grown substantially with the presence of numerous American petroleum stations, warehouses, hotel and accommodation chains, business services and a select few American restaurants. Names such as Shell (now Sol), Kentucky Fried Chicken, Hilton, Marriott, Radisson, PriceSmart and Esso are now virtually household names in Barbados.

Within the past 10 years, Barbados has seen a commendable development in the franchise sector with the acquisition of franchise licences by international franchises such as Subway, Burger King, Payless ShoeSource and Cost-U-Less.

The franchise sector in Barbados is governed by the Franchises (Registration and Control) Act, Chapter 179 of the Laws of Barbados. The Act was first established in 1975 and later amended in 1991.

As is the case in many Caribbean countries, Barbados does not have a 'franchisor culture'. Instead, it represents more of an expansion area for foreign franchises, and in most instances, for product or service distribution. Hence, Barbados is more of a franchisee area, where franchise licences are granted for the operation of foreign franchises. In fact, the sole example of a local franchisor is Automotive Art, the leading auto care retailer in the Caribbean. This local success story has 21 franchise stores operating throughout the region and their branded products are distributed in 65 countries across the globe.²

The main thrust of franchising in Barbados lies with product distribution franchises that hold franchise licences to manufacture, process or distribute certain international brands. A relevant example is the Barbados Bottling Company, which is the local franchise holder for international brands Coca-Cola, Coca-Cola Light, Coca-Cola Zero, Powerade, Sprite, Sprite Zero, Fanta, Canada Dry and Schweppes Tonic Water. They distribute these popular brands alongside their own indigenous brands.

1 Giles A M Carmichael is a partner at Chancery Chambers.

2 Phone interview with Mr Derek Forster, managing director of Automotive Art.

II MARKET ENTRY

i Restrictions

Any non-national or non-CARICOM³ member seeking to operate a business by way of a franchise in Barbados must submit a written application to the Minister of Finance and Economic Affairs, who has sole authority to grant the licence. Upon receipt of the application and all other required documentation, the Minister publishes the application for a licence to operate the business on franchise in the Official Gazette, inviting members of the public to object. These objections play a critical role in the Minister's consideration of the request for a franchise licence.

There are no restrictions on a foreign entity granting a master franchise or development rights to a local entity.

Foreign franchisors are permitted by law to own equity in local businesses and have equal rights as citizens to own real property.

ii Foreign exchange and tax

The Exchange Control Act (Chapter 71 of the Laws of Barbados) provides for the transfer of foreign currency. All incoming funds must be registered with the Exchange Control Authority, a division of the Central Bank of Barbados.

Permission is required from the Exchange Control Authority for the purchase by a non-resident of real property situated in Barbados. This permission is routinely granted if the non-resident purchaser brings funds into Barbados to cover the cost of the property.

The Exchange Control Authority may impose restrictions on repatriation of funds. The major consideration in a request for repatriation is the state of foreign reserves in Barbados at the time of the transaction.

Royalties and other fees paid to a franchisor are subject to a 15 per cent withholding tax.

The Central Bank of Barbados has delegated the authority to the commercial banks to issue drafts to individuals or businesses as payment for goods purchased. The limit is US\$125,000 per transaction, provided the required documents are submitted to the commercial bank. Funds in excess of that amount must be approved directly by the Central Bank.

III INTELLECTUAL PROPERTY

Barbados has demonstrated its commitment to the enforcement of intellectual property rights through its commitments to international agreements, as well as through the enactment of local legislation. The country signed the Paris Convention on intellectual property rights, the Nice Agreement, and is a member of the United Nations World Intellectual Property Organization. There are also specific laws that provide for the protection of intellectual property, namely the Patents Act (Chapter 314), Trade Marks Act (Chapter 319), Industrial Designs Act (Chapter 309), Copyright Act (Chapter 300), and the Protection against Unfair Competition Act (Chapter 329A).⁴

3 The Caribbean Community and Common Market, a regional grouping of 15 Caribbean countries.

4 This Act provides for protection against unfair competition within the context of Barbados's obligations under the Agreement on Trade-Related aspects of Intellectual Property Rights of the World Trade Organization.

i Brand search

A search for protected trademarks and other intellectual property is typically conducted at the Corporate Affairs and Intellectual Property Office (CAIPO),⁵ a division of the Ministry of International Business and Industry. CAIPO is responsible for various aspects of industrial property right affairs such as patents, trademarks and industrial designs.

CAIPO has an electronic intellectual property registry system that allows persons to search a database of all registered intellectual property. After logging into the computerised system, the choice can be made to query trademarks or patents. A trademark query will display a list of search fields such as filing date, registration date, list of Nice⁶ classes of words contained in the trademark and the like. After selecting one or more of the criteria and executing the search, all the items matching the criteria will appear. Upon making the selection choice, all relevant information pertaining to the trademark will appear such as, for example: application number and type, sign type, mark image, colour description, Vienna classes, Nice classes and status. A physical search of written name cards with all relevant information can also be performed as soft copies of intellectual property information are also filed and stored.

ii Brand protection

All trademarks, patents and industrial designs should be registered in Barbados to ensure protection of the rights provided under Barbados intellectual property laws. It is the responsibility of the rights holders to register, protect and enforce their rights.

An application for registration of a trademark or other intellectual property must be filed at CAIPO pursuant to the requirements of Section 10 of the Trade Marks Act. The application form (Form 3) must contain a clear reproduction of the sign that is filed for registration and must list all the classes that apply to the goods or services being offered. The cost of the application is Bds\$75 and five copies of the mark must be submitted along with the application.

iii Enforcement

Protection is afforded for Intellectual Property under the Patents Act (Chapter 314), the Trade Marks Act (Chapter 319) and the Industrial Designs Act (Chapter 309).

Redress for actual or threatened infringement is by way of injunction, damages or an order for the erasure, removal, obliteration, delivery or destruction of the offending material. Penalties for competition offences or infringement range from a fine of Bds\$5,000 or two to six years' imprisonment to Bds\$20,000 or 10 years' imprisonment. Continuing offences attract additional fines of Bds\$500 per day.

iv Data protection, cybercrime, social media and e-commerce

There are no laws specifically governing e-commerce. However, legislation and regulation related to cybersecurity has been enacted through the Privacy and Data Protection Act, which is in the draft stages and should be finalised very soon.

5 CAIPO was established under the Corporate Affairs and Intellectual Property Office Act Chapter 21A.

6 International (Nice) Classification of Goods and Services established by the Nice Agreement of 1957.

Additionally, there has been active dialogue on e-commerce and improving security in Barbados. In April 2015, the island's commerce minister spoke about this move at a seminar entitled 'The impact of e-commerce on entrepreneurs and small businesses: cybercrime, intellectual property rights and maintaining your web presence'.⁷

IV FRANCHISE LAW

i Legislation

Barbados is one of approximately 30 countries across the globe and the only member of CARICOM that has franchise-specific legislation.

The Franchising Sector in Barbados is governed by the Franchises (Registration and Control) Act (Chapter 179A) (the Franchise Act). The Franchise Act was established to 'provide for the licensing, registration and control of businesses which operate on franchise in Barbados and for related matters'. The Barbados legislation has a primary focus on the protection of local business and ensuring that there is no unauthorised use of a franchisor's product, trademark or trade name.

The Franchise Act defines 'franchise' as 'a right granted in writing by the owner of a mark, product, service, technique or device to another person to use the mark, product, service, technique or device whether or not the mark, product, service, technique or device is protected by a trademark or trade secret, or by usage, or otherwise, and includes a licence to use a copyright, an industrial design or an invention'.

ii Pre-contractual disclosure

Barbados follows common law in respect of the tort of misrepresentation, which may be viewed as a false statement of fact addressed to the party misled and which induces the contract. Furthermore, the principle of *memo dat quod non habet* applies to the extent that one is not able to give what one does not own. Hence, prior to contract, the parties are legally protected during negotiations by basic common law principles.

iii Registration

Section 3 of the Franchise Act dictates that any franchise licence application must be in writing and addressed to the Minister of Finance.

Registration of a franchise licence is administered by the tax administration department of the Ministry of Finance and Economic Affairs. According to the regulations of the department, the application must be accompanied by the following: the completed application form (Form 1), a notarised copy of the franchise agreement, incorporation documents, projected profit and loss or income statements for each of the first two years of the proposed operation or, if the enterprise is already in operation, audited balance sheets and profit and loss statements for the past two years of the company's operation.⁸

The application form is divided into four sections: applicant, investment, production and certification. The application must disclose relevant details such as the dates of registration of the company, names and contact information of the chairman, managing

7 Theresa Blackman, 'Businesses Told To Step Up Online Security' (BGIS Media, Top Stories, 2015), www.gisbarbados.gov.bb/index.php?categoryid=9&p2_articleid=13912.

8 Application Form 1 under Section 3 of the Franchises (Registration and Control Act, 1974 as amended).

director, other directors and company secretary, nature of the business, details of any similar project within CARICOM, name and description of products for which the licence is sought for franchise, amount of capital to be invested in the proposed operation (i.e., land, building or leasehold improvements, machinery and equipment and networking capital), number and remuneration of persons expected to be employed in the proposed operation and the proposed address at which the business is to be conducted.

Pursuant to the provisions of the Franchise Act, upon receipt of the application for the franchise licence, the Minister publishes an official notice in the Official Gazette, *The Barbados Advocate* newspaper and the *Nation* newspaper inviting members of the public to object to the granting of such a licence, usually within 60 days.

If the franchise licence is approved, an initial registration fee of Bds\$10,000 is required and there is an annual renewal fee of Bds\$2,000.

iv Mandatory clauses

According to the Franchise Act, no person shall operate a business in Barbados using the mark, product, service, technique, device, copyright, industrial design or invention of another person unless a franchise from the owner is obtained; and no person, other than a citizen or permanent resident, shall operate a business in Barbados using his or her own mark, product, service, technique, device, copyright, industrial design or invention without a franchise licence. Hence, any person who wishes to operate a business in Barbados on franchise must obtain a licence from the Minister of Finance and Economic Affairs before commencing business.

Furthermore, foreign (i.e., non-Barbadian or non-CARICOM) businesses cannot use their own marks, products, services, techniques, devices, copyright, industrial designs or inventions without a franchise licence.

Only legally operating franchises may repatriate profits and capital.

v Guarantees and protection

The Consumer Protection Act (Chapter 326D) came into force on 16 January 2003. The purpose of this Act is to safeguard the rights of consumers in areas such as unfair trade practices, unfair contract terms and misleading and deceptive conduct.

The Consumer Guarantees Act (Chapter 326E) was established in an effort to provide redress for consumers in the event that they receive problematic goods or services. The Act relates to consumer guarantees in relation to the supply of goods and services and rights of redress against suppliers in respect of failure of goods and services to comply with any such guarantees.

Barbados's consumer protection and guarantees legislation is geared towards consumers, namely, persons who use goods and services for non-commercial use.

The normal practice relating to guarantees and protection is guided by basic contract law principles. Guarantees given by individuals and companies to the franchisor are enforceable. However, companies are not permitted to give guarantees in limited circumstances that are deemed as prejudicial to the company.

V TAX

i Franchisor tax liabilities

Income tax in Barbados is subject to the provisions of the Income Tax Act (Chapter 73).

Barbados imposes a corporation tax,⁹ which varies by income and year, on the worldwide income of all tax-resident business entities.¹⁰ The rate for a franchisor is 25 per cent.

ii Franchisee tax liabilities

Franchisees must pay a 15 per cent withholding tax on all royalties paid to franchisors. This would be subject to the provisions of any applicable double-tax treaty. They are also liable to a corporate tax rate of 25 per cent.

As long as the franchisee is tax resident, the franchisee would be liable to income tax on worldwide income. Personal tax is based on the PAYE system. The first US\$12,500 is granted as a personal allowance and as a consequence is exempt from tax. Earnings between US\$12,501 and US\$17,500 are taxed at a rate of 16 per cent, earnings between US\$17,501 and US\$25,000 are taxed at 33.5 per cent, and income over US\$25,001 is taxed at 40 per cent.¹¹

Under the provisions of the National Insurance and Social Security Act of Barbados, all employers are required to register their business with the Director of National Insurance. Therefore, franchisees are required to insure all employees between the ages of 16 and 67. The rates of national insurance contributions for employees are 11.10 per cent and 12.75 per cent for employers. This amounts to a total National Insurance Scheme contribution of 23.85 per cent of an employee's earnings payable by the employer. The maximum insurable earnings are Bds\$4,270 per month.

Franchisees that import products to the island are also liable for import duty. Customs duty is levied on goods imported in accordance with the First Schedule of the Customs Act (Chapter 66). The rate is calculated on an *ad valorem* basis of zero per cent to 20 per cent. Certain goods regarded as luxury items are taxed at a much higher rate.

Franchisees that qualify for Barbados's value added tax (VAT) regime must be registered for VAT.¹² The threshold for VAT registration is Bds\$200,000.¹³ VAT is levied at 17.5 per cent on the value of a wide range of goods and services imported or supplied in Barbados by VAT-registered persons.

iii Tax-efficient structures

Tax efficient structures are available and will vary according to the ultimate beneficial owner of the franchise licence. In this regard, Barbados is party to a number of double-taxation treaties that will reduce withholding taxes on dividends, interest and royalties. Furthermore,

9 At the time of writing, several changes to the tax rates have been proposed, including Barbados companies being subject to corporation income tax at a maximum of 5.5 per cent. Full details by way of legislation are not currently available, and this section may be subject to change and require further review.

10 A business is tax resident if it is either incorporated, continued or registered as an external company under the Companies Act (Chapter 308 of the Laws of Barbados).

11 Barbados Revenue Authority, 'Change to Upper Individual Income Tax Band from August 1, 2018'.

12 Under the VAT provisions, a person is required to register for VAT purposes if they supply goods and services in Barbados in the course of a taxable business and if their annual taxable supplies are Bds\$200,000 or more.

13 As of 1 January 2016, Barbados raised the VAT registration threshold to Bds\$200,000.

the CARICOM double-taxation treaty provides for the payment of dividends at a zero withholding tax rate. Accordingly, the use of a holding company incorporated in a favourable CARICOM jurisdiction will sometimes offer attractive possibilities.

VI IMPACT OF GENERAL LAW

i Good faith and guarantees

The Consumer Protection Act (Chapter 326D) makes provision for the protection and safety of consumers and for connected purposes. This legislation establishes and safeguards rights for consumers in the area of goods and services. It is administered by the Office of Public Counsel.

ii Agency distributor model

The Franchise Act is very general as it relates to all persons operating a business in the country using the mark, product, service, technique, copyright, industrial design or invention of another person. As a consequence, an agent or distributor of a franchised product, regardless of whether or not the operator is a non-national, is subject to the provisions of the Franchise Act.

iii Employment law

In Barbados, there are a number of labour laws that define the rights and responsibilities of all agents in the workplace, namely employees, employers and any respective representative groups. Principal among these laws is the Employment Rights Act of 2012. However, franchisees cannot be treated as employees by the courts.

iv Consumer protection

The Consumer Protection Act (Chapter 326D) of 2002 precludes franchisees from being treated as consumers in any given circumstance by virtue of the fact that they do not meet the criterion of being a 'consumer'. The Act defines a consumer as an individual who acquires from a supplier goods or services of a kind ordinarily intended for private use or consumption.

The Consumer Guarantees Act (Chapter 326E) amends the law relating to consumers upon the supply of goods or services, and the rights of redress against suppliers and manufacturers in respect of a failure of goods or services to comply with any such guarantees.

The Fair Trading Commission Act (Chapter 326B), *inter alia*, provides for the establishment of a Fair Trading Commission to safeguard the interests of consumers, to monitor and investigate the conduct of service providers and business enterprises to promote and maintain effective competition.

The thrust of the Fair Competition Act (Chapter 326C) is to promote, maintain and encourage competition; and to prohibit the prevention, restriction or distortion of competition and the use of dominant positions in trade in Barbados and within the CARICOM Single Market and Economy.

v Competition law

There is currently no antitrust legislation in Barbados.

vi Restrictive covenants

There are no specific laws relating to non-compete arrangements. The law on non-compete arrangements in Barbados is based on common law and developed through judicial precedent.

vii Termination

There are no restrictions on shareholding in local businesses, on taking local leases or owning real property. However, for a company to have a lease or own real property in Barbados, it must first be registered in Barbados.

viii Anti-corruption and anti-terrorism regulation

Under the authority of the Money Laundering and Financing of Terrorism Prevention and Control Act (Chapter 129), the government established the Anti-Money Laundering Authority and its operating arm, the Financial Intelligence Unit, in 2000. Barbados also has a Prevention of Corruption Act (Chapter 144), which provides anti-corruption laws.

ix Dispute resolution

Barbados bases its legal system on the British common law system. The Attorney General, the Chief Justice, judges and magistrates administer justice in Barbados. The Caribbean Court of Justice is the highest court of appeal for Barbados.

Notwithstanding the arrangements put in place for dispute resolution, disputes involving franchises are virtually non-existent in Barbados.

VII CURRENT DEVELOPMENTS

It is interesting to note the re-entry of two large international franchises into the market – Miss Universe (Barbados) in 2016, operated by franchise holder Crown Events Inc, and Miss World (Barbados) in 2017, operated by franchise holder Caribbean Market Centre – after a nine-year and a two-year hiatus respectively. The re-emergence of these international pageantry franchises succinctly illustrates the growing diversification in the local franchise market.

In recent times, Barbados has expanded its protectionist fast-food restaurant market and allowed the entry of the international restaurant franchises Subway and Burger King in 2009 and 2012 respectively. Moreover, with the opening of the Limegrove Lifestyle Centre in 2011, Barbados welcomed retail franchises such as Burberry, Louis Vuitton and Michael Kors.

Additionally, the CARICOM Single Market and Economy (Implementation) (Miscellaneous Provisions) Act No. 24 of 2004 removed the necessity for a national of another member state to apply for a licence to operate a franchise on the island. Hence, a franchisor from Antigua and Barbuda, the Bahamas, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Lucia, St Kitts and Nevis, St Vincent and the Grenadines, Suriname or Trinidad and Tobago is not subject to Section 3 of the Franchise Act.

In addition, there has been considerable dialogue at ministerial level and plans are under way to amend the franchise legislation to make it more attractive to entrepreneurs and potential investors. It is becoming more generally accepted that the current franchise law is outdated and ill-suited to the current business climate. The Franchise Act was created and amended at a time when protectionism combined with minimal external competition was deemed to be a necessary strategy to aid local small and medium-sized businesses to develop.

However, with the advance of globalisation and Barbados's membership in the World Trade Organization, these policies are continually being amended to keep in line with WTO obligations, as well as with more suitable contemporary economic models.

Moreover, with the introduction of the Computer Misuse Act, the Electronic Regulations Act and the soon-to-be enacted Data Protection Act, Barbados is addressing security and privacy policy issues.

Given the constant refrain that Barbados is 'open for business', it is expected that the current Franchise Act will soon be amended to chime more consistently with this mantra.

ABOUT THE AUTHORS

GILES A M CARMICHAEL

Chancery Chambers

Giles Carmichael is a graduate of Durham University in England, where he studied law. He furthered his studies by obtaining a Master of Laws from Suffolk University Law School in Boston and completed his MBA at the IE Business School in Madrid.

Giles Carmichael is admitted to practise in Barbados and has been called to the New York Bar.

Mr Carmichael is a partner at Chancery Chambers and works on corporate and commercial matters, advises on regulatory issues in Barbados and overseas, and is responsible for the overall management of the firm. Mr Carmichael is also the principal at Carmichael Law PC in New York.

Giles Carmichael is a member of the American Bar Association, the Institute of Directors, the International Tax Planning Association, the New York State Bar Association and the New York City Bar Association.

CHANCERY CHAMBERS

Chancery House
High Street
Bridgetown BB11128
Barbados
West Indies
Tel: +1 246 431 0070
Fax: +1 246 431 0076
gcarmichael@chancerychambers.com
www.chancerychambers.com



ISBN 978-1-83862-002-8