



# ICLG

The International Comparative Legal Guide to:

## Franchise 2016

**2nd Edition**

A practical cross-border insight into franchise law

Published by Global Legal Group, with contributions from:

Adams & Adams

Anderson Mori & Tomotsune

Bustaman

Daniel Advogados

DBB

Debarliev, Dameski & Kelesoska,  
Attorneys at Law

DLA Piper Hong Kong

DLA Piper UK LLP

Dorsey & Whitney LLP

Drakopoulos Law Firm

Dubler Attorneys at Law

Gorodissky & Partners (Ukraine)

GRATA Law Firm

HH Partners, Attorneys-at-law, Ltd.

Jacobsen + Confurius Rechtsanwälte

Karimov and Partners Law Firm

LINKEA

Monereo Meyer Marinel-lo Abogados

RASS – Studio Legale Rinaldi e Associati

Uskov & Partners

Zumtobel + Kronberger + Rechtsanwälte OG

**GLG**

Global Legal Group

**Contributing Editor**

Iain Bowler,  
DLA Piper UK LLP

**Head of Business Development**

Dror Levy

**Sales Director**

Florjan Osmani

**Account Directors**

Oliver Smith, Rory Smith

**Senior Account Manager**

Maria Lopez

**Sales Support Manager**

Toni Hayward

**Sub Editor**

Nicholas Catlin

**Senior Editor**

Suzie Levy

**Group Consulting Editor**

Alan Falach

**Group Publisher**

Richard Firth

**Published by**

Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

**GLG Cover Design**

F&F Studio Design

**GLG Cover Image Source**

iStockphoto/GLG

**Printed by**

Ashford Colour Press Ltd  
December 2015

Copyright © 2015  
Global Legal Group Ltd.  
All rights reserved  
No photocopying

ISBN 978-1-910083-73-4

ISSN 2055-8082

**Strategic Partners**



**General Chapter:**

1	<b>Building an International Franchise System from Scratch – Where Do I Start?</b> – Iain Bowler, DLA Piper UK LLP	1
---	--	---

**Country Question and Answer Chapters:**

2	<b>Albania</b>	Drakopoulos Law Firm: Ekflodia Leskaj & Besnik Duraj	4
3	<b>Austria</b>	Zumbobel + Kronberger + Rechtsanwälte OG: Dr. Amelie Pohl	10
4	<b>Belgium</b>	DBB: Benoit Simpelaere & Leonard Hawkes	15
5	<b>Brazil</b>	Daniel Advogados: Hannah Vitória M. Fernandes & André Ferreira de Oliveira	22
6	<b>China</b>	DLA Piper UK LLP: Paula Cao & Claudio d’Agostino	30
7	<b>England &amp; Wales</b>	DLA Piper UK LLP: Iain Bowler	37
8	<b>Finland</b>	HH Partners, Attorneys-at-law, Ltd.: Esa Korkeamäki & Tapio Siilola	46
9	<b>France</b>	LINKEA: Cecile Peskine & Olivier Deschamps	53
10	<b>Germany</b>	Jacobsen + Confurius Rechtsanwälte: Dr. Kay Jacobsen	60
11	<b>Greece</b>	Drakopoulos Law Firm: Panagiotis Drakopoulos & Dr. Evangelos Margaritis	67
12	<b>Hong Kong</b>	DLA Piper Hong Kong: Scott Thiel & Louise Crawford	74
13	<b>Italy</b>	RASS – Studio Legale Rinaldi e Associati: Marco De Leo & Beatrice Masi	81
14	<b>Japan</b>	Anderson Mori & Tomotsune: Kenichi Sadaka & Aoi Inoue	87
15	<b>Kazakhstan</b>	GRATA Law Firm: Aizhan Mukhammad	95
16	<b>Macedonia</b>	Debarliev, Dameski & Kelesoska, Attorneys at Law: Jasmina Ilieva Jovanovik & Dragan Dameski	103
17	<b>Malaysia</b>	Bustaman: Adhuna Kamarul Ariffin & Nur Atiqah Samian	110
18	<b>Romania</b>	Drakopoulos Law Firm: Adrian Roseti	118
19	<b>Russia</b>	Uskov & Partners: Vadim Uskov	125
20	<b>South Africa</b>	Adams & Adams: Eugene Honey & Manisha Maganbhai-Mooloo	132
21	<b>Spain</b>	Monereo Meyer Marinel-lo Abogados: Sönke Lund & Belén Arribas Sánchez	141
22	<b>Switzerland</b>	Dubler Attorneys at Law: Dr. Andreas M. Dubler	152
23	<b>Ukraine</b>	Gorodissky & Partners (Ukraine): Nina Moshynska & Oleg Zhukhevych	160
24	<b>USA</b>	Dorsey & Whitney LLP: Gary R. Duvall & Josh Piper	170
25	<b>Uzbekistan</b>	Karimov and Partners Law Firm: Bobir Karimov	179

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

**Disclaimer**

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

# Spain

Sönke Lund



Belén Arribas Sánchez



Monereo Meyer Marinello Abogados

## 1 Relevant Legislation and Rules Governing Franchise Transactions

### 1.1 What is the legal definition of a franchise?

The franchise agreement was defined for the first time in Spanish legislation, in Act 7/1996 of the Retail Commerce Law (*Ley de Ordenación del Comercio Minorista*), which defined a franchise as “commercial activity under an agreement according to which the franchisor transfers to the franchisee the right of exploiting his own marketing system of products and services”.

This definition was improved in later legislation and established the kinds of activity that fit under a franchise agreement as: “activities for the performance of the contract, according to which an entrepreneur – the franchisor – transfers to another – the franchisee – in exchange for economic direct or indirect compensation, the rights to use a franchise, with regard to a business or commercial activity that the franchisor has carried out with enough experience and success to put his products or services into the market, and includes at least: a) use of a name or label or other intellectual property rights, as well as a similar distribution in the franchise premises or transportation aim of the contract; b) disposal of the specific, fundamental and unique knowledge or the know-how by the franchisee; and c) regular technical and economic assistance, carried out by the franchisor during the performance of the contract, without disregarding its potential supervision, which can be agreed in the contract.”

This definition sets as the main goal of the agreement the marketing of goods and services, with emphasis on the field of commercial distribution. The Spanish Supreme Court (*Tribunal Supremo*) has, on the other hand, settled by stating that the franchise agreement is the agreement reached by two legally and economically independent parties, pursuant to which the franchisor grants the franchisee the right to use, under certain control conditions, during a certain period of time and in a geographically delimited area, a technique in the industrial, commercial or services activity, in exchange for recurring payment by the franchisee. This definition, wider than the legal definition, is not focused on the distribution aspect, and therefore lets other kinds of contract fit in, for instance technology transfer agreements with an obligation of technical support.

The most recent doctrine describes this agreement as the agreement according to which the entrepreneur – franchisor – in exchange for a recurring payment, makes available to another entrepreneur – franchisee – the use of his own methods of doing business, experienced beforehand with success, to integrate them into the franchisee’s distribution network and cooperate together in the distribution of

products or services. According to this definition, the franchise agreement has a concrete and heterogeneous aim: a business model, defined as a pack of organised material and immaterial goods, which reproduces the franchisor’s business model.

### 1.2 What laws regulate the offer and sale of franchises?

The offer and sale of franchises is regulated by the mentioned Retail Commerce Act 7/1996 of 15 January. Article 62 is the provision devoted to franchise agreements.

This Act was thereafter complemented by Royal Decree 201/2010 of 26 February on Franchise Agreements and the Franchisors’ Register (*Real Decreto por el que se regula el Ejercicio de la Actividad Comercial en Régimen de Franquicia y la Comunicación de Datos al Registro de Franquiciadores*).

The regulatory agency in charge of franchise matters is the Franchisors’ Register, which is administered by the State Secretary of Commerce (General Directorate of Internal Commerce sub-directorate of Internal Commerce) of the Ministry for Economy and Competitiveness. Regional Franchisors’ Registers can be created if the regions’ respective legislation foresees it.

Patent and trademark legislation are also applicable, in respect of the use of industrial property elements.

The Competition Act also has an impact through Royal Decree 261/2008 of 22 February, on Defence of Competition (*Reglamento de Defensa de la Competencia*), as well as Commission Regulation (EU) No 330/2010 of 20 April 2010 and European Commission Guidelines on Vertical Restraints (2010/C 130/01).

### 1.3 Are there any registration requirements relating to the franchise system?

The Act created a Register at the State level in which the foreign franchisors – not domiciled in Spain – will have to register as well as the Spanish franchisors, who carry out their business in more than one Autonomous Region. Furthermore, it establishes the main guidelines for each Autonomous Region to create their own Franchisors’ Register, with which franchisors whose activity is carried out only in that Autonomous Region should register.

This Register is created only for the purposes of information and publicity. It is a public and administrative body. This Register’s functions are mainly as follows:

- a. Registration of franchisors in the Autonomous Region where they have their domicile, or directly by the request of the interested party in case the Autonomous Region does not ask for notification.

- b. To constantly update the records of registered franchisors and franchisees.
- c. Registration of franchisors' cancellations.
- d. To issue the appropriate supporting certifications of the registered franchisors.
- e. To grant the Autonomous Regions' administrative entities access to the Register information as required.
- f. To provide public information about the franchisors, upon the request of people concerned.

In order to get registered, franchisors must provide the Register with several documents and data, referring mainly to the franchisor, his industrial property rights and copyrights, as well as the purpose of the potential franchise agreements and a description of the business aim of the contract.

A franchisor (and in some cases also a foreign franchisor) should be registered in the Franchisors' Register and must provide certain information. These obligations should be dealt with no later than three months after the franchisor's activities in Spain have begun. Franchisors are also obliged to communicate to the Franchisors' Register any modification of the information already provided. This communication has to be made within three months of any change taking place.

Once a year in January, franchisors are also obliged to communicate to the Franchisors' Register any closing or opening of premises (whether owned or franchised) during the previous year. As an exception, franchisors established in an EU Member State and without a permanent establishment in Spain but acting with freedom to provide services, will only be obliged to communicate to the Register the commencement of their activities.

#### 1.4 Are there mandatory pre-sale disclosure obligations?

First of all, information to be disclosed to the Franchisors' Register has to be given to the regional Register or, if the regional legislation does not provide for such obligation, to the central one. Pre-contractual information has to be communicated to the franchisees by the franchisor at least 20 working days before the signature of the franchise agreement or pre-agreement, or before any payment is made to the franchisor by the future franchisee.

The main purpose of this obligation is to protect the potential franchisee – who is seen by the legislator as the “weak” party – by providing the appropriate information for him to be fully aware of the basics of the agreement in order to conclude it. Furthermore, the Royal Decree grants the franchisor protection by enabling him to request from the franchisee an obligation of confidentiality with regard to all the pre-contractual information.

Franchisors must disclose the following specific information in an accurate and non-misleading manner, in writing, to the potential franchisee: identification of the franchisor (name, registered address, information of the commercial registry and stock capital, indicating if it is fully paid up or in what proportion), including details of the entry in the Franchisors' Register; foreign franchisors must disclose information about their registry to the Franchisors' Register according to their national regulations; proof of ownership or licence for the use of any trademark or similar element; the franchisor's experience, including the date of incorporation and the main steps in its evolution and the development of the franchise network; the contents and characteristics of the franchise and its exploitation, including a general explanation of the business, special characteristics of the know-how and the permanent commercial or technical assistance the franchisor will provide to franchisees; and an estimation of the necessary investments and expenses to start a business. If the franchisor is offering estimates

on the volume of sales or results of the placement of the business to the potential franchisee, these should be based on: experience or information that can be fully justified; the structure and extent of the network in Spain, including the way it is organised and the number of establishments opened in Spain (either directly owned or through franchises), indicating the cities; as well as the number of franchisees having left the network in the preceding two years, indicating the reasons; and essential elements of the franchise agreement, including the rights and obligations of the parties, conditions for its termination or renewal, economic obligations, exclusivity clauses and limitations imposed on the franchisee in order to run the business.

#### 1.5 Do pre-sale disclosure obligations apply to sales to sub-franchisees? Who is required to make the necessary disclosures?

In a Master Franchise Agreement, the franchisor grants to the master franchisee the right to exploit a franchise in a particular market in exchange for financial compensation (either direct or indirect or both) with the intention of signing franchise agreements with third parties. The master franchisee assumes the position of the franchisor in this particular market or area. In case of a sub-franchising structure, therefore, pre-sale disclosure to sub-franchisees must be made by the master franchisee (sub-franchisor). The information required concerning the franchisor and the contractual relationship between the franchisor and the sub-franchisor is as follows: identification of the franchisor (name, registered address, and information about the entry in the Franchisors' Register); if it is a company, its capital stock in the last balance sheet, indicating what proportion is paid, and the Commercial Register information, if appropriate; if the franchisor was a foreign franchisor, information about its entry in the Franchisors' Register according to its legal obligation; and proof of having obtained a right to use the trademark and other IP elements of the franchisor (indicating their duration); as well as any judicial proceedings that could affect the use of the trademark.

#### 1.6 Is the format of disclosures prescribed by law or other regulation, and how often must disclosures be updated? Is there an obligation to make continuing disclosure to existing franchisees?

No specific legal provisions oblige the franchisor to update to franchisees the information already disclosed, but it could be considered that the information disclosed should be updated if anything relevant is modified. Therefore franchisors are obliged to update this information directly to the Register.

There is no specific obligation for continuing to disclose information to current franchisees once the agreement has been signed, although this could be necessary if some relevant modifications have taken place.

#### 1.7 Are there any other requirements that must be met before a franchise may be offered or sold?

There are no further requirements to be met.

#### 1.8 Is membership of any national franchise association mandatory or commercially advisable?

The principal association of franchisors is the Spanish Association for Franchises, which belongs to the Iberian and American Franchise Federation, the European Franchise Federation and the World Franchise Council. Membership is not mandatory but beneficial, because: it helps franchisors to be represented in international and

national trade fairs; it makes funds available for specific commercial missions; it seeks to harmonise franchisor-franchisee relationships; it provides information and training on franchising; it provides information to potential investors, etc.

### 1.9 Does membership of a national franchise association impose any additional obligations on franchisors?

Remarkably, various associations of franchisors have developed and implemented among their partners Codes of Ethics, which contain commitments the entrepreneur should assume under this kind of agreement. Among others, the Code most worthy of note is the European Franchise Federation (EFF) Code of Ethics, first passed in January 1991 (<http://www.eff-franchise.com>).

The main goal of these Codes is to standardise the conduct of association members, as well as to make a clear distinction of true franchising from other, fraudulent businesses. These Codes are non-legal documents, so they are not legally binding. However, it has been seriously contemplated as doctrine to apply them where the will of the parties is missing, considering that they could be regarded as customary obligations. This theory, however, has not been adopted in Spain. The sentence from the Barcelona Court of Appeal of 16 December 1996 declares that a franchise consists of a contractual relationship of Anglo-Saxon origin, which lacks a specific regulation in Spain, unlike in other European Community countries, where the European Franchise Federation Code of Ethics is applicable. On the contrary, in Spain its use has its legal basis in the principle of contractual freedom on the basis of Articles 1255 of the Civil Code (*Código Civil*) and 51 and 52 of the Code of Commerce (*Código de Comercio*).

The most remarkable aspect of the self-regulation activity mentioned is the creation of various franchise arbitration courts, and dispute resolution related to these kinds of agreements. In Spain, the Spanish Franchise Association has created the Spanish Franchise Association Court, which aims at mediating and arbitrating, both on the basis of Acts and equity, in any dispute related to a franchise agreement or matter of non-mandatory law. Obviously, submission to this Court's decisions is voluntary.

### 1.10 Is there a requirement for franchise documents or disclosure documents to be translated into the local language?

There is no specific requirement for franchise documents to be in Spanish; however, this might be recommendable for marketing purposes.

## 2 Business Organisations Through Which a Franchised Business can be Carried On

### 2.1 Are there any foreign investment laws that impose restrictions on non-nationals in respect of the ownership or control of a business in your jurisdiction?

No, there are not.

### 2.2 What forms of business entity are typically used by franchisors?

Franchisors may establish their franchise network in the country through different types of entity. The most common types of business

entity used by franchisors in Spain are the *sociedad limitada*, the *sociedad limitada nueva empresa* and the *sociedad anónima*.

The *sociedad de responsabilidad limitada* (SRL) or *sociedad limitada* (SL) is a kind of commercial enterprise provided by Spanish legislation, where the capital is divided into shares and the responsibility of the partners is limited by the capital provided and, therefore, if debt is incurred, the partner will not be liable for private assets. This type of enterprise is regulated in the *Ley de Sociedades de Capital*.

The *sociedad limitada nueva empresa* (SLNE), or *sociedad nueva empresa*, is defined in the *Ley de sociedad limitada nueva empresa*, as a field of the *sociedad de responsabilidad limitada*. This type of enterprise will comprise a maximum of five partners.

The *sociedad anónima de capital*, also regulated in the *Ley de Sociedades de Capital*, is divided into shares and it comprises the contribution of all the partners who will not be liable for private assets.

The *empresa conjunta*, also known as the joint venture, is also a common route used to establish a network in the country. The joint venture is not defined in Spanish legislation, but it may be included in Article 1.255 of the Spanish Civil Code, which allows the creation of new contractual modalities, having regard to the principle of contractual freedom.

### 2.3 Are there any registration requirements or other formalities applicable to a new business entity as a pre-condition to being able to trade in your jurisdiction?

In order to be able to trade in Spain, the entity must fulfil certain requirements that may vary depending on the company's home country and on the specific activity it is going to carry out. For example, if a business is duly registered in a country that is a member of the European Union (EU), the general principle of free trade states that the company will be able to offer its services in any other country in the EU without having to create a new company or branch office.

In spite of this general principle, depending mainly on the frequency, duration and regularity with which the company trades in Spain, it will have to eventually create a company in Spain, or a branch office, according to Spanish law. There are different forms of creating a permanent establishment in Spain, one of them being franchising.

## 3 Competition Law

### 3.1 Provide an overview of the competition laws that apply to the offer and sale of franchises.

At a national level, applicable regulation is the Spanish Competition Act 15/2007 of 3 July and Royal Decree 261/2008 of 22 February which approved the Spanish Competition Regulation, developing the Spanish Competition Act.

However, according to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty and Royal Decree 261/2008, the community regulation regarding "block exemption" shall be directly applicable in Member States' national legal systems and will be directly applicable by national competition authorities and courts.

Franchise agreements may be considered as vertical agreements that contain competitive constraints and therefore all community regulation shall be also considered. It follows that, when analysing

applicable law to franchises, it will be also necessary to take into account the community regulation, i.e. Articles 101(1) and (3) of the Treaty on the Functioning of the European Union, Commission Regulation (EU) No 330/2010 of 20 April on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (“block exemption” on vertical agreements) and the Guidelines on Vertical Restraints (2010/C 130/01).

### 3.2 Is there a maximum permitted term for a franchise agreement?

No; but if the franchise agreement contains non-compete clauses, according to Article 5.1 a) of Commission Regulation (EU) No 330/2010 any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years, will not benefit from the block exemption.

We should understand by “non-compete obligation”, any direct or indirect obligation causing the franchisee not to manufacture, purchase, sell or resell goods or services which compete with the contracted goods or services, or any direct or indirect obligation on the franchisee to purchase from the franchisor or from another undertaking designated by the franchisor more than 80% of the franchisee’s total purchases of contracted goods or services.

### 3.3 Is there a maximum permitted term for any related product supply agreement?

As mentioned above, in case the agreement involves a non-compete obligation, according to Article 5.1 a) of Commission Regulation (EU) No 330/2010, any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years, will not benefit from the block exemption.

### 3.4 Are there restrictions on the ability of the franchisor to impose minimum resale prices?

Agreements or clauses having as their direct or indirect object the establishment of a minimum resale price or a minimum price level to be observed by the franchisee, are considered “hardcore” restrictions and are therefore forbidden by EU regulation. Due to the direct application principle of the European Competition Act in the Member States, these kinds of provisions are also forbidden in the Spanish legal system.

### 3.5 Encroachment – are there any minimum obligations that a franchisor must observe when offering franchises in adjoining territories?

According to European antitrust law, the restriction of the territory into which, or of the customers to whom, a franchisee may sell the contracted goods or services, is not permitted, except in case of restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the franchisor or allocated by the franchisor to another franchisee, where such a restriction does not limit sales by the customers of the franchisee.

### 3.6 Are in-term and post-term non-compete and non-solicitation of customers covenants enforceable?

Regarding in-term covenants, and according to Article 5.1 a) of Commission Regulation (EU) No 330/2010, any direct or indirect

non-compete obligation, the duration of which is indefinite or exceeds five years, will not benefit from the block exemption.

Regarding post-term covenants, any direct or indirect obligation causing the franchisee not to manufacture, purchase, sell or resell goods or services after termination of the agreement, are forbidden, unless all the following conditions are fulfilled:

- (a) the obligation relates to goods or services which compete with the contracted goods or services;
- (b) the obligation is limited to the premises and land from which the franchisee has operated during the contract period;
- (c) the obligation is indispensable to protect know-how transferred by the franchisor to the franchisee; and
- (d) the duration of the obligation is limited to a period of one year after termination of the agreement.

## 4 Protecting the Brand and other Intellectual Property

### 4.1 How are trade marks protected?

There are various means of trade mark protection under Spanish legislation. A trade mark can be protected by industrial property rights as an International Trade Mark, as a Community Trade Mark or as a Spanish Trade Mark under Spanish legislation. As trade marks in Spain can be protected as Community Trade Marks, protection can be achieved even if they are unregistered, although the term of protection would be shorter than if they were indeed registered.

The national protection of trade marks is specified under the Spanish Trade Mark Act (*Ley de Marcas*) and the agency responsible for maintaining their registration is the Spanish Office of Patents and Trade Marks (*Oficina Española de Patentes y Marcas*).

In order to enjoy protection as a Spanish trade mark, it shall be registered with the Office, as established in the Trademark Act. The registered trade mark will be protected for a period of 10 years starting from the day of the application, and the protection can be renewed at consecutive intervals of 10 years. The renewal will be made by the owner of the trade mark and shall be filed together with proof of payment of the renewal fee, the amount of which shall be determined by the number of classes included in the renewal application.

Such registration is compulsory in the sense that, without registration, the trade mark does not exist. This is particularly noteworthy as regards Article 46.3 of the above-mentioned Act, under which the trade mark will not have the nature of object of property if it is not registered.

### 4.2 Are know-how, trade secrets and other business-critical confidential information (e.g. the Operations Manual) protected by local law?

The franchisor is bound not to act in a manner that damages the business plan of an enterprise under Article 57 of the Commercial Code, which establishes the principle of good faith in the performance and fulfilment of the commercial contract. This includes the obligation to keep the character of secrecy of the know-how, which is materialised through the prohibition of disclosure. It is a fundamental requirement that is not specifically determined and, since its infringement may cause substantial damages to property, it generates a duty of compensation for damages.

Business entities in Spain, especially medium-sized companies, are more and more aware of the importance of “know-how” and trade secrets. In cases where knowledge cannot be protected by industrial or intellectual property or when the costs for this kind of protection

are simply too high, Spanish legislation also offers protection under the unfair competition legal framework. In this regard, Article 13 of the Spanish Unfair Competition Act (*Ley de Competencia Desleal*) forbids employees from taking and exploiting trade secrets.

Along the same lines, Article 76 of the Patent Act (*Ley de Patentes*) stipulates that the purchaser or licensee to whom the know-how or trade secrets are communicated, is obliged to take the necessary measures to avoid their disclosure. However, this is only applicable to the employer who has already entered into the contract and does not show the product before coming to an agreement.

#### **4.3 Is copyright (in the Operations Manual or in proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement) protected by local law?**

All literary, artistic and scientific original creations expressed by any means or support can be subject to copyright protection under the Spanish Intellectual Property Act (*Ley de Propiedad Intelectual*). This includes books, brochures, pamphlets, correspondence, writings, speeches, lectures, forensic reports, academic explanations and other works of the same nature.

Consequently, the copyright in the Operations Manual or in proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement will be protected under the Spanish Intellectual Property Act as long as they reach the level of originality and creativity required for this kind of protection.

## **5 Liability**

#### **5.1 What are the remedies that can be enforced against a franchisor for failure to comply with mandatory disclosure obligations? Is a franchisee entitled to rescind the franchise agreement and/or claim damages?**

The specific regulations applicable to franchises do not state the consequences of failure to comply with mandatory disclosure obligations. Therefore, the general rules contained in the Spanish Commercial Code and the Civil Code apply. These will mainly refer to the validity of the consent given. According to case law, the consequences of such lack of disclosure will depend on whether it can be proven that the franchisee would have not entered into the agreement if it had been provided with all the correct data. In that case, the consent would be deemed defective and, according to Article 1266 of the Spanish Civil Code, the contract could be annulled. Contrarily, if the misrepresentation would not have affected the decision of the franchisee to enter into the agreement, it would not be annulable. Nevertheless, the franchisee could claim damages as a result of the said failure.

#### **5.2 In the case of sub-franchising, how is liability for disclosure non-compliance or for misrepresentation in terms of data disclosed being incomplete, inaccurate or misleading allocated between franchisor and franchisee? If the franchisor takes an indemnity from the master franchisee in the Master Franchise Agreement, are there any limitations on such an indemnity being enforceable against the master franchisee?**

According to the specific regulation, both the franchisor and the master franchisee must provide the sub-franchisee with the

complete data at least 20 days before the signing of the agreement. Case law, since there is not complete regulation of franchising institutions, tends to consider that the master franchisee is assigned the position of the franchisor and therefore is directly liable before the sub-franchisee.

Any clause affecting or limiting third parties' rights cannot be alleged against such third parties, as long as they are not to be considered parties to such an agreement. Therefore, clauses contained in the Master Franchise Agreement stating any kind of liability limitation, could not be enforced against the sub-franchisee – as long as such clause had not been included in the sub-franchising agreement.

#### **5.3 Can a franchisor successfully avoid liability for pre-contractual misrepresentation by including disclaimer clauses in the franchise agreement?**

Pursuant to the general principle of contractual freedom, the parties are allowed to introduce in the agreement any clause they deem suitable as long as it is not contrary to public order, good morals or prohibitive law. Therefore, it is possible to introduce a disclaimer clause in the agreement in order to avoid liability for pre-contractual misrepresentation. However, under Spanish law, the scope of said clause is limited as, according to Article 1.102 of the Spanish Civil Code, liability arising from wilful misconduct is enforceable for all obligations, and not previously renounceable. As a result, in case of fraudulent misrepresentation, the disclaimer clause would not be applicable as, according to the above-mentioned provision of the Spanish Civil Code, any waiver of action to enforce liability for wilful misconduct is null and void.

#### **5.4 Does the law permit class actions to be brought by a number of allegedly aggrieved claimants and, if so, are class action waiver clauses enforceable despite the expense and inconvenience of individual arbitrations?**

In general terms, class actions are limited mainly to entities acting to protect consumers or in defence of gender equality rights. The possibility of class actions being brought by legal entities acting on behalf of professionals or entrepreneurs is only envisaged under the Spanish Act regarding actions against general terms and conditions to be deemed abusive, and only when aiming to remove the provision that is considered unlawful and oblige the drafting party to cease and withdraw the use of such clauses. Therefore, a group defending the rights and interests of franchisees could bring class actions against the franchisor only in order to remove some general terms and conditions of a given contract or cause him to cease and withdraw the use of such clauses, but not to claim damages for the application of the said terms and conditions.

## **6 Governing Law**

#### **6.1 Is there a requirement for franchise documents to be governed by local law? If not, is there any generally accepted norm relating to choice of governing law, if it is not local law?**

No, there is no requirement for local law to govern franchise documents. The law of any of the parties and the law of the place of performance of obligations, if different, can also govern.

**6.2 Do the local courts provide a remedy, or will they enforce orders granted by other countries' courts, for interlocutory relief (injunction) against a rogue franchisee to prevent damage to the brand or misuse of business-critical confidential information?**

Yes, from the moment of lodging the initial complaint, the plaintiff can solicit from the court interlocutory relief to secure the effective judicial protection that is demanded. Generally, there are two main types of proceedings within the civil jurisdiction: verbal proceedings; and ordinary proceedings. The competent courts are generally the courts of first instance (for conflicts related to franchise agreements) or the Commercial Court (for special matters such as bankruptcy, unfair competition, intellectual property, general conditions, transport or commercial undertakings) where the defendant is domiciled, except where parties have agreed otherwise.

## 7 Real Estate

**7.1 Generally speaking, is there a typical length of term for a commercial property lease?**

As far as commercial lease agreements are concerned, there are no maximum lease terms under Spanish law. The duration is basically freely negotiable. In the unusual case that no explicit term is agreed, Article 1.581 Spanish Civil Code deems a term of one month if monthly payment is agreed. The same happens if the parties agree a yearly rent payment, etc. The terms of a commercial lease agreement shall be always clearly determined.

The duration of lease agreements, e.g. in case of Spanish shopping centres, generally depends on the size of the premises. In case of "mid-sized units", the average term of Spanish retail contracts is currently about 10 years, whereas in case of "small-sized units" it is five to six years:

- Premises from 50 to 500 m<sup>2</sup>: Terms of three to five years.
- Premises from 500 to 1,500 m<sup>2</sup>: Terms of five to 10 years.
- Premises bigger than 1,500 m<sup>2</sup>: Terms of 10 to 20 years.

On the other hand, another determining factor is the reputation or economic impact which each tenant implies to the shopping centre. The "top five" retailers in the Spanish market (e.g. the Inditex Group) are normally able to agree preliminary rights of termination, which allows them to step out of the lease contract at any time they want, or at least after a rather short initial mutual binding period of one to two years. Unless the parties agree a specific notification modus, there is an automatic or tacit extension (*tácita reconducción*) of the term according to Article 1.566 Spanish Civil Code if the retailer continues using the premises for 15 days after the end of the term.

Such extraordinary termination rights of retailers are often connected with the potential right of the landlord to redefine the rent after a certain duration of the contract, e.g. after five or 10 years.

**7.2 Is the concept of an option/conditional lease assignment over the lease (under which a franchisor has the right to step into the franchisee/tenant's shoes under the lease, or direct that a third party (often a replacement franchisee) may do so upon the failure of the original tenant or the termination of the franchise agreement) understood and enforceable?**

In Spain, contractual clauses that establish the fact of insolvency proceedings as a reason for an (automatic) early termination of the lease agreement are null and void due to mandatory legal

bankruptcy provisions – Article 61.3 of the Spanish Bankruptcy Act (*Ley Concursal*). In addition, in the event of Spanish bankruptcy proceedings and a situation of non-fulfilment by the tenant, the receivership and/or court in charge of the bankruptcy proceedings shall be notified of, and shall deal with, the termination of the contract, together with possible liability for damages.

**7.3 Are there any restrictions on non-national entities holding any interest in real estate, or being able to sub-lease property?**

Apart from zones of special interest, e.g. for reasons of national security or due to coastal protection provisions, etc., there are no limitations at all with regard to foreign investments on acquisitions. As a result, no mandatory process of prior government verification of the investment amount applies, but there exist retroactive obligations to notify the governmental institutions for merely statistical purposes.

In general, rules on investment, except for EU citizens and Swiss citizens due to international treaties, are linked to the place of origin of the investment and not nationality. Nonetheless, there is an obligation to report investments in case the capital inflow originates from so-called tax havens prior to carrying out the investment. In this context, quite severe anti-money-laundering legislation, with wide registration and information obligations, needs to be carefully observed.

**7.4 Give a general overview of the commercial real estate market. Specifically, can a tenant reasonably expect to secure an initial rent free period when entering into a new lease (and if so, for how long, generally), or are landlords demanding "key money" (a premium for a lease of a particular location)?**

With respect to the current situation of the commercial real estate market, it can be said that following the main conclusions of current market analysis reports for the years 2015-2016 ("RETAIL – Informe de mercado Junio 2015 / Market Report June 2015", Jones Lang Lasalle-Madrid ([www.jll.es](http://www.jll.es)); "Informe de Locales Comerciales", Gesvalt Sociedad de Tasación August 2015 ([www.gesvalt.es](http://www.gesvalt.es)) y Ferran; "Informe de Valoración de Retail & Consumer Products", June 2015, EY Transaction Advisory Services, Ernst & Young, S.L.), experts expect an ongoing recovery of the Spanish economy in general terms and their main macroeconomic indicators, with GDP reaching around 2-3%, which represents solid growth and the best numbers since the start of the financial crisis (end of 2007, beginning of 2008). For the Consumer Price Index they expect a slightly increasing tendency with positive growth around 1%.

Along with the more stable situation in financial market conditions and an albeit slow recovery in the labour market (the unemployment rate started to go down to 23% / expectations for end of 2016: 20%), together with increasingly positive consumer behaviour and continuing positive development, particularly in the Spanish tourism sector, the positive impact on the commercial rental market can already be expressed in numbers: the transaction prices in the "Retail and Consumer Products" sector increased by 12% in Spain during 2014.

**Commercial real estate market**

In connection with different market sectors, with respect to the retail & shopping centre market, their business units' average vacancy rates are still around 11% during 2014. On the other hand, bigger units are less affected; meanwhile smaller premises still show significantly higher vacancy rates.

Prime SC registered the best sales figures in 2014: an average sale of €3,525/m<sup>2</sup> per annum; Secondary SC reached €2,270/m<sup>2</sup> per annum

and Tertiary SC registered €1,835/m<sup>2</sup> *per annum*. Retailers remain focused on finding prime retail units. However, in view of the lack of prime products, more secondary products are beginning to attract interest. The prime rents 2014 can be summarised as follows: €228/m<sup>2</sup>/month (High Street) and €87/m<sup>2</sup>/month (Shopping Centres).

The investment figure for 2015 as a whole is expected to be around or even in excess of €2.5bn.

Spain closed 2014 with a total of 682 shopping centres or retail outlets and a total Gross Lettable Area (GLA) over 16,000,000m<sup>2</sup>. Recently an increasing GLA tendency has become noticeable. At the end of 2014, the average yield levels generated by Retail Warehousing Parks were around 6.75%; in case of Shopping Centres around 5.25%, and High Street 4.25%. Moreover, a significant increase of transactions in the retail market has put Spain in a good position in recent times as far as retail investment in Europe is concerned, which demonstrates the high interest among international investors in the Spanish market.

As far as the food services sector is concerned ("*Comida Rápida y a Domicilio – Marzo 2014 – 18ª edición*", DBK, S.A.; [www.dbk.es](http://www.dbk.es)), the situation at the end of 2013 can be summarised as follows. There were a total of 4,160 premises in the sector, as a result of an increasing trend in recent years. The generated sales volume fell slightly in comparison to 2012, and 2013 closed with €2.7bn. The main reason for that slight fall was the weakness of private consumption in the past and investment by Spanish-resident people, whereas foreign investment and private consumption by tourists and investors are strongly increasing. The main winners so far are hamburger restaurants and similar small food service shops, whereas pizzerias, for example, registered a substantial decrease of 7%.

With respect to the Hotel Sector ("*Observatorio de la Industria Hotelera España Temporada verano 2015*"; [www.pwc.es](http://www.pwc.es) / [www.cehat.com](http://www.cehat.com)) and due to the ongoing increasing numbers of tourists visiting Spain in the last years, especially during summer time, the situation is dominated by a constantly increasing investment tendency in this sector. In general, all key indicators are positive for 2015 again (i.e. average overnight accommodation, accommodation prices, marketing investment, profitability, etc.) and experts in the sector agree that occupancy rates will be even better than last year. There are increasing tourist numbers coming especially from the UK, Germany, France, Netherlands and Nordic countries, but also the national market presents itself in better shape than before.

#### Initial rent-free period or "key money"

Both situations are possible and often occur. With respect to tenants' expectations of an initial rent-free period, in case of commercial lease agreements such contractual provisions are quite common in Spain. The amount of months concerning the agreed period without rental payment obligations (*carencia*) depends, in the first place, on an economic evaluation related to the necessary modernisations or reform works to be done in order to open the premises to the public. On the other hand, additional "key money" provisions are possible and often dealt with between the previous tenant and the new tenant (*traspaso*) in the event that the landlord is a third party in relation to the franchise contract.

## 8 Online Trading

### 8.1 If an online order for products or request for services is received from a potential customer located outside the franchisee's exclusive territory, can the franchise agreement impose a binding requirement for the request to be re-directed to the franchisee for the territory from which the sales request originated?

As the European Commission Guidelines on Vertical Restraints

pointed out, where there is exclusivity of the franchisee's territory, none of the franchisees can pursue sales in another franchisee's territory. Consequently, active sales out of the allocated territory are forbidden. However, passive sales are admissible. Internet sales have been considered passive sales and any franchisee can make that sale, unless such a franchisee was actively promoting and pursuing that sale.

### 8.2 Are there any limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement?

No, such a pact would be admissible according to the contract freedom principle.

## 9 Termination

### 9.1 Are there any mandatory local laws that might override the termination rights that one might typically expect to see in a franchise agreement?

This is one of the multiple aspects of the franchise agreement not specifically regulated by Spanish law. In this respect, once again it will be the parties which will have to regulate the termination, as well as the general legal prescriptions referring to contracts, that is, Article 1124. (The right to terminate the obligations is implicit in the reciprocal ones, when one of the obliged parties does not fulfil its obligation.)

The damaged party will be able to choose between demanding fulfilment or compensation for damages, including interests. He will also be able to demand early termination (when, after accepting the fulfilment, it becomes impossible) and Article 1156 of the Spanish Civil Code (obligations are extinguished: by payment or fulfilment; by the loss of the subject matter of the contract; by confusion of the rights from the creditor and debtor; by compensation; or by renewal) will play its part.

The causes of termination of a franchise agreement, as explained below, can be very diverse – by expiration of the duration agreed, by mutual consensus, breach of the contract by one of the parties, etc. Moreover, the termination of the contract entails some consequences which will have to be resolved, such as the destination of the stocks, the potential compensation for clients, prohibition of competition, etc.

#### Normal termination

Franchise agreements with a limited duration will only terminate by the expiration of the agreed time period, i.e. when the term fixed at the conclusion of the agreement has expired or when the extensions agreed later have also expired.

The law does not foresee a determined term for the franchise agreement; according to the Courts Doctrine the regular contractual relationships must be limited in time. This means, as the doctrine sets out, establishing a limit to the debtor. Otherwise such a clause would be against the public order. Consequently, according to Article 1255 of the Spanish Civil Code, any clause setting an unlimited duration for a franchise agreement will be considered as null and void.

On the basis of the above, authors underline that contracts, including franchise agreements, in which the parties have agreed an unlimited duration for the performance of the contract, may be unilaterally rescinded by any of the parties. Apart from that, contracts whose performance is limited within a period of time, but which include an automatic extension clause, may also be rescinded by any of the parties at the end of each period agreed.

Exercising the right of rescission presumes in any case the term, as long as one has been agreed. Rescission may not be made with abuse of law and must observe the principles of equity and good faith; compensation for damages being the consequence of their inobservance. In this regard, we must take into account the Act on Unfair Competition, which considers unfair the abusive exploitation by an undertaking of the situation of economic dependence in which its affiliates, clients or suppliers which have no alternative to develop their business find themselves, setting as abusive, among others, the breaking-off, even partially, of the relationship without a written notice, at least six months in advance, unless it is due to serious breaches of the contract clauses agreed by the supplier or for reasons of *force majeure*.

It must also be pointed out that the franchise agreement can be terminated by the mutual consensus of the parties.

#### Early termination

The early termination of the franchise agreement takes place due to the general reasons for contract termination, which can be classified in two groups:

##### *Causes not dependent on the contract*

1. Death or incapability of management of the franchisee  
The franchise agreement terminates by the death or permanent incapability of management of the franchisee (natural person). In case of companies, the termination will take place in case of the dissolution and winding-up of a commercial transfer. Regardless, there is consensus in understanding that the contract terminates when the agreement is concluded due to a relationship of special confidence or when the personal abilities of the franchisee were relevant to the conclusion of the contract.
2. Franchise transfer  
Since the franchise agreement is a contract concluded due to a relationship of special trust between the parties, parties usually agree on clauses which are intended to avoid the early termination of the contract to create an unjustified cession of the franchise.
3. Other termination causes on the part of the franchisee  
This cause takes place when the franchisee is involved in execution, confiscatory or judicial administration proceedings, or when he does not fulfil his obligations towards his clients, suppliers, employees or other creditors, i.e. when certain circumstances can damage the reputation of the franchise network.
4. Bankruptcy proceedings of one of the parties  
This is traditionally one of the reasons for contract termination; the new Bankruptcy Act has suppressed it as a valid reason for contract termination.

##### *Causes arising from the contract*

Early termination takes place when one or more of the obligations under the contract are breached. In this regard, we must point out the most usual causes:

- a. Lack of payment by the franchisee, i.e. of any kind of economic obligations, which are due.
- b. Violation of the prohibition of competition, confidentiality or transfer of the know-how or the other commercial rights, as well as inobservance of the exclusivity obligation.
- c. Insufficient fulfilment of quality in the efficiency of services or distribution of products which are the subject matter of the franchise.
- d. Non-fulfilment of the guidelines regarding maintenance and updating of the company from the franchisor, in order to keep the uniform image of the brand.

Apart from the reasons laid down in the contract, which authorise an early termination of the contract, the same consequences can arise if one of the parties' behaviour meets the requisites established in Article 1124 of the Spanish Civil Code. Provided that it is a reciprocal contract (*do ut des*), like the franchise agreement, in case of breach of contract of the obligations by one of the parties, the other party can proceed with the cancellation of the contract. The damaged party has the choice between requesting its performance or cancellation. In both cases, he can likewise request compensation for damages and accrued interests.

## 10 Joint Employer Risk and Vicarious Liability

### 10.1 Is there a risk that a franchisor may be regarded as a joint employer with the franchisee in respect of the franchisee's employees? If so, can anything be done to mitigate this risk?

In principle, the franchisor and the franchisee are not jointly liable. The reason for this is that one of the main characteristics of franchise agreements is the independence of companies, which predates franchisor-franchisee relations. Nevertheless, and according to the Spanish Law, the franchisee's employees might be regarded as employees of the franchisor due to the two following established theories or mechanisms:

- a. Essentially, Article 43 of the Spanish Workers' Statute includes a non-exhaustive list of situations which can constitute an illegal transfer of employees and involve the franchisor being considered as the real employer. These situations are the following: i) the purpose of the hired service – the franchise – is to make the workers of one company available to another; ii) the formal employer lacks an independent and stable organisation; iii) the formal employer does not have the essential means for its activity; or iv) the formal employer does not exercise its managerial functions.
- b. On the other hand, both franchisor and franchisee could also be considered as a “company group with labour effects”, according to Article 42.1 of the Spanish Commerce Code and applicable jurisprudence.

Therefore, the risk of the franchisor being regarded as a joint employer together with the franchisee regarding the employees of the latter will depend on the degree of intervention exercised by the franchisor upon the franchisee and its employees. It is essentially a factual appreciation of the judge, in which the interventionism and functions of the franchisor have to be evaluated case by case. In order to avoid such elements occurring, the franchisee has to be independent from the franchisor from a functional, organisational and material point of view.

As a result, the franchisor must act cautiously and avoid intervening in the employment contracts between the franchisee and its employees. This means that the franchise system should guarantee the franchisee a certain degree of employment, control and managerial capacity towards its employees. In light of this, an emphasis on the independence of the franchisee from the franchisor will help to mitigate risks for the latter.

### 10.2 Is there a risk that a franchisor may be held to be vicariously liable for the acts or omissions of a franchisee's employees in the performance of the franchisee's franchised business? If so, can anything be done to mitigate this risk?

From the labour law perspective, there is a minimal risk that a

franchisor may be held vicariously liable, only in cases where the existence of an illegal transfer of employees or a “company group with labour effects” are declared (see question 10.1).

## 11 Currency Controls and Taxation

### 11.1 Are there any restrictions (for example exchange control restrictions) on the repatriation of royalties to an overseas franchisor?

As regards franchise agreements and other types of operations which involve the obligation to pay royalties overseas, there are no currency control restrictions nowadays. This is due to the fact that Act 19/2003 of 4 July 2003 on the legal regime of capital movements and cross-border financial transactions (*Ley sobre Régimen Jurídico de los Movimientos de Capitales y de las Transacciones Económicas con el Exterior y Sobre Determinadas Medidas de Prevención del Blanqueo de Capitales*) repealed the exchange control regime established by Act 40/1979 of 10 December 1979 (*Ley sobre Régimen Jurídico de Control de Cambios*).

The prohibition of restrictions on payments between Member States or between Member States and Third Countries is also laid down in Article 63 of the Treaty on the Functioning of the European Union.

Nevertheless, Act 19/2003 and Act 10/2010 of 28 April 2010 on the prevention of money laundering (*Ley de Prevención de Blanqueo de Capitales*), together with Royal Decree 304/2014 of 5 May 2014, establish, under certain conditions, reporting obligations with regard to any kinds of transaction/operation between residents and non-residents in Spain.

### 11.2 Are there any mandatory withholding tax requirements applicable to the payment of royalties under a trade mark licence or in respect of the transfer of technology? Can any withholding tax be avoided by structuring payments due from the franchisee to the franchisor as a management services fee rather than a royalty for the use of a trade mark or technology?

Income derived from the cession of a trade mark is classified as a “royalty” in the Commentaries on the OECD Model Tax Convention on Income and Capital. Thus, it is necessary to take into account in each case the applicable double taxation agreements in order to establish which State has jurisdiction in taxation matters. The OECD Model Convention includes a general criterion whereby royalties can only be taxed by the recipient State. However, double taxation agreements between Spain and other States include, as a general rule, a “shared taxation” provision, that is to say, Spain has jurisdiction to tax royalties paid to non-residents up to the tax limit laid down in those agreements.

In respect of the transfer of technology, it is understood that this concept includes not only the cession of industrial property but also the cession of “know-how”. In this context, Commentaries on the OECD Convention recommend differentiating between “know-how” (passive income) and “technical assistance services” (active income) because of the classification of the income in the field of taxation.

Thus, income earned by way of cession of “know-how” is classified as “royalty” and, consequently, is taxable in Spain up to the tax limit laid down in the corresponding Double Taxation Agreement. Nevertheless, income paid by way of “technical assistance services” is classified as income derived from economic activities (“business profits”) and is subject to taxation in the recipient State.

Nearly all of the double taxation agreements concluded between Spain and other States respect this general criterion, that is to say, “technical assistance services” are only subject to taxation in the recipient State. However, a few of them establish an exception with regard to this general rule.

### 11.3 Are there any requirements for financial transactions, including the payment of franchise fees and royalties, to be conducted in local currency?

Concerning possible restrictions on financial transactions, the Spanish Commercial Code does not establish the obligation to carry out financial transactions in local currency.

Likewise, the Spanish regime governing franchise agreements does not include any particular provision regarding the procedure for the payment of franchise fees and royalties, or the currency which has to be applied. However, the franchisee and franchisor should take into account the foreign currency exchange rate and agree on which party will pay the expenses and commissions.

## 12 Commercial Agency

### 12.1 Is there a risk that a franchisee might be treated as the franchisor’s commercial agent? If so, is there anything that can be done to help mitigate this risk?

There is only a residual risk since, according to the Agency Contract Act (*Ley sobre Contrato de Agencia*), the agent acts, under a contract of agency, on behalf and in the interest of the principal, as an independent intermediary.

## 13 Good Faith and Fair Dealings

### 13.1 Is there any overriding requirement for a franchisor to deal with a franchisee in good faith and to act fairly according to some objective test of fairness and reasonableness?

According to Spanish legislation, any party of any contract has to act in good faith towards the other parties. This obligation is foreseen in Article 7 in connection with Article 1,258 of the Spanish Civil Code and in Article 57 of the Spanish Commercial Code. Furthermore, franchisor and franchisee may sign codes of good practice, which may contain further provisions regarding the good faith which shall govern their relationship. Additionally, even during negotiations of the franchise contract, the parties have to act in good faith (*buena fe in contrahendo*).

Spanish legislation foresees to act in good faith as a principle, which aims that the parties act as a “good father” (*buen padre de familia*). This principle, applied to a franchise contract, shall limit the freedom of choice of the parties in order to protect their legitimate expectations during contract negotiations; for example, both parties may disclose confidential information regarding their business (in order to lay down some ground rules during negotiations of the contract, the parties may sign a non-disclosure agreement (NDA)), as well as during the execution of the franchise contract, for example that the franchisor holds property of all Intellectual Property Rights used by the franchisee during the execution of the contract.

As good faith is a principle in the Spanish legal system, the exact meaning of it has to be applied on a case-by-case basis.

## 14 Ongoing Relationship Issues

### 14.1 Are there any specific laws regulating the relationship between franchisor and franchisee once the franchise agreement has been entered into?

There are no specific laws regulating the relationship between franchisor and franchisee, but some general rules have some provisions applicable to this topic. As already mentioned in section 13 above (“Good Faith and Fair Dealings”), Article 7 and Article 1,258 of the Spanish Civil Code and Article 57 of the Spanish Commercial Code establish the principle of good faith. The contract holders have the obligation of acting fairly during the validity of the contract, as well as determining fair and reasonable contract terms. This principle also implies the obligation of keeping the character of secrecy of the know-how, which is materialised through the prohibition of disclosure.

When it comes to company succession, including in the case of franchises, the EU Acquired Rights Directive has played an important role in the reform of the Spanish Statute of Workers’ Rights. Specifically, Article 44 of the Statute of Workers’ Rights, as the directive intended, safeguards the rights of workers by ensuring that workers are entitled to continue working for the transferee employer on the same terms and conditions as those agreed with the transfer employer.

## 15 Franchise Renewal

### 15.1 What disclosure obligations apply in relation to a renewal of an existing franchise at the end of the franchise agreement term?

No specific disclosure obligations apply.

### 15.2 Is there any overriding right for a franchisee to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term irrespective of the wishes of the franchisor not to renew or extend?

No. The franchisor can refuse to renew the agreement for any of the reasons listed in the agreement, or simply because the franchisor is not willing to renew it once the agreement expires.

### 15.3 Is a franchisee that is refused a renewal or extension of its franchise agreement entitled to any compensation or damages as a result of the non-renewal or refusal to extend?

In general, no; except if the non-renewal can be attributable to a breach of contract by the franchisor.

## 16 Franchise Migration

### 16.1 Is a franchisor entitled to impose restrictions on a franchisee’s freedom to sell, transfer, assign or otherwise dispose of the franchised business?

Yes. Franchising agreements are considered as *intuitu personae* and, from the perspective of the Antitrust Act, the proportionality of such limitation is commonly admitted in its consideration as “absolutely indispensable to protect know-how and assistance provided by the transferor”. (Commission in recital 12 of the Servimaster Decision of 14 November 1988.)

### 16.2 If a franchisee is in breach and the franchise agreement is terminated by the franchisor, will a “step-in” right in the franchise agreement (whereby the franchisor may take over the ownership and management of the former franchisee’s franchised business) be recognised by local law, and are there any registration requirements or other formalities that must be complied with to ensure that such a right will be enforceable?

“Step-in” rights in franchise agreements are not prohibited under Spanish law. However, the new franchisee must be listed in the official Franchise Register.

### 16.3 If the franchise agreement contains a power of attorney in favour of the franchisor under which it may complete all necessary formalities required to complete a franchise migration under pre-emption or “step-in” rights, will such a power of attorney be recognised by the courts in the country and be treated as valid? Are there any registration or other formalities that must be complied with to ensure that such a power of attorney will be valid and effective?

Powers of attorney are not given in the context of commercial agreements. Furthermore, a power of attorney of this nature will be not recognised by Spanish courts or public authorities unless it has been granted before a public notary and in a public document.



### Sönke Lund

Monereo Meyer Marinel-lo Abogados  
Passeig de Gràcia, 98  
08008 Barcelona  
Spain

Tel: +34 93 487 58 94  
Email: [slund@mmmm.es](mailto:slund@mmmm.es)  
URL: [www.mmmm.es](http://www.mmmm.es)

Born in Hamburg in 1959, Lund has a degree in Law from the University of Hamburg, including previous studies in Berlin. He was admitted to the Hamburg Bar in 1991 and to the Barcelona Bar in 1997. He is specialised in intellectual & industrial property law, private international law and procedure, consumer law, distribution and international sales, environmental and technology law and food law.

He is a Chambers 2012, 2013 and 2014 recommended lawyer in the area of Intellectual Property and appears on the list of the best Spanish lawyers in the independent directory, "Who's Who Legal of Franchise Lawyers" in 2012, 2013, 2014 and 2015.

He is a member of the IBA, in which he holds the post of Senior Vice-Chair of the International Sales Committee.

He has published various articles and participated in conferences on food and consumer law, international sales, environmental law and intellectual property.

Member, amongst other organisations, of: the IBA – Dispute Resolution Section; Energy, Environment, Natural Resources and Infrastructure Law Section; Intellectual Property, Communications and Technology Section; International Sales, Franchising and Product Law Section; the NYSBA – Intellectual Property Section (International Intellectual Property Committee), Environmental Law Section (International Environmental Law Committee), Food and Drug Law Section and International Law and Practice Section; the ALAI/ALADDA (*Association littéraire et artistique internationale / Asociación Literaria y Artística para la defensa del Derecho de Autor*) and the German-Spanish Lawyers' Association.

Lund speaks Spanish, German and English.



### Belén Arribas Sánchez

Monereo Meyer Marinel-lo Abogados  
Passeig de Gràcia, 98  
08008 Barcelona  
Spain

Tel: +34 93 487 58 94  
Email: [barribas@mmmm.es](mailto:barribas@mmmm.es)  
URL: [www.mmmm.es](http://www.mmmm.es)

Belén Arribas heads the Information Technology Law Department of her firm. She specialises in a variety of IT contracts, e-commerce, outsourcing, data protection and other technology law matters; she also advises international and local clients in company and commercial law, competition and consumer law, and private international law as well as in complex transactions. She is accredited as an auditor of technological environments (*Auditor Certificado del Registro de Abogados Auditores en Entornos Tecnológicos*).

Her background in the internet and e-commerce have led to her being featured by the independent directory of Who's Who Legal: Who's Who Legal of Internet & E-commerce 2012; Who's Who Legal of Information Technology Lawyers 2013, 2014 and 2015; Who's Who Legal Technology Media & Telecommunications 2015.

Belén Arribas graduated from the University of Barcelona, where she also did doctoral studies in International Law; she graduated from the first programme specialising in IT Law in ESADE. She also holds a postgraduate degree in EC and International Law from the Katholieke Universiteit Nijmegen in The Netherlands. She has attended programmes in The Hague and other international and national seminars.

Belén Arribas lectures in IT and contract law-related matters at ICAB, IFAES, UNED, IDI and other international institutions. She is the author and co-author of a number of articles and contributions.

She is a member of the Barcelona Bar Association and of its Dean's Advisory Group on International Relations. She sits on the Board of the Corporate Law section of the Barcelona Bar; she has recently been invited to join the Group of Experts of Corporate Law.

Belén was a member of the scientific committee organising the first Digital Law World Congress in 2012, where she also coordinated and presented a panel on Privacy Law.

She is a member of ITechLaw and of many of its committees, where she has been a member of the Board of Directors since 2011; she chaired the Arbitration & Mediation Committee and currently chairs the I-WIN Committee; she also co-chaired the planning committee for the ITechLaw Conference in Barcelona, 2008. She is currently a Local Representative for Spain for this organisation. She is fluent in Spanish, English, French, Italian, German and Catalan.



Monereo Meyer Marinel-lo is a Spanish law firm founded in 1989 with a multidisciplinary, intercultural and international approach and a unique specialisation in advising foreign companies with activities in Spain as well as Spanish companies operating abroad. With three offices – Madrid, Barcelona and Palma de Mallorca – and more than 50 lawyers, Monereo Meyer Marinel-lo takes a leading position, offering legal advice in different legal areas such as litigation and arbitration, urban real estate law, competition, consumption and trade, labour and tax law, renewable energies, and restructuring and insolvency, among others.

The firm has 25 years of experience in cross-border work, and offers personal commitment and intercultural competence for each and every mandate: this is the approach that justifies the trust the firm's clients place in its professionals.

The work method of Monereo Meyer Marinel-lo aims to provide clients with excellent and professional service. Each client has a lawyer as a fixed contact person at their side. This person can revert to different experts in various legal areas and legal systems, so the clients can make the right decisions thanks to support offered by the firm.

## Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks



59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [sales@glgroup.co.uk](mailto:sales@glgroup.co.uk)

[www.iclg.co.uk](http://www.iclg.co.uk)