Chapter 41

UGANDA

Paul Asiimwe and Babette Märzheuser-Wood[1]

I INTRODUCTION

The franchise market in Uganda is dominated by domestic micro-franchises although some well-established foreign brands have also operated in this jurisdiction for a long time. The most significant foreign franchises are in the petrochemical industry and these include Shell, Total and Caltex (Chevron, Texaco). In more recent times, privatisation in the telecoms sector has created a new wave of franchisees. MTN Uganda entered the market in 1997 and rolled out its products through thousands of franchisees known as super dealers. These in turn feed the products on through micro-franchisees, leading to MTN's current dominance of the telecoms market. The post-1990s telecoms boom in Uganda has seen the steady growth of franchises in the fusion of the telecoms and financial services sector through establishment of mobile money outlets. Another area employing the franchise model to good effect is the renewable energy sector, where leading players such as Barefoot Power have used the micro-franchise model to increase its market share for solar products.[2]

All these developments continue at an exponential pace in the absence of a formal regulatory environment for franchising. What is key to note is that almost all of the franchising regulations are based on contract law, with little consideration for other aspects such as intellectual property. For the industry to flourish, there may need to be formal structures, such as an association. The key function of such an entity would not be to regulate as such, but rather to support and give direction to franchisors and franchisees alike, in the basic areas of establishment and running successful franchises.

1 Paul Asiimwe is a partner at Sipi Law Associates and Babette Märzheuser-Wood is head of the EMEA franchise group at Dentons.

2 See Barefoot Power's website, http://barefootpoweruganda.com.

II MARKET ENTRY

i Restrictions

Uganda offers a liberal environment for foreign franchisors to enter and set up businesses. This is largely in part due to restructuring of the economy in 1987, through measures such as liberalisation of FOREX trade. Foreigners do not have to have local shareholders, nor are they limited in exporting their profits from their local businesses. However, the legal environment retains some provisions that foreign franchisors may need to be aware of as they embark on doing business in Uganda. The Investment Code Act contains provisions requiring the franchisees to register any agreement that includes the transfer of foreign technology.[3] In a previous study, it was noted that Section 29 of the Investment Code Act, which requires registration of technology licences, has been unpopular with investors. As a result, the Uganda Investment Authority hardly registers any licences and this requirement is likely to be dropped in the proposed amendment to this Act.

Uganda's legislation on ownership of land limits non-Ugandans to owning leasehold property. The only option around this is to seek a long lease, which has now been reduced from a maximum of 99 years to 49 years under a proposed new Land Policy.

ii Foreign exchange and tax

Foreign exchange regulation in Uganda is relatively liberal compared with other countries in Africa. Businesses will be permitted to bring in and take out foreign exchange as long as it is declared. Only in exceptional circumstances under Section 10 of the Foreign Exchange Act can the Central Bank limit foreign exchange transactions, particularly where the country's foreign exchange reserves have fallen below critical levels.

Another key point for a foreign franchisor to note is the tax treatment under Ugandan law. Since almost all foreign franchisors do not incorporate in Uganda and do not attain resident status, they are taxed as non-residents. They therefore pay a witholding tax of 15 per cent on their income, which is normally to be withheld by the franchisee and paid to the Uganda Revenue Authority.

III INTELLECTUAL PROPERTY

i Brand search

As in most other jurisdictions, conducting a search whether in the registry of companies or the trademark registry is possible. A number of cases have occurred where locals have registered famous brands once it has become known that the brand owner intends to start business in Uganda. An intending franchisor would be well advised to first conduct a search in the trademarks registry for the relevant trademark. Absent registration protection is limited to passing off and the famous brands doctrine. The position regarding famous brands in Uganda will most likely will be in line with the Kenyan

3 Sections 29 and 30 of the Investment Code Act require beneficiaries of agreements such as franchise agreements to register these agreements with the Investment Authority.

Intellectual Property Institute's Trademark Office position in the matter of Bulzai Energy Drink & Bull Device KE/T/2010/0067288. In this case, the Registrar held that a famous mark must be proven to be famous in Kenya, rather than in the market of origin *per se*.[4]

ii Brand protection

The trademark filing process in Uganda is relatively straightforward, following the practice in most common law jurisdictions as follows:

a The agent or advocate is issued with a power of attorney by the franchisor, under a form cited as TM1.

b The applicant conducts a trademark search. Fees for foreign applicants are US$65 per class and results will typically be given within two to three days.

c Once the preliminary search indicates availability of the mark, the applicant can file an application using form TM2, normally through a local trademark agent.

d Once the application is filed, it is given a filing date and number and proceeds to examination. In the absence of a formal report, a gazette notice will be issued, permitting the franchisor or applicant to proceed and publish the trademark in the official gazette. A fee of 300,000 Ugandan shillings is paid for a notice covering a few goods. However, longer schedules of goods will attract significant charges. The mark is published for 60 days within which period anyone interested in lodging an opposition may do so.

e If the publication period expires without an opposition being lodged, the franchisor will through their agent apply for a grant of a certificate, upon paying the official fee of US$250.

iii Enforcement

Enforcement of franchise-related intellectual property rights is in the commercial division of the High Court. The High Court has unlimited jurisdiction over all matters including intellectual property laws. Actions for the enforcement of intellectual property rights are normally instituted by civil suit and claims can be made for injunctions, damages, declarations and other reliefs. Enforcement proceedings can also be initiated by bringing criminal complaints against any party, in which case the police will investigate, the Director of Prosecutions will prosecute and the courts will sentence or fine the accused. The High Court also entertains criminal cases, particularly those related to abuse of trademark rights.[5]

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

Uganda does not have a domain name dispute settlement system. It is prudent for any franchisor to protect their desired domain by immediately registering it with the Uganda top domain name registrar.[6] This will enable the franchisor to license this domain,

---

4 This can be through registration of a licence as a permitted user under Section 49 of the Trademarks Act, 2010.

5 Sections 377–380 of the Penal Code Act.

6 See https://www.registry.co.ug.

along with any other intellectual property for use by the franchisee. While Uganda does not have any explicit laws on data protection, it has some important laws that franchisors need to be aware of in relation to e-commerce and cybercrime, including the Uganda Communications Commission Act 2013 for most communication services such as telecoms and broadcasting, excluding information technology, and the Electronic Transactions Act, regulating the safe use of electronic signatures in a commercial environment, as well as the use of electronic signatures in e-government. The Computer Misuse Act[7] is intended to regulate the safe use of electronic transactions in Uganda. While it cannot prevent misuse of IT systems, it provides a sanctions mechanism for the abuse of IT infrastructure, particularly where the offence is of a criminal nature.

IV FRANCHISE LAW

i Legislation

The main laws governing a franchise arrangement in Uganda are the Contract Act, the Investment Code and common law.

ii Pre-contractual disclosure

Under Section 10(1) of the Contract Act, free consent to any agreement is a vital requirement for a binding contract. This implies that before a contract is entered into, there should be no misrepresentation whatsoever of any facts material to the transaction at hand. In the event that there was a misrepresentation, the contract becomes voidable. The person whose consent to the contract was obtained under a misrepresentation may either insist that the contract is performed and that he or she is put in the position in which he or she would have been if the representations made had been true or rescind the contract.[8] However, one needs to prove that they actually acted on the misrepresentation in order to consider it voidable.

It is also important to note that an agreement is void that restricts a party absolutely from enforcing his or her rights under or in respect of a contract, by legal proceedings or that limits the time within which the party may enforce his or her rights unless the parties agree on arbitration as the form of dispute resolution for any matters arising (Section 22).

iii Registration

Under the Investment Code Act, all agreements involved in the the transfer of foreign technology or expertise, including commercial franchise agreements are required to be registered with the Investment Authority by the beneficiary of the transfer (franchisee). The agreement can only be effective after registration as provided for under Section 29(1). This provision has not been actively policed in practice. Unless it is manifestly necessary for the agreement to explicitly be defined as a technology transfer agreement, it

7 Computer Misuse Act, 2011.

8 See Section 16 of the Contract Act.

would be sufficient to make it clear in the wording of the agreement that no technology is being transferred to comply with the Contract Act in order for it to be enforceable.

iv Mandatory clauses

Uganda has no explicit statutory regime governing franchise agreements. As such, there are no mandatory provisions unless the Investment Code Act applies. Certain provisions are considered essential to make a binding bargain. These include:

a date of commencement and expiry of agreement;
b names and addresses of the parties;
c assignability of rights, especially of the franchisee;
d confidentiality;
e royalty rate and when it is due for payment;
f taxes and which party is to pay them;
g intellectual property rights;
h dispute settlement;
i choice of law and forum; and
j termination.

Any well-drafted franchise agreement will contain these provisions.

v Guarantees and protection

Guarantees made by parties to a franchise agreement are enforceable as is any provision of a contractual nature. This is subject to any other relevant factors surrounding the conclusion of the agreement in which the guarantee is made, such as exertion of undue pressure, misrepresentation or fraud. All of these elements could vitiate a guarantee made in the context of a franchise agreement.

Under the Contracts Act a guarantor shall be liable to the extent to which the principal debtor is liable, unless otherwise provided by a contract. Under Section 71, liability takes effect upon default by the principal debtor. Any variance made in the terms of a contract between a principal debtor and a creditor without the consent of a guarantor discharges the guarantor.[9]

V TAX

i Franchisor tax liabilities

The main tax liability for franchisors is withholding tax at 15 per cent, which is retained by the franchisee and passed on to the tax authorities. Withholding tax is payable on royalties, management fees and professional fees.

9 See Section 74.

ii Franchisee tax liabilities

Franchisees would normally expect to bear the following taxes:

a Income tax. Corporation tax of 30 per cent would apply.

b Pay as you earn (PAYE) deducted from employees wages and remitted to the tax authorities at the end of the month. Rates depend on the income bracket.

c VAT if the franchisee is registered at a rate of 18 per cent.

d Workmen compensation insurance is another mandatory levy taken out by employers in favour of any employees who may be injured on the premises during working hours.

iii Tax-efficient structures

The most appropriate structure for a franchisor to adopt is to remain non-resident for tax purposes. This is largely because most of the tax incentives of resident taxpayers have been phased out. This implies that once a franchisor can ascertain the withholding tax applicable, it is clear what tax liability they will suffer. Secondly, if they were to incorporate locally, corporation tax at 30 per cent is higher than withholding tax applicable to franchisor's income.

VI IMPACT OF GENERAL LAW

i Good faith and guarantees

The duty of good faith is not expressly provided in the Contract Act but can be implied. Under Section 80 of the Contract Act for instance, a guarantor is discharged where the eventual remedy of the guarantor against a principal debtor is impaired, because a creditor acts in a manner inconsistent with the rights of the guarantor.

ii Agency distributor model

Commercial agency laws do not apply to franchising in Uganda. The separate question of whether the franchisee could be acting as agent of the franchisor under ostensible authority has some practical application. In a franchise arrangement in Uganda, it would be preferable to clearly exclude agency. This is because agency law in Uganda is not well developed. Where the franchisor and franchisee come from different business cultures, the likelihood of the franchisee seeking to enter into contractual relationships on behalf of the franchisor cannot be ruled out. Requiring the franchisee to display a sign in the premises that clearly states that the franchisee is an independent business operating under licence is recommended.

iii Employment law

It is important that the franchise agreement clearly spells out that there is no employer–employee relationship to avoid future conflicts as well as tax complications. Under the Employment Act, employment can be construed from conduct. This therefore means that the franchisor needs to clarify that the franchisee is not an employee nor an agent and has separate legal capacity under the law. If this is not clear, franchisors could be held legally liable for unpaid wages or face liability for other matters, such as injury at work if the franchisee does not take out the statutory workmens compensation insurance.[10]

iv Consumer protection

While Uganda has had a draft Consumer Protection Bill for a long time, the government has shown little interest in passing it. This draft law provides extensively for consumer rights including cooling off rights. It remains to be seen whether Uganda will follow the examples of Kenya and South Africa in including franchisees among those protected by the Consumer Protection Act as 'consumers'.[11]

v Competition law

Uganda does not have a substantive legal regime regulating anti-competitive practices, although a draft bill on Competition has been pending since 2005. The only explicit competition provisions fall under the Uganda Communication Commission Act 2013. While the Act appears to prohibit anti-competitive practices under Section 53, there are no clear sanctions for players in the sector against this negative behaviour. The Act[12] provides for the creation of a Competition Tribunal and this is a positive step. However, past practice shows that there is a need for the tribunal to practise more regulatory 'activism' especially where the complaints mechanism is weak or ineffective in eliminating anti-competitive practices in the market.

vi Restrictive covenants

There are no significant cases of enforcement of restrictive covenants in Uganda. It would be preferable to liquidate the potential costs of breach in order to discourage breach. This is particularly important since Ugandan courts widely appear to respect freedom of contract, unless it is clear that the agreement was tainted with undue influence or fraud. The only other case in which the courts may not enforce such a liquidated damages provision is where the amount to be forfeited upon breach is manifestly excessive.

vii Termination

The Contract Act gives freedom to parties to an agreement to determine how and when their contract can be terminated. To this extent, post-term covenants will be enforced as long as they are not oppressive. It is possible for the franchisor to take over the franchisor's business, if this is clearly spelt out in the franchise agreement and subject to the restrictions on regulated industries and land ownership. It would, however, be advisable for the franchisor to ensure that any liabilities, tax or otherwise are settled or borne by the franchisee. Uganda's commercial laws have no restrictions on foreign shareholding in local businesses. This creates a more favourable environment compared

10 See Section 3(1) of the Workmens Compensation Act, 2000, Principal Laws of Uganda.

11 See Section 33 of the Judicature Act.

12 See Part X providing for creation of a Communication Tribunal, Sections 60–65.

to some other countries in Africa, where an equity stake by a local shareholder would be required. The land laws, however, restrict foreigners to ownership of leases only.

viii Anti-corruption and anti-terrorism regulation

Uganda prides itself on its numerous anti-corruption institutions, although the vice is yet to be eradicated. Key among the institutions is the Anti Corruption Court, a division of the High Court. The country recently passed the Anti-Money Laundering Bill 2009 but it will only come into force once the President assents to it. In the meantime, other laws such as the Financial Institutions (Anti-Money Laundering) Regulations 2010 have been enacted. Under these Regulations, banks are entitled to enquire into suspicious transactions in order to check for money laundering.[13] The full impact of these measures may remain limited considering the fact that a large part of Uganda's economy remains in the informal and cash sector.

ix Dispute resolution

Free choice of law and jurisdiction is available in Uganda and the country is a signatory to the New York Convention on the Recognition and Enforcement of Arbitration Awards.

VII CURRENT DEVELOPMENTS

The pending introduction of the CPA and the proposed abolishment of the Investment Code Act requirement for registration should be looked out for.

13 See Section 3 of the Regulations.

Appendix 1

ABOUT THE AUTHORS

PAUL ASIIMWE

Sipi Law Associates

Paul Asiimwe is a partner of Sipi Law Associates. He specialises in intellectual property law, trade and investment law and franchise law. Paul is a member of the Uganda Law Society, the East Africa Law Society, the Licensing Executives Society, South Africa Chapter and a lecturer of intellectual property law at the Uganda Christian University, Mukono, Uganda. He holds a law degree from Makerere University, Kampala and a diploma in legal practice, Law Development Centre Kampala as well as an LLM in international economic law from the University of Warwick.

BABETTE MÄRZHEUSER-WOOD

Dentons

Babette heads up the EMEA franchise group at Dentons. She has more than 20 years' experience in international franchising with a particular focus on emerging markets. Her work includes the creation and critique of franchise contracts and their customisation to local law. Babette has transactional experience in all 28 EU Member States. Babette is recognised as one of Europe's leading experts in hotel and leisure franchising with a particular emphasis on German-speaking Europe. Babette is ranked by *Chambers Global* as one of the top 10 franchise specialists in the world. She is also recommended by *The International Who's Who of Franchise Lawyers*, *Chambers UK* and *Legal 500* for her franchise expertise. Babette's research on the role of franchising in the European hospitality industry has attracted widespread media attention. Babette is the author of numerous publications on franchising. She also lectures widely on international franchise laws and her expertise is often sought by franchisors from common law countries that enter civil law jurisdictions. She is an associated editor of *The Franchise Law Review*. Babette is a member of the ABA Forum on Franchising, the IBA Franchise Committee and the IFA. She is dual-qualified in both Germany and the UK. She speaks English, German, French, Spanish and Russian.

SIPI LAW ASSOCIATES
Unit 5, 3rd Floor, Jocasa House
Plot 14 Nakasero Road
Kampala
Uganda
Tel: +256 312 272921 /
+256 414 235391
www.sipilawuganda.com

DENTONS
Dentons United Kingdom
One Fleet Place
London
EC4M 7WS
United Kingdom
Tel: +207 2467053
babette.mwood@dentons.com

www.dentons.com