## Chapter 12

# FRANCHISING IN AFRICA

*Babette Märzheuser-Wood*[1]

## I INTRODUCTION

Six of the world's 10 fastest growing economies are in Africa.[2] Oil-rich Nigeria, politically and economically stable Botswana and Ethiopia, Mozambique, Rwanda, Tanzania and Uganda all meet the IMS criteria of 5 per cent year-on-year GDP growth and 3 per cent growth in GDP per capita. Despite these growth rates, it should not be overlooked that the average income per head in most of these countries remains below $1,500 per year. These African economies are growing through stable policymaking and the absence of civil war. Botswana is a good example. Through sound management it has transformed itself from one of the poorest countries in the world to a middle-income country with a per capita GDP of $13,100 in 2010.[3] Ethiopia relies on coffee exports. The country is in the middle of implementing a five-year 'growth and transformation plan' launched in 2010. In Nigeria the GDP has doubled between 2000 and 2010 and GDP per capita is now a little above $1,500. Ethiopia remains poor with a GDP per capita of $470 while Kenya's per capita GDP has risen to $862.

African countries have an interesting mix of indigenous micro-franchises particularly in the areas of agricultural health, mobile phones, petrol and fast food and a spattering of investments by the more prominent international franchisors such as KFC, Subway and Papa Johns. South Africa is an excellent example of how franchising can be used in Africa to create jobs quickly and efficiently by helping local people set up SMEs under a franchise system. Franchising contributes a phenomenal 12 per cent to the country's GDP, a figure that exceeds the success of franchising in Australia and the United States. There are good reasons to believe that the same success can be achieved

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1 Babette Märzheuser-Wood is head of the EMEA franchise group at Dentons.

2 'No need to dig', *The Economist*, 2 November 2013.

3 Franchising in Africa Legal and Business Consideration 2012, p. 108.

in due course in some other African countries. Many South African franchise systems are indigenous systems tailored to the needs of this large and diverse country. This is primarily due to the potential of franchising to assist with the success of small and medium-sized companies. Failure rates of franchisees are five times lower than those of independent businesses. Another good example of an African success story is African Atlantic Franchise Farming, which sells an agricultural franchise to local farmers in Ghana. This enables the farmers to benefit from cheaper supplies of seed and fertiliser. Additional training is also provided. Despite these success stories Africa remains a challenging environment for brands. It is not always possible to own a lease in a property and restrictions exist for direct investments. Repatriation of royalties can be subject to restraints and withholding taxes erode the profitability of the venture. The standards of protection for intellectual property are substantially lower than in Europe, Australia and the United States. Corruption and bureaucracy are another inhibiting factor. Yet there is an appetite for famous brands and a growing middle class urban population. Some African countries such as Morocco (with 315 brands on the market) and South Africa (where 12 per cent of the economy is attributed to franchising) are experiencing a franchise boom. As a result, franchising has become an increasingly attractive route for foreign businesses to take in Africa. In the hotel sector Africa is the new frontier with all the big brands actively chasing deals on the continent. Marriott recently bought the South African Protea hospitality portfolio thereby acquiring 116 properties on the Continent. Fast food, particularly chicken-based, concepts are popular, with KFC and Nandos present in several African countries. Overall 200 foreign franchises are reported to be active in Africa.

Countries such as Nigeria, Kenya and Zimbabwe have established franchise associations. These can assist with improving the understanding of franchising as a business method. A Pan-African Franchise Federation was founded in spring 2013. Its formation follows ongoing efforts by the World Franchise Council to establish a formal organisation for the franchise sector in Africa.[4]

## II MARKET ENTRY

### i Restrictions

There are no specific restrictions for franchisors entering the African market. While land ownership and the ability to own shares in local companies can be restricted to certain percentages particularly in industries sectors of national importance, these laws do not affect franchising. On the contrary, they support it. Typically the franchisor would prefer not to have a local lease and partner instead with a local franchisee who enters into the lease. The classic franchise sectors of retail, hotels and restaurants do not fall within the scope of regulated industries. Some African countries such as Nigeria and Uganda have foreign investment laws regulating the transfer of foreign technology. This can capture franchise agreements. In Tunisia franchise agreements may require the authorisation of

4 Nixon Peabody Africa Alert, 25 June 2013.

the trade ministry if they are in certain regulated sectors. However, franchising in the fashion, tourism and leisure sectors is actively encouraged and pre-authorised.

Regulated industries that are not open to foreign companies typically cover the telecommunications, insurance, banking, oil and gas and agricultural sectors. For classic retail, restaurant and leisure franchisors these restrictions should not be an obstacle.[5]

### ii Foreign exchange and tax

As with all emerging markets, the question of availability of hard currency should be at the forefront of franchisors' minds. Many African countries require central bank permission for foreign currency transactions. In Kenya, Uganda, Botswana, Egypt, Ghana and Zambia there are currently no restrictions in place on payment in foreign currency. Payments must, however, be made through an authorised bank.[6] Foreign exchange controls exist in the Cape Verde Islands, Ethiopia, Mozambique, Nigeria, South Africa and Tunisia to name some of the most important African countries. In Nigeria the NOTAP Guidelines stipulate that royalty fees may not exceed 5 per cent of the net sales value. In South Africa the limit in retail franchising is 4 per cent. In countries such as Cape Verde, Ethiopia and Mozambique, where hard currency is scarce, various procedures ranging from applications to permissions have to be followed by franchises in order to obtain hard currency. The Bank of Mozambique controls both currency inflows and outflows and any foreign currency transaction is subject to prior authorisation. As part of the authorisation process the franchise agreement can also be scrutinised and a translation may be requested. It is well known that South African central bank approval is needed for remitting royalties abroad in foreign currency.

### iii Withholding taxes

Withholding tax regimes apply in all African countries surveyed. In Kenya a withholding tax of 20 per cent is levied on the payment of technical service fees. Under the double taxation agreement between Kenya and the UK this is reduced to 15 per cent. In Uganda the withholding tax is 15 per cent on all income paid to non-residents. There is no further reduction under the double taxation treaty with the UK. In Botswana equally the withholding tax on royalties is 15 per cent. In the Cape Verde Islands it is 20 per cent on service fees and 15 per cent on royalties. In Ethiopia the withholding tax is 5 per cent for royalties and 15 per cent VAT is payable on service fee payments. In Ghana again withholding taxes range from 10 to 20 per cent. Some African countries have very few double taxation agreements such as Mozambique, which only has agreements with South Africa, Portugal, Italy, the UAE, Mauritius and Macau. In Nigeria the applicable rate of withholding tax for royalty payments is 10 per cent. There is a double taxation agreement with the United Kingdom, France, Canada, South Africa and Italy as well as with the Netherlands. South Africa has a wide range of double taxation agreements often

5 For example, in Kenya mandatory local equity participation is required in respect of mining, maritime, aviation, insurance and telecommunications industries.

6 See Kenya chapter by Babette Märzheuser-Wood and Philip Coulson.

reducing the rate of the withholding tax to nil. Under the double taxation agreement between South Africa and the UK the withholding tax rate is reduced to zero.

Grossing-up clauses are generally enforceable in African countries. The impact of a grossing-up clause on the affordability of the franchise for the local partner should, however, be carefully considered.

## III INTELLECTUAL PROPERTY

Protection of intellectual property in some African countries can be poor. Countries such as Nigeria have been described as having 'an intellectual property free environment'.[7] Counterfeiting and piracy is widespread, although a large number of African countries meet certain TRIPS standards for enforcement of intellectual property rights. African states that are members of the African Regional Intellectual Property Organisation (AREIPO) recognise the protection of trademarks, patents and industrial designs. While the AREIPO membership is no guarantee that IP protection reaches Western standards, it shows a commitment to the protection of intellectual property that goes beyond that of some other African states. AREIPO members are Botswana, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

In competition with AREIPO the African Intellectual Property Organisation (OAPI) was formed by certain French-speaking African nations, again to enable the filing of one regional application for the protection of trademarks in all member countries. OAPI was formed in 1997 and has 16 member countries. Applications can be filed in the Central Office in Yaounde, Cameroon. OAPI countries include Burkina Faso, Cameroon, Chad, Congo, Ivory Coast, Guinea, Mali, Niger, Senegal, Togo and the Comoros.

A growing number of African countries have specific intellectual property or trademark legislation. For example, in Botswana the Industrial Property Act allows for the registration and protection of trademarks. The Cape Verde Industrial Property Code of 20 August 2007 protects the rights of registered trademark owners as does the Egyptian Intellectual Property Rights Law, which also requires all trademark licences to be notarised and registered. Ethiopian law requires a trademark licence to be submitted to the Ethiopian Intellectual Property Office for registration as does the Mozambique Industrial Property Code of 12 April 2006. Under the Nigerian Trade Mark Act 2004 trademark licence agreements must be registered with the Nigerian Trade Mark Registry. While technically trademark registration is only necessary to convey on the licensee the right to enforce the trademark against third parties, it is often recommended to register a trademark licence between the franchisee and the franchisor to enhance the level of protection for the trademark in the country. Typically registration of a trademark licence will prove use by the franchisor and can therefore be used to proceed against pirates. In emerging markets a formal registration certificate can help with enforcing IP rights

7 Rachael Marusak Hermann, IP Watch, 25 March 2013.

and the registration of the trademark licence should be viewed strategically and not discounted as unnecessary.

### i Brand protection and enforcement

Given that AREIPO covers the most important African states the procedure for an AREIPO application for the registration of trademarks is given below. The application for a trademark must be filed either directly at the AREIPO office in Harare, Zimbabwe or via the industrial property office of a contracting state. It is possible to file an AREIPO application for trademark registration claiming priority based on the Paris Convention. Applications can be filed directly by foreign applicants. However, where the applicant's principal place of business is outside an AREIPO contracting state it is mandatory to use a recognised local trademark agent. The AREIPO office will examine the application for compliance with formal requirements and issue a filing date. If the application complies with the formal requirements, AREIPO will notify each designated state and request that each designated state examines the application in accordance with its own national laws. Each designated state must notify the AREIPO office of its findings within a prescribed period. On expiration of that period AREIPO will publish the trademark for registration in all designated countries. The period for oppositions is three months from the publication date. The trademark once registered is valid for 10 years from the filing date and can be reviewed for rolling 10-year periods. The Nice Classification system is followed by AREIPO and multi-class applications are possible.[8]

### ii Data protection

The protection of personal data is in its infancy in Africa. The best protection against data theft is to keep data secure. Uganda has a Computer Misuse Act 2011 that provides sanctions against the abuse of IT Systems. Kenya is planning a Data Protection Bill but this legislative proposal has yet to be enacted into law.

## IV FRANCHISE LAW

### i Legislation

There are at least eight countries in Africa with a franchise law. Two countries, namely South Africa and Tunisia have expressly regulated franchising. Other countries such as Kenya, Nigeria, Uganda, Egypt and the Cape Verde Islands and Angola regulate franchising through technology transfer legislation, application of agency laws or application of consumer protection legislation.

### ii Pre-contractual disclosure

Most African legal systems do not impose pre-contractual disclosure requirements on franchisors. South Africa and Tunisia are two noteworthy exemptions.

8 See www.lysaght.co.uk and the AREIPO website, www. areipo.org, for more details.

### *South Africa*

South Africa's Consumer Protection Act 2008 (CPA) classes the franchisee as a consumer and extends to the franchisee many of the protections provided to consumers. Providing franchisees with the right of disclosure was one of the prime objectives of the CPA in the franchise sector.[9] The franchisor must disclose to the franchisee the following information:

*a* the number of franchise outlets;
*b* the franchisor's turnover and net profit;
*c* a statement confirming whether there have been any significant changes in the financial position of the franchisor;
*d* a list of current franchisees; and
*e* contact details of the franchisor and an organogram depicting the support system and place for the franchisee.[10]

The disclosure document must be provided 14 days before execution of the franchise agreement. In addition the franchisee is entitled to a statutory cooling off notice.

### *Tunisia*

In Tunisia, Law No. 2009-68 dated 12 August 2009 regulates franchising. Article 15 of Law No. 69 requires the franchisor to provide to the franchisee a disclosure document. Disclosure must be made 20 days before the execution of the franchise agreement. Law No. 69 stipulates the following disclosure items:

*a* details of the franchisor;
*b* business history of the franchisor;
*c* proof of trademark registration;
*d* information about the franchise network including a list of franchisees in Tunisia;
*e* the amount of expenses and investments specific to the use of the trademark; and
*f* the financial statements of the franchisor.

### *Other African countries*

The new Kenyan Consumer Protection Act expressly provides that it is applicable to 'franchisees' but it does not create a technical disclosure requirement. Care must be taken, however, to structure the franchise so that it does not give rise to cooling off rights.

In African countries that derive their legal systems from Portuguese law (Cape Verde Islands, Angola, Mozambique) or French law (Tunisia, Algeria, Morocco) a general duty to good faith may exist that can require voluntary disclosure of key facts. However, due to the absence of any relevant case law no specific guidance is available. In former British colonies (Uganda, Ghana, Nigeria, Zambia, Botswana) the focus is on misrepresentation. This means not that active disclosure is required but that misleading information overstating profitability or success rate must be avoided.[11]

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9 Taswell Papier, 'Franchising in South Africa' in *Franchising in Africa 2012*, LexNoir.

10 South Africa Regulation 3 under the Consumer Protection Act 68/2008.

11 See, for example, Section 10.1 of the Contract Act in Uganda.

### iii Registration

There are no classic franchise registration laws in Africa. A number of registration issues in the wider sense arise. These relate to registration of certain franchise agreements as technology transfer agreements in countries such as Uganda, Nigeria and Ethiopia and in respect of mandatory registration of trademark licences for example in Egypt. Registration may also be needed to obtain permission to purchase hard currency. For example in Mozambique the franchise agreement, under which payment is owed, must be submitted to the Bank of Mozambique for approval.[12] The South African Reserve Bank equally screens franchise and licence agreements as part of the foreign payment approval process.

*Nigeria*

In Nigeria the National Office for Technology Acquisition and Promotion (NOTAP) deals with the registration and review of licence agreements that deal with, *inter alia*, use of the trademark, supply of technical expertise, supply of managerial assistance and training of personnel.[13] As franchise agreements include both a trademark licence and the transfer of technical know-how or training, they must be registered with NOTAP. NOTAP will examine the agreement to ensure it does not impose certain 'excessive' restrictions on the franchisee;[14] this includes a review of fair pricing and a review of the powers of intervention granted to the franchisor. There are 17 'blacklisted' items in total including the requirement that the franchisee must submit to the jurisdiction of foreign courts.

*Uganda*

On the face of it, Uganda's Investment Code Act requires all franchise agreements that involve the transfer of foreign technology to be registered. Absent registration, the agreement is void.[15] However, in practice, compliance with the Investment Code Act is rare and the authorities do not strictly enforce the Act.

*Ehiopia*

The Investment Proclamations 2002 and 2003 of the Ethiopian Parliament regulate technology transfer agreements. A pure product retail franchise is not caught.[16] Business process franchising, particularly in the service sector, may well require registration with the agency. As in Nigeria and Uganda there are restrictions imposed on the powers of the franchisor including as regards pricing and purchase ties.[17]

12 Diogo Xavir Da Cunha, *Franchising in Mozambique 2012*, LexNoir.

13 Chapter 62 of the Laws of the Federation of Nigeria 2004.

14 Theo Emuma and Bimbola Fowler-Eka, *Franchising in Nigeria 2012*, LexNoir, p. 189.

15 See Section 29.1 of the Investment Code Act of Uganda.

16 Article 14 of the Investement (amendment) Proclamation 375-2003.

17 Yohannes Asseta and Biset Beyene Molla, *Franchising in Ethiopia 2012*, LexNoir, p. 149.

### iv Mandatory clauses

Where franchise agreements are subject to registration under technology transfer laws, they may not contain certain prohibited provisions. These include certain restrictions on the use of the technology after termination (Uganda), supply of spare parts (Ethiopia) and export restrictions (Nigeria). Because some of the prohibited clauses run contrary to key principles of franchising, franchisors generally try to structure the agreements so that they fall outside the relevant legislation.

### v Guarantees and protection

Given the difficulties with local enforcement that can be encountered in many African countries, it is important that franchisors seek adequate security in the form of cash deposits, letters of credit or bank guarantees.

## V TAX

### i Franchisor tax liabilities

The main tax liability for franchisors is withholding tax. This has been discussed in Section II.iii, *supra*.

### ii Franchisee tax liabilities

Franchisees would be expected to pay local income and corporation taxes. VAT may also be payable on service fees.

### iii Tax-efficient structures

The most important tax structuring technique for most franchisors is to remain non-resident for tax purposes. This limits the exposure to local taxes to withholding tax. Obviously, this means that a local permanent establishment in the form of a local office or training centre must be avoided.

## VI IMPACT OF GENERAL LAW

Technology transfer requirements aside, franchise agreements are not very heavily regulated in Africa. Mostly, African legal systems recognise the autonomy of the contracting parties and allow them to provide, in their contractual arrangements, for such provisions as they see fit.

### i Good faith

The duty of good faith can be implied, particularly in those African countries that were influenced by French, Portuguese and German legal cultures. Given the most recent decisions of even the English courts regarding the existence of an implied duty of good faith in long-term contracts such as franchise and distribution agreements, franchisors would be well advised to act reasonably and in good faith when dealing with their African franchisees.

### ii Agency model

In African countries with a common law-based legal system, agency law is not applied to franchise agreements. Some countries with a Portuguese heritage do apply commercial agency law to franchise relationships. In Angola, the Angolan contract law specifically stipulates that the provisions governing termination of agency agreements also apply to franchise agreements. In Egypt, there is a debate ongoing regarding the application of the commercial agency law to franchising. The situation is comparable to that in most of the Middle East.

### iii Employment law

The franchise agreement should contain a clear provision to the effect that the relationship of franchisor and franchisee is an arm's-length commercial relationship between two businesses and not one of employer and employee.

### iv Consumer protection

Generally speaking, franchisees are not treated as consumers in Africa. Consumer protection legislation that affects franchisees only exists in South Africa and in Kenya.

In Kenya the Consumer Protection Act 2012 which came into force on 14 March 2013 (CPA) defines 'consumer' to include franchisees. The CPA protects consumers including franchisees from certain unfair practices. The CPA protects franchisees against excessively one-sided contractual agreements. Terms that are 'so adverse to the consumer as to be inacceptable' can be challenged under the CPA. The CPA is a very recent law, and as such, there is no case law to provide guidance on the type of provision that may be regarded as unacceptable. It is possible that the CPA may be viewed as mandatory law in which case it will apply despite the choice of foreign law as the governing law of the franchise agreement.[18] The sanctions for violation of the CPA include rescission of the agreement and damages, including punitive damages. If the agreement is rescinded, the rescission operates to terminate at the same time all related agreements such as guarantees, product supply agreements and the like.

The Kenya CPA is based on the South African Consumers Protection Act, which came into force in 2008 (the South Africa CPA). The South Africa CPA requires franchise agreements to be in writing and drafted in plain, understandable language. The term 'franchise agreement' is defined widely. It covers the traditional concept of franchising as well as certain licensing and distribution agreements. Under the South Africa CPA franchise agreements must include certain mandatory minimum content listed in the law. Franchisees can launch complaints against non-compliant franchisors with the National Consumer Commission or take action in the High Court. Fines of up to 10 per cent of the annual turnover of the franchisor can be imposed. The South Africa CPA also seeks to protect franchisees against unfair contract terms in franchise agreements. Unusually, the South African CPA introduces a right of the franchisee to select suppliers which limits the ability of the franchisor to impose a purchase ties. An exemption is available for branded goods of the franchisor. In all cases benefits received

18 See Appendix I on Kenya.

by the franchisor from suppliers such as kickback payments or marketing contributions must be fully disclosed. Further, all goods supplied by the franchisor to the franchisee must be reasonably fit for purpose and of good quality. Other important provisions affecting franchising include a restriction on unreasonable fees and the restriction of provisions which are not reasonably necessary for the protection of the business interest of the franchisor.[19] The South Africa CPA regulates in some detail the advertising fund and imposes a number of restrictions on how monies contributed by franchisees may be spent.

Elsewhere in Africa the African Consumer Protection Dialogue[20] works to assist African countries with the creation of consumer protection initiatives. This includes a legal framework toolkit. Participating countries include Egypt, Morocco, Uganda, Tanzania, Ghana, Nigeria and South Africa, to name a few. Initiatives by the United Nations are also on the way to improve competition and consumer protection law in Africa.

### v Restrictive covenants

In most African countries, with a few exceptions, restrictive covenants can be enforced against the franchisee. As is the case in Europe, the restrictions need to be reasonable in order to be enforceable.

In South Africa, enforcement is judged on a case-by-case basis. The franchisor needs to demonstrate that the restraint is necessary to protect a legitimate interest and the interest protected by franchisor needs to outweigh the franchisee's interest to continue working in its learned profession. Facts considered by the court include the duration and geographical scope of the restriction and whether adequate consideration has been given for the restraint.[21] Examples of interests capable of protection by restraint of trade include typical franchisor IP rights such as trade secrets and know-how but not general business training and business systems. Overall, given these high standards, enforcement is likely to be difficult and liquidated damages provision may be a better route to creating some protection.

In Nigeria, the NOTAP Registration Rules prevent registration of a franchise agreement that prevents the franchisee from 'using complementary technology'. This would suggest that the franchisee must be free, both during and after the term, to engage in a similar business. There are no cases of enforcement of restrictive covenants in Uganda. In Kenya restrictive covenants can be declared void by the court, if the court is of the view that the restriction goes beyond what is reasonably necessary. Angola limits enforcement to a period of no more than two years and to the contractual territory and client base covered by the agreement. In Cape Verde, Mozambique and Tunisia the

19 Lize Louw, 'South Africa: Re-evaluating Franchise Agreements and Disclosure Practices', Mondaq.

20 www.icpen.org.

21 Taswell Papier, 'Franchising in South Africa' in *Franchising in Africa 2012*, LexNoir, pp. 220, 221.

maximum permitted restriction is 12 months. In Ethiopia a restriction of up to five years is permitted. In Egypt restrictive covenants are unlikely to be enforceable.

### vi Termination

In some African countries franchise, agency and technology transfer laws restrict termination.

In Angola the application of agency law requires the payment of good will compensation for loss of the client base upon termination. The Angolan courts follow the Portuguese courts and their strict application of commercial agency law to franchising.[22] Interestingly, despite their Portuguese heritage the Cape Verde Islands have not followed this approach.[23] In Egypt, some sources suggest that Commercial Agency Law[24] applies to franchising. The Agency Law imposes a mandatory notice to cure on the franchisor and termination of franchise agreement under the Agency Law would be limited to termination for material breach.[25] Termination would typically be permitted for breach of a material contractual obligation by either party.[26] Elsewhere in Africa, the view prevails that termination is governed by the contractual arrangement between the parties. This suggests that specific termination events should be included in the franchise agreement in the usual way and if these termination events occur the franchisor should be free to terminate. In South Africa termination upon the occurrence of an insolvency event may be complicated by the business rescue provisions contained in the Companies Act 71 of 2008. Under these provisions the business rescue practitioner can elect whether to suspend or cancel certain contractual provisions for a period of time.

### vii Competition law

The main focus of competition law in Africa is on the control of monopolies, mergers and cartels and not on the control of vertical restraints. The main functioning authority competition law in Africa is COMESA. COMESA is a trade union comprising, *inter alia*, Libya, Egypt, Sudan, Eritrea, Ethiopia, Uganda, Kenya, Zambia, Zimbabwe and Madagascar. It offers to Member States a wider harmonised and more competitive market.[27] The focus is on the removal of trade and investment barriers between Member States with the vision of creating a fully integrated competitive and unified region in which goods, services, capital and persons can move freely.

COMESA has a competition commission that deals principally with the approval of mergers and acquisitions. The COMESA Competition Commission is responsible for 'promoting fair competition and penalising uncompetitive practices in the region'.[28] The COMESA Competition Regulations that were issued in 2013 prevent various restrictive

22 João Afonso Fialho, *Franchising in Angola 2012*, LexNoir, p. 101.

23 João Afonso Fialho, *Franchising in the Cape Verde Islands 2012*, LexNoir, p. 127.

24 Law 120 of 1982.

25 Mazeiro and Maisonneuve, ABA Paper for the 32nd ABA Forum on Franchising 2009.

26 Bonzo Makgalemele, *Franchising in Botswana 2012*, LexNoir, p. 114.

27 www.comesa.int.

28 www.comesacompetition.org.

practices. Restrictive practices are defined as 'any conduct which appreciably restrains trade between member states'. The general principles established by the COMESA regulation follow the concepts of European competition law. The current focus as regards vertical restraints is on exclusive arrangement. It is expected that COMESA will follow European case law and practice for guidance in this area.[29] Hopefully, this will mean that franchise agreements will be considered exempt. The general guidance available suggests that restrictions which are indispensable for attaining certain legitimate business objectives will be permitted. It is thought that exclusive vertical agreements are unlikely to be prohibited in the absence of market dominance if it can be shown that there will be some technological or efficiency gain.[30] Given its pro-competitive effect, it is hoped that franchising will not be discouraged by the new COMESA rules.

Countries such as Botswana, Kenya and Namibia also have their own local active competition agencies. Mozambique has recently enacted a competition law that prohibits, *inter alia*, certain horizontal and vertical agreements and the abuse of dominance. The Botswana competition regulations came into force in October 2011 and active enforcement is now reported to be gaining momentum.

**viii Anti-corruption and anti-terrorism**

Corruption is a major problem in Africa. In 1999 a number of African states adopted the African Union Convention on preventing and combating corruption. The African Union has 53 members[31] including Algeria, Angola, Botswana, Cameroon, Chad, Congo, Egypt, Eritrea, Ethiopia, Gambia, Kenya, Libya, Madagascar, Mauritania, Namibia, Nigeria, South Africa, Senegal, Somalia and Sudan. Approximately half of the Member States of the African Union have ratified the Convention. The United Nations Convention against corruption has been ratified by 140 countries. Most African countries have ratified the Convention with the exception of Chad, Sudan, South Sudan, Eritrea, Somalia and Equatorial Guinea. The UN Convention is dedicated principally to prevention with measures directed at both the public and private sectors. It further requires that countries establish criminal offences to cover a wide range of acts of corruption. Additionally, in a major breakthrough, Member States agreed on asset recovery, which is stated explicitly as a fundamental principle of the UN Convention. As a result of the above conventions, corruption and bribery is a criminal offence in most African countries but enforcement and prevention have a long way to go before making a significant impact. Several African nations were among the worst performers in the Transparency International Annual Report on Perceived Corruption. Somalia was one of three nations receiving the lowest score in the report released on 3 December 2013 by the Corruption Watchdog Group. The report rates each nation with a score of between zero and 100 with zero being the lowest score. African countries that scored 20 or below include Sudan, South Sudan,

29 Lebohang Lengoasa, 'Competition Law and Exclusive Vertical Agreements in Africa', 6 July 2013.

30 Ibid.

31 See www.africa-union.org.

Guinea Bissau, Equatorial Guinea, Chad and Eritrea. Only three African nations received scores of around 50, namely Botswana, Cape Verde and Ruanda.

Another significant issue for US franchisors that enter the African market is compliance with the USA Patriot Act and the necessary anti-terrorism screening that they need to undertake in respect of their franchisees. Equally UK-listed companies and other companies listed on a recognised stock exchange need to satisfy themselves that their franchisees are not in any way associated with any form of terrorism or sources funded by terrorists. The African Union has adopted a resolution in which the Union pledges to fight terrorism but the continent clearly has a long way to go.[32] The US has tried to combat terrorism in Africa by providing counter-terrorism aid to certain targeted African countries, mainly in north-west Africa (i.e., Morocco, Algeria, Mauretania, Niger, Chad, Nigeria and Mali) but with limited success. At this point it is recommended that the focus of franchisors should be on careful due diligence regarding their local franchisee to satisfy themselves that the local franchisee has no terrorist connection and is not funded with money that represents proceeds from terroristic activities or money laundering.

### ix Dispute resolution

Franchisors have two choices when it comes to the modality of dispute resolution with their African franchisees. They can opt for international arbitration before a recognised arbitration institution such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) or the American Arbitration Association (AAA) or the United Nations Conference on International Trade Law (UNCITRAL). The ICC has a number of regional branches including in Dubai and Tunisia. The other option for franchisors is to ask the franchisee to submit to the jurisdiction of a foreign court, usually the competent court in the home jurisdiction of the franchisor. Theoretically the franchisor could accept the jurisdiction of the local courts of the country where the franchisee operates, but this is rarely done given the uncertainty and lack of development of the judiciary in most African countries. The difficulty with a foreign jurisdiction clause will be local enforcement of a foreign judgment in the relevant African country. Most African countries will have a procedure for recognition and enforcement of foreign judgments but the procedure may involve a fresh examination of some of the merits of the case. Absent specific bilateral treaties, it is therefore not recommended that franchisors impose the jurisdiction of their home courts due to the difficulties with enforcement.

As a result arbitration is often the preferred method of dispute resolution for international franchisors. Many African countries are parties to the New York Convention on the Recognition and Enforcement of Arbitration Awards. In total 149 countries have ratified this Convention but some important African states are still missing namely Libya, Chad, Sudan and South Sudan, Ethiopia, Somalia, Congo, Angola, Namibia, Zimbabwe, Malawi, Sierra Leone, Guinea Bissau and Western Sahara.

32 See, for example, Eric Schmitt, 'International Effort Seek to Counter Jihadists in Africa', *The New York Times*, 26 June 2013.

Specific advice should in each case be sought by franchisors regarding the best approach to choice of law and jurisdiction.

As regards choice of law, the freedom of the parties to elect the law of a foreign country to govern their contract is largely recognised with some limitations. In Angola, Mozambique and Cape Verde, the parties must demonstrate that the law chosen has a meaningful connection with the contract. This suggests that a neutral law such as Swiss law or English law can only be chosen if one of the parties is based in the UK or Switzerland. In Ethiopia, the parties must opt for one of a number of permitted choices including the law of nationality of a party or the place of performance.[33] In Egypt, there is a risk that the choice of a foreign law will not be valid if the franchise agreement is classed as a technology transfer agreement or agency agreement.

Public policy limitations exist nearly everywhere and can at times be interpreted widely to include any violation of any local law, for example in Nigeria.[34] Any local mandatory franchise, agency or technology transfer laws are likely to take precedence.[35]

33 Draft Proclamation to Provide for Federal Rules of Private International Law, Article 21-1.

34 Theo Emuwa and Bimbola Fowler-Ekar, 'Franchising in Nigeria' in *Franchising in Africa 2012*, LexNoir, p. 195.

35 For example, the Tunisian Franchise Law.

## Appendix 1

# ABOUT THE AUTHORS

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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.

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