

## Chapter 29

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# KENYA

*John Syekei, Philip Coulson and Babette Märzheuser-Wood<sup>1</sup>*

### I INTRODUCTION

The international franchise market in Kenya has grown extensively. There are currently a considerable number of international franchisors with established operations in the Kenyan market, for example KFC, Nando's, Subway, Papa John's and Dubai-based Baby Shop or South African Mr Price. Local franchisors are few but well established within the Kenyan market, such as the livestock services offered by Sidai Africa to local farmers and Sasini Tea and Coffee or Dormans Coffee. The Kenyan franchise industry is not formally organised into a national body but there is a Kenya Franchise Association (KEFRA) which was called into life as part of a private local initiative.

### II MARKET ENTRY

#### i Restrictions

There are no specific restrictions or approvals for foreign franchisors entering the Kenyan market. There are, however, regulatory issues relating to establishing a business or operating a branch in Kenya. Typically, it would be best to structure the franchise so that the franchisor does not acquire a local presence. Most franchise agreements are structured in this way. Kenyan law is based on common law principles and very similar to English law so that English law agreements can be used without substantial amendments. The decisions of the English courts are often used as persuasive precedents.

Certain franchise agreements or arrangements may fall within the ambit of the Competition Act, 2010 if they are determined to involve restrictive trade practices, that is:

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<sup>1</sup> John Syekei and Philip Coulson are partners at Coulson Harney Advocates and Babette Märzheuser-Wood is head of the EMEA franchise group at Dentons.

*agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in goods or services in Kenya, or a part of Kenya.*<sup>2</sup>

Examples of restricted practices under the Competition Act include fixing purchase or sale prices, limiting or controlling production or investment, distorting or restricting competition, among others. The foregoing practices are prohibited unless they have been specifically exempted in the prescribed manner under the Competition Act by the Competition Authority. The nature of the franchise business may also require the franchisor to seek approval from the regulatory body and procure a licence if it operates or proposes to operate in a regulated industry, for example, telecommunications, insurance, banking and so on. Most franchise industry sectors such as retail, restaurants and hotels are unregulated and freely accessible. For a service franchise a closer look needs to be taken at the relevant industry.

There are no specific restrictions on a foreign entity granting a master franchise or development right to a local entity since there is no specific law in Kenya governing franchise arrangements. Parties to a franchise agreement are free to incorporate transfer restrictions into the franchise agreement subject to the provisions of the Competition Act as highlighted above.

Local equity participation requirements will apply in respect of the following industries:

- a* mining;
- b* maritime;
- c* aviation;
- d* banking and insurance; and
- e* telecommunications.

Statutory restrictions on ownership of land by foreign nationals will also apply to foreign individuals or corporate entities with foreign shareholders under the Kenyan Constitution and the Land Registration Act.

## **ii Foreign exchange and tax**

There are currently no exchange controls applicable in Kenya that restrict the repatriation or remittance of foreign currency.

The Central Bank Act, Cap 491 of the Laws of Kenya<sup>3</sup> states that the following transactions must be effected through an authorised bank:

- a* payments in Kenya, to or for the credit of a person outside Kenya;
- b* payments outside Kenya, to or for the credit of a person in Kenya; and
- c* payments in Kenya (other than a payment for a current transaction) between a resident and non-resident.

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2 Section 21(1), Competition Act, Cap 504 Laws of Kenya.

3 Section 33H(1) Central Bank Act, Cap 491 Laws of Kenya.

A person who contravenes the above provisions commits an offence and shall be liable on conviction to a fine not exceeding 500,000 shillings or to imprisonment for a term not exceeding three years, or to both. However, it is a formality to handle payments through an authorised bank and not an obstacle in practice to payment of franchise fees.

In Kenya, withholding tax is chargeable with respect to dividends, interest, royalties and technical services fees. Royalty payments payable by the franchisee to the franchisor are subject to a 5 per cent withholding tax where paid to a resident whereas the rate of 20 per cent applies if royalties are paid to a non-resident. As most foreign franchisors will be non-residents, they face a 20 per cent withholding tax. This can have a significant impact on royalty revenue unless a grossing up clause is agreed.

A withholding tax of 10 per cent is levied on the payment of technical service fees (as well as professional/management fees) where the services are provided by a resident. The rate is 20 per cent where the service provider is non-resident.

Under the current VAT Act, VAT is chargeable at 16 per cent regardless of whether or not the franchisor has a place of business in Kenya. Where the franchisor has no place of business in Kenya and the franchisee is a registered person (invariably a Kenya-based business), the franchise will be treated as an imported taxable service and VAT will be due from the franchisee.

### III INTELLECTUAL PROPERTY

#### i Brand search

Trademark searches are conducted at the Kenya Intellectual Property Institute (KIPI).

The trademarks registries database (trademark register) is computerised and searches are undertaken to confirm availability of trademarks and whether prior third party rights exist on the register. Searches will also reveal whether the conflicting marks are registered in similar classes which are identical or similar in representation (visually and phonetically). When considering phonetic similarity local language needs to be considered.

The search can be conducted by any person or by a trademark agent authorised by such person (personal search), or by a trademark examiner at KIPI (official search) who will issue a search report on the trademark and whether there is any conflict.

There is no specific protection regime for image rights or business processes in Kenya. Common law principles on privacy, copyright image rights, passing off and trade secrets/confidentiality would be applicable in this regard.

Kenya also recognises and protects unregistered marks.

#### ii Brand protection

Trademarks are filed at KIPI. The process for trademark filing is as follows:

- a* filing and lodging the prescribed application form together with seven representations of the proposed trademark;
- b* payment of prescribed fees;
- c* examination of the application (for formal accuracy [and merit]) by the Registrar of Trademarks;

- d* notification whether the Registrar has accepted, refused or granted conditional acceptance;
- e* upon acceptance for registration, advertising of the proposed trade marks in the IP Journal; and
- f* if no opposition is lodged against the registration of the proposed trademark during the opposition period (60 days from the date of advertisement), a certificate of registration is issued by KIPI.

The process of registration normally takes six months.

Copyright subsists and is protected at the time when a copyright work is created by the author in a material form. Copyright-protectable works can be registered in Kenya with the Kenya Copyright Board. This can be used by franchisors to protect the manual or training materials, etc. The registration process entails the following:

- a* filing and lodging the prescribed application form together with a representation of the copyrightable works and an affidavit sworn by the author of the works;
- b* payment of prescribed fees of US\$125; and
- c* a certificate of registration is normally issued within two weeks of filing the application.

### iii Enforcement

The registered owner of a trademark obtains the right to exclusive use of the trademark for a period of 10 years. The Trademarks Act makes it a criminal offence for any person to forge and use a forged trademark or falsely apply for a registered trademark, and upon conviction, a person is liable to the prescribed fines, imprisonment and forfeiture of goods.

The Trademarks Act also provides for proceedings before the High Court for passing-off in the case of unregistered marks, and infringement in the case of registered marks. A claim for unfair competition may also be made as a subsidiary claim to either passing-off or trademark infringement. The owner of the trademarks is entitled to the following remedies, among others: damages, injunctive relief and interestingly an account for profit.

Infringement of copyright is also actionable in the High Court. The remedies available for infringement of copyright include: damages; injunctive relief; and again an account for profits; delivery up of any infringing copies, or any article used or intended to be used for making infringing copies; or an award of an amount calculated on the basis of reasonable royalty that would have been payable by a licensee in respect of the work or type of work concerned.

These provisions are very useful to franchisors in that they can claim ongoing payment of franchise fees and an account of profits if a franchisee continues to use their trademarks and copyright materials after termination or expiry of the franchise agreement.

The Anti-Counterfeit Act Cap 130A prohibits trade in counterfeit goods and establishes the Anti-Counterfeit Agency which combats dealing in and authorises seizure of counterfeit goods in Kenya. Offences in counterfeiting are liable to imprisonment or to a fine, in respect of each article or item involved in the particular act of dealing in

counterfeit goods to which the offence relates, not less than three times the value of the prevailing retail price of the goods, or both.

Confidentiality clauses and non-disclosure clauses in franchise agreements are enforceable in accordance with their provisions and according to contract law and English common law principles which are persuasive in Kenyan courts.

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

Kenya does not have specific statutory law regulating data protection and follows principles of English common law relating to data protection as a guide. The Data Protection Bill and Freedom of Information Bill, which are yet to be enacted into law, will regulate data protection and privacy. The Kenya Information Communications Act 2010 contains certain data protection provisions such as protection of confidential information, consumer protection against unauthorised use of personal information as well as safekeeping of data security by a certification service provider.

The Central Bank of Kenya regulates money remittance and payment systems, including electrical retail transfers and e-money under the National Payment System Act and Money Remittance Regulations under the Central Bank of Kenya Act.

### **IV FRANCHISE LAW**

#### **i Legislation**

There are no specific laws in Kenya governing franchise agreements. Franchise agreements are generally regulated by the Law of Contract Act and English common law principles relating to contract law.

Kenyan courts generally observe choice of law and forum clauses in contract. The governing law is chosen by the parties. Kenyan courts will only disregard the application of a rule of foreign law where its application would be contrary to public policy.

Aspects of the franchise agreements are also regulated by the Trademark Act, with regard to the protection of trademarks and patents of the franchisor, the Competition Act, the Consumer Protection Act, and the Income Tax Act, among others.

#### **ii Pre-contractual disclosure**

Kenyan law does not prescribe any pre-contractual disclosure requirements in franchising since there is no specific legislation governing franchise agreements in Kenya and the general common law approach of caveat emptor (the buyer beware – or the buyer must do its own research and due diligence) applies. A cooling off notice may, however, have to be given in relation to certain franchise agreements that are made remotely under the new Kenyan Consumer Protection Act (CPA).

#### **iii Registration**

There are no specific approval, registration or filing requirements for franchise agreements. Franchise agreements in Kenya are governed by the law of contracts.

However, any trademarks that are the subject of a franchise agreement should first be registered. While Kenya recognises unregistered trademarks as a concept it will

be much easier to take proceedings against a franchisee that continues to use the system and the marks after termination if such action can be based on trademark infringement.

The nature of the franchise business may also require the franchisee to seek regulatory approval if they operate or propose to operate in a regulated industry, for example, telecommunications, insurance, banking and so on.

Certain franchise transactions may also need approval of the Competition Authority under the Competition Act to ensure that the franchise does not impede competition, and assess its effects on consumer welfare in Kenya. This is due to the fact that agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings that have as their object or effect the prevention, distortion or lessening of competition in trade in goods or services in Kenya or a part of Kenya<sup>4</sup> are prohibited unless they have been specifically exempted under the Competition Act.

#### iv **Mandatory clauses**

A franchise agreement is a contract between the franchisor and the franchisee governed under the law of contracts in Kenya and the provisions of English common law. Since there is no specific legislation governing franchise agreements in Kenya, there are no mandatory clauses for franchise agreements.

Contracts are not prescribed in Kenya and hence the franchise agreement will contain provisions agreed upon between the franchisor and the franchisee. There are, however, typical boilerplate clauses contained in contractual agreements such as: duration/term, assignment, payment terms, disclosure, confidentiality, dispute resolution, obligations of parties as well as termination.

#### v **Guarantees and protection**

It is common practice for the franchisor to require a guarantee from the franchisee's owner as guarantor acting as security to ensure the franchisee meets its obligations.

A guarantee must meet the essential conditions required to form a valid and enforceable contract. The Law of Contract Act provides that a guarantee must be in writing or there must be a memorandum of it in writing signed by the guarantor. For it to be enforceable, it must be perceived that the guarantor was aware of the full implications of signing a guarantee. It must also be perceived that the franchisor reasonably believed that the guarantor was not acting under 'undue influence', and that the franchisor acted in good faith in this regard. The guarantee should therefore be in a stand-alone written agreement containing express language covering the above requirements.

Guarantees from individuals as well as companies are enforceable in Kenya.

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4 Section 21(1) Competition Act, Cap 504 Laws of Kenya.

## **V TAX**

### **i Franchisor tax liabilities**

Local franchisors, resident in Kenya will be liable to corporate tax at the rate of 30 per cent. A rate of 37.5 per cent is applicable to the taxable profits of non-resident foreign companies.

International franchisors have no tax obligation where they are not operating any business in Kenya. The obligation to pay withholding tax will fall with the franchisee operating the business in Kenya before remittance of the royalties to an international franchisor. As stated above the rate of withholding tax is 20 per cent.

### **ii Franchisee tax liabilities**

Part of the franchisee's obligations is the payment of royalties to the franchisor. In Kenya, royalty payments to a resident are subject to a 5 per cent withholding tax whereas the rate of 20 per cent applies if royalties are paid to a non-resident.

The franchisee is also obligated to pay VAT in Kenya as per the Value Added Tax Act, No. 35 of 2013. Where the franchisor does not have a place of business in Kenya and the franchisee is a registered person (invariably a Kenya-based business), the franchise will be treated as an imported taxable service and VAT on it will be due from the franchisee.

### **iii Tax-efficient structures**

The Kenya Revenue Authority has introduced remarkable efficiency and professionalism in tax administration and operations. There is a deduction allowed against profits on expenditure of a capital nature spent on buildings and machinery used for the purposes of manufacture and certain hotels of 100 per cent.<sup>5</sup> Manufacturing investment in buildings and machinery attract an investment allowance of 150 per cent on the plant, machinery, buildings and equipment. Enterprises in export processing zones also enjoy a 10-year tax holiday.

Inclusion of gross-up provisions in franchise agreements may also provide some tax efficiency for franchisors who receive payments such as royalties from franchisees.

## **VI IMPACT OF GENERAL LAW**

### **i Good faith and guarantees**

There is no implied duty of good faith under Kenyan contract law, in respect of franchise agreements. Where parties wish to include a duty of good faith, this must be expressly provided in the terms of the contract. The newly enacted CPA which came into force on 14 March 2013 defines 'consumer' to include franchisees. The CPA protects franchisees from certain unfair practices and extremely one-sided franchise agreements may come under threat.

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5 [www.kra.go.ke/publications/publicationguidetoinvest.html](http://www.kra.go.ke/publications/publicationguidetoinvest.html).

**ii Agency distributor model**

Franchisors can be treated as principals while the franchisees can be treated as agents. English common law principles on agency and contract apply in Kenya in construing provisions in a contract; hence, under common law a claimant can sue a franchisor for the acts of the franchisee where it can be shown that the franchisee acted under ostensible authority.

Claims brought against a franchisor are decided on the common law principles of agency or apparent agency. However, it is for the claimant to show that indeed there was an agency relationship created by the franchise agreement. To protect against this it is important that the franchise agreement clearly states that there is no agency. Further, the franchisee should be required to display in its business premises and on all official correspondence a clear statement that they are an independent business operated under licence from the franchisor.

**iii Employment law**

A corporate franchisee cannot be an employee of the franchisor as an employee must be a natural person.

There are no specific restrictions on an individual franchisee being an employee of the franchisor. However, if a court was required to determine this question, it would look at the circumstances of the working relationship between the franchisee and the franchisor as well as the terms set out in the franchise agreement. Agency liability and tax consequences would also be considered.

**iv Consumer protection**

The CPA defines a consumer to include a franchisee in terms of a franchise agreement to the extent applicable in terms of the CPA.<sup>6</sup> Therefore, franchise agreements should be made in accordance with the provisions of the CPA and its regulations.

There is an exception to this provision where the court may order that a consumer be bound by all or parts of the franchise agreement where it determines that it would be inequitable in the circumstances for the consumer/franchisee not to be bound. This could be of some help where the franchisee is very clearly a large company that is not in need of consumer type protection.

As a consumer, the franchisee has a number of rights including: the right to quality goods and services; the right to disclosure; and protection from unfair practices, which includes protection from unconscionable conduct.

The Consumer Protection Act also provides for protection of the franchisee (consumer) from unfair practices. The Consumer Protection Act provides that unfair practices include false, misleading or deceptive representations and unconscionable representations, and gives instances of what would constitute these.

Where a franchise agreement is not signed by the franchisor and the franchisee at the same time and in the same room, a franchise agreement could also be a 'remote agreement' under the CPA giving the franchisee a cooling off right. To avoid this situation

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6 Section 2(1) Consumer Protection Act, No. 46 of 2012.

it is recommended that all franchise agreements be signed in person and not by e-mail or otherwise remotely.

#### v Competition law

Certain franchise agreements or arrangements may fall within the ambit of the Competition Act, 2010 if they are determined to be restrictive trade practices, that is:

*agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in goods or services in Kenya, or a part of Kenya.*

Such agreements are prohibited unless they have been specifically exempted under the Competition Act by the Competition Authority. Examples of prohibited restrictive practices include:

- a* directly or indirectly fixing purchase or selling prices or any other trading conditions;
- b* dividing markets by allocating customers, suppliers, areas or specific types of goods or services;
- c* any practice involving a practice of minimum resale price maintenance;
- d* limiting or controlling production, market outlets or access, technical development or investment; or
- e* otherwise preventing, distorting or restricting competition.

Clearly most franchise agreements involve the allocation of exclusive territories and hence the division of markets. Franchise agreements also contain purchase ties by requiring the franchisee to purchase products from the franchisor or its nominated suppliers. This suggests that franchise agreements could be prohibited agreements unless they are exempted. The Competition Act, however, provides that an undertaking or association of undertakings may apply to be exempted in the prescribed manner from the above provisions of the Act. Without obtaining an express exemption it is difficult to say whether the restrictions in the franchise agreement will be enforceable. Mostly, competition authorities in emerging markets focus on more obvious and significant anti-competitive practices such as cartels and abuse of market power, but it cannot be ruled out that a certain practice in a franchise agreement that restricts competition could not be challenged under the Act, absent an exemption. If the franchisor is looking for certainty, they should therefore apply for an exemption.

The Authority in determining the application for exemption may:

- a* grant or refuse to grant the exemption; or
- b* issue a certificate of clearance stating that in its opinion, on the basis of the facts in its possession, the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices does not constitute a restricted trade practice.

**vi Restrictive covenants**

The Contracts in Restraint of Trade Act provides that an agreement containing a restriction of trade is not void but can be declared void by the court if it is of the view that the covenant is not reasonable either in the interests of the parties, inasmuch as it affords more than adequate protection to the party in whose favour it is imposed against,<sup>7</sup> or the provision is contrary to public interest. This could typically be used to challenge post-term restrictions of competition by the franchisee such as the requirement not to engage in a competing business for a period of time after termination. If it can be shown that the restriction does not go beyond what is reasonably necessary, it will normally be enforceable. As a rule, restrictions should be limited geographically and in time, and similar drafting principles to those recommended for English law agreements do apply. A restriction for a period of time not exceeding one year whereby the franchisee could not compete with the franchisor from the location of its former store (or a reasonable area nearby) would normally be enforceable. If the franchisee breaches the non-compete and other restrictive covenants outlined in the franchise agreement, the franchisor may seek redress through the courts, possibly by applying for an injunction to prevent further breach or the parties can use alternative dispute resolution mechanisms provided for in the agreement such as arbitration or mediation.

**vii Termination**

The termination of franchise agreements will typically be governed by the contract between the parties and English common law principles on agency and contract.

Post-term restrictive covenants will be enforced as laid out in the contractual agreement between the franchisor and franchisee and by the Contracts in Restraint of Trade Act. See subsection vi, *supra*.

The franchisor may be able to take over the franchisee's business but only upon prior satisfaction of the legal requirements for certain specific businesses as well as the provisions of the Competition Act above. Accordingly, if the franchisee is active in a restricted sector, a foreign franchisor may not be able to take over the business but it may be able to nominate a local successor franchisee that meets the relevant licensing requirements.

The franchisor may face restrictions on the percentage of equity that it may legally be authorised to acquire in a local entity or franchisee for some specific business industries which require that a certain percentage of local shareholding shall be maintained.

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

Kenya does not have specific anti-terrorism legislation although there is an Anti-Terrorism Bill that contained controversial provisions and still awaits debate and approval in Parliament. The Penal Code and the Proceeds of Crime and Anti-Money Laundering Act, 2009 makes it an offence for any person (franchisor or franchisee) to open, operate, finance, recruit or assist any person or organisation engaged in terrorist activities.

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<sup>7</sup> Section 2(1) Contracts in Restraint of Trade, Cap 24 Laws of Kenya.

Under the Proceeds of Crime and Anti-Money Laundering Act, a person (both franchisee and franchisor) should not enter into any agreement or engage in any arrangement or transaction with anyone in connection with property that it knows or ought reasonably to know or perform any other act in connection with the property obtained through commission of an offence.

There is an Anti-Corruption and Economic Crimes Act (Cap 65 of the Laws of Kenya) with the objective of providing for the prevention, investigation and punishment of corruption, economic crime and related offences.

#### ix Dispute resolution

Parties to franchise deals generally tend to follow the method of dispute resolution stipulated in the franchise agreement between them. Typical franchise agreements provide for arbitration as a dispute resolution mechanism. However, the franchisor and franchisee in a franchise agreement may opt for litigation on matters that call for the attention of the courts.

The Constitution of Kenya provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, provided that they do not contravene the Bill of Rights, are repugnant to justice and morality or inconsistent with the Constitution or any written law.<sup>8</sup>

Mediation is recognised as form of alternative dispute resolution in Kenya. Mediation is, however, not mandatory, although parties are at liberty to convert arbitration to mediation or to suspend court proceedings to seek alternative dispute resolution methods, mediation included.

Kenyan courts do recognise and uphold foreign choice of law or jurisdiction. In the case of *Skoda Export Limited v. Tamoil East Africa Limited*,<sup>9</sup> the court held they are empowered to respect the rights of parties to choose the place where they intended to resolve their dispute. Despite this principle, there have been instances where the Kenyan courts have accepted jurisdiction despite an exclusive foreign jurisdiction clause.

There is no specific specialist mediation facility for franchise disputes. Arbitration is probably best suited to tailor the dispute resolution mechanism to the preferences of the parties as arbitrators with experience in international licensing can be chosen. Failing that, disputes arising from franchise agreements may be resolved before the Kenyan courts. The procedure and timelines for instituting the suits in the Kenyan courts is set out under the Civil Procedure Act and Civil Procedure Rules, 2010. Where the parties have provided for arbitration and other methods of dispute resolution in the franchise agreement, Kenyan law allows for parties to agree to seek conservatory or similar interim relief in any court of competent jurisdiction, including Kenyan courts.

It is possible to obtain an interim or permanent injunction to prevent a former franchisee from continuing to trade in breach of non-compete provisions.

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8 Article 159(2) and (3), Constitution of Kenya, 2010.

9 Civil Case No. 645 of 2007.

Damages for breach of contract are calculated based on the English principle that the plaintiff is only due damages that were contemplated in the agreement. Any claim for damages must be specifically pleaded and proved for it to be awarded.

In making an award for damages for breach of contract, the courts are guided by the following principles:

- a* the amount of damages is to compensate the claimant for his or her loss not to punish the defendant;
- b* damages are compensatory – not restitutionary;
- c* contractual damages are limited to those damages that the parties intended to be recoverable; and
- d* damages must be specifically pleaded and proved.

The courts have discretion and power to determine by whom and out of what property and to what extent such costs and damages are to be paid, and to give all necessary directions for that purpose. It may also award interest on costs at any rate not exceeding 14 per cent per annum, and such interest shall be added to the costs and shall be recoverable as part of the costs.<sup>10</sup>

Costs are capped if they are taxed.

Enforcement of a judgment is made by a separate application to court in which the party seeking to enforce judgment sets out what mode of enforcement it desires in the form of a decree. The party seeking to enforce its judgment requests assistance from the court to execute its decree whether by attachment or property, imprisonment of the judgment debtor, delivery of property or whatever relief it requires. The civil procedure rules provide that the decree is signed and sealed by the Registrar of the High Court upon satisfaction that it is drawn up in accordance with the judgment and is approved by all parties to the suit.

Enforcement of arbitral awards is done by the successful party making an application to the court accompanied by the original award and the arbitration agreement. Once the award is recognised by the court, it is enforceable in the same manner as a judgment.

Kenyan courts readily recognise foreign arbitral awards. Kenya is a signatory to New York Convention, which it assented to on 10 January 1989.

A foreign arbitral award is enforceable in Kenya in the manner prescribed in the New York Convention, which states that a party seeking to enforce an arbitral award shall apply to the High Court of Kenya for its enforcement with the following documents accompanying the application:

- a* the original arbitral award or a certified copy; and
- b* the original arbitration agreement.

The Kenyan Arbitration Act also provides that an international arbitration award shall be recognised as binding and enforced in accordance with the provisions of the New York

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10 Section 27, Civil Procedure Act, Cap 21 Laws of Kenya.

Convention or any other convention to which Kenya is signatory and relating to arbitral awards. On balance it is easier to enforce foreign arbitral awards than foreign judgments.

The case of *CMC Holdings Limited & CMC Motors Group Limited v. Jaguar Land Rover Exports Limited*<sup>11</sup> is noteworthy, where CMC Holdings had entered into a franchise agreement with Land Rover Exports Limited on 12 December 1985 in relation to the Landrover franchise. The applicant was seeking an interim injunction restraining the respondent from interfering with the distributorship agreement. The judge held that the application for an injunction was not merited and was dismissed with costs to the respondent and that the matter be determined through arbitration as provided in the franchise agreement between the parties. The arbitration is still ongoing.

## VII CURRENT DEVELOPMENTS

In spite of lack of a comprehensive legal framework that deals with franchising, the developments in this field are impressive. It is growing rapidly even though in the recent past it had been slow and limited to foreign firms partly due to lack of intellectual property enforcement in most African countries, which hampers the process of branding that is required for successful franchising.<sup>12</sup> The franchising market in Kenya is evolving from single-unit owners to multi-unit operators employing professional staff of field and unit managers.

The Kenyan market has seen a considerable number of new franchise entrants such as Clarks, Subway, KFC, as well as Estée Lauder, which launched its products in Kenya through a franchise agreement with Lyntons Beauty World.

Franchising in Kenya is on the rise and will call for more specialised franchise laws in Kenya. The recent introduction of the CPA follows the South African example and like South Africa includes franchisees among the definition of consumer.

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11 [2013] e K.L.R.

12 Nora Dihel, 'Beyond the Nakumatt Generation: Distribution Services in East Africa', World Bank, October 2011.

## **COULSON HARNEY ADVOCATES**

Nairobi Business Park  
Ngong Road  
PO Box 10643-00100  
Nairobi  
Kenya  
Tel: +254 20 289 9000  
Fax: +254 20 289 9100  
p.coulson@coulsonharney.com  
j.syekei@coulsonharney.com  
www.coulsonharney.com

### **PHILIP COULSON**

#### *Coulson Harney Advocates*

Philip Coulson is an experienced lawyer having qualified in the UK (1991) and worked as an English solicitor. From 1994 to 2008 he worked with Kaplan & Stratton, one of Kenya's leading law practices. In September 2008, Philip left Kaplan & Stratton to establish a new law firm, Coulson Harney.

Mr Coulson's experience covers company and commercial law, capital markets, property development, finance, acquisitions, takeovers, joint ventures, investments, corporate reorganisations, general commercial contracts and advice on land law matters tourism and conservation. He has received several citations as one of the leading lawyers in corporate and commercial law in Kenya from several international legal directories. His most recent citations were by *IFLR* and *Chambers and Partners* who recognised him as a Leading Lawyer and Band 1 commercial and corporate lawyer respectively. Philip is also a member of the Law Society of Kenya, the Law Society of England & Wales, the International Bar Association and the Commonwealth Lawyers' Association.

### **JOHN SYEKEI**

#### *Coulson Harney Advocates*

John trained at Daly & Figgis Advocates and Deloitte and headed the intellectual property department at a leading firm as a partner until joining Coulson Harney in March 2010. John's practice areas and experience cover commercial intellectual property advice, IP litigation, advertising law and litigation, advice on drafting and negotiation of information technology agreements the seller or buyer side, and advice on the protection and enforcement of trademarks, patents, copyright and industrial designs. He practises across Africa directly for local clients. He also acts for clients in intellectual property infringement actions, anti-counterfeiting raids, due diligence investigations and reports, drafting of licensing and franchise agreements, trademark oppositions, trademark cancellations and domain name dispute resolutions before WIPO. He advises a number of leading technology companies in the world including Google, Facebook, Microsoft and IBM. He also acts as the Kenyan counsel on regulation, compliance and corporate matters for Philip Morris International. He is a member of the Internatioanl Trademarks

Association, the International Bar Association and the Federation of Intellectual Property Practitioners (FICPI).

## **DENTONS**

1 Fleet Place  
London  
EC4M 7WS  
United Kingdom  
Tel: +207 2467053  
babette.mwood@dentons.com  
www.dentons.com

## **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.