1 Introduction

The Kingdom of Saudi Arabia is a relatively new country with a young and vibrant population. Although only established recently on 23 September 1932, the society is still very much guided by traditional principles and beliefs. Nevertheless, the Kingdom’s vast oil wealth has brought in investments from all over the world and, today, most well-known and established global franchise concepts from all over the world can also be found operating in Saudi Arabia. While nearly 30% of the population consists of immigrant labourers, professionals, and their families, Saudi Arabia remains cautious about opening up to visitors and only religious tourists and pilgrims, Gulf Cooperation Council (“GCC”) citizens, and holders of employment and special visas are currently permitted to enter and move freely within the country.

As the Kingdom’s wealth and development continues to grow, more and more Saudis are traveling abroad and gaining an appetite for global brands and franchise concepts, while foreigners visiting and working in the country look for trusted and recognised brands. As all aspects of Saudi society continue to liberalise, it is expected that the appetite for more global brands and a deeper penetration of the market will only increase.

In addition, with the help of national policies supporting local talent and innovation, several well-known and respected Saudi brands have been created and are franchised in-Kingdom, in the GCC region, and, in some cases, around the world. For these reasons, the Saudi authorities have recently released a draft franchise law (the “Draft Law”) to govern the franchising relationship in Saudi Arabia and to replace the current franchising regime that has existed since 1962.

2 Existing Franchise Regime

2.1 Overview

The Commercial Agency Law (“CAL”) [The Commercial Agencies Law, enacted by Saudi Arabia Royal Decree No. M/11/1382, dated 20/02/1382 H., corresponding to 22/7/1962G.] and its Implementing Regulations (“IRs”) [The Implementing Regulations of the Commercial Agencies Law, issued under Saudi Arabia Ministerial Decision No. 1897/1401, dated 24/05/1401 H., corresponding to 30/03/1981 G.] were enacted broadly to govern any principal-agent commercial relationship in Saudi Arabia, including distributors, retailers, and any party providing, representing, or otherwise overseeing the distribution of another party’s goods in the Kingdom [Supra note 2 at Art. 1; supra note 3 at Art. 1.]. Thus, along with general uncodified Shari’a principles and rules of contract, the CAL and IRs have been the sole and defacto set of statutory rules governing the franchise relationship in Saudi Arabia [1] The Commercial Agencies Law, enacted by Saudi Arabia Royal Decree No. M/11/1382, dated 20/2/1382 H., corresponding to 22/07/1962 G. [The Implementing Regulations of the Commercial Agencies Law, issued under Saudi Arabia
When the CAL was enacted, however, the commercialisation of franchising was not a significant part of the economy. Thirty years later, franchising was officially brought under the umbrella of the CAL and IRs by virtue of Saudi Arabia Ministerial Order No. 1013/1412 [Saudi Arabia Ministerial Order No. 1013/1412, issued 17/09/1412 H., corresponding to March 22, 1992G.]. The CAL and IRs, like most Saudi statutory law, are drafted broadly and generally, leaving room for flexibility and interpretation, perhaps due to business-friendly Shari’a principles which seek to uphold freedom of contract between competent parties. The general rule in Saudi Arabia is that the contract is the Shari’a or law of the parties, and thus the statutory law is minimal. The most significant rules created by the CAL and IRs pertain to nationalisation and registration.

### 2.2 Nationalisation

First, only Saudi Arabian nationals may serve as commercial agents in Saudi Arabia [Supra note 2 at Art. 1.]. Thus, when franchising, the franchisee must always be a Saudi Arabian national or wholly Saudi-owned company arrangement.

### 2.3 Registration

Second, a commercial agent must be registered at the Commercial Agents Registry (“CAR”) at the Ministry of Commerce and Investment (“MOCI”) [Ibid., Art. 3; supra note 3 at Art. 6.]. The duty to register lies solely on the Saudi commercial agent [Supra note 2 at Art. 3.]-although the foreign principal’s cooperation is required in order to have the agency agreement properly notarised, legalised, and consularised.

Failure to register does not render the agency agreement unenforceable against the agent in Saudi Arabia, but it does subject the agent to potential fines and penalties [Ibid., Art. 4; supra note 3 at Art. 20.-although it is rare that these are enforced. Thus, most parties agree to keep their relationship unregistered because, among other reasons, the process of registering and de-registering is not worth the effort. Otherwise, Saudi Arabian law does not provide any specific statutory protections to franchisors or franchisees as in many other jurisdictions.

### 3 Draft Law

#### 3.1 Overview

On 1 January 2017, the Draft Law was released for public comments for a period of 25 days. While the status of the Draft Law is not yet known as of this writing, its entry into force provision states that it will enter into force 180 days after the date of its publication in the Official Gazette [Supra note 1 at Art. 34.].

The Draft Law is a clear and concise set of rules governing franchising operations and consists of a succinct 34 articles. However, its provisions (if adopted) would mark a sweeping change to Saudi Arabia’s existing franchising legal framework. Whereas the CAL and IRs are drafted broadly and generally and with little statutory protections, governmental involvement, or oversight, the Draft Law provides for substantially more default and mandatory principles, as well as a significant increase in the government’s regulatory oversight of the franchise relationship.

#### 3.2 Nationalisation

It is interesting to note that nowhere in the Draft Law is the role of franchisee limited to Saudi Arabian nationals only, as is the case under the CAL and IRs. Rather, “Franchisee” is defined as “any natural or legal person authorised to engage in the business of franchising in the Kingdom [Ibid., Art. 1.].”
In addition, Saudi Arabia’s foreign investment Negatives List [SAGIA Business Center, ttps://sagia.gov.sa/en/InvestorServices/InvestorLibrary/SubCategory_Library/Business_not_permitted.pdf.] (a list of commercial activities that are banned to any foreign investment and, thus, may only be performed by Saudi nationals or wholly Saudi-owned companies) does not specifically mention franchising as a blacklisted activity.

Thus, the door has ostensibly been opened to allow foreign investors to operate as franchisees in Saudi Arabia (but see infra Part 4.2).

3.3 Registration

Whereas under the CAL and IRs the Saudi commercial agent was responsible for registering the agency at the CAR, the Draft Law shifts this burden to the franchisor.

However, in addition to shifting the burden to the franchisor, the Draft Law also adds additional registration burdens. Namely, the franchisor must also register in Saudi Arabia any trademarks that will be used in the franchise business [Supra note 1 at Art. 8.]. The franchisor must register the franchise agreement and a Disclosure Document (described in Part 3.4.3?b) below) with the MOCI prior to execution, which must be supported by further documentation, including evidence of the registration of any trademarks used in the franchise business, constitutional documents of the franchisor, and any other documentation to be specified in subsequent implementing regulations [Ibid., Art. 9.1.].

After registration, the MOCI has 30 days to issue an approval or rejection of the registration [Ibid., Art. 10.1.]. If there is no response after 30 days, the registration is deemed approved [Ibid.]. However, registration does not constitute approval or legality of the contents of the documentation provided [Ibid., Art. 10.2.].

If there is ever a “substantial change” [“Substantial change” is defined as: any change in information or circumstances that may reasonably have a substantial negative impact on the value of the franchise business or on the decision of the franchisee to enter into the franchise agreement., ibid., Art. 1.] in the franchise relationship, the franchisor is further required to register a statement of such changes and a new Disclosure Document with the MOCI [Ibid., Art. 11.].

Finally, it is important to note that all documents provided to the MOCI in the registration process must be drawn up in Arabic and, if not, a translation by an in-Kingdom certified translator must be provided [Ibid., Art. 9.3].

3.4 Other Significant Provisions

The below items reflect the most significant proposed changes to Saudi Arabia’s franchise law regime based on the Draft Law. Some of these provisions are default rules that apply unless agreed otherwise in the franchise agreement, others are mandatory rules, while others are merely optional suggestions.

3.4.1 Application

In common business terms, the franchising relationship is distinct from agency and distribution relationships.

For example, agents typically take possession of the principal’s goods and act purely as an intermediary between the principal and the customer at a price set by the principal. The agent’s value mainly comes from its knowledge of local law and regulations and ability to timely clear the products through customs. Occasionally, the agent will provide services such as installation or training in relation to the products. The agent will generally invoice the customer and take a commission on the sale.

Distributors, on the other hand, typically purchase the principal’s products in its own name, then resells them at a schedule and price determined by the distributor. The distributor will profit from a margin on the resale. A good distributor can help a principal to develop a market demand for its products.
In contrast to agents and distributors, the franchise relationship also involves the active use of the principal’s brand, trademark, trade secrets, copyrights, patents, and/or other intellectual property rights by the franchisee.

However, under current Saudi Arabian law, all three relationships are treated the same. Thus, the Draft Law seeks to carve out the franchise relationship from the agency and distribution models. In that regard, the Draft Law shall apply to:

any arrangement under which a Franchisor grants to a Franchisee, for monetary or non-monetary consideration, the right to operate a franchise business for the Franchisee’s own account, including the provision to the Franchisee of technical knowhow and training as well as determination of the method of operation by the Franchisee of the franchise business in association with the trademark of the Franchisor or of the licensor granting the Franchisor the right to use the same [Ibid., Art. 3.2.].

On the contrary, the Draft Law does not apply to, inter alia, contracts governed by the CAL and IRs, contracts limited only to the purchase or sale of goods or services bearing a trademark, and contracts only to use intellectual property rights associated with a good or service [Ibid., Art. 4.]. Furthermore, certain types of franchises would be exempt from application of the Draft Law as specified in subsequent implementing regulations [Ibid., Art. 32.].

3.4.2 Franchisor Qualification

In order to have a valid franchise, the franchise concept must have been carried out by at least two companies (which may include the franchisor) in at least two locations for a period of at least one year [Ibid., Art. 7.1.].

3.4.3 Exchange of Information

A number of provisions in the Draft Law require franchisors and franchisees to cooperate in the exchange of information.

a. Franchisee transparency
   For example, the franchisee must provide accounting statements of the franchise business to the franchisor and allow the franchisor access to inspect the franchise premises as a default rule unless agreed otherwise in the contract [Ibid., Art. 5(d) and (e)].

b. Disclosure Document
   The Draft Law makes several references to a Disclosure Document form, which the franchisor must provide to both the MOCI and the franchisee prior to executing the franchise agreement. In addition, in the event of any “substantial change” in the franchise relationship, an updated Disclosure Document must be provided to both the MOCI and the franchisee.
   The Draft Law does not specify in detail what disclosures must be made by the franchisor in the Disclosure Document, but only states that subsequent implementing regulations shall set out the requirements [Ibid., Art. 26.].
   It appears that one item that must be included in the Disclosure Document pertains to past or anticipated financial performance of the franchise business (see 3.4.9 below).

c. Training and knowledge transfer
   The franchise agreement must include obligations on the franchisor to provide training, technical and marketing expertise to the franchisee [Ibid., Arts. 13.2(c) and (d)]. As applied to foreign franchisors, this coincides with Saudi Arabia’s longstanding policy of ensuring that Saudi citizens benefit from training and knowledge transfer from foreign investors.

d. Advertising and marketing costs
   The franchisor must deposit into an “independent bank account” all sums paid by the franchisee to the franchisor with respect to advertising and marketing activities in relation to the franchise business [Ibid., Art. 25.1].
Further, the franchisor must provide a yearly statement of such sums to the franchisee, and a similar statement at least once per year at any time within 14 days of a request [Ibid., Arts. 25.2 and 25.3.].

3.4.4 Exclusivity and Non-Competition

The geographical exclusivity of the franchisee is a default rule under the Draft Law. Thus, unless agreed otherwise by the parties in writing, the franchisor shall not set up a competing business in the franchisee’s territory designated in the franchise agreement or license any other franchisee to do so either [Ibid., Art. 6(f)].

3.4.5 Change of Control and Assignment and Delegation

The franchisor may not object to a change in control of the franchisee except on “reasonable” grounds [Ibid., Art. 18.1]. Further, the franchisor may not object to the franchisee’s assignment of the franchise agreement to a third party unless:

a. it is unlikely that the assignee has sufficient financial resources to fulfil the franchisee’s obligations under the franchise agreement;
b. the assignee does not meet the franchisor’s “reasonable” requirements or the same standards applied to the franchisee;
c. the assignee fails to execute an adherence declaration or assignment agreement with the franchisor as of the date of assignment;
d. the franchisee fails to pay any amount due to the franchisor;
e. the franchisee fails to timely cure any substantial breach of the franchise agreement; or
f. the franchisee fails to comply with any of its covenants pertaining to assignment [Ibid., Art. 18.2].

In relation to the final subsection (f), the franchise agreement must describe any restrictions on the franchisee’s ability to assign any of its rights to a third party [Ibid., Art. 13.2(h)]. Thus, it can be assumed that, while the franchisor may not completely forbid assignment to a third party or leave it to the franchisor’s absolute discretion, clear parameters may be set as to the appropriate candidate who may qualify as an assignee according to express standards. In any event, while assignment may not be completely prohibited, the ability of the franchisee to sub-franchise the franchise concept may be expressly forbidden in the franchise agreement [Ibid., Art. 14(a)].

The Draft Law does not describe any notification obligations on the franchisee if a change of control or assignment occurs, but presumably the parties would include this in the franchise agreement. In that regard, the franchisor must object to the franchisee’s notice of a change in control or proposed assignment within 60 days and, if no objection is given, the franchisor’s consent will be implied [Ibid., Art. 19].

3.4.6 Term and Termination

All franchise agreements shall have a duration of not less than five years [Ibid., Art. 13.2(k)]. However, it may be terminated earlier in two cases.

In the first case, the franchisee has the sole right to cancel the franchise agreement within seven days after it is signed, in which case the franchisor must refund any sums received from the franchisee less “reasonable expenses” incurred, the franchisee must return any property received to the franchisor, and no damages will accrue to either Party [Ibid., Art. 17.1]. In the second case, the franchisor may terminate the franchise agreement for “good cause,” which is defined (only) as:

a. breach of the franchise agreement by franchisee and failure to cure within 14 days of notice;
b. repeated failure by the franchisee to comply with any agreement made with the franchisor or one of its affiliates;
c. bankruptcy or insolvency of the franchisee;
d. voluntary abandonment or suspension of the franchise business by the franchisee;

e. violation by the franchisee of public health and safety standards;

f. failure of the franchisee to maintain the necessary licenses and approvals to operate the franchise business;

g. substantial violations by the franchisee of any Saudi Arabian laws which could have an adverse impact on the goodwill of the franchise business;

h. commission by the franchisee of any commercial fraud in the course of operating the franchise business; or

i. infringement by the franchisee of the intellectual property rights of the franchisor [Ibid., Art. 20.].

3.4.7 Mandatory Renewal

The franchisee has a statutory right to renew the franchise agreement for a similar term with written notice not less than 180 days before its expiry [Ibid., Art. 22.]. The franchisor can refuse a mandatory renewal of the franchise agreement only if:

a. the parties agree on different terms and conditions in a new franchise agreement;

b. the franchisor has “good cause” for termination pursuant to Art. 20;

c. the franchisee has failed to make payment(s) as per the franchise agreement;

d. sale of the franchise business to a different franchisee approved by the franchisor;

e. the franchisor no longer wishes to implement the franchise concept in Saudi Arabia (with any franchisee); or

f. failure of the franchisee to execute a renewal agreement according to the franchisor’s “reasonable requirements” at least 60 days prior to expiry of the franchise agreement ['Ibid.].

3.4.8 Wrongful Termination and Non-Renewal

In the event of a “wrongful termination” by the franchisor, the franchisor must compensate the franchisee in the amount paid by the franchisee to purchase “tangible assets” for the franchise business [Ibid., Art. 21.]. The Draft Law does not specify if “tangible assets” means real property, personal property, or both.

In addition, if the franchisor refuses to renew the franchise agreement with the franchisee for any reason except execution of a new franchise agreement (i.e., Part 3.4.7?a) above), the franchisor must pay the same compensation to the franchisee [Ibid., Art. 23.].

3.4.9 Minimum Sales and Financial Targets

The Draft Law lays out a number of “optional” provisions which may or may not be included in the franchise agreement depending on the agreement of the parties. One such optional provision is minimum sales obligations on the franchisee [Ibid., Art. 14.1(e).]-which provides one way in which the franchisor can maintain some control over the franchise relationship by setting targets which, if not reached, provide grounds for termination.

However, the Draft Law appears to limit the franchisor’s control in this regard by requiring that any information in the Disclosure Document concerning anticipated financial performance (i.e., targets) of the franchise business must:

a. be based on “reasonable” standards with referenced outlines;

b. outline any assumptions on which the targets are based;

c. specify whether the targets are based on past business of the franchisor, a franchisor affiliate, or a third party franchisee; and

d. describe areas where the franchise business of the franchisor or an affiliate have met or exceeded target levels [Ibid., Art. 28.].

In addition, if such information is included in the Disclosure Document, a statement to the effect that “profitability levels are variable, not guaranteed, and may be different than expected by the franchisor” must also be included.
Thus, it would not be surprising to find that the MOCI decides to reject the registration of a franchise agreement with aggressive sales and financial targets based on incongruent information in the Disclosure Document that does not show that such targets could reasonably be reached.

Even so, a franchisee who has failed to reach agreed upon targets could raise the statement in the Disclosure Document as a defense to the termination of the franchise agreement by the franchisor noting that profitability levels are not guaranteed.

### 3.4.10 Penalties and Damages

The Draft Law provides that a committee set up by the MOCI shall be authorised to impose fines up to SAR 1 million (USD 266,667) for violations of the Draft Law [Ibid., Art. 33.]. In addition to damages for wrongful termination and non-renewal, the franchisee has a statutory cause of action against the franchisor for any damages sustained as a result of any inaccuracy in the Disclosure Document [Ibid., Art. 29.]. Further, the franchisee may terminate the franchise agreement with 60 days written notice if the franchisor fails to timely submit or update the Disclosure Document, or with written notice within two years after execution if the franchisor fails to register the franchise agreement and Disclosure Document with the MOCI [Ibid., Art. 30.].

In either case, the franchisee is entitled to the same damages specified for wrongful termination and non-renewal, as well as additional costs incurred for incorporating, acquiring, or operating the franchise business [Ibid., Art. 31.].

### 3.4.11 Choice of Law and Forum

The Draft Law provides that the courts of Saudi Arabia shall have jurisdiction to interpret and settle disputes under the franchise agreement, although the Parties may agree to use alternative dispute resolution (“ADR”) methods [Ibid., Art. 16.]. Notably, the Draft Law does not state whether or not ADR in a non-Saudi forum is acceptable.

### 4 Analysis

The Draft Law, if adopted, would mark a sweeping change to Saudi Arabia’s franchising law regime and create a significantly more robust set of regulations compared to the previous regime. Whereas the CAL and IRs represent a “hands-off” approach that allow parties to freely agree to franchise parameters and craft their contracts uniquely, the Draft Law represents a different approach with statutory standards, default rules, and mandatory protections, as well as a significantly more robust role for the MOCI.

#### 4.1 Transformation of the MOCI

Historically, the MOCI has been a purely bureaucratic body, tasked only with the most objective initiatives. That is, the MOCI is not particularly competent to subjectively review and approve the substance of documentation. Its foreign investment counterpart, the Saudi Arabian General Investment Authority (“SAGIA”), has traditionally been the more subjective and scrutinising body, tasked with analysing potential investments, vetting foreign investor qualifications, and ensuring satisfaction of the spirit of its role—which is to develop the Saudi society and economy.

Now, it appears that the MOCI will start to take on a role similar to SAGIA. The MOCI will be tasked with collecting the constitutional documents of franchisors, although the Draft Law does not indicate for what purpose such documents must be provided. More importantly, the MOCI will have the authority to review the franchise agreement submitted for registration and may reject registration if it deems the substance thereof to be non-compliant.

It is not uncommon that major international franchisors with highly valuable brands and franchise concepts will have
standard franchise agreements exceeding several hundred pages including appendices, exhibits, and the like with carefully crafted provisions, some of which require a certain degree of legal expertise and knowledge to understand (i.e., “legalese”). Setting aside the difficulty and expense of translating such documents and provisions into Arabic, frankly it is not practical to believe that the MOCI has the competence or capabilities to review and analyse such agreements against the Draft Law provisions.

4.2 Nationalisation

Although the Draft Law does not specifically mention that only Saudi companies are permitted to act as franchisees in Saudi Arabia (as under the CAL and IRs), the reality is that it is highly unlikely that SAGIA would license any foreign investor to establish an entity in Saudi Arabia to engage in franchising activities as a franchisee.

Despite the written law, SAGIA has wide discretion to interpret and apply the law and, where there are uncertainties, SAGIA may not always take the most foreign investor friendly approach. Indeed, one of SAGIA’s main roles is to bring the most high-paying and high-technology jobs from other parts of the developed world to Saudi citizens, as well as bringing in foreign investors to do the jobs and activities that Saudi companies themselves are not yet competent to do. Thus, low-technology and low-demand activities are typically reserved for Saudi-owned companies only.

The role of franchisee in general is typically not characterised as high-tech, high-paying, or otherwise innovative or ground-breaking. Rather, franchisees are akin to employees of the franchisor, who are required to follow a set of rules and a business method laid down by the franchisor. Often, the franchisor’s business model and goodwill has been improved upon and perfected over a number of years, and its operating requirements can become complex and detailed enough that little creativity or input is needed from the franchisee with regard to marketing, expansion, or otherwise. The franchisee merely acts at the instructions of the franchisor.

Thus, despite the apparent hole in the Draft Law that could allow non-Saudi investors to establish franchisee networks in Saudi Arabia, it is not likely that foreign investors would be licensed to do so. The Franchise Law when adopted will likely exclude this apparent hole, presumably after public commenting from local Saudi citizens and businesspeople seeking to protect the existing status quo with respect to localisation measures.

4.3 Registration

Even so, it will be interesting to see the practical reaction of franchise parties to the Draft Law’s proposed registration regime. Although the CAL and IRs require registration, most agencies remain unregistered due to a weak enforcement regime. Most franchise parties find that the time and difficulty required to register is not worth the costs and effort.

The Draft Law, similarly, provides for penalties and fines for violation of, inter alia, non-registration; but, unlike the current framework, such fines and penalties can be imposed on the foreign franchisor.

Further, the Draft Law changes the current regime by providing non-registration as grounds for termination by and statutory compensation to the franchisee. On the other hand, the Draft Law does not expressly state anywhere that failure to register voids or otherwise affects the enforceability of the franchise agreement.

Thus, in light of these proposed changes to Saudi Arabia’s existing franchise registration framework, whether or not the franchisor will register will require a thorough cost-benefit analysis, and may depend on several factors, including the level of MOCI enforcement of fines and penalties. Based on past experience, this will likely be minimal-unless a transformation of the MOCI is truly planned.

4.4 Foreign Investment versus Local Innovation

The Draft Law dramatically changes the balance of power in the franchise relationship and levels the playing field by
4.5 “Reasonableness” Calculations

While the Draft Law is aimed at bringing Saudi Arabia’s franchising law regime in line with the developed world, the status of Saudi Arabia’s judiciary remains in the undeveloped and developing world and is not equipped to competently deal with nuances such as the many calculations of “reasonableness” contained in the Draft Law.

The Saudi court system is presided over by independent judges and panels with no right to a jury trial and, while appellate procedures are available, there is no system in place to ensure uniformity of decisions. For example, there is no court reporting system, so case law is not available to the public to understand the court’s decision, reasoning, and application of the law to a particular set of facts. Further, judges have wide discretion to open or close their court proceedings to the public and there is no established right of the public to demand access. Even so, the judiciary does not follow a system of stare decisis or precedent. So even if it were possible to understand and record a court’s application of the law in one case, the opinion of one judge or panel would not serve as binding or persuasive
precedent in a case with a similar set of facts.

For these reasons, it is difficult to define or predict the court’s method of interpreting and processing legal theories such as “reasonableness.” Thus, counsel in Saudi Arabia typically advise clients to avoid using such terms in their contracts because doing so could open the door to time-consuming and unpredictable litigation before the Saudi courts.

Due to the statutory implementation of standards of “reasonableness” under the Draft Law, franchise parties may be more likely to threaten or engage in litigation if there is a perception or potential argument for unreasonableness. The threat of time-consuming and unpredictable litigation before the Saudi courts is often enough to procure a settlement.

5 Conclusion

In conclusion, the Saudi authorities typically do not release a draft law for public commenting unless there is a strong intent to adopt the law in the substantial form in which it was released—perhaps with minor variations based on public comments. Thus, it is important to understand the provisions of the Draft Law and prepare for a new franchising law framework to apply in Saudi Arabia in due course. Existing franchisors and franchisees should be prepared to come into compliance with the Draft Law provisions, and parties contemplating a franchise in Saudi Arabia should weigh the benefits and disadvantages of doing so in light of the proposed regulations.

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