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South African Franchisees as Consumers: The South African Example

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ARTICLE

FRANCHISEES AS CONSUMERS: THE SOUTH AFRICAN EXAMPLE

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INTRODUCTION

Franchising is a system of marketing and distribution where an independent businessperson, the franchisee, is granted the right to market the goods and services of another, the franchisor.[1] As a vehicle for entrepreneurship and investment, franchising allows for efficient expansion of good business practices, the development of intellectual property both domestically and internationally, and the promotion and growth of small businesses.[2] Since the late 1950s, the franchising business format has rapidly expanded throughout the United States.[3] Around the globe, the US concept of franchising is relatively new and has earned an increasing share of international commerce.[4] Franchised businesses worldwide have steadily accrued hundreds of billions of dollars in annual sales[5]—a record of growth that is likely to continue.

Numerous countries have responded to this rise in franchising by enacting franchise disclosure laws and, sometimes, franchise relationship laws as well. The franchise sector was first regulated in the 1970s in the United States and Canada.[6] By 1990, they were joined by France and Mexico.[7] As of

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1. Dean T. Fournaris, *The Inadvertent Employer: Legal and Business Risks of Employment Determinations to Franchise Systems*, 27 FRANCHISE L.J. 224, 224 (2008).

2. Elizabeth C. Spencer, *Consequences of the Interaction of Standard Form and Relational Contracting in Franchising*, 29 FRANCHISE L.J. 31, 31 (2009).

3. ELIZABETH CRAWFORD SPENCER, THE REGULATION OF FRANCHISING IN THE NEW GLOBAL ECONOMY 1 (2010).

4. *See* Robert W. Emerson, *Franchise Encroachment*, 47 AM. BUS. L.J. 191, 196–97 & n.23 (2010) (detailing the numerous statistics indicating the phenomenal growth of franchising worldwide, be it throughout Europe as well as such diverse and important national economies as those of Australia, Brazil, China, India, and Japan). For analysis of franchising in the European Union, see Robert W. Emerson, *Directing the Disjointed: A Call to Harmonize EU Franchise Law,* 12 INT'L J. FRANCHISING LAW 41_(2014) (review of MARK ABELL, THE LAW AND REGULATION OF FRANCHISING IN THE EU (2013).)

5. Manitoba Law Reform Comm'n, *Consultation Paper on Franchising Legislation*, 8 ASPER REV. INT'L BUS. & TRADE L. 181, 187 (2008) (reporting that, according to a study conducted in 2001, "more than 767,000 franchised businesses directly employ[ed] 9.8 million people, with a payroll of $229 billion and an economic output of nearly $625 billion" and that franchising in 2001 accounted for 11% of the private sector payroll and 9.5% of the private sector economic output - more than US$1.53 trillion).

6. *See* California Franchise Investment Law, Cal. Corp. Code §§ 31000-31516 (West 2011) (adopted as 1970 Cal. Stat. 2645). *Compare* SPENCER, *supra* note 3, at 1 (California franchise enactment), *with* Peter Macrae Dillon, *Will Franchising Survive as a Business Model Under Canadian Laws and Regulations?*, 26 FRANCHISE L.J. 32, 32 (2006) (discussing how Canada's Alberta province was "on the heels of California" in adopting franchise legislation in 1971).

2000, thirteen countries had enacted franchise legislation, including Australia, Brazil, China, Taiwan, Indonesia, Malaysia, Romania, and Spain.[8] Currently, over thirty countries, representing about one-third of the nations where franchised businesses operate, have enacted franchise-specific regulation.[9] Increased international franchise activity coupled with a growing recognition that franchising has its own distinctive business model has led the move toward more regulation.[10] However, despite the tremendous growth of international commerce and an increasingly global business climate for which uniform laws would be a true boon, there has been no franchise law equivalent to the Convention on Contracts for the International Sale of Goods.[11] Despite, for example, the creation of the International Institute for the Unification of Private Law ("UNIDROIT") Model Franchise Disclosure Law in 2002,[12] the laws vary from country to country.[13] The Republic of South Africa is no exception. In comparing South Africa's new franchising regulations against the regulations of older commercial regulations, this Article examines key features, such as cooling-off periods, the unconscionability doctrine, and penalties for violations, which together set the consumers' rights orientation of the South African law far from that of other key countries.

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7. *See* SPENCER, *supra* note 3, at 1; *see also* Am. Bar Ass'n, International Franchise Sales Laws xxv (Andrew P. Loewinger & Michael K. Lindsey eds., 2006).

8. *See* SPENCER, *supra* note 3, at 1; *see also* BUSINESS FRANCHISE GUIDE paras. 7000–7256 (CCH, 2000); *see also Disclosure Requirements in International Transactions*, BUSINESS FRANCHISE GUIDE (CCH) Issue No. 226 (Sept. 9, 1998).

9. *See* SPENCER, *supra* note 3, at 1.

10. *See id.* at 2.

11. *See generally* United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], *available at* http://www.cisg.law.pace.edu/cisg/text/treaty.html. For a current list of the CISG's eighty signatory nation-states, including most of the leading national economies, such as the United States, Japan, China, Germany, and France, see STATUS: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.htm (last visited Feb. 23, 2014).

12. MODEL FRANCHISE DISCLOSURE LAW (UNIDROIT 2002), *available at* http://www.unidroit.org/english/modellaws/2002franchise/main.htm.

13. *See* SPENCER, *supra* note 3, at 2.

I. *FRANCHISING IN SOUTH AFRICA*

A. *Generally*

In South Africa, franchising operations were traditionally found in the fast food or restaurant industries.[14] However, with about 49 million citizens,[15] South Africa has a franchise landscape replete with business opportunities for retailers, business-to-business services, and automotive franchises to expand.[16] This trend toward increased franchising has allowed South Africa to emerge as a major franchising market. Currently, franchises are responsible for about 12% of the country's gross domestic product.[17]

In response to the growing economic influence of franchises, the South African government enacted the Consumer Protection Act (the "South Africa's Act" or the "Act") on April 24, 2009.[18] The Act codifies franchise practices that have been advocated by the Franchise Association of South Africa since the early 1990s.[19] Additionally, the Act expands certain provisions of the country's Competition Act of 1998.[20] Upon first glance, it appears the law seeks to remedy two issues that primarily affect black South Africans: high illiteracy[21] and

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14. *See South African Franchise Market*, WHICHFRANCHISE.CO.ZA, http://www.whichfranchise.co.za/article.cfm?articleID=613 (last visited Feb. 23, 2014).

15. *The World Factbook (South Africa)*, CIA.GOV, https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html (last visited Feb. 23, 2014) (an estimated population of 48,601,098 as of July 2013).

16. *See id.* (noting that, as of 2010, there were about 550 franchised brands and nearly 30,000 individual franchised outlets in South Africa).

17. *Id.*

18. Consumer Protection Act 68 of 2008 (S. Afr.).

19. Kendal Tyre, *A New Legal Landscape for Franchising in South Africa*, FRANCHISING BUS. & L. ALERT, Sept. 2009, at 3.

20. *Id.*

21. Before the end of apartheid, the official illiteracy rate for blacks in South Africa was thirty-three percent while other estimates placed it as high as fifty percent. During the same time period, the illiteracy rate for whites was only one percent. Quite notably, the black illiteracy rate is much higher in South Africa than in many, if not most, African countries. The pattern of illiteracy is also different. While in most countries older people are most likely to be illiterate, in South Africa almost thirty-five percent of teenagers were illiterate. *See* Lorraine Eide, *Current Crisis Facing Children in South Africa and the Efforts to Overcome It*, 34 HOW. L.J. 37, 39 (1991).

low business ownership.[22] This shift toward more regulation in South Africa can be understood by examining the country's history.

B. *History of 20th Century South Africa*

Originally colonized by the British as a strategically important international trade port, South Africa entered the 20th century in the midst of armed conflict, racial segregation, and race discrimination.[23] Following the Second Anglo-Boer War (1899–1902), which was incited by a battle between the British Empire and local Dutch farmers for control over South Africa's natural resources and economy, the South African government initiated various segregationist and racially discriminatory policies.[24] These policies, building upon the British and Dutch legacy of segregation within the South African colonies, were a response to increasing participation of black Africans in the country's economic system and their demands for political rights.[25]

After World War II, when the segregationist National Party defeated the moderate United Party in the 1948 elections and enacted its "apartheid" legislation,[26] these policies became much more oppressive.[27] Many black, Indian, and coloured[28]

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22. Although whites represented no more than one-tenth of South Africa's population, by some estimates, they owned ninety percent of the country's wealth during apartheid. *See* Bob Drogin, *Ending Apartheid at Work*, L.A. TIMES, Aug. 14, 1995, at A1. In the later years of apartheid, South Africa had a population of nearly forty million. S. Afr. Inst. of Race Relations, *Race Relations Survey 1989/90*, at 35 (1990), *available at* http://www.scribd.com/doc/33820505/SA-Inst-of-Race-Relations-Race-Relations-Survey-1989-90.

23. *See generally History*, S. AFR. GOV'T INFO., http://www.info.gov.za/aboutsa/history.htm (last modified July 15, 2013).

24. *See id.*

25. *See id.*; *see also* DAVID DOWNING, WITNESS TO HISTORY: APARTHEID IN SOUTH AFRICA 15 (2004). Specifically, supporters of the racially discriminatory laws were concerned that without such laws, the black Africans majority would overrun white South Africans and cause the country to lose its hard-fought national independence. The supporters also believed that the cheaper black African labor would threaten the employment opportunities of white workers and miners.

26. The word "apartheid" comes from the Dutch word for the quality of being "apart," and it refers to the South African policy of racial segregation of white inhabitants from the rest of the population. 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 92 (Lesley Brown ed., 1993).

27. DOWNING, *supra* note 25, at 15.

people were removed from their homes and deprived of their rights to the land after the government classified specific areas of the country as "white."[29] In addition, under apartheid, members of those groups were arrested, prosecuted, repressed, and forced into poverty.[30] During the 1970s, the apartheid government also began instituting population control laws.[31]

Separate educational opportunities for blacks and whites were also a notable feature of apartheid. Under the so-called "Bantu educational scheme,"[32] blacks were educated as semi-literate manual laborers and domestic workers rather than

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28. Under the South African apartheid regime's rigid racial classification system, "coloured" persons were of mixed racial heritage. ROGER OMOND, THE APARTHEID HANDBOOK: A GUIDE TO SOUTH AFRICA'S EVERYDAY RACIAL POLICIES 11 (2d ed. 1985).

29. *See* DOWNING, *supra* note 25, at 15; *see also* Alois Mlambo, *The Ambiguities of Independence, Zimbabwe 1980–1990*, *in* UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA 57, 64 (Margaret C. Lee & Karen Colvard eds., 2003) (describing how black populations were stripped of their rightfully owned land).

30. *See* DOWNING, *supra* note 25, at 15. Essentially, these apartheid laws institutionalized discrimination. For example, the Mixed Marriages Act of 1949, prohibited marriage between people of different races, and the Immorality Act of 1950 forbade all sexual relations between whites and non-whites. *See* APARTHEID MUSEUM, UNDERSTANDING APARTHEID: LEARNER'S BOOK 45 (2006), *available at* http://www.apartheidmuseum.org/sites/default/files/files/downloads/Learners%20book%20Chapter3.pdf (describing various apartheid legislation).

31. *See* Rachel Rebouché, *The Limits of Reproductive Rights in Improving Women's Health*, 63 ALA. L. REV. 1, 8 (2011) (discussing South Africa's history of racially discriminatory reproductive rights). In particular, the government provided tax incentives to white women, encouraging them to have children and made public appeals to white families asking them to have "enough children to ensure [the country's] continued existence as a Christian and Western country on the continent of Africa." Jerome A. Singh et al., *South Africa a Decade After Apartheid: Realizing Health Through Human Rights*, 12 GEO. J. ON POVERTY L. & POL'Y 355, 373 (2005) (citing a speech delivered by the apartheid government's Minister of Bantu Administration and Development, M.C. Botha). In stark contrast, policies aimed at controlling the black population encouraged broad access to, and use of, contraceptives. *Id.* In some instances, for example, medical providers injected black women without their consent, with Depo-Provera, a contraceptive drug, at three times the recommended dosage. *See* Diane Cooper et al., *Ten Years of Democracy in South Africa: Documenting Transformation in Reproductive Health Policy and Status*, 12 REPROD. HEALTH MATTERS 70, 71 (2004) (describing the broad use of contraceptive injections on black, rural women and how such injections are less reversible than traditional birth control); *see also* Barbara Brown, *Facing the 'Black Peril': The Politics of Population Control in South Africa*, 13 J. S. AFR. STUD. 256, 267–68 (1987) (discussing the apartheid government's family planning policies targeted at black South Africans).

32. *See generally* Bantu Education Act 47 of 1953 (S. Afr.) (allowing whites to go to "Model C" schools while blacks were required to attend schools that were lesser equipped, lesser resourced, and had a less advanced course curriculum).

attorneys or other professionals.[33] Proponents of this scheme believed blacks had no place in South Africa outside of labor and sought to maintain blacks as an underclass.[34] In black schools, teachers were less educated, had lower professional qualifications, and received less government expenditures per student compared to white schools.[35] Consequently, blacks were not equipped with the educational tools necessary to compete at the university level.[36]

By the 1980s, anti-apartheid sentiment grew within the country and internationally.[37] In 1987, the United Nations and other organizations began issuing sanctions intended to cripple the country economically and culturally, affecting areas such as foreign trade and sports.[38] Following the sanctions, many foreign franchisors began selling off their franchises at fire sale prices as part of a mass business exodus out of the country.[39] Apartheid would not end until 1994 when black Africans gained a 63% majority in the South African National Assembly.[40] Since 1994, the country has been rebuilding, focusing on job creation, reducing inequality, ending poverty, and producing overall

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33. *See id.*; *see also* Lisa R. Pruitt, *No Black Names on the Letterhead?: Efficient Discrimination and the South African Legal Profession*, 23 MICH. J. INT'L L. 545, 563 (2002).

34. *See* KENNETH S. BROUN, BLACK LAWYERS, WHITE COURTS: THE SOUL OF SOUTH AFRICAN LAW 50 (2000); *see also* Pruitt, *supra* note 33.

35. *See* Pruitt, *supra* note 33, at 563 & n.58; *see also* S. AFR. INST. OF RACE RELATIONS, RACE RELATIONS SURVEY 839, 841 (Carole Cooper et al. eds., 1989–1990) (describing the lower education requirements of teachers at black schools); *id.* at 839 (discussing lower professional qualifications for teachers at black schools compared to white schools); *id.* at 795 (showing lower annual expenditures for black schools versus white schools).

36. *See* Pruitt, *supra* note 33.

37. It should be noted that as early as 1966 the United Nations condemned apartheid as a crime against humanity. *See* Winston P. Nagan, *Economic Sanctions, U.S. Foreign Policy, International Law and the Anti-Apartheid Act of 1986*, 4 FLA. INT'L L.J. 85, 133 (1988).

38. *See* DOWNING, *supra* note 25, at 15; *see also* U.N. Ctr. Against Apartheid, Resolutions on the Policies of Apartheid of the Government of South Africa Adopted by the United Nations General Assembly in 1987: A Commentary, U.N. Doc. No. 4/88 (Apr. 1988), *available at* http://www.aluka.org/action/showMetadata?doi=10.5555/AL.SFF.DOCUMENT.nuun1988_03.

39. *See* Helen Suzman, *Transformation in South Africa: Cause and Effect*, 32 STAN. J. INT'L L. 149, 156–57 (1996). Making the exit from South Africa even more dramatic was the rapid rise in franchised businesses in the rest of the world. *See generally* Emerson, *supra* note 4.

40. *See* Suzman, *supra* note 39, at 154. Black Africans had, in fact, been a majority of the South African population for many decades. *Id.*

growth.[41] One of the most significant challenges to the new South African government has been to determine how to help the black African population reclaim land stolen during the country's colonization.[42] Over the last decade, the country has further developed its mixed jurisdiction legal system, reflecting aspects of both the civil law and common law systems.[43]

II. *SOUTH AFRICA'S CONSUMER PROTECTION ACT: A COMPARATIVE ANALYSIS*

The historical backdrop of apartheid may explain the country's move toward more regulation in the area of consumer protection. The overall goal of the Act is:

> [T]o promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behavior, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements, to establish the National Consumer Commission, to repeal [legislation created during apartheid], and to make consequential amendments to various other Acts.[44]

The sweeping language of the Act indicates the government's desire to remedy the sins of apartheid and any residual effects apartheid might have on current business practices within the country.

A few provisions of the Act are notable. For purposes of the Act, franchisees are included within the definition of

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41. *See* Suzman *supra* note 39. By 1996, five hundred American companies had returned to South Africa, tripling the amount of American companies that had been in the country before the sanctions. *Id.* at 157.

42. *See Postscript to* UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA, *supra* note 29, at 411.

43. *See* François du Toit, *Constitutionalism, Public Policy and Discriminatory Testamentary Bequests—A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdiction?*, 27 TUL. EUR. & CIV. L.F. 97, 109 (2012) (discussing the "hybrid" nature of South Africa's legal system).

44. Consumer Protection Act 68 of 2008 (S. Afr.).

"consumers."[45] The language defines franchisees as consumers "in terms of a franchisee agreement."[46] Specifically, the definition refers to franchisees as consumers where there is "solicitation of offers to enter into a franchise agreement" and where a franchisor supplies "any goods or services to a franchisee in terms of a franchise agreement."[47] Thus, as consumers, franchisees are given a bundle of rights designed "to promote and advance the social and economic welfare of consumers in South Africa" including honest dealing, fair value, good quality, safety, privacy, choice, information, fair and responsible marketing, supplier accountability, and equality.[48] Moreover, the Act is applicable to all transactions for the supply or potential supply of goods or services, in the ordinary course of business,[49] paid for with valuable consideration (i.e., cash or anything of value, whether intrinsic or extrinsic).[50]

Under the Act, all agreements, including franchise agreements, must also be written in "plain language" such that a person "with average literacy skills and minimal experience as a consumer of the relevant goods or services" can understand it.[51] Furthermore, the Act allows the franchisee, without cost or penalty, to cancel a franchise agreement within ten days of signing the agreement.[52] The Act also prohibits specific

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45. *Id.* § 1. The definition reads:

"consumer", in respect of any particular goods or services, means—

> (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
> (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
> (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
> (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(*b*) to (*e*).

46. *Id.*
47. *Id.* § 5(6)(b), (e).
48. *Id.* § 3(1); *see also* Tyre, *supra* note 19.
49. Consumer Protection Act 68 of 2008 § 1 (S. Afr.) (defining "supply").
50. *Id.* (defining "consideration").
51. *Id.* § 22(2).
52. *See id.* § 7(2).

"unconscionable conduct" against consumers, including "physical force . . . coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct."[53] Finally, the Act provides for stiff penalties for violation of its provisions, including fines and imprisonment.[54]

In light of these provisions and the history of the country, South Africa's Act appears to be more favorable to consumers rather than businesses. A question remains, however, as to whether and how much this pro-consumer approach to regulation will affect businesses and future business growth within the country. A comparison to four distinct nations (the United States, France, Australia, and China) and their varying approaches to franchising and consumer protection laws, further illuminates this issue.[55]

The United States Federal Trade Commission ("FTC") first promulgated the Franchise Disclosure Document in 1979, with

53. *Id.* § 40(1).

54. *See id.* § 111(1).

55. The franchising and franchising regulations have had a broad impact on the economies of each of these four countries. For example, in the United States, franchise businesses contributed about 4.6% (US$454 billion) to the gross domestic product ("GDP") of the United States, generated about US$769 billion in sales output, and created about 8.1 million jobs in the United States alone. Int'l Franchise Ass'n, *Franchise Business Economic Outlook for 2013*, at 1, 7 (2012), http://www.franchise.org/uploadedFiles/Franchise_Business_Outlook_12-17-2012.pdf. Similarly, France is now the largest franchising market in Europe, with 929 grossing US$51.6 billion in sales annually. Iuliana Scărlătescu & Mihaela Mărăcine, *The High Impact of Franchising on Economic Affairs in Some of the EU Members*, ANNALS UNIV. ORADEA: ECON. SCI. (Jan. 2009), *available at* http://steconomice.uoradea.ro/anale/volume/2009/v1-international-relations-and-european-integration/39.pdf. In 2011, France had a total GDP of US$2.712 trillion. GLOBAL FINANCE, *France*, http://www.gfmag.com/gdp-data-country-reports/272-france-gdp-country-report.html#axzz2LqRvnLcL (last visited Feb. 24, 2014). China has undergone franchise regulation reforms for the last thirty years and currently the country has 4500 franchise systems spreading across seventy industries. Thomas Leclercq & Guillaume Smitsmans, *Franchising in China: Overview and Opportunities*, THIRD PLACE LTD. 1, 2 (2012), http://www.third-place.be/wp-content/uploads/2012/12/Franchising-in-China-Whitepaper-by-Third-Place-Franchise-Consulting.pdf. From 2008 to 2010, China saw a 32% increase in total franchise systems available in the country. *Id.* In comparison, Australia has had franchise-specific regulation since 1998. *See generally* Trade Practices (Industry Codes—Franchising) Regulations 1998 (Cth), *available at* http://www.comlaw.gov.au/Details/F2010C00457. Currently, the franchising sector contributes 15% (or US$127 billion) to the country's total GDP. U.S. & FOREIGN COMMERCIAL SERVICE, DOING BUSINESS IN AUSTRALIA: 2011 COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES 9 (2011), *available at* http://www.franchise.org/uploadedFiles/Franchise_Industry/International_Development/Country_Profiles/Australia_Country%20Guide_2011.pdf.

major amendments again in 2007.[56] Thus, the United States has a long tradition of franchise regulation, a situation recognized worldwide by legal commentators.[57] In contrast, France, an older, civil law system, began franchise regulation with its *Loi Doubin* in 1989[58] and may suggest that South Africa's laws should become more pro-business. China, as a growing world economy,[59] recently created regulation in 2004 and 2007 that seems to favor the rights of franchisees.[60] Lastly, Australia, an English speaking country, culturally similar to the United States, began its franchising regulation in 1998 with amendments in 2001 and 2008.[61]

Accordingly, comparative analysis of each country's approach to franchise regulation will answer the question whether a pro-consumer approach to franchise regulation will harm business growth in South Africa. Moreover, this analysis will determine whether South Africa can serve as a model for franchise law reform in the United States.

III. *A COOLING-OFF PERIOD*

One key feature of the South African Act is that it allows the franchisee a cooling-off period. Under the Act, a franchisee may

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56. *See generally* Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15444 (Mar. 30, 2007) (later codified at 16 C.F.R. pt. 436) (amending Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures; Promulgation of Final Interpretive Guides, 44 Fed. Reg. 49966 (proposed Aug. 24, 1979) (later codified at 16 C.F.R. pt. 436)).

57. *See* Katharina Wurm, *Franchising Legislation—A Global Overview*, *in* INTERNATIONAL FRANCHISING: A PRACTITIONER'S GUIDE 59, 70 (Marco Hero ed., 2010); *see also* Gerald C. Wells & Dennis E. Wieczorek, *A Road Map to the New FTC Franchise Rules*, 27 FRANCHISE L.J. 105, 105 (2007).

58. CODE DE COMMERCE [C. COM.] art. L330-3 (Fr.); *see* Wurm, *supra* note 57, at 65.

59. At the close of 2010, China had surpassed Japan as the world's second largest economy. *China Overtakes Japan as World's Second-Biggest Economy*, BBC NEWS, Feb. 14, 2011, http://www.bbc.co.uk/news/business-12427321. The American research firm Frost & Sullivan predicts that China will overtake the United States as the world's largest economy by 2025. *China 'To Be World's Biggest Economy by 2025'*, TELEGRAPH (U.K.) (Nov. 5, 2012), http://www.telegraph.co.uk/finance/china-business/9655058/China-to-be-worlds-biggest-economy-by-2025.html.

60. *See* Wurm, *supra* note 57, at 63–64.

61. *See id.* at 59–60 (stating that Australia seeks to increase the openness, quality, and expediency of franchise disclosures with laws that favor both franchisees and consumers).

cancel a franchise agreement within the first ten business days of signing.[62] This cancellation is without costs or penalties, but does require the franchisee to notify the franchisor in writing.[63] The franchisee thus has an opportunity to change her mind and reevaluate whether she wants to commit her time, money, and resources to building a franchise.

For the franchisor, on the other hand, the cooling-off period has drawbacks. First, the franchisor must wait and see whether the franchisee is going to commit to the agreement. The franchisor thus might have to forego other potential franchisees who would be willing to commit. Second, in providing the franchise agreement to the franchisee, the franchisor transfers any intellectual property and proprietary information the agreement might contain.[64] A franchisor might be wary of giving a franchise agreement to a potential franchisee only to see the franchisee cancel the contract and walk away with the franchisor's valuable information and know-how.[65] Third,

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62. Consumer Protection Act 68 of 2008 § 7(2) (S. Afr.) ("A franchisee may cancel a franchise agreement without cost or penalty within 10 business days after signing such agreement, by giving written notice to the franchisor.").

63. *Id.*

64. Press Release, Webber Wentzel, Consumer Protection Act Regulations an Urgent Wakeup Call for Franchisors (July 18, 2011), *available at* http://www.webberwentzel.com/wwb/content/en/ww/ww-in-the-news?oid=31619&sn=Detail-2011&pid=32749.

65. *See generally* Robert W. Emerson, Franchise Savoir-Faire: Clueless in America (Feb. 18, 2014) (unpublished manuscript) (on file with author) (discussing potential issues with transferring know-how and trade secrets to franchisees in the United States and abroad). In South Africa, intellectual property protection can be traced back to the Patents, Designs, Trade Marks, and Copyright Act of 1916. *See* GEORGE M. SIYOKA ET AL., INTELLECTUAL PROPERTY PROTECTION IN AFRICA: STATUS OF LAWS, RESEARCH, AND POLICY ANALYSIS IN GHANA, KENYA, NIGERIA, SOUTH AFRICA, AND UGANDA 20 (2006), *available at* http://www.acts.or.ke/dmdocuments/ecopolicy16.pdf. Under the current legal framework, intellectual property is placed into two categories: copyright and industrial property rights. *See* ETHÈL TELJEUR, THE EDGE INST., INTELLECTUAL PROPERTY RIGHTS IN SOUTH AFRICA: AN ECONOMIC REVIEW OF POLICY AND IMPACT 6 (2003), *available at* http://www.tips.org.za/files/Teljeur_IPRs_paper_2003.PDF. Copyrights, along with so-called "neighbouring" rights, cover: literary, musical, photographic, artistic and scientific works; map, technical drawings, and computer programs; and provide protection from piracy and copyright infringement. *Id.* at 6–7. In contrast, industrial intellectual property includes inventions, designs, trademarks, and service marks, commercial names, and designations. *Id.* at 7. Typically, industrial intellectual property rights are protected by patents, registered trademarks, registered industrial designs, and geographical indications. *Id.* One way for a franchisor to protect its intellectual property from theft by a would-be franchisee is to file for intellectual property protection in South Africa covering the trademark and licensing materials

franchisors must expend capital, such as overhead or preparation expenses, before awarding a new franchise.[66] The specter of franchisee cancellation during the cooling-off period could discourage franchisors from making crucial investments in the prospective franchise early in the process and delay the initial starting of the business.[67] Under the Act, franchisors have no remedy to recover losses sustained due to cancellation of the agreement by the franchisee—a result that may leave some franchisors questioning whether business in South Africa is worth the risk. Moreover, at a minimum, this provision may result in franchisors becoming less willing to compromise during franchise negotiations, which could be harmful to overall franchise investment in the country. The cancellation period could result in increased costs of franchising, with fewer franchises granted and some businesses finding other ways to operate without using franchising.

By way of comparison, in the United States, the current FTC franchise disclosure rules do not provide for any cooling-off period after the franchise agreement is signed.[68] The rules do, however, require franchisors to provide disclosure documents at least fourteen days before the prospective franchisee makes a payment to the franchisor or signs the franchise agreement.[69] Similarly, in the event the franchisor unilaterally makes material

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transmitted to the franchisee under the franchise agreement. *See generally* Natasha Odendaal, *SA's Intellectual Property Protection Ranks High Globally,* POLITYORG.ZA (Oct. 1, 2010), http://www.polity.org.za/article/sa-intellectual-property-protection-ranks-high-globally-2010-10-01 (discussing South Africa's intellectual property protection). Details of the intellectual property provided to the potential franchisee can be outlined in the franchise agreement and could be used as evidence in future infringement litigation. *See* Eugene Honey, *Franchising, Licensing, Distribution, Agency Agreements: Consumer Protection Act Regulations at Last*, POLITYORG.ZA (Aug. 17, 2011), http://www.polity.org.za/article/franchising-licensing-distribution-agency-agreements-consumer-protection-act-regulations-at-last-2011-08-17 (discussing how the South African Consumer Protection Act allows a franchisor to place details on intellectual property in the franchise agreement itself).

66. Lucinda Rhoodie & Belinda Scriba, *Franchise Agreements and the Consumer Protection Act*, POLITYORG.ZA (April 8, 2011), http://www.polity.org.za/article/franchise-agreements-and-the-consumer-protection-act-2011-04-08.

67. These risks could, of course, be included in the costs a franchisor passes on to a new franchisee. If the market permitted it, savvy franchisors would simply charge more money for their franchises so as to compensate for the potential loss of the franchise agreement and the loss of their intellectual property.

68. *See* 16 C.F.R. § 436 (2012).

69. § 436.2(a).

changes to the standard form disclosures, the franchisor must provide the amended disclosures to the franchisee at least seven days before the signing of the agreement.[70] Under either scenario, a franchisee in the United States must be given a period of time *before* a franchise agreement can be signed and given the force of law.

The lack of a cooling-off period does not appear to benefit or harm franchising in the United States. Although the comparative economic prosperity of the United States may appeal to foreign franchisors, the complexity of the United States' legal system may be an ongoing issue. For any foreign franchisor entering the market there may be legal pitfalls, including FTC disclosure rules, Securities Exchange Commission filing requirements, tax regulations, intellectual property approvals, and so forth—all factors that may discourage expansion into the country.[71] Thus, while other concerns might prevent a foreign franchisor from selling franchise agreements in the United States, the lack of a cooling-off period in franchise-specific regulations appears to be a neutral factor in American franchising.[72]

From the other perspective—a common law country *with* a franchising cooling-off period—Australia may serve as a warning that the time period does little to affect the franchise parties. Under Australian trade practice regulations, a franchisee may terminate a franchise agreement, or an agreement to enter into a franchise contract, within seven days of entering such an agreement.[73] Additionally, if the franchisee chooses to terminate the agreement, the franchisor must return all payments and

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70. § 436.2(b).

71. *See generally* Erik Wulff, *International Franchising: A Different Perspective from the United States*, INT'L FRANCHISE ASS'N (Jan. 2009), http://www.franchise.org/franchise-news-detail.aspx?id=44086.

72. Similarly to the United States, France also does not require a cooling-off period after the franchise agreement is signed. Under the *Loi Doubin*, franchisors must disclose certain information to franchisees at least twenty days before either the franchisee signs the contract agreement, or before the franchisee pays the franchisor any precontractual sum. CODE DE COMMERCE [C. COM.] art. L330-3 (Fr.). With the twenty day time frame, and the precontractual disclosures, prospective franchisees in France certainly have time to think about those disclosures, before they sign the contract or pay any money.

73. *Trade Practices (Industry Codes–Franchising) Regulations 1998* (Cth) pt 3 s 13(1) (Austl.).

valuable consideration given by the franchisee to the franchisor within fourteen days of termination.[74] Unlike South Africa's Act, a franchisor in Australia is entitled to deduct "reasonable expenses" from the amount returned to the franchisee provided that such expenses, and their method of calculation, have been set forth in the franchise agreement.[75]

The effect of the seven day cooling-off period in Australia appears minimal. Australia has had franchise-specific regulation since 1998.[76] Although there was a decline in franchising in the few years following adoption of franchise regulation, economic growth in Australia has been exceptional since.[77] The trend of economic growth tracks the overall increase in franchising in the country since the 1970s.[78] As such, foreign franchises are likely to continue thriving in the Australian market.[79] It should be noted, however, that of the 960 franchises operating in Australia, ninety-three percent of those appear to be Australian-based.[80]

Finally, China, like South Africa and Australia, has a mandatory cooling-off period following the signing of the franchise agreement. According to China's Commercial Franchise Registration Administrative Measures decreed by the Chinese Ministry of Commerce ("MOFCOM"), franchisors must give the franchisee a mandatory cooling-off period following the

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74. *Id.* s 13(3).

75. *Id.*

76. Australia's Franchising Code is more formally known as the Trade Practices (Industry Codes—Franchising) Regulations. For the full text of the regulations, see *Trade Practices (Industry Codes–Franchising) Regulations 1998* (Cth) (Austl.), *available at* http://www.comlaw.gov.au/Details/F2010C00457.

77. Penny Ward, *Australia's Evolving Franchising Laws: Help or Hindrance?*, FRANCHISING WORLD (July 2007), http://www.franchise.org/franchise-news-detail.aspx?id=35092#.

78. *Id.*

79. *Id.*

80. *Id.* One reason for this could be because of Australia's geographic isolation and potential difficulties with supplying the country with particular goods or services. *See generally* André Sammartino, A Geographically Isolated Economy's Experience of the International Expansion of Retailing (Nov. 2006) (unpublished working paper) (on file with the University of Melbourne Department of Management and Marketing) (discussing the difficulties of foreign retail franchises due to Australia's geographic isolation and the rise of domestic Australian retail superstores).

signing of the franchisee agreement.[81] During this cooling-off period, the franchisee must have the unilateral right to terminate the agreement within a certain time frame.[82] However, unlike South Africa's Act, the length of the cooling-off period is set by the franchisor and franchisee.[83]

Along with the cooling-off period, China requires franchisors to operate at least two stores anywhere in the world for at least one year before entering into a new franchise agreement with a prospective franchisee.[84] This is commonly referred to as a "2+1" requirement. Under prior laws, international franchisors could only meet the "2+1" requirement by having two franchises that were *within* China's borders for one year,[85] regardless of whether the franchisor had franchises in other countries. These earlier laws brought franchise expansion in the country to a crawl.[86] The current law, however, appears to relax these requirements.[87] In addition, the

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81. Yanling Ren, *China*, *in* GETTING THE DEAL THROUGH: FRANCHISE IN 32 JURISDICTIONS WORLDWIDE 28, 30 (Philip F. Zeidman ed., 2011), *available at* http://www.franchise.org/uploadedFiles/Franchise_Industry/F2011Chinachapter.pdf; *see* Phillip Zeidman & Tao Xu, *The Principal Features of the Current Franchise Regulation—The Franchisor Franchisee Relationship, in* CORP. COUNS. GD. TO DOING BUS. IN CHINA VOL. 1 § 11:8 (3d ed. 2012).

82. Ren, *supra* note 81; Zeidman & Xu, *supra* note 81.

83. Ren, *supra* note 81; Zeidman & Xu, *supra* note 81.

84. (中国商业特许经营管理条例) [Regulations for the Administration of Commercial Franchising Operations] (promulgated by the St. Council, Jan. 31, 2007, effective May 1, 2007) ST. COUNCIL GAZ., May 23, 2007, art. 7 (China), *available at* http://franchiseasia.blogspot.com/2007/05/regulations-for-administration-of.html.

85. Philip F. Zeidman, *China: 2010 and Beyond*, FRANCHISING WORLD (Jan. 2010), http://www.franchise.org/Franchise-Industry-News-Detail.aspx?id=49348.

86. *See id.*

87. Chinese courts have been inconsistent in determining the effect of the "2+1" requirement on the validity of a franchise agreement. For example, one Chinese court found that a franchise agreement was null and void because the "2+1" requirement had not been met. *See* (刘永兴) [Wang Jin] v. (北京阳光瑞丽美容有限公司) [Beijing Sunlight Rulli Beauty Co. Ltd.], (Beijing Chaoyang Dist. Ct., Oct. 10, 2008). In contrast, the court in *Yongxing* found that a failure to comply with the "2+1" requirement does not make a franchise agreement null and void. (刘永兴) Liu Yongxing v. (天才猫(北京) 国际品牌管理顾问有限公司) [Talent Cat (Beijing) International Brand Management Consultants Co., Ltd.], (Beijing No. 1 Interm. People's Ct., Apr. 10, 2009). The court reasoned that the "2+1" requirement is administrative rather than mandatory in nature and, therefore, could not nullify or void an otherwise legal contract. *Id.* Some commentators believe that if the "2+1" requirement is "administrative" rather than mandatory—meaning that a violation would result only in administrative penalties rather than rendering the contract void—then such an approach would be beneficial to future franchise growth in China. *See* Paul Jones,

law seeks to protect franchisees by ensuring that franchisors have a "well-developed business format" and the necessary business resources to support new franchisees, including trademarks, logos, patents, and proprietary technology.[88] Currently, the requirements of the Chinese laws, including the cooling-off period, although pro-consumer (i.e., pro-franchisee), do not appear to hinder franchise growth in China as the government moves more toward deregulation and the economy continues to expand.[89]

Overall, the requirement of a compulsory cooling-off period may be harmful to foreign franchise expansion.[90] In effect, the cooling-off period merely cools the growth of franchising. Two countries with the cooling-off law, China and Australia, both have increasing franchise growth.[91] However, ninety-three percent of the franchise growth in Australia is by Australian-based franchisors, not foreign ones.[92] In China, the franchisor and franchisee can agree to the cooling-off period.[93] Thus, the cooling-off period in China is dependent on the bargaining power of the parties, which, in most instances, will favor the franchisor.[94] Any stifling effects from cooling-off periods have yet to be seen in China probably because franchisors can simply contract out of a long cooling-off period.

Chinese Franchise Update: How Mandatory is the 2+1 Rule?, ICSME 1, 2 (July 14, 2009), http://www.icsme-china.com/upload/china_franchise_update_090714.pdf (discussing the predictions of Chinese leaders as to how the requirement could impact Chinese business growth).

88. Ren, *supra* note 81, at 30.

89. *See generally* Zeidman, *supra* note 85.

90. *See* Introduction—China, BUS. FRANCHISE GUIDE (CCH) ¶ 7060 (2011) (discussing how China's mandatory cooling-off period creates uncertainty for franchisors expanding in the country). *See generally* Caroline O. Shoenberger, *Consumer Myths v. Legal Realities: How Can Businesses Cope?*, 16 LOY. CONSUMER L. REV. 189, 212–16 (2004) (discussing the ineffectiveness of cooling-off periods in protecting consumers from fraud and unfair business tactics and how businesses must now adjust to untenable consumer expectations).

91. *See* Zeidman, *supra* note 85; *see also* Ward, *supra* note 77.

92. *See* Ward, *supra* note 77.

93. Ren, *supra* note 81, at 33.

94. *See, e.g.*, Newark Motor Inn Corp. v. Holiday Inns, Inc., 472 F. Supp. 1143, 1152 (D.N.J. 1979) (discussing the argument that despite the franchisee's ability to accept or reject a franchise agreement, the uniformity of essential franchise terms ultimately favors the franchisor).

Accordingly, nothing in the other four nations' experience indicates the need for or utility of a cooling-off time. The United States and France do not have such a law. Australia has a period, but its highly domestic franchise market may simply make franchise growth or decline too related to Australia's special situation. The same may hold for China, where the period is not imposed by the state but only through agreement of the parties. A compulsory cooling-off period has the potential to be harmful to franchise growth in South Africa.

IV. *UNCONSCIONABLE FRANCHISE AGREEMENT CLAUSES*

A. *South Africa's Act*

Another key feature of South Africa's Act is its prohibition against unconscionable conduct. The Act defines "unconscionable conduct" as the "use [of] physical force against a consumer, coercion, undue influence, pressure, duress, or harassment, unfair tactics or any other similar conduct"[95] or conduct "otherwise unethical or improper to a degree that would shock the conscience of a reasonable person."[96] Specifically, the Act refers to such unconscionable conduct:

> in connection with any—
>
> (a) marketing of any goods or services;
>
> (b) supply of goods or services to a consumer;
>
> (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
>
> (d) demand for, or collection of, payment for goods or services by a consumer;
>
> (e) recovery of goods from a consumer.[97]

For franchisees, this section offers a bundle of potential claims against franchisors.

As stated above, franchisees are regarded as consumers under the Act.[98] As consumers, franchisees may seek relief under

95. Consumer Protection Act 68 of 2008 § 40(1) (S. Afr.).
96. *Id.* § 1.
97. *Id.* § 40(1)(a)–(e).
98. *See supra* notes 45–48 and accompanying text.

the Act for common law duress and undue influence.[99] In South Africa, undue influence or duress will render a contract voidable.[100] This is because, depending on the facts of each case, a person's will may have been improperly persuaded or influenced to reach a particular decision.[101] Similarly, if physical force is used against the franchisee, the franchise agreement will be void ab initio.[102] Moreover, the rule applies to unethical conduct in, among other things, marketing, negotiation, execution, and enforcement of agreements, including franchise agreements.[103] Some commentators believe that the wide breadth of the language within this section indicates that the framers sought to impose "good faith" in all business dealings covered under the Act.[104]

For franchisors, on the other hand, the breadth of terms blurs the line between outright unconscionable conduct and simple hard bargaining. For example, terms such as "pressure" or "unfair tactics" will undoubtedly mean different things for different parties. The meaning may even vary from transaction to transaction. Thus, until the legislature provides more guidance, the meaning of a term will be up to a court's discretion. What courts consider "unfair" might simply be hard bargaining or sound business practice to business owners. The vagueness of these terms could lead to inconsistent court rulings. These inconsistent rulings could then result in uncertainty in the judiciary and the business community regarding what conduct is actionable and what conduct is permissible. Considering the stiff civil penalties awaiting any unwary business that falls prey to the Act, it will be up to the

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99. *See* W. Jacobs et al., *Fundamental Consumer Rights Under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis*, POTCHEFSTROOM ELEC. L.J. 302, 346–47 (2010), *available at* http://www.saflii.org/za/journals/PER/2010/24.pdf.

100. *See id.* at 347.

101. *See id.*

102. *See id.* According to Black's Law Dictionary, the Latin term "ab initio" means "from the beginning." BLACK'S LAW DICTIONARY 5 (9th ed. 2009). Thus, under South African law, when physical force is used, no contract or agreement could have been formed.

103. *See* Jacobs et al., *supra* note 99, at 347–48.

104. *Id.* at 347.

South African consumer tribunals[105] to construe the meaning of these terms in order to resolve any forthcoming litigation.[106]

Fortunately, there are a few remedies to this situation. First, the South African Competition Commission could promulgate regulations that precisely define any ambiguous terms within the Act.[107] Additionally, the South African Tribunals could look to South African case law and the legislative history of the Act for guidance in construing any of the Act's ambiguous terms. Such an approach would give direction to franchisors and allow them to conform their business practices (especially their negotiation practices concerning prospective franchisees) to conduct that does not violate the Act. Unfortunately, franchisors should probably wait until the law is settled as to the meaning of these terms before doing business in South Africa. With either remedy, at least in the present, the Act might stifle franchise growth in South Africa. To gain insight into whether this result might occur, this Article will further analyze the regulatory schemes of other countries and compare them to South Africa's regulatory scheme.

B. *United States*

In the United States, Section 45 of the Federal Trade Commission Act ("Section 45") prohibits "unfair or deceptive acts or practices in or affecting commerce."[108] For purposes of this section, "unfair or deceptive practices" include such acts or practices that "cause or are likely to cause reasonably foreseeable injury in the United States; or involve material conduct occurring within the United States."[109] Section 45's prohibition applies to all persons engaging in domestic or foreign commerce.[110] This includes franchisors. Although the

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105. Consumer Protection Act 68 of 2008 § 75(1)(a)–(b) (S. Afr.).

106. *See infra* Section V.

107. *See* Competition Act 89 of 1998 § 21(4)(d) (S. Afr.) (granting the South African Competition Commission the authority to promulgate regulations concerning the definitions of regulatory terms that are related to the Commission's job of regulating competition and curtailing anti-competitive practices in the South African economy).

108. 15 U.S.C. § 45(a)(1) (2012).

109. § 45(a)(4)(A)(i)–(ii).

110. § 45(a)(2), (a)(4)(A). However, § 45 does not protect franchises located in foreign countries. *See* Nieman v. Dryclean U.S.A. Franchise Co., 178 F.3d 1126, 1129–31

Act does not use the term "unconscionable"[111] as in South Africa's Act, it does specifically describe an act or practice as unfair where it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[112] Furthermore, courts are empowered by Section 45 to consider public policy, as established by statutes, regulations, and judicial decisions, to determine whether an act or practice is unfair.[113]

Section 45 does not appear to hinder franchise growth in the United States. One reason could be that the US Congress has not yet provided a private right of action for aggrieved franchisees who believe that franchisors have violated their rights.[114] All redress must proceed through an enforcement action brought by the FTC under Section 5 of the Federal Trade Commission Act,[115] effectively restricting the number of claims that can be brought against franchisors. Moreover, it is unlikely that the FTC will promulgate more franchise-specific regulations. It took nearly thirty years to amend the initial FTC Rule (1978 to 2007), and further revision is certainly not yet on the horizon. Further undermining any new regulation may be the notion that prospective franchisees can avoid much potential harm by simply shopping among different franchisors

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(11th Cir. 1999) (ruling that the Federal Trade Commission Act does not apply to US citizens operating outside the territorial United States because the Act lacked express language to that effect). The Act will apply, however, to foreign franchises operating in the United States. 15 U.S.C. § 45(a)(4)(A).

111. Traditionally, in American law, a contract is unconscionable in an action at law if it is "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." Hume v. United States, 132 U.S. 406, 411 (1889); *see* Robert W. Emerson, *Franchise Goodwill: "Take a Sad Song and Make It Better"*, 46 U. MICH. J.L. REFORM 349, 400 (2013) (discussing unconscionability and equitable estoppel in franchising). The South African and American use of the term appears to be similar.

112. 15 U.S.C. § 45(n).

113. *Id.* For discussion of the implied covenant of good faith and fair dealing in the franchising context, see Robert W. Emerson, *Franchise Contract Interpretation: A Two-Standard Approach*, 2013 MICH. ST. L. REV. 641; Robert W. Emerson, *Franchising and the Parol Evidence Rule*, 50 AM. BUS. L.J. 659, 723 & n.298 (2013).

114. *See* Joel R. Buckberg & Jillian M. Suwanski, *Disclosure Law Violations: Understanding the Penalties*, FRANCHISING WORLD (Aug. 2008), http://www.franchise.org/Franchise-News-Detail.aspx?id=41926.

115. *See id.* Section 5 actions are discussed *infra* notes 166–170 and accompanying text.

for the most favorable terms and conditions.[116] Prospective franchisees can also freely discuss the nature of the franchise system, business prospects, and what to expect when contracting with existing franchisees.[117] Both alternatives enable a franchisee to avoid any potential unfairness by the franchisor, making more regulation unnecessary.

C. *France*

France is no different from South Africa or the United States in seeking to prohibit unconscionable conduct toward consumers. Because France is a civil law system, a few key principles apply to franchise agreements. First, France recognizes the freedom of contract. Under article 1134 of the French Civil Code, "agreements legally formed have the force of law over those who are the makers of them . . . [and] must be executed with good faith."[118] Good faith under French law requires honesty and fair dealing on the part of both parties.[119] Read in isolation, this article empowers parties to make whatever agreements they choose so long as the agreements are compatible with the law and done in good faith.

French civil law also requires equality among the parties and valid consent to contract. Article 1108 of the Civil Code requires four conditions for an agreement to be valid: (1) the consent of the party binding himself; (2) his capacity to contract; (3) an object forming the subject matter of the agreement; and (4) a lawful cause for forming the agreement.[120] Article 1108 seeks to protect the individual bargaining positions

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116. *See* Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities, 72 Fed. Reg. 15,444, 15,447 (Mar. 30, 2007) (to be codified at 16 C.F.R. pts. 436 and 437).

117. *See id.*

118. CODE CIVIL [C. CIV.] art. 1134 (Fr.) (translation provided by author).

119. Ejan Mackaay, Paper Prepared for the Symposium in Honour of Michael J. Trebilcock: The Economics of Civil Law Contract and of Good Faith 14 (OCT. 1–2, 2009), *available at* http://www.law.utoronto.ca/documents/conferences2/Trebilcock09_Mackaay.pdf.

120. *See* CODE CIVIL [C. CIV.] art. 1108 (Fr.).

of each party to the contract and to introduce an element of equality into the agreement to prevent unconscionability.[121]

In addition, article 1109 of the Civil Code specifically delineates that no agreement can be formed where consent has been "given through mistake . . . exported through violence or surreptitiously obtained by fraud."[122] As in South Africa, a finding by a French court of fraud, duress, coercion, or undue influence can render a franchise agreement void. Despite these Civil Code requirements for franchise agreements, France remains the largest franchise market in Europe.[123]

D. *Australia*

Australia's regulations also prohibit unconscionable conduct.[124] Part 2-2, section 22(1) of Australia's Competition and Consumer Act of 2010 ("CCA"), as amended by the Competition and Consumer Legislation Amendment Act of 2011, states the following:

> (1) A person must not, in trade or commerce, in connection with:

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121. *See* A.H. Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States*, 14 LOY. L.A. INT'L & COMP. L.J. 455, 473 (1992).

122. CODE CIVIL [C. CIV.] art. 1109 (Fr.).

123. France continues to lead Europe with US$51.6 billion in annual sales through franchised units in 2006, *see* Rose Marie Faria, *France Serves as a Gateway to Europe*, FRANCHISE WORLD (last visited Feb. 23, 2014), http://www.franchise.org/franchise-news-detail.aspx?id=33190, and EU€47.9 billion in such sales as of 2010, *see Les Chiffres-Clés en France*, FÉDÉRATION FRANÇAISE DE LA FRANCHISE, http://www.franchise-fff.com/comprendre-la-franchise/les-chiffres-cles/en-france.html (last visited Feb. 23, 2014). In terms of the number of franchisors, France leads all other European nations by far—1658 different franchisors as of 2012. *See Les Chiffres-Clés á l'International*, FEDERATION FRANÇAISE DE LA FRANCHISE, http://www.franchise-fff.com/comprendre-la-franchise/les-chiffres-cles/a-linternational.html (last visited Feb. 23, 2014). *See generally* Robert W. Emerson, *Franchise Contracts and Territoriality: A French Comparison,* 3 OHIO ST. ENTREPRENEURIAL BUS. L.J. 310 (2010) (discussing French franchising and law, with comparisons to American law).

124. It is worth noting the general structure of Australia's statutory prohibitions against unconscionable conduct. Section 22(1) sets out the general prohibition of unconscionable conduct in business transactions. *Competition and Consumer Act 2010* (Cth) pt 2-2 s 22(1) (Austl.). Section 22(2) describes the different factors that courts can consider when determining whether particular conduct by a *seller* is unconscionable. *Id.* s 22(2). Section 22(3) describes the different factors courts can consider when determining whether particular conduct by a *buyer* is unconscionable. *Id.* s 22(3). Sections 22(2) and 22(3) are otherwise identical.

> (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
>
> (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);
>
> engage in conduct that is, in all the circumstances, unconscionable."[125]

Additionally, part 2-2, section 21(1) states, "a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to another person, engage in conduct that is, in all the circumstances, unconscionable."[126]

The CCA does not precisely define the meaning of "unconscionable." Instead, it allows courts to consider a variety of factors in determining whether any particular conduct is unconscionable.[127] For example, under section 22(2),[128] a court can assess the relative bargaining positions of each party, whether the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier, and whether the business consumer could understand the documents provided by the corporation or person.[129] In addition, the court can look to: whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer; the

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125. *Competition and Consumer Act 2010* (Cth) pt 2-2 s 21(1) (Austl.); *Competition and Consumer Legislation Amendment Act 2011* (Cth) sch 2 (Austl.). It should be noted that a franchisor need not always be a corporation. *See Trade Practices (Industry Codes—Franchising) Regulations 1998* (Cth) pt 1 s 3 (Austl.) (defining "franchisor" to include "a person who grants a franchise" and "a person who otherwise participates in a franchise as a franchisor").

126. *Competition and Consumer Act 2010* (Cth) pt 2-2 s 21(1) (Austl.). The Australian Parliament appears to have intended section 21(1) to cover unconscionable conduct generally, while section 22(1) covers unconscionable conduct in business transactions. *See id.* (noting that the title of section 21 is "Unconscionable conduct" and the title of section 22 is "Unconscionable conduct in business transactions").

127. *Competition and Consumer Act 2010* (Cth) pt 2-2 s 22(2) (Austl.) (listing twelve different factors that courts may consider in determining whether a supplier's conduct toward a business consumer was unconscionable).

128. *See supra* note 126 (unconscionability in the Australian statutes). This section concerns unconscionability by the seller. Some provisions were amended in 2012 with the *Statute Law Revision Act 2012* (Cth) (Austl.), but nothing affected unconscionability. *See id.* sch 1 pt 1 ss 31–36, *available at* http://www.comlaw.gov.au/Details/C2012A00136/Html/Text#_Toc336340051.

129. *Competition and Consumer Act 2010* (Cth) pt 2-2 s 22(2)(a)–(c) (Austl.).

amount that equivalent goods or services would have cost from a person other than the supplier; the extent to which the supplier's conduct toward the business consumer was consistent with the supplier's conduct toward similar business consumers in similar transactions; and what industry codes or standards applied to the transaction.[130]

Furthermore, under section 22(3),[131] courts can consider the extent to which the acquirer unreasonably failed to disclose to the small business supplier any conduct by the acquirer that might have affected the interests of the small business supplier[132] or posed risks to the business consumer that were unforeseeable to the small business supplier.[133] Judges also can take into account the parties' conduct in the context of any contract between the acquirer and the small business supplier for the acquisition of goods or services.[134] Finally, they can consider whether the acquirer had a contractual right to unilaterally vary a term or condition of a contract between the acquirer and the small business supplier for the acquisition of goods or services,[135] and the extent which the parties acted in good faith.[136] Thus, Australian courts have broad latitude in assessing all aspects of a contract or transaction to ensure fairness and prohibit unconscionable conduct on the part of the stronger party, which, at least in the franchise context, is most often the franchisor.[137] The broad statutory latitude provided here is in stark contrast to that of South Africa's unconscionability

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130. *Id.* s 22(2)(d)–(g).

131. Section 22(3) concerns unconscionable conduct by the buyer. *See supra* note 124.

132. *Competition and Consumer Act 2010* (Cth) pt 2-2 s 22(3)(i)(i) (Austl.).

133. *Id.* s 22(3)(i)(ii).

134. *See id.* s 22(3)(j)(iii).

135. *Id.* s 22(3)(k).

136. *Id.* s 22(3)(l). Under Australian law, all parties to a business transaction have an implied duty of good faith. *See Pac. Brands Sport & Leisure Pty Ltd. v. Underworks Pty Ltd.* [2006] 149 FCR 395, ¶¶ 64–65 (Austl.) (describing the test for determining if a party breached the duty of good faith in terminating a franchise agreement).

137. *See* Parliamentary Joint Comm. on Corps. & Fin. Servs., *Opportunity Not Opportunism: Improving Conduct in Australian Franchising* para. 8.16 (2008) (Austl.), *available at* http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2008-10/franchising/report/~/media/wopapub/senate/committee/corporations_ctte/completed_inquiries/2008_10/franchising/report/report_pdf.ashx (discussing the bargaining power imbalance that tends to favor franchisors over franchisees).

provision, which provides little or no guidance on how courts should construe the meaning of "unconscionable conduct" under the Act.[138] Unlike South Africa, Australia provides clarity for both domestic and foreign franchisors as to what conduct meets or violates the Act.

Surely clarity in its unconscionability law benefits Australian business. According to the Franchise Council of Australia, a peak body in Australia that represents franchisors, franchisees, and service providers to the country's US$131 billion franchise sector,[139] "the current regulatory framework strikes a practical balance between the interests of all stakeholders."[140] The Council believes that *any* change to the current definition or interpretation of unconscionable conduct in Australia will adversely affect that balance.[141] In addition, the Council found that more regulation would create unnecessary uncertainty and cost, and create a disincentive to invest in Australia.[142] With the existence of protections for franchisees before entering the franchise agreement and during the course of the relationship, the Council feels that Australia already has "the most comprehensive franchising regulation in the world."[143]

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138. *See* Consumer Protection Act 68 of 2008 § 40(1) (S. Afr.) (defining "unconscionable conduct" as the "use [of] physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct"); *see also* § 1 (further defining "unconscionable conduct" as conduct "otherwise unethical or improper to a degree that would shock the conscience of a reasonable person").

139. *About Us*, FRANCHISE COUNCIL AUSTL., http://www.franchise.org.au/about-the-fca.html (last visited Feb. 23, 2014).

140. Franchise Council of Austl., *The Nature and Application of Unconscionable Conduct Regulation: Can Statutory Unconscionable Conduct Be Further Clarified in Practice?* para. 3.1 (2009), *available at* http://archive.treasury.gov.au/documents/1707/PDF/Franchise_Council_of_Australia.pdf. Prior to the adoption of the current framework, the Productivity Commission of Australia had found that more consumer protection was needed for franchisees. In particular, the Commission noted that "[u]nfair terms appear commonplace in standard form contracts," and that such exploitative contracts would remain prevalent so long as no regulatory measures are introduced against them. Australian Gov't Productivity Comm'n, Review of Australia's Consumer Policy Framework 430 (2008), *available at* www.pc.gov.au/__data/assets/pdf_file/0008/79172/consumer2.pdf.

141. Franchise Council of Austl., *supra* note 140.

142. *Id.*

143. *Id.* § 3.1(3).

E. *China*

In contrast, Chinese laws prohibiting unconscionable conduct are in their infancy. Article 4 of the Regulation on the Administration of Commercial Franchises states, "[t]he principles of free will, fairness, honesty and good faith shall be followed for engagement in franchise activities."[144] Similarly, Article 5 of the Company Law of the People's Republic of China states that "when undertaking business operations, a company shall comply with the laws and administrative regulations, social morality and business morality. It shall act in good faith, accept the supervision of the government and the general public, and bear social responsibilities."[145] In addition, Article 6 of the Contract Law of the People's Republic of China mandates that contracting parties "shall observe the principle of honesty and good faith in exercising their rights and performing their obligations."[146] Good faith, under Chinese law, implies that the parties to a transaction will be at arm's length and will not engage in unconscionable conduct, fraud, misrepresentation, deceit, and other similar practices.[147] Although implied under Chinese provisions requiring good faith, Chinese law does not explicitly prohibit unconscionable conduct.[148]

Despite the relative infancy of franchising in China, there are over 4000 franchise systems with more than 330,000

144. (中国商业特许经营管理条例) [Regulation on the Administration of Commercial Franchises] (promulgated by the St. Council, Jan. 31, 2007, effective May 1, 2007) ST. COUNCIL GAZ., Feb. 6, 2006, art. 4 (China), *available at* http://tradeinservices.mofcom.gov.cn/en/b/2007-02-06/23214.shtml.

145. (中华人民共和国公司法 (2005年修订) [The Company Law of the People's Republic of China (Revised in 2005)] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., Oct 27, 2005, at art. 5 (China) (emphasis added), *available at* http://tradeinservices.mofcom.gov.cn/en/b/2005-10-27/8385.shtml.

146. (中华人民共和国合同法) [Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2009, effective Oct. 1, 1999) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., Mar. 15, 1999, art. 6 (China) (emphasis added), *available at* http://tradeinservices.mofcom.gov.cn/en/b/1999-03-15/8371.shtml.

147. *See China Franchise Law*, SIGNATURE FRANCHISING para. 21, http://www.signaturefranchising.com/China%20Franchise%20Rules%20&%20Law.html (last visited Feb. 23, 2014).

148. One explanation for this may be that franchising has been developing in China for only about ten years or so unlike other countries such as France and the United States.

franchised stores operating within the country.[149] Moreover, as of July 2012, it is estimated that China had a population of over 1.34 billion.[150] Accordingly, it may be time for the Chinese government to promulgate more franchise-specific regulation similar to that of South Africa. Like South Africa, China has a rapidly transforming economy—far different from the established structures of the other three nations (Australia, France, and the United States)—as the social structure shifts quickly from rural to urban, from illiterate to educated and globally connected. China also is culturally diverse with at least twelve recognized ethnic groups and eleven languages spoken within the country.[151] With such a large, diverse population and wide array of franchisors doing business in the country, more comprehensive franchise regulation may provide franchisors with greater certainty as to the legality of their business practices while giving franchisees more security when they make the decision to invest. The vagueness of China's franchising laws, however, is not impairing its robust franchise market.[152] If China serves as a model for franchise growth in South Africa, then

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149. RESEARCH IN CHINA, CHINA FRANCHISE MARKET REPORT, 2010, *available at* http://www.researchinchina.com/Htmls/Report/2011/6039.html#6d (last visited Feb. 23, 2014).

150. *China Demographics Profile 2013*, INDEX MUNDI, http://www.indexmundi.com/china/demographics_profile.html [hereinafter *China Demographics 2013*] (last updated Feb. 21, 2013). The United States and South Africa, in comparison, have population sizes of only 317 million and 52 million, respectively. *See U.S. and World Population Clock*, U.S. CENSUS BUREAU, http://www.census.gov/main/www/popclock.html (last visited Feb. 23, 2014); *South Africa: Fast Facts*, SOUTHAFRICA.INFO (Nov. 9, 2012), http://www.southafrica.info/about/facts.htm#.UTOuVxx3aLo.

151. *See China Demographics 2013*, *supra* note 150. Chinese ethnic groups include Han Chinese, Zhuang, Manchu, Hui, Miao, Uighur, Tujia, Yi, Mongol, Tibetan, Buyi, Dong, Yao, and Korean. *Id.* The languages spoken in China are Mandarin (Putonghua, based on the Beijing dialect), Yue (Cantonese), Wu (Shanghainese), Minbei (Fuzhou), Minnan (Hokkien-Taiwanese), Xiang, Gan, and Hakka dialects. *Id.* In South Africa, the races are divided into five categories: African, Coloured, White, Indian, and Asian. *See South Africa: Fast Facts*, *supra* note 150. Moreover, South Africa is a very multi-lingual country with eleven official languages. *Id.* These languages are Afrikaans, English, isiNdebele, isiXhosa, isiZulu, Sesotho sa Leboa, Sesotho, Setswana, siSwati, Tshivenda, and Xitsonga. *Id.*

152. China's franchise sector has expanded nearly 15% since 2008. THOMAS LECLERCQ & GUILLAUME SMITSMANS, THIRD PLACE LTD, FRANCHISING IN CHINA: OVERVIEW AND OPPORTUNITIES 2 (2012), *available at* http://www.third-place.be/wp-content/uploads/2012/12/Franchising-in-China-Whitepaper-by-Third-Place-Franchise-Consulting.pdf.

vague unconscionability clauses are far from dispositive in predicting future growth in the country.

F. *Unconscionability as a Concept Encouraging Franchise Expansion*

Overall, unconscionability clauses do not appear to negatively affect franchise business growth. In all four countries—where the governments either prohibit "unconscionable" conduct outright or, in the alternative, prohibit unfair practices or tactics, require fairness between the parties, and imply good faith in all business dealings—franchising continues to grow as a business model from year to year.[153] Thus, unconscionability clauses, such as the one in South Africa and the other countries examined, may actually encourage franchise expansion. Franchisees and prospective franchisees may be more willing to invest their resources into a new business because they have more protections and recourse under the law.[154]

153. Between 2011 and 2013, 21,339 new franchise outlets were created in the United States, a two-year growth rate of nearly 3% . IHS GLOBAL INSIGHT, FRANCHISE BUSINESS ECONOMIC OUTLOOK FOR 2014 1 (Jan. 8, 2014), *available at* http://www.franchise.org/industrysecondary.aspx?id=10152. In the United States, franchise businesses grew 1.4% in 2013, and are expected to grow an additional 1.7% in 2014 *Id.* For 2013, the growth in number of franchised establishments and in franchise output (4.3%) both exceeded the overall results for industries in which franchisees are concentrated. *Id.* France, in contrast, has seen average annual franchise growth of ten percent since 2000 and remains the largest franchise market in Europe. *See supra* note 123. In Australia, franchisors can expect to see thirteen percent annual revenue growth each year. *Built for Growth: Franchises Deliver Double Digit Growth Second Year Running*, PWC AUSTRALIA (Sept. 20, 2010), http://www.pwc.com.au/media-centre/2010/franchising-indicator-sep10.htm. In comparison, Chinese franchises are expected to go from 400,000 to 800,000 by 2021, creating over 10 million jobs in the country. LECLERCQ & SMITSMANS, *supra* note 152, at 2.

154. *See Franchisor Group Opposes Making Australia Franchising Code Mandatory*, Global Franchising Developments, BUS. FRANCHISE GUIDE (CCH) ¶ 7315, § 3.2.3 (2009) (discussing how Australia's unconscionability provisions encourage franchising because it requires franchisors to have better business practices and discourage oppressive conduct toward franchisees).

V. *STEEP CIVIL PENALTIES*

A. *South Africa*

One other prominent feature of South Africa's Act is the penalties it imposes for violating it. Under the Act, South African Tribunals can impose an "administrative fine in respect of prohibited or required conduct."[155] An administrative fine imposed under the Act may not exceed the *greater* of "10 per cent of the respondent's annual turnover during the preceding financial year" or 1 million in South African rand.[156]

The more problematic of the two alternatives is the steep civil penalty of ten percent of the violator's annual turnover. For purposes of the Act, annual turnover is defined as "the total income of that [franchisor] during the immediately preceding year."[157] Consider, for example, what ten percent of McDonald's total income would be.[158] The penalty is potentially crippling to a franchisor, in part because the Act does not clearly define whether the ten percent annual turnover penalty refers to the

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155. Consumer Protection Act 68 of 2008 § 112(1) (S. Afr.). A right of action under the Act is provided to the following person:

> a) A person acting on his or her own behalf;
> b) an authorized person acting on behalf of another person who cannot act in his or her own name;
> c) a person acting as a member of, or in the interest of, a group or class of affected persons;
> d) a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and
> e) an association acting in the interest of its members.

Id. § 4(1). Moreover, the National Consumer Commission (the country's "consumer watchdog"), the National Consumer Tribunal (serving as the regulatory body under the Act), the Ombudsman, alternative dispute resolution agents, as well as various consumer and civil courts, are all charged with enforcing the Act. C. Van Heerden & J. Barnard, *Redress for Consumers in Terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion*, 6 J. INT'L COM. L. & TECH. 131 (2011). The Act also provides for criminal penalties. Under the Act, a person convicted of violating the Act can be fined or imprisoned for a period not exceeding twelve months or both. Consumer Protection Act 68 of 2008 § 112(3) (S. Afr.).

156. § 112(2). Converted to US dollars, this amount is about US$120,000. *Currency Converter*, XE, http://www.xe.com/ucc/ (last visited Feb. 15, 2013).

157. Consumer Protection Act 68 of 2008 § 112(4) (S. Afr.).

158. McDonald's Corporation had over US$27 billion total revenue in 2011. MCDONALD'S CORP., 2011 ANNUAL REPORT 7 (2012), *available at* http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/Investors%202012/2011%20Annual%20Report%20Final.pdf.

franchisor's total sales globally or only the total sales in South Africa. By comparison, South Africa's Competition Act states that "an administrative fine imposed in terms of subsection (1) may not exceed 10% of the firm's annual turnover *in the Republic* and its exports from *the Republic* during the firm's preceding financial year."[159] The logic of the South African Consumer Protection Act, therefore, can go either of two ways: (1) the Competition Act is a model, and one assumes that the Consumer Protection Act uses the same definition for annual turnover; or (2) because the South African legislature did not use the term "Republic" for the Consumer Protection Act, it presumably is referring to the total sales of the franchisor in South Africa and abroad. Until clarified by statutory amendment, regulation, or court decision, there is a distinct possibility that a penalty would use all sales worldwide as the baseline.[160]

Fortunately for franchisors, the Act does provide some guidance to tribunals that are determining the appropriate amount of an administrative fine. While there remains the issue of precisely defining the preceding year's turnover,[161] the Act specifies that any tribunal determining an appropriate administrative fine must consider the following factors:

> (a) The nature, duration, gravity and extent of the contravention;
>
> (b) any loss or damage suffered as a result of the contravention;
>
> (c) the behaviour of the respondent;
>
> (d) the market circumstances in which the contravention took place;

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159. *See* Competition Act 89 of 1998 § 61(2) (S. Afr.) (emphasis added). Accordingly, the Competition Act makes it very clear annual turnover refers to total sales *in* South Africa.

160. Interview with Candice Meyer, Partner, Webber Wentzel, in Cape Town, South Africa (May 9, 2012),

161. Since sales and revenue fluctuate from year to year, perhaps a longer period than just the preceding year would be a better measure for penalties. At any rate, does the counting start from one year immediately prior to the violation (as perhaps the Act indicates when it refers to "the immediately preceding year," Consumer Protection Act 68 of 2008 § 112(4) (S. Afr.)), or does it measure it by fiscal years (as perhaps the Competition Act implies in the phrasing "the firm's preceding financial year," Competition Act 89 of 1998 § 61(2) (S. Afr.))?

> (e) the level of profit derived from the contravention;
>
> (f) the degree to which the respondent has co-operated with the Commission and the Tribunal; and
>
> (g) whether the respondent has previously been found in contravention of this Act.[162]

These factors, as written, can be mitigating factors or aggravating factors, and thus give tribunals guidance in determining the amount of any fine levied against a franchisor for violating the Act. Moreover, the penalties set forth under the Act are maximum penalties, not minimums. Fines in many cases will be significantly lower than ten percent of a franchisor's total sales. It is likely that a ten percent of turnover fine would probably require extreme and egregious conduct in almost every one of these factors. Thus, franchisors will not be writing a blank check to the South African government merely by opening franchises in South Africa. Nevertheless, many commentators argue that the perceived and potential risk for non-compliance are too great and that franchisors would be well-advised to reevaluate their current policies and practices to ensure that they comport with all facets of the Act.[163]

The Act also provides for vicarious liability of employers for their employees' conduct. Thus, a tribunal could hold an employer jointly and severally liable for the acts of its employees.[164] The effect of these laws on franchising and commerce in South Africa is yet to be seen,[165] but it is worth noting that disgruntled or unscrupulous franchisees could use the Act as a bargaining weapon against franchisors.

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162. Consumer Protection Act 68 of 2008 § 112(3) (S. Afr.).

163. *See* Candice Posthumus, *The Consumer Protection Act—It Has Teeth*, NORTEN ROSE FULBRIGHT (July 27, 2010), http://www.nortonrose.com/news/44319/the-consumer-protection-act—it-has-teeth; *see also* Andrew Allison, *The Consumer Protection Act: When and How Does It Apply*, GOTTA QUIRK (Apr. 4, 2011), http://www.gottaquirk.com/2011/04/04/the-consumer-protection-act-when-and-how-does-it-apply. Alternatively, franchisors could simply not do business in South Africa given the level of uncertainty contained in the Act and the potential costs for violating the Act.

164. *See* Consumer Protection Act 68 of 2008 § 113(1). The vicarious liability provisions apply to fines only, not imprisonment. § 113(2).

165. *See* Allison, *supra* note 163.

B. *United States*

Similarly to South Africa, franchise regulation in the United States also provides for civil penalties. Under Section 5 of the Federal Trade Commission Act, the FTC "may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule . . . respecting unfair or deceptive acts or practices . . . with actual knowledge or knowledge fairly implied on the basis of objective circumstances."[166] In such an action, the person, partnership, or corporation will be liable for a civil penalty "of not more than [US]$10,000 for each violation."[167] Where a violator has continued to fail to comply with a rule or continues to engage in unfair or deceptive acts or practices, in or affecting commerce, each day of such continuance is an additional violation for the purposes of the civil penalty.[168] Courts do, however, have discretion in assessing penalties. The rule mandates that when determining the amount of the civil penalty, "the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require."[169] Moreover, the FTC "may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court."[170]

As stated above, Section 45 prohibits unfair and deceptive acts or practices that affect commerce.[171] However, franchisees do not have a private right of action against franchisors who violate Section 45.[172] All enforcement and redress must proceed through an enforcement proceeding brought by the FTC.[173]

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166. 15 U.S.C. § 45(m)(1)(A) (2012).

167. *Id.*

168. § 45(m)(1)(C).

169. *Id.*

170. § 45(m)(3).

171. *See* § 45(m)(1)(A).

172. *See* Michael G. Brennan & Philip F. Zeidman, *United States*, *in* GETTING THE DEAL THROUGH: FRANCHISE IN 32 JURISDICTIONS WORLDWIDE, *supra* note 81, at 199, 203 (stating that FTC rules do not grant aggrieved franchisees the right to bring legal action against franchisors who violate FTC rules); *see also* 15 U.S.C. § 45.

173. *See* 15 U.S.C. § 45(m)(1)(A). The lack of a private right of action by aggrieved franchisees stands out all the more since federal courts interpreted the

Under Section 45, the FTC may bring civil actions and seek monetary penalties, customer redress, and injunctive relief,[174] such as cease and desist orders against violating franchisors.[175] In addition, the FTC could seek contractual remedies, such as rescission, reformation, and other equitable relief.[176] Franchisees may also receive monetary refunds.[177] Additionally, individual states can establish remedies for aggrieved franchisees. Franchise violation penalties can vary from state to state.[178] Accordingly, some states, such as California, provide criminal penalties for violation of state franchising laws.[179] Enforcement of state franchise regulations is usually the duty of a state official, generally either the state attorney general or a specialized franchisor investigator.[180] In some states, there is a

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Securities and Exchange Act of 1934 as impliedly containing a private right of action. *See, e.g.*, Kardon v. Nat'l Gypsum Co., 73 F. Supp. 798, 802 (E.D. Pa. 1947) ("The Act does no more than forbid certain types of conduct, which it defines in general terms, in connection with the purchase of securities. It does not even provide in express terms for a remedy, although the existence of a remedy is implicit under general principles of the law."). However, federal courts have consistently held that there is no such private right of action under § 45. Morrison v. Back Yard Burgers, Inc., 91 F.3d 1184 (8th Cir. 1996); Layton v. AAMCO Transmissions, Inc., 717 F. Supp. 368 (D. Md. 1989); Freedman v. Meldy's, Inc., 587 F. Supp. 658 (E.D. Pa. 1984).

174. *See* § 45(l)–(m).

175. *Id.* § 45(b).

176. *Id.* § 45(l) (equitable relief). *See generally* Wagstaff v. Protective Apparel Corp. of America, 760 F.2d 1074 (10th Cir. 1985) (holding that a distributorship agreement could be rescinded on the grounds of frustration of purpose, and state law did not preclude rescission of a contract); Wilson v. Zimmerman, 495 P.2d 713 (Or. 1972) (holding that a franchisee could rescind a franchise agreement if false representations which induced franchisee to enter into contract were material).

177. Brennan & Zeidman, *supra* note 172, at 203.

178. Under principles of federalism in the United States, individual states can always provide more protection than required under federal law but never less. *See* U.S. CONST. art. VI, cl. 2. (stating that federal laws "shall be the supreme Law of the Land" superseding any state laws that conflict with them); *see also* Gorrie v. Bowen, 809 F.2d 508, 520 (8th Cir. 1987) ("The supremacy clause only operates . . . to the extent that there is a conflict between state law and a federal law or regulation.").

179. California, for example, has various franchise registration laws that provide for criminal penalties. *See, e.g.*, People v. Gonda, 188 Cal. Rptr. 295, 297 (Cal. Ct. App. 1982) (finding a "willful" violation of state franchising laws in a criminal prosecution, even where defendant's counsel had assured defendant of compliance with various disclosure laws and defendant relied on such advice).

180. *See, e.g.*, People *ex rel.* Fahner v. Halzel, 449 N.E.2d 531 (Ill. App. Ct. 1982) (observing that Illinois' Franchise Disclosure Act vested enforcement duties in the Illinois Attorney General).

private right of action.[181] Criminal penalties can range from fines to imprisonment,[182] but in most states enforcement authorities do not seek criminal penalties for violations.[183]

C. *France*

In contrast to the United States, France offers its own set of civil and criminal penalties for franchise violations. Article 1 of the French Commercial Code's *Loi Doubin*[184] applies specifically to distribution contracts, including franchise agreements.[185] Under the statute and the related regulatory decree, franchisors must disclose certain information to franchisees before the parties enter into a franchising agreement.[186]

An implementing decree concerning the *Loi Doubin* issued on April 4, 1991, guides franchisors in determining what they should include in their disclosures.[187] Besides the numerous required items to disclose,[188] the decree requires franchisors to provide the disclosures in a language understandable to the future franchisee (presumably French), and it must occur at

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181. *See, e.g.,* Bonfield v. AAMCO Transmissions, Inc., 708 F. Supp. 867 (N.D. Ill. 1989), *overruled on other grounds by* Lewis v. Hermann, 775 F. Supp. 1137, 1153 (N.D. Ill. 1991).

182. *See, e.g.,* 815 ILL. COMP. STAT. 705/25 (1988) (making it a class 2 felony to violate certain provisions of the Illinois Franchise Disclosure Act); 815 ILL. COMP. STAT. 705/26 (2009) (establishing a private cause of action for aggrieved franchisees and establishing civil liability for franchisors who violate certain provisions of the Illinois Franchise Disclosure Act).

183. Brennan & Zeidman, *supra* note 172, at 203.

184. *See* CODE DE COMMERCE [C. COM.] art. L330-3 (Fr.); *supra* text accompanying note 58.

185. *See* CODE DE COMMERCE [C. COM.] art. L330-3 (Fr.).

186. *Id.* (the statute–*Loi Doubin*); CODE DE COMMERCE [C. COM.] art. R330-1 (Fr.) (the regulatory decree).

187. Décret 91-337 du 4 avril 1991 portant application de l'article 1er de la loi 89-1008 [Decree 91-337 of April 4, 1991, implementing Law 89-1008] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 6, 1991, art. 1 (corrected 4 May 1991) (now in force per Décret 2009-557 du 19 mai 2009 relatif à la partie réglementaire du code de commerce [Decree No. 2009-557 of May 19, 2009 on the Regulatory Part of the Commercial Code], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 20, 2009, art. 4).

188. *See* CODE DE COMMERCE [C. COM.] art. R330-1 (Fr.) (listing such items as the franchisor's company name, location, activity, capital, managers, last two annual financial statements, trademark information, commercial premises, market prospects, other franchisees (up to 50), number of franchisees which left the network in the past year, reasons for such departures, and terms and conditions for renewal, cancellation, or assignment).

least twenty days before the parties execute the franchise agreement.[189] Furthermore, the decree levies civil fines and penalties against franchisors who violate the disclosure requirements.[190] The law is not entirely clear, inasmuch as French codified laws do not provide much guidance as to the amount of the fines and penalties, and the *Loi Doubin* only applies to franchised relationships in which the franchisee received exclusive or quasi-exclusive rights.[191] However, courts have delineated what constitutes quasi-exclusivity (roughly, about eighty percent or more of a market).[192] Failure to deliver proper disclosures is a quasi-criminal offense in France, and a franchisor thus violating the disclosure requirements could face government prosecution.[193]

D. *Australia*

Australian law also provides for steep civil fines and penalties. The Australian Competition and Consumer Commission ("ACCC") is a governmental entity charged with administering and enforcing the CCA and the Franchising Code of Conduct.[194] The ACCC relies upon complaints from persons who believe a franchisor has not followed the disclosure requirements.[195] If, after investigating the complaint, the ACCC

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189. *See id.*

190. Décret 91-337 du 4 avril 1991 portant application de l'article 1er de la loi 89-1008 [Decree 91-337 of April 4, 1991, implementing Law 89-1008] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 6, 1991, art. 2 (corrected 4 May 1991) (now in force per Décret 2009-557 du 19 mai 2009 relatif à la partie réglementaire du code de commerce [Decree No. 2009-557 of May 19, 2009 on the Regulatory Part of the Commercial Code], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 20, 2009, art. 4).

191. *See* CODE DE COMMERCE [C. COM.] art. L330-3 (Fr.).

192. Christophe Héry, *Pre-contractual Information Obligation in French Commercial Contracts*, DISTRIBUTION L. COMM'N NEWSLETTER (Int'l Ass'n of Young Lawyers, Brussels, Belg.), July 2010, at 7.

193. *Id.* (noting that a franchisor would face contract avoidance in civil matters and a EU€1500 fine in criminal actions). Failure to follow disclosure requirements is also a quasi-criminal offense in some United States jurisdictions, such as Florida. *See, e.g.*, Fla. Stat. § 817.416(2) (2012).

194. *Franchising Code of Conduct*, AUSTL. COMPETITION & CONSUMER COMM'N, *available at* http://www.accc.gov.au/business/industry-codes/franchising-code-of-conduct (last visited Feb. 23, 2014).

195. John Sier & Phillip Colman, *Australia*, *in* GETTING THE DEAL THROUGH: FRANCHISE IN 30 JURISDICTIONS WORLDWIDE 5, 8 (Phillip F. Zeidman ed., 2012), *available at* http://www.franchise.org/uploadedFiles/F2012%20Australia.pdf.

finds that the franchisor breached the Franchising Code of Conduct, the ACCC can seek administrative resolutions, impose a fine, or instigate court proceedings.[196] Additionally, in 2009 the Ministers for Innovation, Industry, Science, and Research in Australia proposed measures to strengthen Australia's Franchising Code of Conduct and provisions of the Trade Practices Act to protect franchisees from the anti-competitive and unfair practices of more powerful franchisors.[197] These measures, implemented in 2010, empower the ACCC to warn the public about "rogue or unscrupulous" franchisors, conduct audits of non-complying franchisors, compel franchisors and franchisees to engage in proscribed dispute resolution procedures, and require franchisors to give six months notice to franchisees as to whether the franchisee will be allowed to renew.[198]

Although the Franchising Code of Conduct does not provide for specific civil or criminal penalties, the ACCC can impose penalties under the CCA.[199] Section 76 of the CCA ("Section 76") allows the ACCC to impose "pecuniary penalties" on any person, including a corporation, who contravened or

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196. *Id.* (discussing a variety of remedies available to the Australian Competition and Consumer Commission ("ACCC")). However, unless the franchisee discovers the violation of the disclosure requirements within seven days of signing the franchise agreement, the franchisee does not have a right to terminate the franchise agreement. *Id.*

197. Media Release, Craig Emerson, Austl. Gov't Innovation Minister, Government to Strengthen Franchising Code of Conduct and Unconscionable Conduct Law 1 (Nov. 5, 2009) [hereinafter Media Release], *available at* http://www.franchise.org.au/files/4b8608511e5d6.pdf. It is possible that the Ministry may have been concerned about the remedies available to franchisees under the Trade Practices Act and thought more protections for franchisees were necessary. For example, under the Australian common law, a franchisor's contravention of statutory provisions, like the Trade Practices Act, would only render a contract unenforceable and would not result in further penalties. *See Ketchell v Master of Educ. Servs. Pty Ltd.* (2007) 226 FLR 169, 175 (Austl.) (citing *Trade Practices Comm'n v Milreis Pty Ltd.* (1977) 29 FLR. 144, 158 (Austl.)), *overruled by Master Educ. Servs. Pty Ltd. v Ketchell* (2008) 236 CLR 101 (Austl.) (finding that a statutory contravention *does not* render a contract unenforceable). The holding of the High Court of Australia in *Ketchell* effectively gave franchisees less protections under the law and may have resulted in the proposed measures to strengthen Australia's Franchising Code of Conduct and various provisions of the Trade Practices Act.

198. *See* Media Release, *supra* note 197, at 1–4.

199. *Competition and Consumer Act 2010* (Cth) pt VI s 76 (Austl.).

attempted to contravene, Part IV of the CCA.[200] In addition, the ACCC can levy pecuniary penalties against any party that has aided, abetted, counseled, or procured a person to contravene Part IV, or induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene Part IV, or has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of Part IV, or has conspired with others to contravene Part IV.[201]

If a corporation, including a franchisor, violates any section of Part IV, that corporation, or "body corporate," must pay the *greatest* of the following:

> (i) $10,000,000;
>
> (ii) if the Court can determine the total value of the benefits that have been obtained . . . by one or more persons that are reasonably attributable to the act or omission—3 times that total value;
>
> (iii) if the Court cannot determine the total value of those benefits—*10% of the annual turnover* . . . of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the act or omission occurred; and . . .
>
> (d) for each other act or omission to which this section applies—$10,000,000.[202]

Section 76 provides courts with some guidance as to how to apply the provision presented above. For purposes of the provision, "annual turnover of a body corporate, during the turnover period is the sum of the values of all the supplies that [the corporation], and any [corporation] related to the [corporation], have made, or are likely to make during [a 12-month period]," excluding certain taxes and supplies that are not connected with Australia.[203] The CCA defines "supply" in

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200. *Id.* s 76(1)(a)(i). Part IV of the CCA is the Restricted Trade Practices provision. That provision includes section 22 discussed in Part IV.D.

201. *Id.* s 76(1)(c)–(f).

202. *Id.* s 76(1A) (emphasis added).

203. *Id.* pt VI s 76(1B)(5). This is similar to the "annual turnover rate" as defined in South Africa's law. *See* Consumer Protection Act 68 of 2008 § 112(4) (S. Afr.) (defining annual turnover as "the total income of that [franchisor] during the immediately preceding year"). The annual turnover rate of a noncompliant franchisor may not necessarily be an appropriate gauge to determine a pecuniary penalty—perhaps because it is excessive or unreflective of the financial benefit a franchisor may

two ways. First, regarding goods, supply represents those goods provided "by way of sale, exchange, lease, hire or hire-purchase"[204] by the corporation. Regarding services, supply refers to those services "provide[d], grant[ed], or confer[red]"[205] by the corporation. Accordingly, as in South Africa, Australian courts can impose a penalty equivalent to ten percent of a corporation's overall sales, whether in goods or services or both, for a specific twelve-month period.[206]

In deciding the penalty amount, an Australian court can order the violator to pay the country for each violation to which a given section applies.[207] The court may also consider all relevant matters, including the nature and extent of the acts or omissions and of any loss or damage suffered as a result, the circumstances of such acts or omissions, and whether the violator has previously been found by the court, in prior proceedings, to have engaged in any similar conduct.[208] Unlike in the United States, the CCA also provides a private right of action for aggrieved parties to recover losses or damages that result from a franchisor's or other party's contravention of the Act.[209]

Australia also has a unique approach to criminal penalties. Unlike South Africa, the United States, China, and France, criminal proceedings may not be brought against any person for a violation of the CCA, including Part IV discussed above.[210] According to section 78, no criminal proceedings may lie against any person who contravenes the CCA, attempts to contravene

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have received from a single violation or set of violations. However, it may be that the legislature simply wanted noncompliant franchisors and the like to feel a punitive sting and to discourage potential criminal practices. *See generally* Gregory C. Shaffer & Nathaniel H. Nesbitt, *Criminalizing Cartels: A Global Trend?*, 12 SEDONA CONF. J. 313, 321 (2011) (describing increased competition and the prevention of cartels as the main reasons why many countries, including Australia, are moving toward enhanced sanctions).

204. *Competition and Consumer Act 2010* (Cth) pt I s 4(1) (Austl.).

205. *Id.*

206. *See supra* text accompanying note 202.

207. *Competition and Consumer Act 2010* (Cth) pt VI s 76 (Austl.) ("[T]he Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect *of each act or omission* by the person to which this section applies . . . ." (emphasis added)).

208. *Id.*

209. *See id.* s 82(1).

210. *See id.* s 78.

the CCA, aids, abets, counsels, or procures a person to contravene the CCA, induces, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene the CCA, has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of the CCA, or has conspired with others to contravene the CCA.[211] As such, violations of the CCA are not within the purview of Australia's criminal laws.

E. *China*

Similar to the United States and France, Chinese law provides for stiff civil penalties and criminal liability. These penalties are contained under articles 24, 25, 27, and 28 of the Regulations on Administration of Commercial Franchise ("Franchising Regulations").

Article 24 of the Franchising Regulations governs penalties against franchisors who do not satisfy the "2+1" requirement under article 7. Under article 24, if a franchisor does not satisfy the "2+1" requirement,[212] the Chinese commercial administrative department "shall order it to make a correction, confiscate its illegal proceeds, impose a fine of more than 100,000 yuan but less than 500,000 yuan on it, and make an announcement about it."[213] Additionally, if an entity or individual who is not an "enterprise" engages in a franchise as a franchisor, the commercial administrative department shall order the offending person to stop the "illegal business operations, confiscate its or his illegal proceeds, and impose a fine of more than 100,000 yuan and less than 500,000 yuan."[214] The regulations do not define the meaning of "illegal business operations," but presumably the regulations are referring to the

211. *See id.* s 78(a)–(f).

212. *See supra* text accompanying notes 84–89.

213. Shangye Texujingying Guanli Tiaoli (商业特许经营管理条例) [Regulation on the Administration of Commercial Franchises] (promulgated by the St. Council, Jan. 31, 2007, effective May 1, 2007) ST. COUNCIL GAZ., Feb. 6, 2007, art. 24 (China), *available at* http://tradeinservices.mofcom.gov.cn/en/b/2007-02-06/23214.shtml. 500,000 Yuan is about US$82,000. *XE Currency Converter*, XE, http://www.xe.com/ucc (last visited Feb. 24, 2014).

214. *See* Shangye Texujingying Guanli Tiaoli, *supra* note 213.

offending person's operations in the scope of the illegally operated franchise.

Article 25 governs penalties against franchisors that do not satisfy certain filing requirements.[215] Under Article 25 of the Franchising Regulations, if a franchisor fails to make an archival filing after entering in a franchise agreement for the first time, the Chinese commercial administrative department must order the franchisor to make such a filing within a limited time period and the department must "impose a fine of more than 10,000 yuan but less than 50,000 yuan."[216] If the franchisor again fails to make the appropriate filing, the department must impose another penalty of between 10,000 and 50,000 yuan, and it must make an announcement.[217]

Article 27 governs penalties for franchisors that use fraudulent or misleading advertisements or promotions.[218] Article 27 authorizes a fine "of more than 30,000 yuan but less than 100,000 yuan" if a franchisor engages in fraudulent or misleading advertising or promoting.[219] If the circumstances are serious, the commercial administrative department can impose a penalty of "more than 100,000 yuan but less than 300,000 yuan" along with a public announcement.[220] The franchisor is also liable for the fraudulent or misleading advertising under Chinese advertising law.[221] Article 27 also provides for criminal sanctions if the fraudulent or misleading nature of the

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215. Article 8 governs the filing requirements. *Id.* art. 8. Specifically, after a franchisor enters into a franchise agreement for the first time, the franchisor must file a photocopy of the business license or enterprise registration certificate, a sample franchise contract, a brochure for franchised operations, a market plan, a written commitment and relevant certification materials proving that the provisions in Article 7 are followed, and any other documents or materials required by the State Council. *Id.* If the franchisor is operating in only one province, the archival filing will be with the commercial administrative department of that province. *Id.* If the franchise operates in multiple provinces, the archival filing must be with the State Council. *Id.*

216. *Id.* art. 25.

217. *Id.*

218. *See id.* art. 27 (proscribing penalties for violations of Article 17 which prohibits franchisors from using fraudulent or misleading advertisements).

219. *Id.*

220. *See id.*

221. *Id.*

advertising constitutes a criminal offense.[222] However, Article 27 does not describe the precise nature of the criminal sanctions.[223]

Article 28 of the Franchising Regulations also provides for civil penalties if the franchisor does not disclose certain information.[224] Under Article 28, a franchisor can be fined "more than 10,000 yuan but less than 50,000 yuan" for violating Chinese franchise disclosure laws.[225] For more serious violations, the franchisor can be fined "more than 50,000 yuan but less

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222. *Id.*

223. Also, where money or property is defrauded "in the name of franchise," and it constitutes a criminal offense, it shall be investigated and penalized as such under Chinese criminal laws. *Id.* art. 29.

224. *Id.* art. 28. Articles 21, 22, and 23 require certain disclosures by franchisors. Article 22 requires that the franchisor disclose to the franchisee the following:

> (1) the name, domicile, legal representative, registered capital, business scope of and basic information about the franchised operations of the franchiser;
> (2) the basic information about the registered trademark, enterprise mark, patent, know-how and business model of the franchiser;
> (3) type, amount and payment method of franchising fees (including whether the guaranty bonds should be collected as well as the conditions and methods for guaranty bonds);
> (4) prices and requirements for providing products, services and equipment to the franchisee;
> (5) specific contents, methods and implementation plans for continuously providing business guidance, technical support, business training and other services to the franchisee;
> (6) specific measures for guiding and supervising the business activities of the franchisee;
> (7) the investment budget for the franchise outlet;
> (8) the quantity, distribution and business evaluation of current franchisees within the territory of China;
> (9) digests of the financial statements and audit reports as audited by the accountant firm for the recent two years;
> (10) the conditions about franchise-related lawsuits and arbitration for the recent five years;
> (11) whether the franchiser or its legal representative has ever conducted major illegal business operations; and
> (12) other information prescribed by the commercial administrative department of the State Council.

Id. art. 22. Article 21 requires that the franchisor disclose this information, along with the text of the franchise agreement, in writing, at least twenty days before the franchisee actually signs the franchise agreement. *Id.* art. 21. Article 23 generally requires that the franchisor's disclosures be accurate, and it grants the franchisee the power to rescind the franchise agreement if the franchisor's disclosures were inaccurate. *See id.* art. 23.

225. *Id.* art 28.

than 100,000 yuan" coupled with a public announcement of the fine.[226]

CONCLUSION

Franchising has historically been thought of as catering to mom-and-pop investors. Today, however, many franchisees are sophisticated, well informed, and experienced businesspersons who recognize the arm's length nature of the business relationship between the franchisor and the franchisee and, therefore, seek to protect themselves. Nonetheless, numerous other franchisees do not come to the business world with those advantages of knowledge, skills, and practice.[227] Certainly, this dearth of qualifications must be at least as likely for prospective franchisees in the developing world.

The foregoing analysis indicates that South Africa's imposition of civil penalties is not unique to that country. All the countries discussed above provide for civil penalties when there are violations of their respective business and consumer protection acts. In comparing all of the examined nations, Australia is the only country, other than South Africa, that empowers courts to impose a penalty for ten percent of annual turnover against a violating franchisor. Such a steep civil penalty is not seen in United States, Chinese, or French law. Moreover, although Australia does allow for a stiff annual turnover penalty, it does not allow for criminal liability, a result that is different from the other four countries. South Africa, on the other hand, allows for stiff annual turnover penalties *and* criminal liability—making South Africa's laws the most stringent of all five countries compared. Notwithstanding the imposition of less extensive civil penalties, franchising appears to still be thriving in the United States, France, and China. China, for example,

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226. *Id.*

227. *See* Robert W. Emerson, *Fortune Favors the Franchisor: Survey and Analysis of the Franchisee's Decision Whether to Hire Counsel*, 51 SAN DIEGO L. REV. (forthcoming 2014); Robert W. Emerson, *Franchisees in a Fringe Banking World: Striking the Balance Between Entrepreneurial Autonomy and Consumer Protection*, 46 AKRON L. REV. 1 (2013); Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting Debate Over Franchise Relationship Laws*, 76 ALB. L. REV. 193 (2013); Robert W. Emerson & Uri Benoliel, *Can Franchisee Associations Serve as a Substitute for Franchisee Protection Laws?*, 118 PENN ST. L. REV. 99 (2013).

imposes civil penalties and, in some cases, public disgrace for franchisors that violate the country's regulations but, nevertheless, franchising continues to grow in that country each year.

In comparing the two countries that allow for an annual turnover penalty—Australia and South Africa—foreign franchise expansion may be affected. Australia's large franchising sector is largely composed of Australian-based franchisors. This could be an indication that foreign franchisors are unwilling to take the risk—a result that may be harmful to Australia's economy. On the other hand, it could just be a matter of distance and Australia's geography. As for South Africa, the effect of the annual turnover penalty has yet to be seen. If, in the coming years, franchise expansion to South Africa slows, then the pro-business approach of the United States and France may be a better model for attracting and retaining franchise investment.

Across all five jurisdictions, unconscionable conduct or, alternatively, unfair business practices, are prohibited and discouraged. South Africa and Australia directly prohibit unconscionable conduct and, as stated above, will levy stiff civil penalties against violators. In the United States, unfair or deceptive trade practices are prohibited and the FTC, along with the courts, are empowered to ensure that parties are not engaging in such conduct. In contrast, France and China impose requirements of good faith and fairness between contracting parties and, accordingly, any conduct, practices, or tactics that fall short of those standards are prohibited. Moreover, in China, depending on the severity of the violation, the contract could be rendered unenforceable. Thus, in comparing all five countries, it is not likely that a prohibition of unconscionable conduct is likely to negatively impact future franchise growth in South Africa.

In contrast, South Africa's ten day cooling-off period is potentially harmful to franchise growth. In light of South Africa's history of apartheid coupled with the country's still very high illiteracy rates, it is understandable that a post-signing, cooling-off period would be desirable to the legislature to protect South African consumers, including franchisees. However, the only other two countries in this analysis that require a compulsory cooling-off period are Australia and

China. Australia's cooling-off period is most analogous to South Africa's because it fixes a specific time period (i.e., seven days) for franchisees to cancel a contract without penalty. Although franchise growth in Australia slowed following the adoption of this provision, the country has seen exceptional franchise growth in more recent years. Foreign franchisors, however, still compose a very small percentage of Australia's franchise market.

In contrast, China has also seen rapid franchise growth notwithstanding their imposition of a compulsory cooling-off period. The difference between China's cooling-off period compared to that of South Africa and Australia is that China's cooling-off period can be agreed upon by the franchisor and franchisee and, presumably, could be as short as a day or even less under the current regulations. China's cooling-off period, therefore, is not much of a bar to foreign franchise investment in the country. Not surprisingly, the majority of the franchises in China are foreign-based.

Neither the United States nor France require a cooling-off period. Both countries, however, recognize that a franchisee must be provided with certain disclosures before signing the agreement and require that those disclosures be provided to the franchisee on or before a specific amount of days prior to the signing of the agreement. However, once agreement is signed—assuming there was no fraud or prohibited business practices—the agreement becomes enforceable against the franchisee. In evaluating the approach of the United States and France, it becomes clear that the lack of a cooling-off period may be beneficial to franchise growth in the countries. The United States, for example, has seen large franchisee growth from both domestic and foreign franchisors. Similarly, France remains the largest franchise market in Europe. Accordingly, South Africa may be better served by following the pro-business approach of both the United States and France and eliminating the country's compulsory cooling off period.