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International Franchising

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Plenary II – News from around the world

*Session Chair***Andrew Loewinger** Nixon Peabody,
Washington, DC*Speakers***Luciana Bassani** Dannemann Siemsen, Rio de Janeiro**Phillip Colman** MST Lawyers, Mt Waverley**Lee Plave** Plave Koch PLC, Reston**Peter Snell** Gowlings, Vancouver**Volodymyr Yakubovskyy** Nobles, Kiev

This year's session at the IBA/IFA Conference on *News from around the world* provided a full array of legislative, administrative and judicial issues, that when viewed together illustrate the further evolution of the franchise model – some for the perceived good of franchising, while other issues seem to produce problematic results for both franchisors and franchisees.

Argentina

Luciana Bassani presented the franchise news from Argentina. Luciana concentrated her remarks on the new franchise provisions in the Argentine Civil Code that will become effective in August 2015. For the first time in Argentina, the new Code addresses common franchise issues that are seen in many western jurisdictions, including the United States and Europe. Included in these issues are post termination covenants against competition, which are considered to be enforceable if not greater than one year, and what constitutes a minimum term for a franchise contract, which is deemed to be three years.

The Code also addresses exclusivity of a franchisee's territory and a limitation on the rights accorded to a franchisee in which to operate its franchised unit. One provision of the new Code that should put franchisor's on edge is Article 1521, which holds a franchisor to be liable for system defects that causes damages to the franchisee.

Australia

Philip Colman presented the franchise news from Australia. The first point he made about Australia is that its franchise sector is thriving, with close to 30 per cent of Australian franchise systems entering international markets. On the legal front, there have been two significant legal developments in Australian, namely the creation of a new franchising code of conduct and the recent announcement of the extension of unfair contract laws to cover the small business sector.

The 2015 Franchising Code of Conduct amends the 1998 original code and imposes new obligations on both franchisors and franchisees, including mandated good faith obligations, a varied pre-contractual disclosure regime and a limitation on the enforceability of restraint of trade clauses in certain circumstances. The revised Code also introduces civil penalties for violations of key provisions of the Code, which includes violations of the 1998 Code.

Ukraine

Volodymyr Yakubovskyy reported on the latest changes to the Ukraine franchise law. He reported that franchising is a relatively new notion to the Ukraine business community and the concept and the laws are a work in progress. The historical problem for franchisors in the Ukraine was their inability to register their franchise agreements, which led to the unenforceability of franchise agreements. To finally remedy this problem, in February 2015 the legislature passed the law of Deregulation, which repeals the registration requirements. This change will make franchising in the Ukraine less bureaucratic for franchisors.

Canada

Peter Snell reported on the burgeoning franchise legislation and case law coming out of the provinces of Canada. On the legislative front, Peter reported that the

government of British Columbia announced that it was seeking public consultation with respect to proposed franchise legislation that would include detailed disclosure obligations. If this province adopts the new disclosure requirements, it will be the sixth province in Canada to adopt disclosure requirements for franchisors.

Peter also discussed two important decisions from the Canadian courts that cause pause in the franchise community. One case, *Bhasin v Hrynew*, recognised for the first time a 'general organising principle' of good faith and a duty of honesty in contractual relations in common law Canada. The other case, *Bertico v Dunkin Brands Ltd*, awarded a franchisee damages and gave a franchisee lease and franchise agreement termination rights for breach of the franchise agreement by the franchisor for failing to protect its brand in a franchisee's market within the province of Quebec. The impact of this case will cause franchisors pause in establishing or retreating from specific markets. Jean-Philippe Turgeon and Stéphanie Destrempe provide a more detailed discussion of this case in another article in this newsletter.

United States

Lee Plave provided the group with a summary of key franchise issues that have emerged in the US during the past year. Top of mind for most US franchise attorneys is the recent pronouncement from the general counsel of the National Labor Relations Board (NLRB) alleging there to be a joint employment relationship between McDonald's and its franchisees. The impact of this conclusion would be to find that both the franchisor and its franchisees are jointly responsible for the alleged unfair labour practices that the NLRB claim exists in the McDonald's system. If the conclusion were to stand, it is thought that it would upset the franchise model as the franchise community currently knows it. As the case winds its way through the administrative agencies and possibly the courts, both franchisors and franchisees will wait to see how this decision will impact the way that they do business.

The other issue that faces US franchisors is what will be the impact of the general thawing of relations between the US and Cuba. The big question will be whether the thaw will produce a ready-made market for US franchisors.

Plenary III – Supply chain issues

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Speakers

Martine de Koning Kennedy Van der Laan,
Amsterdam

Jeffrey Kolton Franchise Market Ventures,
New York

In this plenary session, Larry Weinberg led a panel discussion of supply chain issues with Martine de Koning and Jeffrey Kolton of Franchise Market Ventures. The panellists discussed common practices and legal issues arising in Canada, the United States and Europe.

Because the general goal of franchising is to present a uniform brand, franchisors

often require their franchisees to offer specific products or services at their outlets to ensure consistency of the customer experience. In the United States and Canada, franchisors frequently include provisions in their franchise agreements mandating that the franchisee may only sell products and services approved by the franchisor. Foreign concepts expanding into the EU typically use provisions similar to those used in North America, where the franchisee is obligated to sell only approved products or services. Franchisors in the European Union and the European Economic Area (EEA) may be limited in this regard by EU competition law or national civil laws. The scope of the presentation was limited to discussion of Canada, the United States, and the EU/EEA countries.