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Agreement Negotiations with
Franchisee Conglomerates in
Latin America



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Introduction

Brief Overview:

- Introduction to the session theme: Balancing franchise standardization with the demands of powerful franchisee conglomerates in Latin America.
- Introduction of the panellists, emphasizing their regional expertise in franchise law (Latin America, USA, Nigeria).



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Franchising in Latin America:

- The franchise industry in Latin America has seen significant growth over the past few decades, driven by rising consumer demand and the region's growing middle class.
- Sectors like Food & Beverage, Retail, Education, and Services (e.g., health and beauty) are particularly strong in the franchise market.
- Countries such as Brazil, Mexico, Argentina, and Colombia are leading in franchise development, each hosting a large number of both international and domestic franchise brands.



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Franchising in Latin America:

- The franchise landscape in Latin America is characterized by the presence of large conglomerates that operate as master franchisees or multi-unit franchisees.
- These conglomerates often have extensive portfolios that include various brands across multiple sectors, leveraging their substantial resources, market knowledge, and established distribution networks.
- There are also many mid-sized companies and independent entrepreneurs who operate smaller-scale franchises. These operators are typically more regionally focused but may own multiple units of a single brand.



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Franchising in Latin America:

- Franchising is an important contributor to Mexico's economy, accounting for about 5% of the country's GDP. The sector has been growing steadily, with more than 90,000 points of sale and over 1,300 franchise concepts operating.
- Around 85% of these franchises are Mexican brands, while U.S. brands represent about 10% of the market. This growth has been particularly strong in the food and beverage sector, which makes up 32% of the franchise market.
- Franchising in Mexico also creates significant employment, generating approximately 823,000 direct jobs in sectors like retail, services, and personal care.

Sources: <https://www.technavio.com/>, <https://www.trade.gov/>, Franchising.com



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PANEL SESSION

1. Pre-contractual Strategy

- Business decision to expand internationally

2. The Global Franchise Agreement: Benefits and Challenges

- **Advantages of Standardization:**
 - Uniformity in branding, operations, and customer experience.
 - Streamlined training and support processes across multiple regions.
 - Reduced legal and administrative costs by using a standardized agreement.
- **Challenges in Latin America:**
 - Regional variations in legal requirements and enforcement.
 - Cultural and economic differences that may require flexibility.
 - Balancing global uniformity with local relevance



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3. Understanding the Power Dynamics with Franchisee Conglomerates

- **The Role of Conglomerates:**
 - Influence and bargaining power of large franchisee groups in Latin America and other jurisdictions.
 - Conglomerates push for deviations from standard agreements.
- **Potential implications under US law**
 - Sherman Act, 15 U.S.C. §§ 1–7
 - Section 5 of Federal Trade Commission Act, 15 U.S.C. § 45(a)
 - *But see RJR Nabisco, Inc. v. European Cmty.*, 136 S.Ct. 2090, 2100 (2016):
 - “A basic premise of our legal system [is] that, in general, ‘United States law governs domestically but does not rule the world.’ This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.”



3. Understanding the Power Dynamics with Franchisee Conglomerates

- Potential implications under US law

- Section 5 of Federal Trade Commission Act, 15 U.S.C. § 45(a)
 - *RJR Nabisco, Inc. v. European Cmty.*, 136 S.Ct. 2090, 2100 (2016):
- The Supreme Court has reached virtually the same conclusion for **two centuries!** See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007); *Smith v. United States*, 507 U.S. 197, 204, n.5 (1993); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949); *Cuba R.R. Co. v. Crosby*, 222 U.S. 473, 479 (1912), *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356-357 (1909); *Slater v. Mexican National R.R. Co.*, 194 U.S. 120, 126 (1904); *Brown v. Duchesne*, 60 U.S. 183, 195 (1856); and *United States v. Palmer*, 16 U.S. 610, 631 (1818).

3. Understanding the Power Dynamics with Franchisee Conglomerates

- **FTC Franchise Rule case:** see *Nieman v. Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126, 1130 (11th Cir. 1999), *certiorari den.*, 120 S.Ct. 938 (2000) (rejecting application of FTC Franchise Rule to international transaction).
- **FTC Franchise Rule.**
 - Applies only to business that operate inside US. 16 C.F.R. § 436.2.
 - Fed. Trade Commission: “[T]here is no evidence in the record that a disclosure document addressing the American market would be beneficial to a prospective foreign investor. Just the opposite appears to be true. Such a document may be irrelevant and potentially misleading when given to a foreign investor (or an American investing in a foreign market) because of vast differences between American and foreign markets, cultures, and legal systems.” 64 Fed. Reg. 57294, 57300 (1999).

3. Understanding the Power Dynamics with Franchisee Conglomerates

- But – no private right of action for FTC Act violations!
 - *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988–89 (D.C. Cir. 1973).
 - *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974).
 - *Days Inn of Am. Franchising, Inc. v. Windham*, 699 F. Supp. 1581 (N.D. Ga. 1988) (no private right of action exists to enforce the Franchise Rule).
 - *G&R Moojestic Treats, Inc. v. Maggiemoo's Int'l LLC*, 2004 WL 1110423 (S.D.N.Y. 2004).



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3. Understanding the Power Dynamics with Franchisee Conglomerates

- Potential Conflicts:
 - Areas where conglomerates often seek modifications (e.g., territorial exclusivity, royalty structures, local marketing autonomy, commercials).
 - The risk of setting precedents that could affect global operations.



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4. **Strategies for Negotiating with Powerful Franchisees**

- **Maintaining Core Standards:**
 - Identifying non-negotiable elements of the franchise agreement (e.g., brand integrity, operational consistency).
 - Techniques for communicating the importance of uniformity to franchisee conglomerates.
- **Flexibility Without Compromise:**
 - Areas where flexibility might be beneficial or necessary (e.g., local marketing strategies, supply chain considerations).
 - Balancing flexibility with the need to maintain control over the franchise system.
- **Using Legal Frameworks to Support Negotiations:**
 - Crafting agreements that allow for some local adaptation while preserving core standards.
 - Leveraging legal precedents and regulations to support the franchisor's position.
 - Account for host country law and US law (for US franchisors) – Sherman Act, FTC Act, and possible US sanctions law.



4. Strategies for Negotiating with Powerful Franchisees

- US Sanctions Regimes

- Some administered by OFAC (Ofc Foreign Assets Control) w/in US Treasury Dep't
- Some under federal law and some under executive order – for ex.
 - Cuban Liberty and Democratic Solidarity (**Libertad**) Act of 1996 (“**Helms-Burton Act**”), 22 U.S.C. §§ 6021 – 6091) (codified parts of Cuban Asset Control Regs. issued under Kennedy Admin. in 1963, at 31 C.F.R. Pt 515).
 - But – **EU** and **UK** banned compliance with Helms-Burton. See EU Council Reg. 2271/9 and UK Stat. Instruments 1996 No. 3171
 - **Exec. Order 13224** (Sept. 23, 2001) (tools to combat terrorism and related activities including financing, establishment of “special designated nationals” list administered by OFAC, issued after Sept. 11, 2001 attacks)
 - **Trading With the Enemies Act**, 50 U.S.C. Ch. 53
 - **Anti-boycott acts**, incl. reporting requirements at 26 U.S.C. § 999
 - **Global Magnitsky Human Rights Accountability Act** (P.L. 114–328) (2016)
 - **Trafficking Victims Protection**, 22 U.S.C. § 7114 (anti-slavery provisions)



5. Cross-Border Considerations:

- **Regional Differences in Franchise Law:**

- How legal frameworks in Latin America differ from those in the USA and Nigeria.
- The importance of understanding local laws in shaping negotiation strategies.

6. Case Studies and Lessons Learned:

- **Successful Negotiations:**

- Examples of how franchise agreements have been successfully adapted without compromising the franchise system.
- Insights from the panellists on what worked and what didn't in their own experiences.

- **Challenges and Failures:**

- Common pitfalls in negotiating with large franchisee conglomerates.
- Lessons learned from agreements that deviated too far from the standard.



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- **Conclusion** (Moderator/Chair)
- **Key Takeaways:**
 - Summarize the main points discussed: the importance of maintaining franchise standards, the need for strategic flexibility, and the benefits of understanding the local context.



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