

THE MODERN FRANCHISE AGREEMENT

CANADIAN FRANCHISE ASSOCIATION
LEGAL DAY, ONTARIO REGION

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Overview

- Key provisions of the Modern Franchise Agreement;
- Trends in drafting techniques in the Modern Franchise Agreement;
- Options and approaches to dealing with issues and problems in drafting and negotiating the Modern Franchise Agreement;
- Questions

Key provisions of the Modern Franchise Agreement

- The Grant and Reservation of Rights
- Territory Protection
- Approved Renewal (DH)
- Trade-marks (DH)
- Approved Supplier and Volume Rebates
- Advertising Funds
- System Modifications
- Mandatory Arbitration (DH)
- Choice of Law (DH)
- Transfer and Assignment
- Option of Franchisor to Purchase Franchised Business on Termination
- Negotiating your Franchise Agreement

The Grant and Reservation of Rights (RM)

1. Right and Licence to operate Franchised Business
 - limits as to time (i.e. 5 years, 10 years)
 - location/territory
 - exclusive/non-exclusive

2. Reservation of Rights
 - i.e. protected territory
 - excepting
 - internet/online sales
 - sales at Kiosks
 - movie theatre sales
 - hospital/educational site sales
 - grocery stores/convenience stores

Territory Protection (RM)

- Required Disclosure (Ss. 12, 13 & 14 AWA Regs)
 - Description of any exclusive territory granted
 - Description of Franchisor's policy, if any, for exclusive territory and whether such right is dependent upon sales levels, market penetration or other condition and when it might be altered
 - Description of Franchisor's policy on proximity of existing franchisee to direct or indirect distribution of products
- How is territory defined?
- To what extent is territory "protected"?
- Is Territory Protection tied to, or dependent upon, revenue expectation(s)?
 - Setting revenue expectations maximizes potential of a territory
- Can Territory be expanded?
- Right to bid upon, make proposal or right of first offer on new territories or adjoining territory?

Approved Renewal (DH)

- Required Disclosure (S. 18 of AWA Regs) of restrictions and conditions on Renewal

Typical conditions for Franchisor's approval:

- Compliance with franchise agreement and other agreements.
 - *Substantial* compliance with *material* terms
- Franchisee is “current” with trade creditors and Franchisor.
- Renovations to modernize the premises.
- Execution of the current form of franchise agreement
- Prior written notice of intent to renew.
- Right to possession of premises.
- Payment of renewal fee.
- Delivery of executed release.
 - Enforceability in light of Midas?

Approved Renewal (DH)

- Midas facts:
 - Class action proceedings against franchisor.
 - Franchisor required renewing/assigning franchisees to sign releases, following renewal/assignment conditions in their respective franchise agreements.
 - The form of release would result in release from class action claim, i.e. release of their right to association
- AWA
 - Section 4 grants franchisees right to associate.
 - Section 4(4) renders any FA that purports to interfere with right to associate void.
 - Section 11 further states that any purported waiver or release of statutory rights is void.
 - Section 4(5) grants a right of action against part that contravenes section 4.

Approved Renewal (DH)

- Midas findings:
 - Provisions of FA void to the extent that it require waiver of AWA rights
 - Release *prima facie* void
 - Releases signed in context of settling contemplated claims are enforceable
- Franchisor “attempting” to require execution of release is sufficient to give rise to right of action
- Release on renewal/assignment should carve-out release of statutory rights

Trade-marks (DH)

- Protection of brand
- In the Modern Franchise Agreement, is the assertion of trade-mark rights enough?
 - Domain Name Control
 - Don't count on CIRA's Dispute Resolution Policy
 - Electronic Publishing (e.g. Facebook pages, Twitter accounts, etc.)
 - Using trade-mark appropriately and lawfully;
 - Assignment of all copyrights;
 - Indemnity of Franchisor;
 - Prior written consent to use any electronic identifiers; and
 - Assignment of all identifiers to the Franchisor on or prior to termination or expiration.
 - Special considerations for webpages
 - Special considerations for social media

Approved Suppliers and Volume Rebates (RM)

- Mandatory Disclosure (Ss. 7 & 8 of AWA Regs)
 - Description of restrictions or requirements to purchase or lease good or services
 - Description of Franchisor's policy, if any, regarding volume rebates; Franchisor's or Franchisor's Associates receipt of rebate, commission, payment or other benefit and whether benefits or payments are shared with Franchisee – directly or indirectly
- Cases
 - Mandatory Arbitration
 - Best Practices
 - A & P Case
 - Sears Canada case
 - Shoppers Drug Mart case
 - Quizno's case
 - Pet Value case

Advertising Funds

- Disclosure Requirements –
 - S. 6 of AWA Regs requires statement in Disclosure Document - % of fund spent on national campaign and % local advertising AND % retained by Franchisor – 2 years prior and present
- Separate Funds – National and Regional
- Advertising Funds
 - Best Practices
 - Administrative Costs
 - Decision Making
 - Social Networking
 - Website

System Modifications

- System Changes
 - As required by Franchisor
 - Time Sequence
 - Cost Sharing

Mandatory Arbitration (DH)

- Mandatory arbitration clauses
- Arbitration of certain types of disputes (e.g. trade-mark rights) should be specifically excluded
- Arbitration advantages:
 - Selecting knowledgeable arbitrator
 - Confidentiality
 - No precedential value
 - Avoid disclosure
 - S. 5 of AWA Regs: required to disclose whether franchisor has been *found liable* in civil action or if civil action is *pending*
 - Cost/Time advantages (maybe)

Mandatory Arbitration (DH)

- MDG
 - ONCA found that the arbitration clause in FA remained effective upon rescission
 - Arbitration clause that is fairly drafted and mutual is not a penalty or obligation
 - ONCA stayed the action and referred matter to arbitration
- Strategic advantages in the face of a rescission claim? Maybe.
- Strategic advantage in the face of a class action? Questionable.

Choice of Law (DH)

- My house, my rules
 - Contracting parties have the right to choose the law of the jurisdiction that will govern the contract
 - Some franchisor select law its “home” province as the law that governs the franchise agreement
- BUT a franchisor in a disclosure province (e.g. Ontario) that signs a franchise agreement with a franchisee in “non-disclosure” province (e.g. B.C.) may open itself up to disclosure obligations
 - Midas: Law of Ontario was to apply to “all matters relating to the validity, construction, performance and enforcement”
- Alternative: choose law of province in which the Franchisee is located with *exclusive* attornment in courts of province in which Franchisor is located

Transfer and Assignment

- Required Disclosure (S. 18 of AWA Regs) of restrictions and conditions on Transfer and/or Assignment
- Is there a minimum time of ownership prior to Transfer/ Assignment?
- Substantial Compliance and Process of Verification
- Financial Capability to deal with trade creditors
- To satisfy lender(s)
- To pay for/ finance – upgrades required on transfer
- Franchisee to acknowledge that F.A. in good standing and no monies owed by the parties save and except – present royalties etc. in approximate amount of \$ _____ etc.
- Signing of release (carve-outs of statutory rights)

Option of Franchisor to Purchase Franchised Business on Termination

- Not unusual in Hotel Transactions for Franchisor to have Right of First Refusal
- Under what circumstances should Option to Purchase be considered?

Negotiating your Franchise Agreement

- Amend by separate “Amending Agreement”
- What are the “Big Picture Items” that need to be dealt with?
e.g with start-ups sometimes concessions are granted
- What is quid pro quo?

QUESTIONS

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