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Franchising in Tunisia is the 14th article in Wiley Rein's International Franchise Development Series. The International Franchise Development Series offers a broad overview of franchise regulation and the legal issues confronting franchisors seeking to expand into certain countries from the combined legal perspective of U.S. and local counsel.

Franchising in Tunisia

By Robert A. Smith, Yessine Ferah, and Maureen A. O'Brien

Prior to 2009, franchisors were reluctant to enter the Tunisian market in large part due to a case-by-case franchise approval process, which many viewed as fertile ground for corruption. In response, Tunisia, with the assistance of the U.S. Department of Commerce's Commercial Law Development Program, enacted franchise legislation. Among other things, the law provides that franchise concepts in specified business sectors do not require the prior approval of the Ministry of Trade (MOT) to enter the Tunisian market. While there are still few foreign franchises operating in the country, one of the current objectives of the Tunisian government is to create a franchise-friendly environment to spur economic growth among the country's small- and medium-sized businesses. Consequently, Tunisia could well be considered the hidden gem of international franchise development opportunities.

Franchise Regulation

Prior to the enactment of the 2009 law, a franchise agreement in Tunisia was considered an "of its own kind" contract governed by the general legal regime applicable to contracts under, for the most part, the Tunisian "Code des Obligations et des Contrats."

On August 12, 2009, however, Law n° 2009-69 ("Act") was passed. A portion of the Act aims to regulate franchising in Tunisia by setting forth the primary rights and obligations in a franchise relationship. Under the Act, a franchise agreement is "a contract through which the trademark owner grants the right of its use to a natural person or to a legal entity called franchisee, to distribute the products or provide services in return for consideration" and a "franchise network" consists of independent shops operating under the same trademark and pursuant to unified business methods, premises planning, management methods, marketing, and sources of supply.

The decree n°2010-1501, dated June 21, 2010, identifies those clauses that must be in the franchise agreements, as well as the information required to be included in the franchise disclosure document.

Content of the Franchise Agreement

Under Tunisian law, a franchise agreement must include provisions related to the rights and obligations of the franchisor and the franchisee, and, notably, the following provisions: (1) services provided by the franchisor to the franchisee, the transfer of know-how, technical expertise, and use of intellectual property rights; (2) required payments by the franchisee; (3) term of the franchise agreement and the conditions of renewal; (4) conditions on the use of the trademark or the corporate name; (5) conditions of termination of the franchise agreement; (6) conditions of the exclusivity of supply; (7) non-competition conditions; (8) any exclusive rights to use the franchisor's trademark or corporate name; (9) the franchisee's obligation to keep confidential the information disclosed by the franchisor; (10) the investment plan to be realized by the franchisee; (11) the basis on which advertising

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expenses are shared; (12) the manner in which information regarding the franchisee's sales and financial situation are communicated to the franchisor; (13) conditions under which the franchisor or its representatives have access to the franchisee's premises; and (14) any subfranchise right granted to the franchisee.

Anti-competitive clauses in a franchise agreement that are intended to: (1) dictate the price to be charged by the franchisee for the goods or services offered; or (2) fix a minimum turnover to be realized by the franchisee, are prohibited.

If the franchise agreement grants exclusivity for all of Tunisia, the franchisee must also be granted the right (but not the obligation) to subfranchise.

Authorizations

As indicated above, except for certain sectors, in principle, franchises require the prior approval of the MOT.

The MOT may require that the draft franchise agreement, the draft franchise disclosure document, and all related documents be translated into French (or even into Arabic).

The authorization process generally lasts around 4-6 months, but it can be even longer. The length of the process is contingent on a number of factors, including the number of files pending before the MOT.

In theory, the burden of securing the MOT's authorization falls on the franchisee, and the authorization must be obtained before the execution of the franchise agreement. If the franchise agreement is signed prior to the MOT's approval, it cannot be enforced until such authorization is received.

In order to repatriate royalties overseas, the prior approval of the Central Bank of Tunisia must be secured. Even though the authorization of the Central Bank of Tunisia is different from the MOT's authorization, generally, upon receiving an application for franchise authorization, the MOT will automatically refer the file to the Central Bank for approval. Accordingly, when the MOT's authorization is obtained, it should, in principle, include the authorization of the Central Bank of Tunisia.

Franchise Disclosure Document

Tunisian franchise regulation requires a franchisor to disclose certain information to franchisees at least 20 days before signing a franchise agreement.

There are no local language rules or regulations regarding disclosure; however, the franchise disclosure document must provide basic information about the franchise, including: (1) the legal form of the franchisor's enterprise and the nature of its activity; (2) the identity of the franchisor's legal representative; (3) the address of the franchisor's head office; (4) the list of the franchisor's managers; (5) the amount of the franchisor's capital; (6) a summary of the history of the franchisor; (7) information related to the franchisor's registration number in the trade register (or any equivalent registration number); (8) proof of ownership of the trademark or the trade name; (9) information relating to the registration of the trademark with the Tunisian register of trademarks; (10) information about the franchise system; (11) the list of franchisees in Tunisia, their addresses, dates on which they joined the system and former franchisees (no particular time period for this disclosure is specified in the regulation); (12) information about the franchisor's industry and the opportunities for the development of the industry in areas where the trademark is represented and in Tunisia; (13) the nature and the amount of expenses and investment specific to the trademark or the trade name; and (14) the franchisor's financial statements (in practice, the financial statements for the last fiscal year are typically included in the disclosure document; however, the MOT may request that financial statements from prior fiscal years also be included).

Registration

The franchise agreement must be registered with the Tunisian tax authorities within 60 days of the date of the execution.

In addition, the franchisee may record its right to use the franchisor's marks with the National Register of Marks in order for the franchisee to be

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able to enforce the agreement against third parties.

Termination

In some cases, the Tunisian Competition Jurisdiction (the Tunisian Competition Council) may consider the termination of a commercial relationship without objective reason as anti-competitive and may order the terminating party to reinstate the relationship/agreement.

In addition, as a matter of public policy, if an entity (such as the franchisee) is experiencing financial difficulties, outstanding contracts with that entity (such as the franchise agreement) may not be able to be terminated. This public policy may override the express provisions of the franchise agreement. ■

For more information, please contact:

Robert A. Smith
202.719.4481
rsmith@wileyrein.com

Yessine Ferah
+(216) 71 28 17 87
yessine.ferah@fandalawfirm.com

Maureen A. O'Brien
202.719.3563
mobrien@wileyrein.com

Yessine Ferah is the Managing Director of Ferah & Associates Law Firm in Tunis, Tunisia. He represents many Tunisian and international franchise systems and regularly advises about international expansion to Tunisia. Robert A. Smith is a partner and chair of the Franchise Group at Wiley Rein LLP. Maureen A. O'Brien is special counsel at Wiley Rein LLP.

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