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INTERNATIONAL DEVELOPMENT – PERSONAL GUARANTEES AND OTHER MECHANISMS TO SECURE FRANCHISEE PAYMENT AND PERFORMANCE

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I. **Introduction**.[1]

When a franchisee and franchisor begin discussing international development, their interests initially are aligned. The franchisor wants to enter or expand in the subject country and the franchisee desires to profit from the introduction or expansion of the franchisor's brand in the franchisee's market. Beyond that, their interests diverge in a number of directions. In addition to the fees to be paid and the required development schedule, the franchisor will seek to minimize the risk that the franchisee will not meet its contractual obligations and, as a result, will typically seek to bind all parties related to the franchisee to ensure that the franchisee does so. On the other hand, the franchisee entity, which internationally is often a company with substantial assets and experience, will resist this effort to encumber the financial statements of its principals with a guarantee. As a result, some of the most protracted negotiations often will be focused on whether, and to what extent, persons and entities related to the franchisee will be liable for the franchisee's failures.

This paper will discuss the basics of a guarantee and the importance of local law considerations in drafting and enforcing a guarantee. It also will address variations on a guarantee, as well as alternatives to a guarantee. Finally, the paper will discuss enforcement challenges.

II. **Guarantees – Background**.

A. **What is a Guarantee**?

According to Black's Law Dictionary, a guarantee is a "promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another who is liable in the first instance."[2] A guarantee is similar to a warranty in that they both are issued as an obligation of one party to another to indemnify that party against a possible default. While a warranty relates to present or past actions, and is an independent promise designed to protect another party from loss when what is warranted is not in the same form as when the contract is entered, a guarantee relates to a future obligation and is a collateral promise designed to protect one contracting party (the franchisor) if the other contracting party (the franchisee) fails to meet its obligations under the contract.[3] Guarantees require mutual assent, consideration, definiteness and a meeting of the minds – much like any other contract. A guarantee requires a primary debt obligation and stands behind the primary obligation. Therefore,

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1 The authors would like to thank Jerita Salley and Luke Karamyalil of Wiley Rein LLP for their invaluable assistance with this paper.

2 Black's Law Dictionary, 772 (9th ed. 2009).

3 Laurence P. Simpson, *Handbook on the Law of Suretyship*, 23 (1950).

if the primary obligation is satisfied, or if it is void or illegal, the guarantee may be unenforceable.[4]

Typically, a franchisor will require that the guarantors unconditionally guarantee the performance of the franchisee's obligations. These guarantees are generally required to be obtained from the individual owners of the franchised business, if not all owners, at least those whose ownership exceeds a certain threshold. Where there are multiple guarantors, each one, unless expressly specified otherwise, is jointly and severally liable. This allows the franchisor to enforce the guarantee against one or all of the guarantors in order to recoup the debt owed to the franchisor regardless of the ownership structure of the franchise.[5]

In addition, unless agreed otherwise, a guarantor's obligation is not discharged following modification of the underlying agreement, unless the modification is material. From a guarantor's perspective, it is in his best interests to make sure that any amendment that the franchisor and franchisee enter into be in consultation with the guarantor. While this is not much of an issue where the guarantor is a substantial owner of the franchisee and actively involved with the franchised business, it may be where the guarantor's connection to the franchisee is less direct. In those instances, the guarantor should seek to require that the franchisee consult with him throughout the franchise term. A franchisor can eliminate these concerns by ensuring that any amendment or settlement with the franchisee is agreed to by the guarantor.

B. Skin in the Game.

Guarantees are important in franchise agreements because they protect the franchisor from a franchisee who is unable or unwilling to pay or perform. However, guarantees can also be used as a "carrot" to incentivize the franchisee to perform under the contract. Since the guarantors are almost always owners of the franchisee entity, the guarantee adds an incentive to the guarantors to ensure that the franchisee is operating in accordance with the agreement and the franchisor's system.

C. Types of Guarantees.

While there are several forms of guarantee, the two more common ones are the performance guarantee and the financial guarantee.

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4 *Enforcing Against a Personal Guarantor*, Field Fisher & Waterhouse LLP, 2 (2012), http://www.fieldfisher.com/media/1782056/Enforcing-Against-a-Personal.pdf; *see In re Carley Capital Group*, 119 B.R. 646, 648 (W.D. Wis. 1990).

5 *Wachovia Bank, National Ass'n v. Horizon Wholesale Foods, LLC*, No. 09-0072-KD-8, 2009 WL 3526662 (S.D. Ala. Oct. 23, 2009).

1. **<u>Guarantee of Financial Obligations</u>.**

A financial guarantee commits the guarantor to the financial obligations of the franchisee. [6]

Full financial guarantees allow the franchisor to recoup monies owed by the franchisee from the guarantors. Generally, a guarantee will explicitly state that the franchisor may pursue its claim against the guarantor without fully exhausting the franchisor's remedies against the franchisee. However, as described below local laws may play a significant part in upholding or voiding such a clause.

Because of the difficulties in collecting from foreign guarantors, complete due diligence is essential to ensure that the guarantors have the financial capacity to pay any foreseeable default payments.

2. **<u>Guarantee of Performance of Franchisee Obligations</u>.**

A personal guarantee should also require the guarantor to guarantee, beyond the franchisee's financial obligation, all other obligations and covenants of the franchisee.[7] Arguably, a franchisor's most important asset is the confidential information relating to its system. Needless to say, preventing others from obtaining these trade secrets is critical. This not only protects the franchisor, but also all other franchisees. In order to ensure that the owners of the franchise, in addition to the franchisee entity, protect the confidential information, a guarantor should be bound by the agreement's confidentiality and noncompetition restrictions.

D. **<u>Transfer Restrictions</u>.**

A personal guarantee can also help ensure that there are no unauthorized transfers. A guarantee typically provides that the guarantor remains liable under the guarantee unless released by the franchisor. Since it is unlikely that a guarantor would be willing to guarantee obligations for an entity in which he no longer has an ownership interest, a guarantor will be incentivized to seek franchisor consent to a transfer and his release from the guarantee.

III. **<u>Negotiating and Drafting Guarantees</u>.**

The requirements of local law are relevant when drafting a guarantee for an international franchise agreement and these requirements can be fluid. Enforcing a guarantee in an international franchise agreement can be difficult and, if the guarantee fails to comply with applicable law, the effort may prove impossible. Consulting with local counsel at the outset and having a continued relationship with them throughout the term of the agreement will yield results in the event of a default by the franchisee. While

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6 *See* attached Exhibits A-B for examples of a long form and short form financial guarantee.

7 *See* attached Exhibit C for an example of a performance guarantee.

this is an extra cost, the benefit from ensuing compliance with local law may be the difference in the franchisor's ability to enforce the guarantee. Local law requirements impacting enforceability of guarantees can include technical execution formalities, notice or process requirements and substantive terms (or substantive limits). Although not exhaustive, here are some examples of country-specific requirements derived from a variety of sources, including deals on which the authors have worked.

Alberta, Canada.

The Guarantees Acknowledgement Act requires an individual guarantor to appear before a lawyer in order to affirm that he or she understands the obligations of the guarantee which he or she is about to enter and requires the guarantor and the lawyer to sign a certificate in a prescribed form.[8]

Argentina.

Argentine law, both civil and commercial, requires that the franchisor first seek redress from the franchisee before the franchisor seeks it from the guarantor. However, these protections can be expressly waived in the guarantee.[9]

Australia.

Unless the guarantee is signed simultaneously with, or prior to the franchise agreement, Australia requires that there must be consideration in order for the guarantee to be enforced.[10] Most Australian guarantees will state that the guarantee is given in consideration for the franchisor entering in to the franchise agreement. In addition, a guarantee is generally drafted as a deed (which unlike an agreement does not require consideration).

China.

Significant changes have occurred in China over the past several years with respect to the ability of Chinese citizens (individuals and companies) to provide

8 Guarantees Acknowledgment Act, R.S.A. 2000, §§ 3-4 (Alberta). The lawyer must be an active member of the Law Society of Alberta or, for acknowledgments made outside of Alberta, a lawyer entitled to practice law in that jurisdiction. Prior to April 2015, the act required a certificate from a notary public rather than a lawyer.

9 Argentine Civil Code, §§ 2012 & 2020-2022; Argentine Commercial Code, §§ 480 & 482.

10 Will K. Woods, *Fundamentals of International Franchising*, 168, American Bar Association Forum on Franchising (2d ed. 2013).

guarantees.[11] Personal guarantees in China are regulated by the Administrative Rules on Individual Foreign Exchange and any regulations promulgated by the State Administration of Foreign Exchange ("SAFE").

The Rules previously required that any guarantee to a foreign lender had to be registered with SAFE, and those guarantees were required to follow the specific requirements and procedures set out in the Circular on Relevant Issues Concerning Foreign Exchange Regulation Encouraging and Guiding Private Investment.[12] Under the regulations, Chinese individuals could not provide security interests (guarantee, mortgage, pledge, etc.) to foreign parties and Chinese companies had to meet strict requirements in order to provide security to foreign parties.

These restrictions have been significantly relaxed to allow parties (individuals and entities) to provide cross-border guarantees for a non-financing security (such as a franchise agreement) without the requirement of filing with or reporting to SAFE (People's Republic of China State Administration and Foreign Exchange) unless otherwise expressly required by SAFE. [13]

<u>Germany</u>.

Providing notice of the underlying default to a guarantor is not required if the guarantee is written in German and in the manner prescribed by the German Civil Code. However, if a guarantee is drawn up to support a cumulative assumption of the franchisee's debts and if the franchise agreement mandates a written notice to the franchisee, then the franchisor must also provide notice to the guarantor.[14]

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11 Gibson Dunn, *China Adopts Fundamental Changes in Foreign Exchange Control* (May 20, 2014), http://www.gibsondunn.com/publications/documents/China-Adopts-Fundamental-Changes-in-Foreign-Exchange-Control.pdf.

12 Paul Lee, *Taking Personal Guarantees in Cross-Border Financings in China*. DLA Piper UK LLP (Aug. 14, 2012), http://www.dlapipertradefinance.com/export/sites/dtf/downloads/Taking_personal_guarantees_in_cross-border_financings_in_China.pdf.

13 China foreign exchange control: new regulations give financial institutions more flexibility, Norton Rose Fulbright, (August 2014), http://www.nortonrosefulbright.com/knowledge/publications/119992/china-foreign-exchange-control-new-regulations-give-financial-institutions-more-flexibility.

14 Bürgerliches Gesetbuch [BGB] (Civil Code) § 765 *et seq.* (Germany).

Guatemala.

Prior to submission to a local court, the guarantee must be translated into Spanish; however, this does not require that the guarantee be executed in Spanish.[15] Additionally, a guarantor's signature should be legalized by a notary public and then by the Guatemalan Consulate to ensure enforceability.[16]

Middle East and North Africa.

In most Middle Eastern and North African countries, the best practice is to have the guarantee translated into Arabic. This acts to rebut certain defenses commonly asserted by the guarantors.[17]

In the UAE, a franchisor should pursue the debts owed to it within six months after the debt has become due, or the debt could be discharged.[18] However, the courts have not uniformly followed this requirement. For example, the Abu Dhabi Supreme Court found that the six-month duration did not apply to guarantees in commercial transactions – rather the Court imposed a ten-year limit.[19] But the Dubai Court of Cassation upheld the six-month limit, stating that it was a civil obligation mandated by Article 1092.[20]

Panama.

Panama's Antitrust Act requires that guarantees must be negotiated to avoid the appearance of it being a contract of adhesion.[21] As such, franchisors should give the franchisee and guarantors a template guarantee and then negotiate the terms of the guarantee. The franchisor should keep a red-lined copy as evidence that the parties did negotiate the guarantee.

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15 Congress of the Republic, art. 11, Decree 2-89; Congress of the Republic, art. 37, Decree 2-89 (Guatemala).

16 *See generally* Hague Legalization Convention, 527 U.N.T.S. 189, T.I.A.S. 10072, 20 I.L.M. 1405, 1407.

17 Woods, *supra* note 10, at 167.

18 U.A.E. Civil Code, art. 1092.

19 Mamoon Khan & Arina Gidwani, *Guarantees as Security in the UAE*, (July-Aug. 2013), http://www.tamimi.com/en/magazine/law-update/section-5/july-august-2/guarantees-as-security-in-the-uae.html.

20 *Id.*

21 Richard M. Asbill & Steven M. Goldman, *Fundamentals of International Franchising*, 270, American Bar Association Forum on Franchising (2001).

Similarly, the Act also states that a requirement that the guarantor waive all demands and notices regarding the franchise agreement could amount to a contract of adhesion, the franchisor should, as stated above, keep a red-lined copy of the guarantee that shows a change requiring all renewals, extensions, amendments or modifications must also notify the guarantor of such a change.[22]

Russia and Belarus.

Russia takes a hard stance on foreign choice of law provisions. Franchisors will find it extremely difficult to convince a Russian court to apply non-Russian law when interpreting a guarantee. Because it is so time consuming and expensive to try to apply non-Russian law when the guarantor is a Russian citizen with assets in Russia, it would be more practical to apply Russian law to the guarantee. If Russia law does not apply to the Guarantee, the better option is to use arbitration and to enforce the arbitration award based on the New York Convention. In addition, in both Russia and Belarus, a guarantee must be a bilateral agreement signed by the franchisor and the guarantor.[23]

Spain.

Specific language must be used in the guarantee to uphold the document. Spain requires that the guarantee be explicit and not implicit and must not extend beyond what is expressly stated. Further, a guarantee must be executed before a stock exchange broker. (Spain merged the notary and stock exchange framework in 2001 and now it follows one concept.)[24]

Taiwan.

Taiwanese law requires that, if a corporation is the guarantor of an obligation, the corporation may only do so if expressly allowed by its articles of incorporation and the articles will be carefully examined to determine the permitted scope of the guarantee. If a public company is to be the guarantor, the company must file the guarantee restrictions with the Taiwan Securities and Futures Bureau.[25]

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22 *Id.*

23 Penny Ward, Lee Plave & Christopher Nowak, *Unique and Often Overlooked Issues and Limitations on Doing Business in International Financing*, 31, American Bar Association Forum on Franchising (Oct. 15, 2014).

24 Asbill, *supra* note 21, at 272 & 301.

25 Taiwan Companies Act, art. 16.

Thailand.

Thailand offers statutory rights to guarantors that can only be waived through express language in the guarantee. These protect the guarantor by requiring that the franchisor first seek to enforce the guarantee against the franchisee or another third party before bringing a claim against the guarantor.[26]

Familial Issues.

Spousal issues are another important consideration in connection with guarantees. In some jurisdictions, in order for a personal guarantee to be fully recognized, it is recommended that the spouse of the guarantor also agree to the guarantee. Spain, Peru, and Taiwan are examples of countries where it is easier to enforce a guarantee if the spouse also signs the guarantee.[27]

In Turkey, an heir to an estate may only take the estate if the heir is willing to accept any personal guarantee that is tied to that estate; however, the heir may refuse to take the estate in order to avoid to the guarantee.[28]

IV. Variations on a Personal Guarantee.

While a franchisor's goal is a "full" guarantee with joint and several liability by all persons with an ownership interest in the franchisee (or at least an ownership interest above a certain threshold), there are several variations to this type of guarantee that a franchisor may consider. While these variations may not provide the level of "comfort" a franchisor desires, they may be sufficient (or, at least, good enough) to proceed with the deal.

A. Standby Guarantee.

A franchise agreement guarantee typically provides that the franchisor may seek to collect from the guarantors before it has exhausted its remedies against the franchisee. In this variation, the personal guarantors remain liable, but the franchisor must first exhaust its remedies against the franchisee entity before it can act against the guarantors.[29]

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[26] Amendment to the Civil and Commercial Code (No. 21) B.E. 2558 (2015) (Thailand).

[27] Asbill, *supra* note 21, at 273.

[28] Woods, *supra* note 10, at 168.

[29] *See* attached Exhibit D for an example of a standby guarantee.

B. Limitation of Waivable Defenses.

One of the advantages to a guarantee is that the guarantors typically cannot assert the defenses to the underlying obligation that would be available to a franchisee. In other words, a franchisee may defend his nonpayment on the basis of the franchisor's prior breach; however, this defense usually is not available to a guarantor when the franchisor seeks to enforce the guarantee. Accordingly, allowing a guarantor to assert this defense might make the guarantee more palatable.

C. Financial Caps.

A franchise agreement guarantee typically has no ceiling on the guarantor's liability. That uncapped liability can put tremendous pressure on the guarantors personally. There are several ways to limit the exposure of the guarantors while providing some level of comfort to the franchisor. The first is a monetary ceiling on the guarantors' liability. The trick with a dollar cap is to determine an amount that will provide security to the franchisor, yet be palatable to the guarantors.[30]

One of the problems with joint and several liability from a guarantor's perspective is that each guarantor has the same exposure even if each has different ownership levels and differing financial positions. An alternative would allow the parties, whether or not in connection with a dollar cap, to agree that each guarantor would have a different level of exposure, which could be tied to their ownership interests.[31]

As previously noted, one reason for a guarantee in a franchise agreement is to provide comfort to a franchisor that the franchisee will meet its financial obligations. Early in the relationship, the parties are essentially strangers. As time goes on, the parties get to know each other and the franchisor may be willing to accept less financial protection. Accordingly, the franchisor may be willing to accept a guarantee where the cap decreases over time, or upon the occurrence of certain milestones, provided the franchisee has not been in default of its obligations.[32]

In drafting a financial cap or other financial limit in a guarantee the franchisor should pay close attention to the language and give careful consideration to the interaction of the guarantee limits and any claims based on the guarantor's personal breach of confidentiality or non-competition obligations.

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[30] *See* attached Exhibit E for an example of a financial cap.

[31] *See Id.,* for an example of this variation.

[32] *Id.*

Since the financial risk to the franchisor increases with each unit the franchisee operates, a different approach to a capped guarantee would be for the cap to increase as the franchisee begins operating additional units.[33]

D. Term Limits.

As the parties become more familiar with each other, it may become more palatable for the franchisor to forego a guarantee. Accordingly, in lieu of a diminishing dollar cap, the parties could agree to an uncapped guarantee that terminates, assuming no defaults, as of a date certain or upon a certain milestone.[34] As with the cap, a franchisor may have a different approach on the financial aspect of the guarantee in comparison to the confidentiality and non-competition obligations of the guarantors.

E. Performance Guarantee.

Even if the franchisor is willing to forego or limit a guarantee of the franchisee's financial obligations, the franchisor should still seek to bind the guarantors to the confidentiality and noncompetition restrictions in the franchise agreement.[35]

V. Alternatives to Personal Guarantees.

This section will discuss some of the most common alternatives to personal guarantees, including the advantages and disadvantages that may arise in the international context.

A. Letter of Credit.

A letter of credit is a letter from a bank guaranteeing that a franchisee's payment to a franchisor will be received on time and in the correct amount. If the franchisee is unable to make payment according to the terms of the contract, the bank will be required to cover the outstanding amount. Due to the nature of international dealings, including factors such as distance, differing laws in each country, and difficulty in knowing each party personally, the use of letters of credit has become a very important aspect of international trade.

A letter of credit can eliminate foreign enforceability hurdles since the letter of credit may be presented to a bank in the franchisor's home country for payment.[36]

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[33] *Id.*

[34] *See* attached Exhibit F for an example of a term limit.

[35] *See* attached Exhibit C for an example of a performance guarantee.

[36] Carl E. Zwisler & Beata Krakus, *Avoiding Common Mistakes in International Franchising,* § 3.6, IFA Legal Symposium (May 2015).

Although clearly a top choice for franchisors, there are disadvantages to using a letter of credit. Banks usually require a significant deposit and fees in connection with a letter of credit, and such deposit and fees may tie up capital that could be used by the franchisee for expansion or other obligations.[37] Also, the letter of credit documentation must be very clearly drafted to ensure that the franchisor can draw on it as needed.[38] Finally, sophisticated parties will usually insist that an independent third party confirm the existence of a breach before a franchisor may draw on a letter of credit or a bank guarantee.[39]

B. <u>Bank Guarantees</u>.

A bank guarantee is similar to a letter of credit and is a bank's assurance of a specific sum of money to an intended beneficiary (*e.g.,* the franchisor). Unlike a letter of credit, however, the specified sum is only paid if the other contracting party does not fulfill its obligations under the agreement.[40]

Like a letter of credit, a bank guarantee can eliminate foreign enforceability hurdles since the bank guarantee may be presented to a bank in the franchisor's home country for payment.[41] Parties tend to favor a letter of credit over a bank guarantee since a letter of credit can be drawn upon without having to conclusively prove damages or otherwise seek enforcement in the franchisee's home jurisdiction.[42]

As with a letter of credit, there are disadvantages to using a bank guarantee. Banks usually require a significant deposit and fees in connection with a bank guarantee, and such deposit and fees may tie up capital that could be used by the franchisee for unit expansion or other obligations. Also, the bank guarantee documentation must be very clearly drafted to ensure that the franchisor can draw on it

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37 *Id*.

38 *Id*.

39 *Id*.

40 Peter Cherewyk, *What's the Difference Between a Bank Guarantee and a Letter of Credit*, Investopedia, http://www.investopedia.com/ask/answers/06/202005.asp (last visited Apr. 5, 2017).

41 Bank Guarantees, *Your Protection Against Non-Performance and Non-Payment*, Credit Suisse AG, 6 (2010), http://www.proassociati.com/upload/documenti/8/47_bank-garantee-credit-suisse.pdf.

42 Asbill, *supra* note 21, at 271.

as needed.[43] Finally, sophisticated parties will usually insist that an independent third party confirm the existence of a breach before a franchisor may draw on a bank guarantee.

C. <u>Security Interest in Assets</u>.

A franchisor and franchisee may agree that the franchisee will grant to the franchisor a security interest in certain of the franchisee's assets (*e.g.*, a certificate of deposit or other assets) that may be repossessed if the franchisee fails to make payments according to the applicable agreement. A significant advantage under this approach is that the parties agree in advance to a minimum predetermined amount that will be due to the franchisor in the event of the franchisee's breach of the agreement. If the franchisee's assets are significant, this can be an effective way to ensure the franchisee's performance, especially since an international franchisee's owners often are wealthy.[44]

This alternative, however, comes with potential enforceability drawbacks, such as navigating foreign security laws regarding creating, attaching and perfecting security interests, which may prove to be costly and timely endeavors depending on the jurisdiction. In some jurisdictions, however, the process is simple and similar in cost and process to a UCC filing. In other cases, staying abreast of changes to applicable foreign laws impacting enforceability of a security may lead to significant legal expenses. A security interest may also impact the franchisee's financing options because a lender will likely insist on the first position security interest (although that could be resolved through a subordination or similar arrangement with the lender).

D. <u>Cash Deposit/Liquidated Damages</u>.

A cash deposit tied to a liquidated damages provision is often utilized in M&A transactions and may be a viable alternative to a personal guarantee depending on the applicable jurisdiction. In the franchise context, the franchisee would deposit a predetermined amount of cash into an escrow account maintained by a financial institution, and the franchisor and franchisee would contractually agree to the amount available to the franchisor as liquidated damages if the franchisee breaches the contract.[45]

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[43] Zwisler, *supra* note 36 § 5.4.9.

[44] *Id*. § 3.6.

[45] Roer Schmidt & Joyce Mazero, *Legal Enforcement of International Franchise Relationships: What Makes Sense for the Business* (March 2008), http://franchise.org/legal-enforcement-of-international-franchise-relationships-what-makes-sense-for-the-business.

Although seemingly simple, this formulation is not without its disadvantages. Placing the deposit in escrow can tie up capital that could be used for other things, including expansion. The franchisor may need to defend the amount of liquidated damages as reasonable and attributable to defaults for which the franchisor does not plan to also ask for injunctive relief because they will likely be viewed as an election of remedies.[46] The franchisor must also confirm the enforceability of liquidated damages clauses in the applicable jurisdiction. Even more significant, the franchisor would again be tasked with navigating the hurdles associated with bringing an action in foreign jurisdictions if there is a dispute regarding the escrow agreement (assuming that jurisdiction of the escrow agreement is in the foreign jurisdiction).

E. **Guarantee by a Related Entity.**

A guarantee by a related entity is very similar to a personal guarantee, except that a corporation (or other entity), instead of an individual, agrees to be held responsible for completing the duties and obligations of the franchisee entity in the event that the franchisee fails to fulfill the terms of the contract.

An advantage to using a corporate guarantee is that the franchisor may look to the corporation for the fulfilment of the duties and obligations of the franchisee. In the context of international franchising, however, this option has its own disadvantages, as the effectiveness of any guarantee (corporate or otherwise) will depend on the degree of difficulty with which the franchisor can execute on the assets supporting the guarantee.[47] Also, the franchisor must ensure that (i) all applicable corporate consents and formalities have been followed by the franchisee[48] and (ii) the corporate entity maintains adequate capitalization to stand behind the guarantee.[49] Further, the related entity may be reluctant to provide a guarantee since an uncapped guarantee could jeopardize its bankability given that the guarantee obligation may be a material contingent liability on the guarantor's financial statement.[50] Also, certain foreign courts may not enforce a guarantee unless the primary debtor (*i.e.*, the franchisee) has first

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46 *Id*.

47 Zwisler, *supra* note 36.

48 Asbill, *supra* note 21, at 269.

49 *Id.*

50 Gary R. Duvall, Joseph Adler & Carl Hurwitz, *Negotiating International Franchise Agreements*, 2016 CFA Franchise Law Day, 18 (Jan. 28, 2016), https://www.dorsey.com/~/media/files/newsresources/events/2016/01/negotiating_international_franchise_agreements_012816.pdf?la=en.

exhausted its own assets or they may impose restrictions on guarantee arrangements, while some countries impose time limits on guarantees.[51]

F. US Affiliate Guarantee.

One way of alleviating the enforcement issues that present themselves in the context of using guarantees (personal or corporate) in the international franchising context is to require a guarantee from a US affiliate of the franchisee whereby the franchisee's US affiliate agrees to be held responsible for completing the duties and obligations of the franchisee to the franchisor if the franchisee fails to fulfill the terms of the agreement.

Although this arrangement provides several advantages for the franchisor (the franchisor may look to the US affiliate for the fulfilment of the duties and obligations of the franchisee and the parties are subject to the jurisdiction of US courts, which likely have well-settled law regarding the enforcement of guarantees), it may nevertheless present certain challenges for both parties. For example, as mentioned previously, an uncapped guarantee could jeopardize a guarantor's bankability since the guarantee obligation may be a material contingent liability on the guarantor's financial statement. The franchisor has the burden of ensuring that all applicable corporate consents and formalities have been followed by the franchisee, as the effectiveness of any guarantee will depend on how difficult it is to execute on the assets supporting the guarantee.[52] In addition, the franchisor must ensure that the corporate entity maintains adequate capitalization to stand behind the guarantee throughout the term of the agreement.[53]

G. Capitalization Commitment.

When used as an alternative to a personal guarantee, the franchisor and franchisee could contractually agree that the franchisee would not provide a personal guarantee so long as the franchisee maintains a net worth (or other financial benchmark) above a certain threshold. Although this approach does not alleviate the hurdles associated with bringing an action against the franchisee in a foreign jurisdiction if the franchisee does not achieve the financial target, it may provide the franchisor with some comfort (assuming the franchisor completes its due diligence of the franchisee's

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51 Ned Levitt, Kendal H. Tyre & Penny Ward, *The Impossible Dream: Controlling Your International Franchise System,* 17, ABA Forum on Franchising (Oct. 13, 2010); Penny Ward, Lee J. Plave & Christopher Nowak, *Unique and Often Overlooked Issues and Limitations on Doing Business in International Franchising,* 31, ABA Forum on Franchising (Oct. 15-17, 2014).

52 Ned Levitt, Kendal H. Tyre & Penny Ward, *The Impossible Dream: Controlling Your International Franchise System,* 20, ABA Forum on Franchising (Oct. 13, 2010).

53 Asbill, *supra* note 21, at 269-70.

financial statements) that the franchisee has the ability to fulfill its obligations under the agreement.

Unfortunately, the franchisor will be tasked with ensuring that the franchisee maintains adequate capitalization throughout the term of the agreement, which may cause the franchisor to utilize its time and resources.

This alternative could be structured in several ways. If the franchisee's net worth falls below the agreed-upon floor, the franchisee may be required to commit to increase its net worth to the required minimum. While this sounds good, there is no assurance that funds will be available to do so. In addition, since the remedy for failing to do so likely would be a default of the underlying agreement, the franchisor may not be willing to take such drastic action.

Another alternative relating to the franchisee's capitalization, would be for the guarantors to sign a standby guarantee that only becomes effective if the franchisee's net worth falls below the agreed-upon minimum. This has the advantage from the franchisor's perspective to be self-effectuating and avoids the issue relating to the availability of funds for a capital call. [54]

H. <u>Trade Credit Insurance</u>.

Trade credit insurance is a less known and little used alternative to personal guarantees in international franchising. Trade credit insurance provides coverage against the risk that a commercial customer (the franchisee) fails to pay for goods or services.[55] According to insurers, the use of trade credit insurance (i) allows policy holders (the franchisors) the ability to add multiple franchisees (and countries) to the same insurance policy; (ii) allows access to value-added services (likely for an additional fee) including assistance with or access to systems-based accounts receivable management, collections agents and legal services; and (iii) enables the insured (the franchisor) to penetrate new foreign markets with less risk.[56]

Some significant disadvantages include the possibility that the insured may only be entitled to a percentage of the default amount from the insurer; the insured (the franchisor) is likely responsible for the costs associated with the insurance policy premium and deductible in the event a claim is made under the policy (unless the parties agree to pass these costs on to the franchisee); and the insured will need to

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54 *See* attached Exhibit G for an example of standby financial guarantee.

55 *A Trade Credit Insurance Guide*, AIG, 2 (2016), http://www.aig.com/content/dam/aig/america-canada/us/documents/business/trade-credit/aig-trade-credit-playbook-na-jan-2017.pdf.

56 *Id*. at 4.

analyze the policy in light of the typical issues one faces when making claims against insurance companies, including exclusions to coverage and caps on coverage. Finally, because trade credit insurance has not traditionally been used often in the franchise industry, the success rate of claims of franchisors against insurers is relatively unknown.

VI. Enforcement of Guarantees in International Franchise Agreements.

Personal guarantees are more likely to be enforced when individuals draw up and execute an unambiguous agreement requiring the personal guarantor to pay the debts of the franchisee. However, that alone will not ensure that the guarantee is enforced. Local law considerations, as described above, can supersede contractual provisions of the guarantee. Beyond the careful drafting of a guarantee, franchisors should recognize that it is difficult to enforce guarantees in foreign jurisdictions. Absent a judicial resolution in the guarantor's home jurisdiction, a task not lightly pursued, arbitration is the preferred method for enforcing obligations of the guarantors.

A. Arbitration.

The most important development in arbitration law is the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention"). The Convention was adopted by a United Nations diplomatic conference on June 10, 1958 and came into force on June 7, 1959 and there are now 157 countries that are signatories to the Convention.[57] The Convention simplifies the process of obtaining recognition and enforcement of arbitration awards.

The New York Convention applies to two categories of arbitration awards: those made in one country and whose enforcement is sought in another if they arise out of differences between persons, whether physical or legal, and those that are considered domestic awards in the country where its implementation is sought.[58] However, the Convention also allows countries to declare that they will only apply the Convention to "differences arising out of legal relationships, whether contractual or not, which are not considered as commercial" under the particular country's law.[59] The U.S. has adopted such a declaration. Additionally, the U.S. also has adopted the right it has under the Convention to only apply the Convention to awards made in territories outside of the U.S. An exception to that rule that the U.S. has adopted is that the Convention will not apply if the parties are both citizens of the U.S. However, the Convention will apply if the dispute involves property outside the U.S. even if both parties are citizens of the U.S.

[57] *See* attached Exhibit H for a list of the signatories.

[58] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I(1), June 10, 1958 [hereinafter New York Convention].

[59] *Id.* art. I(3).

The New York Convention essentially was created to recognize and enforce arbitration agreements, and to recognize and enforce arbitration awards that fall under the Convention.[60] These two obligations, as they relate to U.S. franchisors, are important. The New York Convention has been implemented through the Federal Arbitration Act ("FAA"). The FAA provides a broader avenue to federal courts in the U.S. when the cases arise under the New York Convention rather than domestic arbitration. The only way for domestic arbitration under the FAA to reach federal court is if the parties have diversity of citizenship or if the claim arises under federal law. However, the FAA allows any action that falls within the scope of the Convention to enter federal court because the Convention is deemed to arise under the federal laws. Therefore, the FAA allows a motion to confirm the arbitration in any court having jurisdiction under the FAA.[61] [62]

Under the FAA, proper venue would be in any district "in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought."[63] If the guarantee explicitly called for a district in the United States as the place for arbitration, venue would be proper there as well.[64]

When examining personal jurisdiction courts have generally enforced the requirement for the Due Process Clause, as outlined in *Int'l Shoe Co. v. Washington* – that there be "minimum contacts with [the forum] such that maintenance of the suit does not offend traditional notions of fair and substantial justice" – to apply in order to enforce an arbitral award under the Convention. 326 U.S. 310, 316 (1945).[65]

There are two ways to challenge an award. First, the losing party may argue that the arbitral award may not be enforced through the New York Convention due to one of the grounds in Article V of the Convention (discussed more below). However, this is more of a defense against confirming the award rather than a motion directed at

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60 *Id.* art. II-III.

61 Federal Arbitration Act, 9 U.S.C. § 206.

62 Federal courts do not have exclusive jurisdiction over arbitration awards that arise from the Convention. State courts may also entertain these awards. However, the FAA provides for a very broad power of removal. 9 U.S.C. §205 states that a case may be removed to federal court if it relates to an award falling under the Convention.

63 Federal Arbitration Act, *supra* note 61, § 204.

64 *Id.*

65 *See, e.g. Telcordia Tech., Inc. v. Telekom SA*, 458 F.3d 172, 178-79 (3d Cir. 2006); *Glencore Grain Rotterdam BV v. Shivnanth Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002); *Base Metal Trading v. OJSC Novokuzmetsky Aluminium Factory*, 283 F.3d 208, 212 (4th Cir. 2002).

vacating the award. If a challenger wants to seek to vacate the arbitral award completely, he may rely on the language of the Convention that states that "[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that the award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[66]

The Convention does offer parties an exclusive list of four other defenses that may be asserted, which can lead to nonrecognition of the arbitral award.[67] The burden of proving these defenses rests on the party resisting recognition. Franchisors should carefully draft personal guarantees in a way that avoids these defenses.

If the parties are under some incapacity under the law applicable to them, or if the guarantee is not valid under the law that the parties have subjected themselves to, a court may refuse to recognize the arbitral award.[68] Courts may also refuse recognition if the party against whom the award is granted "was not given proper notice of the appointment of the arbitrator of the arbitration proceedings or was otherwise unable to present his case."[69] This provision is rarely used.

Courts also may refuse to recognize an award if it "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration."[70] However, the same clause allows a court to separate arbitrable and non arbitrable matters, and the award of the arbitrable matters may be enforced. Courts also may refuse to recognize arbitral awards if the composition of the tribunal or the arbitral procedure "was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.[71] This clause, too, is very seldom used.

An important timetable that franchisors and franchisor counsel should keep in mind is the statute of limitations. An action for confirmation must be brought "within three years after an arbitral award falling under the Convention is made."[72] The Second

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66 New York Convention, *supra* note 58, art. V(1)(e).

67 *Id.* art. V(1)(a)-(d).

68 *Id.* art. V(1)(a).

69 *Id.* art. V(1)(b).

70 *Id.* art. V(1)(c).

71 *Id.* art. V(1)(d).

72 9 U.S.C. § 207.

Circuit has stated that the three-year window starts running as soon as the arbitrators enter an award, not when the award becomes final under the jurisdiction where the arbitration took place.[73]

B. <u>Enforcing U.S. Court Judgments in Foreign Jurisdictions</u>.

Generally, domestic guarantees may be enforced quite easily if the litigation is brought in the proper jurisdiction and venue. As long as a competent court hears a case and issues a judgment, that judgment is given full faith and credit in other states. However, that is not typically the case in the international context.

> "There are four basic problems with international guarantees which should be dealt with in the body of the guarantee itself. The first relates to consent to jurisdiction, the second to service of process, the third to choice of law. The final major issue, and perhaps the most important, is the issue of enforcing any judgment obtained in a United States court in the home country of the guarantor."[74]

There are no bilateral or multilateral treaties between the United States and any foreign state that requires the foreign state to enforce the judgment of a U.S. court.[75] Generally this is due to foreign states' notion that U.S. money judgments are excessive according to their idea of fairness. Just like the U.S., foreign states govern foreign judgments through local law. It is widely agreed that foreign states have the right to scrutinize judgments that are attempted to be enforced within their jurisdiction. Foreign courts hold on to their right to determine if the court that issued the judgment had jurisdiction, whether the defendant was properly informed of the action, if the proceedings were fair and absent any fraud, and to establish that the judgment is not contrary to the public policy of the local jurisdiction.[76] A U.S. court's judgment in a foreign jurisdiction also depends on the principles of comity, reciprocity, and *res judicata*.[77]

Foreign courts will scrutinize the judgment to ensure that the U.S. court had proper jurisdiction to determine the suit. However, many foreign countries apply their own notion of jurisdiction and look to see whether that standard was met in the U.S.

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73 *See Transport Wiking Trader Schiffahrtsgesellschaft MbH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 581 (2d Cir. 1993).

74 Sidney G. Saltz, *International Guaranties*, 1 (2008).

75 *Enforcement of Judgments*, United States Department of State, https://travel.state.gov/content/travel/en/legalconsiderations/judicial/enforcement-of-judgments.html (last visited on Mar. 30, 2017).

76 *Id.*

77 Nadja Vietz, *How to Make Sure Your US Judgment Can Be Enforced Abroad*, Washington State Bar News, vol. 63 No.3, 15 (Mar. 2009).

court. In other words, the party attempting to enforce the judgment must show the foreign court that jurisdiction was proper even under the standard that that court would impose. Germany's "mirror-image principle" is an example of this. "German law projects its own jurisdictional rules on the foreign court, which is then treated as having international jurisdiction if a German court would have had jurisdiction had the situation been reversed."[78] An English court normally recognizes the jurisdiction of the U.S. court if either "at the time the proceedings were commenced, the defendant was present in the country of the foreign court, or if the defendant submitted to the jurisdiction of the foreign court, either by agreement or by taking part in the proceedings."[79] English courts also will only recognize a U.S. court's jurisdiction over a company if "it has established and managed at its own expense a fixed place of business in the foreign country and for more than a minimal period of time carried on business at those premises, or a representative of that [company] has been carrying on business in that country for more than a minimal period of time."[80]

Foreign courts also examine whether the defendant was served properly. This is not generally problematic when the defendant has participated in the suit while it is in the U.S. court. This is based on the logical notion that if the defendant has participated in the U.S. suit, service was either conducted properly on the defendant or proper service was waived by defendant. However, this issue arises when a party attempts to enforce a default judgement against the defendant due to the defendant's lack of participation in the U.S. suit. In Europe, "proper service usually requires service to have been in accordance with the laws of the European country, and, in most instances, pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15, 1965, as well."[81]

Foreign courts will also weigh the public policy of the local jurisdiction before enforcing a U.S. court's judgment. Punitive and treble damages are not viewed as favorably around the world as they are in the U.S. Most European countries negatively view punitive damages, and as such, enforcement of those damages imposed by a U.S. court would be difficult to enforce.[82]

A foreign court's stringent inquiry into whether the U.S. court had proper jurisdiction, whether the defendant was served properly, and whether the damages imposed are too harsh make it awfully difficult for a U.S. court's judgment to be successfully recognized by a foreign court. As such, an attempt to impose a U.S.

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78 *Id.* at 16.

79 *Enforcement of US Court Judgements in England*, Bryan Cave International Arbitration and Litigation Team Bulletin, 3 (Aug. 2014).

80 *Id.*

81 Vietz, *supra* note 77, at 16.

82 *Id.*

court's judgment must not be the last thought of a lawyer who wins the judgement. The lawyer bringing the suit must from the onset assume that he will, at the end of the suit, attempt to impose the judgement abroad. Therefore, the lawyer must be careful and properly follow both U.S. and the foreign jurisdiction's law.

VII. Conclusion.

International franchise expansion is not easy. While a well drafted guarantee that complies with applicable local law does not change that fact, it can protect the franchisor financially and protect the brand's integrity if the international franchisee is not successful or otherwise turns out to be an unsuitable brand representative. Considering the variety of countries and parties involved in international franchise transactions, there is no one-size-fits-all solution to securing franchisee payment and performance. The key factor in a franchisor's effective use of guarantees (or alternative mechanisms) to meet its objectives is the conjunction of a specific understanding of the legal framework applicable to the relationship and a keen understanding and balancing of the risks and interests of the franchisor and master franchisee based on the specific facts of the transaction.

Exhibit A

<u>Long Form Guarantee</u>

Each and every undersigned Person (individually, “Guarantor” and, collectively, “Guarantors”) has, effective ______________________________, executed this Guarantee (“Guarantee”), which is made for the benefit of Franchisor, in consideration, and as a material inducement to Franchisor in respect of the execution and performance by Franchisor, of the foregoing Franchise Agreement (“Franchise Agreement”) by and between Franchisor and ________________ (“Franchisee”).

NOW THEREFORE, each and every Guarantor agrees jointly and severally, irrevocably and unconditionally, collectively to abide and be bound **(i)** during the Agreement Term and thereafter for so long as any provision of the Franchise Agreement survives or Franchisee has any financial obligations to Franchisor, any Franchisor Affiliate or any Related Person of Franchisor under the Franchise Agreement or any other Related Agreement and **(ii)** with respect to the Confidentiality Obligations and the Non-Competition Obligations for one year after the expiration or termination of the Agreement Term or Franchisor’ release of that Guarantor from its Guarantee, which ever happens first, as follows:

1. DEFINED TERMS

Except as otherwise provided herein, all capitalized or defined terms in this Guarantee have the meanings ascribed to them in the Franchise Agreement.

2. ACKNOWLEDGMENT

Each and every Guarantor has, and will remain under a continuing obligation to have read, understood and discussed or had or taken the opportunity to discuss with its own advisers and consultants (financial, legal, technical and otherwise) this Guarantee, the Agreement and any other Related Agreement in its or their entirety.

3. GUARANTEE

Each and every Guarantor guarantees and assumes liability to Franchisor, and its successors and assigns, for any and all financial and other obligations and covenants of Franchisee under the Franchise Agreement and any other Related Agreement, and, without limiting the generality of this Guarantee, will see to it and cause Franchisee to punctually pay and perform each and every such obligation and covenant, and otherwise remain in Full Compliance. Without limiting the generality of the foregoing, each and every Guarantor agrees that: **(A)** Guarantor will pay or perform as required under the Franchise Agreement or any other Related Agreement if Franchisee fails or refuses punctually to do so; **(B)** the liability of Guarantor under this Guarantee is direct and immediate, and joint and several; **(C)** such liability will not be contingent or conditioned on pursuit by Franchisor of any remedies against Franchisee or any other Person; **(D)** such liability will not be diminished, relieved or otherwise affected by any extension of time, credit or other indulgence which Franchisor may periodically grant to Franchisee or to any other Person, including, without limitation, the acceptance of any partial payment or performance or the compromise or release of any Claims, none of which will in any way modify or amend this Guarantee; **(E)** any monies received from any source by Franchisor for application toward payment of the obligations under the Franchise Agreement and under this Guarantee may be applied in any manner or order as Franchisor may periodically determine; **(F)** Guarantor will be bound by and will perform the Confidentiality Obligations and the Non-Competition Obligations and will regard those obligations and covenants as obligations and covenants of Guarantor; and **(G)** if any Guarantor for any reason ceases to own any interest in Franchisee before termination or expiration of the Franchise Agreement, all obligations of that Guarantor under this Guarantee will remain in force and effect, except to any extent Franchisor expressly releases in writing that Guarantor from this Guarantee. Notwithstanding any such release: **(i)** the obligations of Guarantor hereunder will remain in force and effect for one year immediately following any such release with respect to the Confidentiality Obligations and the Non-Competition Obligations; and **(ii)** such release will not affect the obligations of any other Guarantors hereunder.

Each and every Guarantor acknowledges and agrees that, in lieu of signing a new Guarantee each time Franchisee signs a New Development Rider, the obligations of each Guarantor under this Guarantee will extend to and include all obligations under each such New Development Rider entered into after the date of this Guarantee.

4. RELEASE

Each and every Guarantor releases and waives: **(A)** acceptance and notice of acceptance by Franchisor of the foregoing undertakings; **(B)** payment of any independent consideration by Franchisor to any Guarantor in exchange for this Guarantee; **(C)** notice of demand for payment of any indebtedness or nonperformance of any obligations hereby guaranteed; **(D)** protest and notice of Default to any Person with respect to the indebtedness or nonperformance of any obligations hereby guaranteed; **(E)** any right or Claim to require that an action be brought against Franchisee or any other Person as a condition of liability hereunder; **(F)** any right or Claim to payments and Claims for reimbursement or subrogation which any Guarantor may have against Franchisee arising under, or in connection with or relation to, the execution and performance of this Guarantee by any Guarantor; **(G)** any law or statute which requires that Franchisor make demand on, assert Claims against or collect from Franchisee or any others, foreclose any security interest, sell collateral, exhaust any remedies or take any action against Franchisee or any others before making any demand on, collecting from or taking any action against any Guarantor under this Guarantee; and **(H)** any and all other notices and legal, equitable or other defenses to which Guarantor may be entitled with respect to this Guarantee.

Further, each and every Guarantor freely and without any influence forever releases and covenants not to sue Franchisor and its Affiliates and their respective past and present officers, directors, shareholders, members, managers, agents and employees, in their corporate and individual capacities from any and all Claims, whether known or unknown, vested or contingent, suspected or unsuspected that Guarantor now owns or holds or may in the future own or hold based on, arising out of or relating to, in whole or in part, any fact, event, conduct or omission occurring on or before the date of the Franchise Agreement, including, without limitation, Claims arising under any laws, rules or ordinances, Claims for contribution, indemnity and/or subrogation and Claims arising out of, or relating to the Franchise Agreement, any Related Agreement and all other agreements between Franchisee and/or Guarantor and Franchisor or its Affiliates, the sale of a franchise to Franchisee and/or Guarantor, the development and operation of any Franchised Restaurant by Franchisee and/or Guarantor and the development and operation of all other restaurants operated by Franchisee and/or Guarantor that are franchised by Franchisor or its Affiliates. Each and every Guarantor expressly agrees that fair consideration has been given by Franchisor for this release and each Guarantor understands that this is a negotiated, complete and final release of all Claims.

5. ENFORCEMENT

The Enforcement Provisions will govern this Guarantee as if fully incorporated herein, substituting the term “Guarantor” for the term “Franchisee.” Without limiting any Enforcement Provision as applied to this Guarantee, if Franchisor utilizes legal counsel in connection with any failure by any Guarantor to comply with this Guarantee, that Guarantor will reimburse Franchisor for any of the costs and expenses that Franchisor may incur.

6. DEFAULT

Each and every Guarantor will be in Default under this Guarantee, if any of the following events occur: **(A)** any Guarantor fails to pay or perform any obligation under this Guarantee in a timely fashion; **(B)** any breach occurs with respect to any agreement or representation contained or referred to in this Guarantee; or **(C)** a suitable replacement Guarantor is not named within 60 days after any Guarantor **(i)** dies, is dissolved or ceases to exist, **(ii)** loses competency or has a guardian appointed, **(iii)** becomes insolvent or unable to pay its creditors (including without limitation Franchisor or Franchisor Affiliates), **(iv)** files a petition in bankruptcy, an arrangement for the benefit of creditors or a petition for reorganization, (v) has filed against it a petition in bankruptcy, an arrangement for the benefit of creditors or petition for reorganization, which is not dismissed within 60 days of the filing, **(vi)** makes an assignment for the benefit of creditors, **(vii)** has any receiver or trustee appointed over it that is not dismissed within 60 days of appointment or **(viii)** has any execution levied against its business, property or assets, to the extent such execution materially affects the ability of that Guarantor to meet its obligations hereunder.

If a Default occurs, all obligations of each and every Guarantor to Franchisor will be considered due and payable immediately and without notice. Upon the death of one of the undersigned, the estate will be bound by this Guarantee for all obligations existing at the time of death. The obligations of the surviving Guarantors will continue in full force and effect.

7. ASSIGNMENT

This Guarantee will inure to the benefit of and be binding on the Parties and their respective heirs, legal representatives, successors and assigns. Franchisor may freely assign its interests and rights, title and benefit in and to this Guarantee, in whole or in part, without the prior written consent of any Guarantor. No assignment by Franchisor will release any Guarantor from this Guarantee. No Guarantor may assign or delegate any right or obligation to any other Person without the approval of Franchisor. No right of action will accrue to any third Party under this Guarantee other than Franchisor and its successors, assigns, receivers or administrators.

8. MISCELLANEOUS

No Guarantor will in any way be released or discharged from any liability under this Guarantee by: **(A)** any invalidity, illegality or unenforceability of the Franchise Agreement or any Related Agreement; **(B)** any alteration or amendment of, or variation to, the Franchise Agreement or any Related Agreement; **(C)** any allowance of time by Franchisor under the Franchise Agreement or any Related Agreement; **(D)** any forbearance or forgiveness or indulgence in respect of any matter or thing on the part of Franchisor concerning the Franchise Agreement or any Related Agreement; **(E)** the insolvency, bankruptcy, winding up or reorganization of Franchisee (or any analogous event or the exercise of any power of disclaimer arising in such circumstances); or **(F)** any dispute or disagreement between Franchisor and Franchisee under or in relation to the Franchise Agreement or any Related Agreement. If at any time any one or more of the provisions of this Guarantee is or becomes illegal, invalid or otherwise unenforceable in any respect, neither the legality, validity or enforceability of the remaining provisions of this Guarantee, nor the legality, validity or enforceability of such provision, under the law will in any way be affected or impaired as a result.

IN WITNESS WHEREOF, each Guarantor has executed this Guarantee below under seal.

Exhibit B

<u>Short Form Guarantee</u>

In consideration of, and as an inducement to, the execution of the foregoing Franchise ("Agreement") entered into with Franchisee and Franchisor, Guarantors, who each own an equity interest in Franchisee, hereby: **(1)** unconditionally guarantee to Franchisor and its successors and assigns, for the term of the Agreement and thereafter as provided in the Agreement, that Franchisee will **(a)** punctually pay and perform each and every undertaking, agreement and covenant set forth in the Agreement and **(b)** punctually pay all other monies owed to Franchisor and/or its affiliates; **(2)** agree to be bound by each and every provision in the Agreement; and **(3)** agree to be liable for the breach of each and every provision in the Agreement. The obligations hereunder are subject to the Enforcement Provisions set out in the Agreement.

Exhibit C

<u>Performance Guarantee</u>

In consideration of, and as an inducement to, the execution of the Franchise Agreement by Franchisor entered into Franchisee, the undersigned ("Guarantors"), hereby personally and unconditionally agree as follows:

1. <u>Guarantee To Be Bound By Certain Obligations</u>. Guarantors hereby personally and unconditionally guarantee to Franchisor and its successors and assigns, for the term of the Agreement and thereafter as provided in the Agreement or at law or in equity, that each will be personally bound by the restrictions contained in Section __ of the Agreement [Confidentiality Restrictions] and Section ___ [Noncompetition Restrictions].

Exhibit D

Standby Guarantee

In consideration of, and as an inducement to, the execution of the Franchise Agreement by Franchisor entered into Franchisee, the undersigned ("Guarantors"), hereby personally and unconditionally agree as follows:

1. Guarantee and Assumption of Franchisee's Obligations. Guarantors hereby: **(A)** guarantee to Franchisor and its successors and assigns, for the Term and thereafter as provided in the Agreement or at law or in equity, that Franchisee and any assignee of Franchisee's interest under the Agreement will: **(1)** punctually pay and perform each and every undertaking, agreement and covenant set forth in the Agreement and **(2)** punctually pay all other monies owed to Franchisor and/or its affiliates; **(B)** agree to be personally bound by each and every provision in the Agreement, including, without limitation, the provisions of Sections______; and **(C)** agree to be personally liable for the breach of each and every provision in the Agreement.

2. Limitations. Notwithstanding anything to the contrary in this Guarantee, Guarantors' financial obligations under Section 1 provisions will become effective upon entry of a final judgment in favor of Franchisor.

Exhibit E

Financial Cap Language

Dollar Cap

Notwithstanding anything herein to the contrary the collective financial liability of Guarantors under this Guarantee will not exceed $___________________.

Differing Liability Levels

Notwithstanding anything herein to the contrary: **(1)** the liability of each Guarantor hereunder will be several and not joint, and **(2)** the maximum liability of each Guarantor at any time shall be 50% of all obligations guaranteed.

Decreasing Dollar Cap

Provided Franchisee is in Full Compliance and has not received a written notice of default which it has failed to cure with the applicable cure period, if any: **(1)** beginning with the 5th anniversary of the Effective Date, the collective financial liability of Guarantors under this Guarantee will not exceed $___________________; and **(2)** beginning with the 10th anniversary of the Effective Date, and continuing through the Agreement Term, the collective financial liability of Guarantors under this Guarantee will not exceed $___________________

Increasing Dollar Cap Based on Operating Units

Notwithstanding anything herein to the contrary the collective financial liability of Guarantors under this Guarantee will not exceed $___________________ for each Franchised Unit opened by Franchisee.

Exhibit F

Term Limit Guarantee

In consideration of, and as an inducement to, the execution of the Franchise Agreement by Franchisor entered into Franchisee, the undersigned ("Guarantors"), hereby personally and unconditionally agree as follows:

1. Guarantee and Assumption of Franchisee's Obligations. Guarantors hereby: **(A)** guarantee to Franchisor and its successors and assigns, for the Term and thereafter as provided in the Agreement or at law or in equity, that Franchisee and any assignee of Franchisee's interest under the Agreement will: **(1)** punctually pay and perform each and every undertaking, agreement and covenant set forth in the Agreement and **(2)** punctually pay all other monies owed to Franchisor and/or its affiliates; **(B)** agree to be personally bound by each and every provision in the Agreement, including, without limitation, the provisions of Sections______; and **(C)** agree to be personally liable for the breach of each and every provision in the Agreement.

2. Limitations. Notwithstanding anything to the contrary in this Guarantee, the provisions of Section 1 will only be applicable for the period beginning on the Effective Date on the Franchise Agreement and, provided Franchisee has not received a notice of default:

Variation 1 – ending on the fifth anniversary of the Effective Date.

Variation 2 -- ending on the opening of the ____ Franchised Unit.

Exhibit G

Guarantee Effective Upon Net Worth Decrease

In consideration of, and as an inducement to, the execution of the Franchise Agreement by Franchisor entered into Franchisee, the undersigned ("Guarantors"), hereby personally and unconditionally agree as follows:

1. Guarantee and Assumption of Franchisee's Obligations. Guarantors hereby: **(A)** guarantee to Franchisor and its successors and assigns, for the Term and thereafter as provided in the Agreement or at law or in equity, that Franchisee and any assignee of Franchisee's interest under the Agreement will: **(1)** punctually pay and perform each and every undertaking, agreement and covenant set forth in the Agreement and **(2)** punctually pay all other monies owed to Franchisor and/or its affiliates; **(B)** agree to be personally bound by each and every provision in the Agreement, including, without limitation, the provisions of Sections______; and **(C)** agree to be personally liable for the breach of each and every provision in the Agreement.

2. Limitations. Notwithstanding anything to the contrary in this Guarantee, Guarantors' financial obligations under Section 1 will only be applicable if the net worth of Franchisee, as shown on Franchisee's audited financial statements for the most recent fiscal year, falls below $_______________ and thereafter will remain in force and effect for the balance of the Agreement Term.

Exhibit H

Signatories To The New York Convention

Afghanistan
Albania
Algeria
Andorra
Angola
Antigua and Barbuda
Argentina
Armenia
Australia
Austria
Azerbaijan
Bahamas
Bahrain
Bangladesh
Barbados
Belarus
Belgium
Benin
Bhutan
Bolivia (Plurinational State of)
Bosnia and Herzegovina
Botswana
Brazil
Brunei Darussalam
Bulgaria
Burkina Faso
Burundi
Cambodia
Cameroon
Canada
Central African Republic
Chile
China
Colombia
Comoros
Cook Islands
Costa Rica
Cote d'Ivoire
Croatia
Cuba
Cyprus
Czechia
Democratic Republic of the Congo
Denmark
Djibouti
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
Estonia
Fiji
Finland
France
Gabon
Georgia
Germany
Ghana
Greece
Guatemala
Guinea
Guyana
Haiti
Holy See
Honduras
Hungary
Iceland
India
Indonesia
Iran (Islamic Republic of)
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Kazakhstan
Kenya
Kuwait
Kyrgyzstan
Lao People's Democratic Republic
Latvia
Lebanon
Lesotho
Liberia
Liechtenstein
Lithuania
Luxembourg
Madagascar
Malaysia
Mali
Malta
Marshall Islands
Mauritania
Mauritius
Mexico
Monaco
Mongolia
Montenegro
Morocco
Mozambique
Myanmar
Nepal
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
Norway
Oman
Pakistan
Panama
Paraguay
Peru
Philippines
Poland
Portugal
Qatar
Republic of Korea
Republic of Moldova
Romania
Russian Federation
Rwanda
Saint Vincent and the Grenadines
San Marino
Sao Tome and Principe
Saudi Arabia
Senegal
Serbia
Singapore
Slovakia
Slovenia
South Africa
Spain
Sri Lanka
State of Palestine
Sweden
Switzerland
Syrian Arab Republic
Tajikistan
Thailand
The former Yugoslav Republic of Macedonia
Trinidad and Tobago
Tunisia
Turkey
Uganda
Ukraine
United Arab Emirates
United Kingdom of Great Britain and Northern Ireland
United Republic of Tanzania
United States of America
Uruguay
Uzbekistan
Venezuela (Bolivarian Republic of)
Viet Nam
Zambia
Zimbabwe