



#IFA 2017

CONVENTION

JANUARY 29-FEBRUARY 1 | MANDALAY BAY | LAS VEGAS, NV

Regional Focus: Latin America / Europe

- Dr. Mark Abell, Bird & Bird, London
- Simon Bartholomew, British Franchise Association, U.K.
- Marcelo Cherto, Brazilian Franchise Association, Sao Paulo
- Martin Arauz, formerly Starwood Hotels, Miami
- Moderator: David Humphrey, ECP-PF Holdings

Key takeaways

- Brexit is a work in progress; stay tuned
- Franchisors should immediately reassess their IP protection strategy in Europe and the UK
- Brazil is a challenging environment, but the market for franchising remains very strong
- Cuba is gradually opening to American firms, but creative approaches would be required for franchisors
- Fortune favors the brave!

How Does Brexit Impact US Franchisors with Franchisees in the EU?

Dr. Mark Abell

Bird & Bird,

London.

Introduction

- On 23 June 2016, the UK voted 51.9% to 48.1% in favour of leaving the EU
- A totally unexpected result that could have substantial impact not only on the world economy, but also on US businesses with a presence in the UK and Europe
- It has been seen by commentators as voicing the frustration felt by the economically and politically alienated and disengaged
- It is the British equivalent to the election of Donald Trump as the US President

What do US Franchisors need to know about Brexit?

- The road map moving forward – what , when and how?
- The likely legal impact of "Brexit" for US Franchisors with franchisees in the UK and the rest of the EU
- The short to mid-term commercial opportunities that the resulting drop in the value of the pound has produced for US Franchisors

The Road Map

- No-one knows for sure!

It looks likely that Brexit will be a reality by early 2019

- Referenda are constitutionally alien to the UK. Their outcome is purely advisory. They are not legal binding, but they do create strong political pressure to act
- Under Article 50 of the Lisbon Treaty, the UK may, decide to withdraw and implement this by notifying the European Council
- The Council will negotiate a withdrawal agreement with the UK on behalf of the EU
- The withdrawal agreement must be agreed by a qualified majority of the Council, with consent of the European Parliament
- EU Treaties will cease to apply to the UK from the date the withdrawal agreement comes into force OR, failing such agreement being concluded, two years after the Council was notified of the withdrawal (unless the Council unanimously agrees to extend this period)
- It will be for the British Parliament to determine when (/if) to trigger Article 50 and commence negotiations of the terms of a Brexit, but it is likely that it will be early in 2017

The Legal Impact

- No-one knows for sure!

What happens to EU laws in the UK now?

- There will be no immediate change to English or Scottish law as a result of the referendum decision and so franchisors should not be panicked into taking steps to change their franchise or other agreements at present
- Directly applicable EU legislation (e.g., Treaty provisions and Regulations) will cease to have legal force in the UK immediately upon Brexit, (unless Parliament passes equivalent UK law)
- EU laws that have been transposed into UK legislation (Directives) will continue to operate, but the UK statute will no longer be required to comply with the Directive from which it derives
- UK Parliament will be free to amend the legislation as it sees fit
- The Court of Justice of the European Union ("CJEU") case law is likely to continue to be persuasive in UK courts after a Brexit, but this influence will diminish over time as UK law diverges
- Depending on the UK's new status in relation to the EU (which is to be negotiated), the UK may join the European Free Trade Association ("EFTA") (and then also the Lugano Convention on Jurisdiction and Judgments) and possibly the European Economic Area ("EEA")

What are the implications of Brexit for US Franchisors?

It Depends upon Whether it is a “Hard” or “Soft” Brexit

- **“Soft”**. If the UK joins EFTA and through it joins the EEA, the position in relation to many aspects of legal practice will remain unchanged. This must be a real possibility and if it is the outcome, there is likely to be less upheaval from a legal point of view
- **“Hard”**. If the UK negotiates a looser arrangement with the EU via a series of bilateral and multilateral trade agreements and/or reliance on the rules of the World Trade Association, OECD and G20, of which it will remain a member

Franchise Regulation

- Although there is franchise specific regulation in France, Spain, Italy, Sweden, Belgium, Romania and two of the three Baltic States, there is no EU wide franchise specific regulation in the EU
- As such Brexit will have no impact in this regard
- However, if the European Parliament's current review of the regulation of franchising were to lead to an EU wide franchise regulation, the UK would probably not be obliged to adopt such a regulation

Trade Mark Law

- The most significant effect of a Brexit on US franchisors will be in terms of their brand protection strategy for the UK and Europe
- This therefore needs some urgent and expert consideration by US franchisors as soon as possible
- It is likely that EU trade marks ("EUTM"s) will no longer have effect in the UK
- This is something that US franchisors with EUTMs need to keep an eye on as it may at some point mean that they have to re-apply for some of their trade marks in the UK
- US franchisors have EUTM registrations but only use their marks in the UK could be vulnerable to attack for non-use

Cross-border dispute resolution (DR)

- Disputes where one party is based in the UK and another in an EU Member State may be affected by a Brexit. Other disputes may also be affected if the subject matter has some connection with a Member State
- The Brussels Regulation currently governs jurisdiction and the enforcement of judgments within the EU. The Lugano Convention sets out very similar rules, so if the UK becomes a signatory to this convention post-Brexit little will change. Otherwise, the position will depend on negotiated bi-lateral and multi-lateral agreements with other countries, or the possible ratification by the UK, in its own right, of the Hague Convention on Choice of Court Agreements (which the EU has ratified)

Labour and Immigration Law

- EU employment laws that are considered to impose the greatest burden on businesses — such as agency worker rights, collective consultation and working time rights — are the most likely to be subject to change
- The position on immigration is still unclear. Labour shortages, a loss of talent and mobility restrictions are all ways in which businesses could be affected depending on how the government elects to regulate or remove EU nationals' right to live and work in the UK. Extending the current Points-Based System to apply to EU nationals is possible but not a foregone conclusion

Labour and Immigration Law

- Changes to immigration laws in relation to EU citizens currently living and working in the UK could have a substantial impact on your franchisee's employees particularly in the food and beverage and hospitality industries. US franchisors with a presence in the UK should therefore audit their franchisees' workforce in terms of immigration status, considering applications that could be made now (e.g. for permanent residency), and communicate with concerned employees
- In the longer term, if and when the government proposes that laws be amended or repealed, employers should also review employment contracts (with a view to addressing any unenforceability risks that might arise), policies, procedures and benefit schemes, and check any European Works Council arrangements

Data Protection, Privacy and Cyber Security Law

- The extent to which General Data Protection Regulation (GDPR), due to come in force on 25 May 2018, the Network & Information Security (NIS) Directive ("Cyber Directive") will be adopted in the UK will depend heavily on the type of relationship the UK adopts with the EU. However, it seems likely that either the GDPR or a law that looks very like it will be required in the UK given that the UK's current law is in need of refreshment (it is nearly 20 years old) and given the way that EU data transfer laws operate
- The UK will wish to continue to trade with the EU post Brexit, therefore closely comparable data protection and cyber security laws in many areas will be necessary to avoid barriers to trade
- US franchisors with franchisees in other EU member states will need to be very careful to ensure that they comply with EU data protection and cyber security laws even after Brexit

Anti-trust Law

- EU anti-trust rules will continue to apply post-Brexit to agreements or conduct of UK businesses that have an effect within the EU and parallel EU and UK enforcement action will become possible
- However, the Commission will have reduced powers, e.g. no power to carry out on-site investigations (dawn raids) in the UK nor to ask the Competition and Markets Authority to investigate on its behalf
- Importantly for franchising, new block exemption measures (including the block exemption that covers franchising) at UK level will be needed, as the UK Competition Act currently relies on the EU block exemption regulations (which will no longer apply following a Brexit). It may mean that the UK adopts a more lenient, US "Chicago School" "rule of reason" style of approach to restrictions on issues such as exclusivity and price maintenance. This would allow franchisors far greater flexibility in their franchise agreements

The Commercial Opportunities

US Franchisors should be aware that.....

- The current drop in the value of the pound has led to a good number of US franchisors buying out their UK master franchisees
- Brexit may provide grounds for termination of franchise agreements and other contracts, depending on the specific facts and drafted terms (e.g., the material adverse change or force majeure clauses in a contract). The question is particularly relevant to franchise agreements that have the EU as the territorial scope. Parties might argue that a contract has become frustrated as a result of Brexit. This is of great relevance to any US franchisors that have granted master franchises for the European Union, rather than specifically named countries

- There could be a gradual repeal of EU regulations and restrictions seen to be burdensome. For example, relaxation of competition law rules to allow the inclusion of more territorial restrictions than are currently permitted by the EU competition rules, and/or a decision not to implement laws akin to the new GDPR. That could be a positive change for US franchises located in the UK
- US franchisors with a large number of commercial contracts, particularly with entities within the EU, should consider in due course auditing these contracts to determine the effect Brexit will have on rights and obligations under these agreements
- The commercial impact of the cost of increased trade barriers between the EU and the UK could have an adverse impact for some US franchisors with networks based in the UK and covering other EU member states due to, for example, the impact of the restriction of free movement of persons and monitoring of currency fluctuations

Conclusion

- The impact of Brexit on US franchisors is currently uncertain
- The one thing that US franchisors should do, sooner rather than later, is consider how they adapt their trade mark protection strategy in the UK and EU to take account of impending changes resulting from Brexit
- US franchisors must keep a watching brief as various areas of law develop in response to the political changes that look likely to take place over the next two years or so. Bird & Bird will be providing an on-going review of the impact of Brexit on franchising as matters develop
- Any franchisor wishing to be kept apprised of relevant issues should contact mark.abell@twobirds.com



Franchising in Brazil

Marcelo Cherto

*Founder and Board
Member Brazilian
Franchising Association*

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TAKE-AWAYS OF THIS PRESENTATION



**Brief overview of
Brazil** and its
franchising market



Why it is worth
considering Brazil
as a potential
target-market



**Tips on doing
business in
Brazil**



**Can one thrive in times of
political chaos and economic
recession?**

BRAZIL



206+ Million
people

**5th largest country in
the World**

3,286,486 square miles

World's 9th economy
with a lot to be done



Brazil

RIGHT NOW

Politically **divided**

Last president was **impeached**

Former president is the defendant in **several criminal suits**

New president is **threatened**

Corruption finally being fought

Several Congress members **struggling to avoid prison**



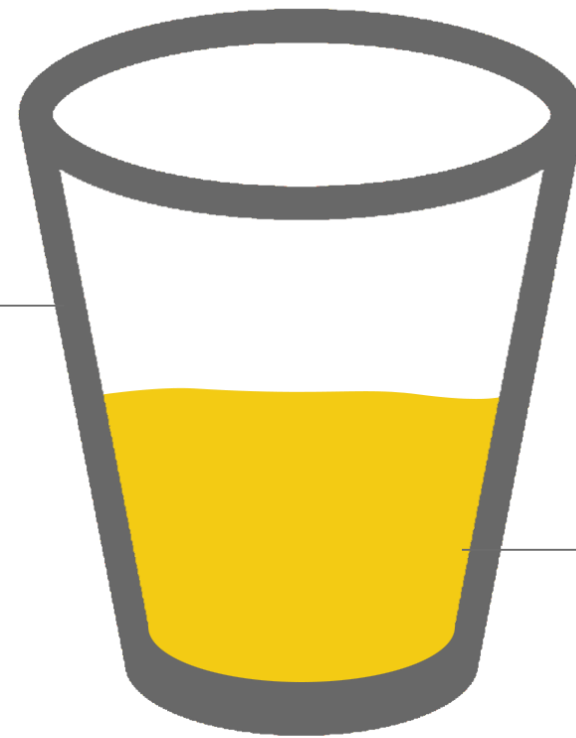
MOST LATIN AMERICAN COUNTRIES ARE UNDERGOING MAJOR POLITICAL CHANGES, with left-wing parties getting weaker and “center” and right-wing getting back to power



Traditional old-time politicians are **being rejected in favor of newcomers**

**IN BRAZIL,
perhaps more than in other countries,
one must be aware that**

a glass half empty



is a glass half full



For Brazilians
crisis is
nothing new
“Uncertainty is our middle
name”

DATA: 26.05.87

JORNAL: O ESTADO DE SÃO PAULO

CADERNO: Caderno de Empresas

PÁG.: 05

O franchising e a crise

MARCELO CHERTO

Em linhas gerais, o business format franchising, entre nós apelidado franquía comercial, consiste na outorga a alguém (o franchisee), pelo titular de uma marca e produtor e/ou comerciante de certos bens e/ou serviços e/ou, ainda, detentor de um certo know how (o franchisor), do direito de uso daquela marca em conexão com a prestação de certos serviços e/ou produção e/ou comercialização de

aquele país, já é amplamente conhecido e comprovadamente bom, na imensa maioria dos casos, para o franchisor, para o franchisee e para o próprio consumidor.

Por essas e outras tantas razões, nos Estados Unidos, como em tantos outros países, as autoridades não hesitam em reconhecer no franchising um elemento altamente benéfico para a economia como um todo, e buscam estimular seu desenvolvimento por todos os meios possíveis. Já entre nós, in-

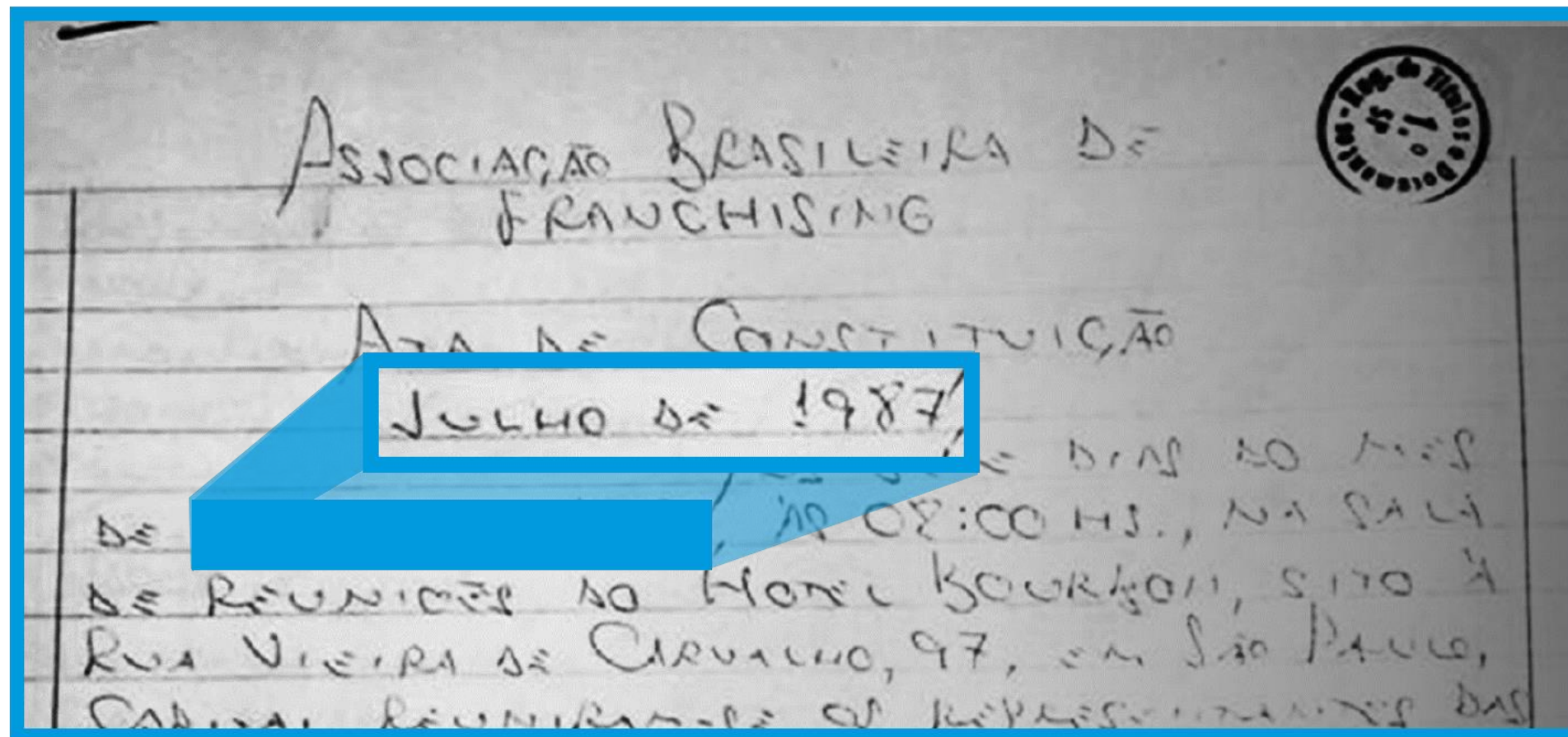
cial a sua própria "sobrevivência" no mundo empresarial.

É quase certo que a grande maioria dos que se encontram nesse situação ficariam felicíssimos em poder contar com o apoio, a orientação e a supervisão de uma empresa séria e bem estruturada, detentora de marca de sucesso, com amplo conhecimento das técnicas de marketing, cujos produtos e/ou serviços fossem reconhecidamente do gosto dos consumidores, que se dispusesse a outorgar a eles

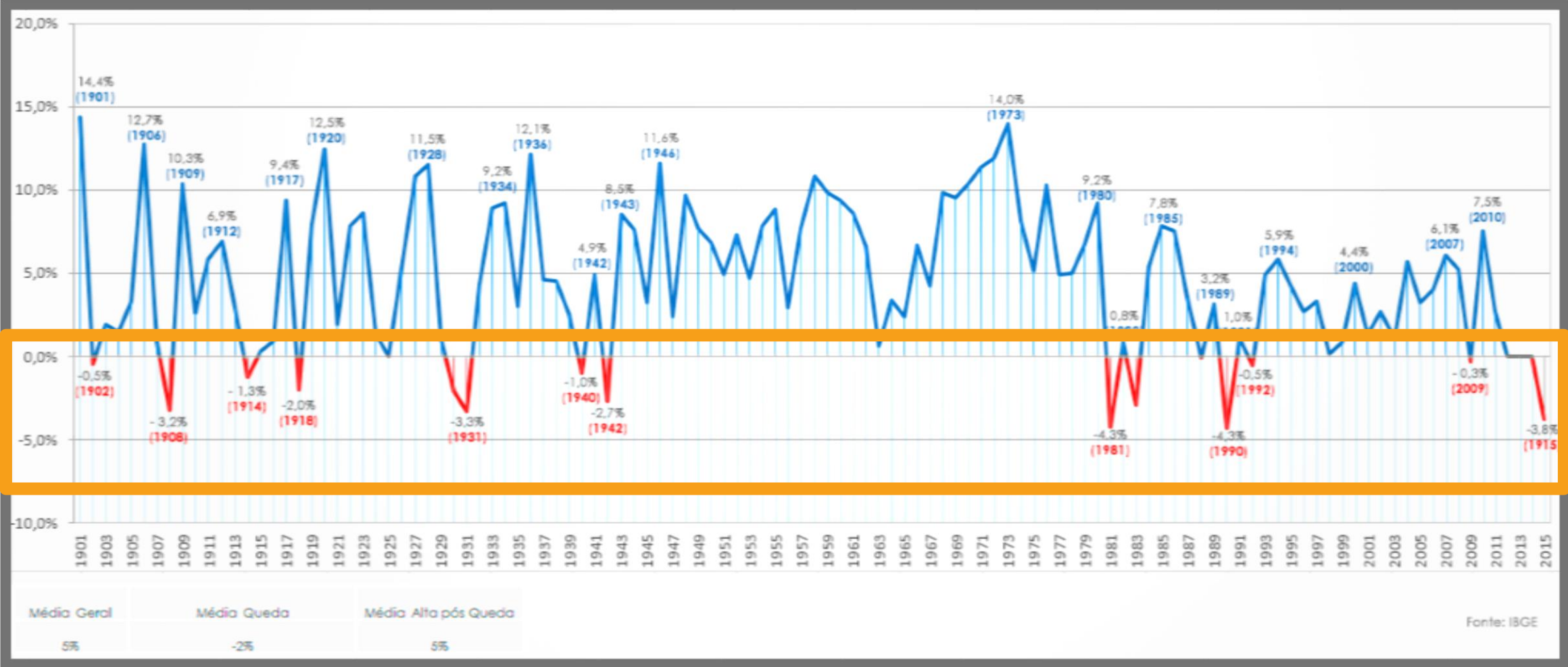
o sistema pode efetivamente contribuir para o fortalecimento das pequenas e médias empresas no País.

Parece que agora se trata apenas de uma questão de tempo até que as demais autoridades, especialmente o Fisco, percebam que, ao contrário do que antes acreditavam, o franchising deve ser estimulado. Afinal sua eficácia, no caso dos pequenos e médios empresários, é muito menos discutível que a da mera concessão de financiamentos a juros subsidiados, que além

The Brazilian Franchising Association **WAS FOUNDED DURING A MAJOR CRISIS**



Brazil`s GDP evolution since 1900





2009



2013



2016

HOWEVER...

In a crisis...



while most cry,

**THERE IS ALWAYS SOMEONE
SELLING HANDKERCHIEFS**



2015 + 2016

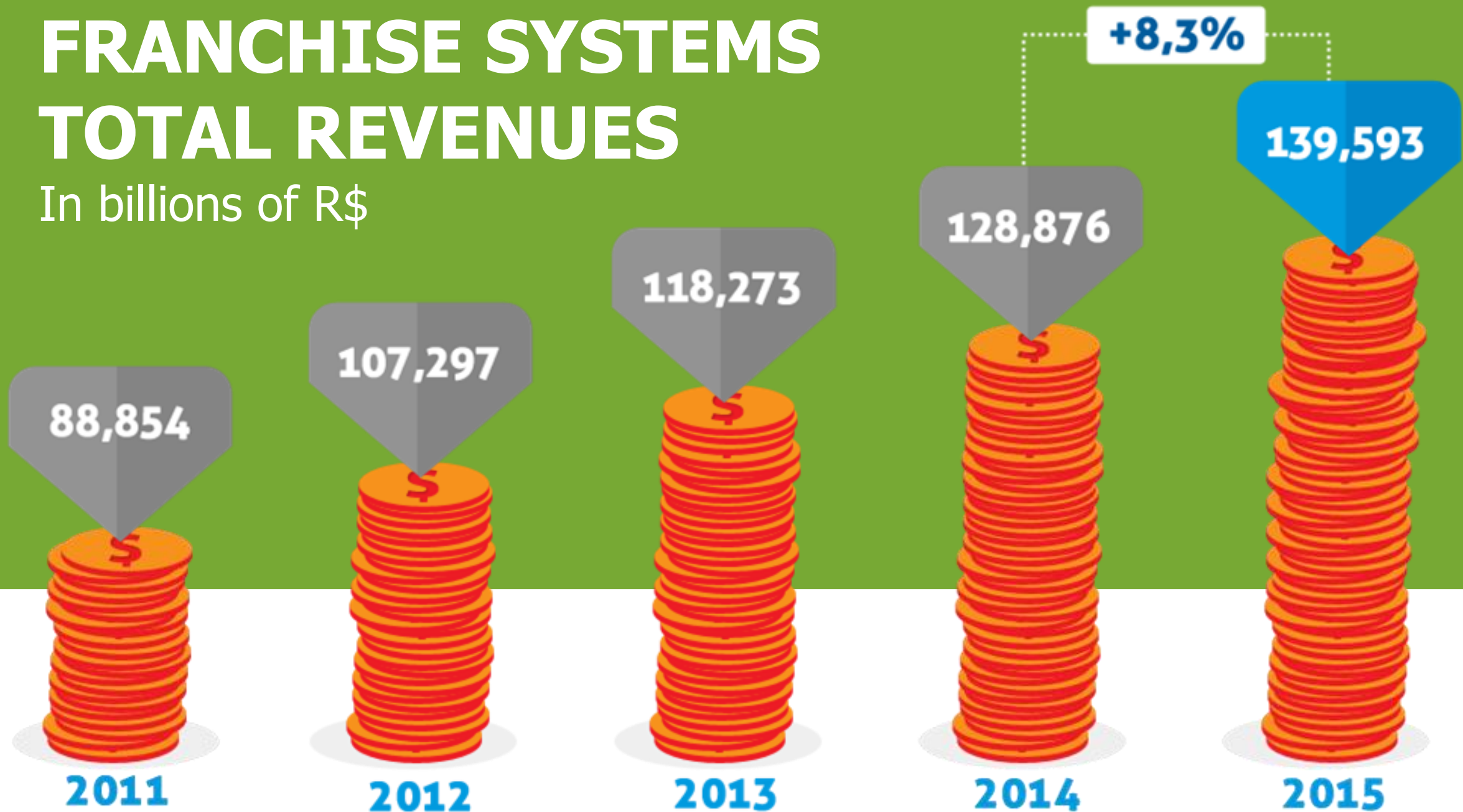
170,000
independent retail
businesses **were**
closed



20,000 new franchises
were granted

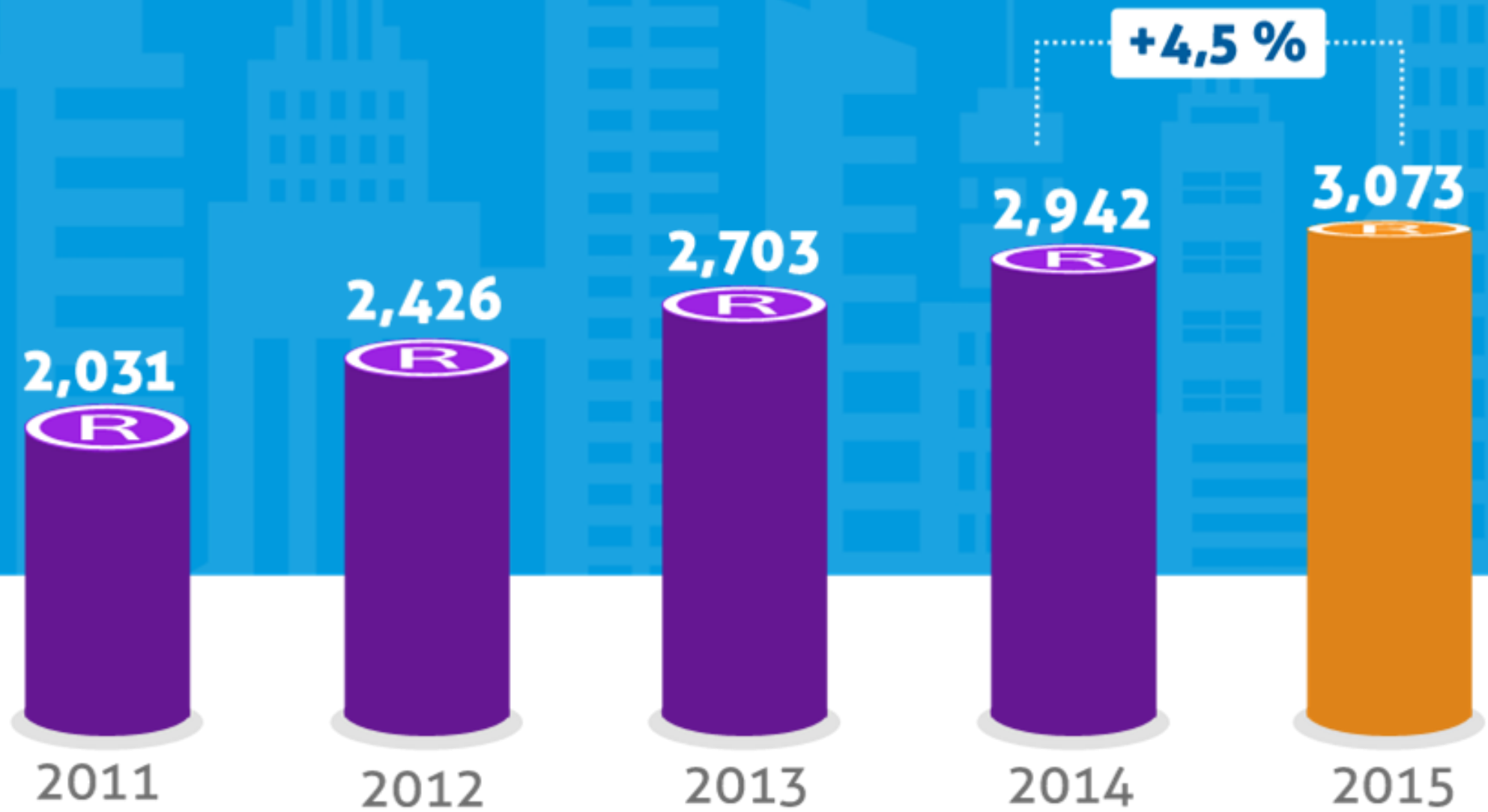
FRANCHISE SYSTEMS TOTAL REVENUES

In billions of R\$



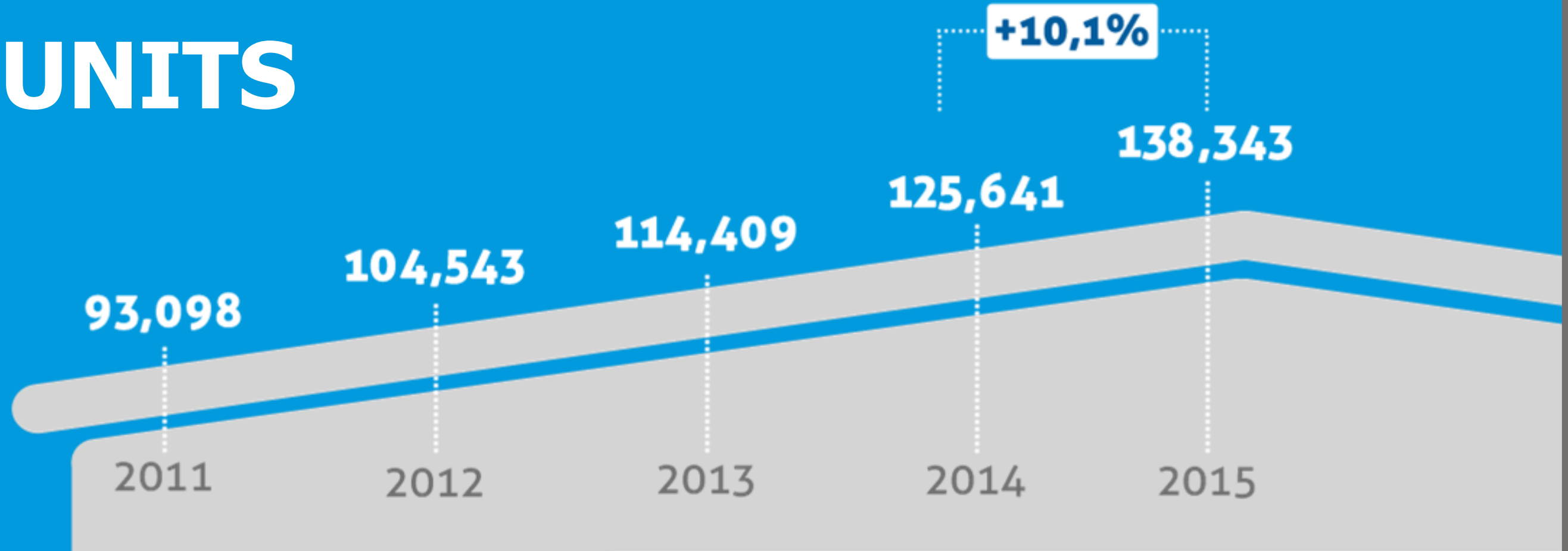
Source: ABF

FRANCHISORS



Source: ABF

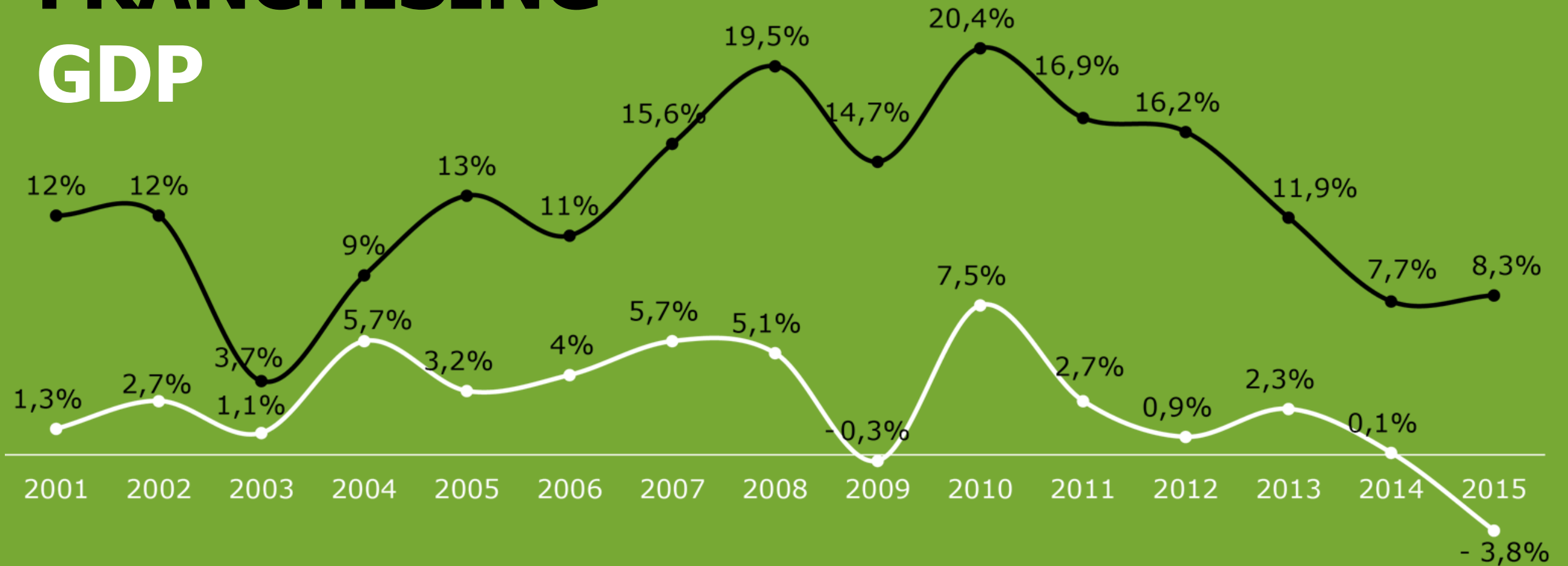
UNITS





Franchising IS RESILIENT

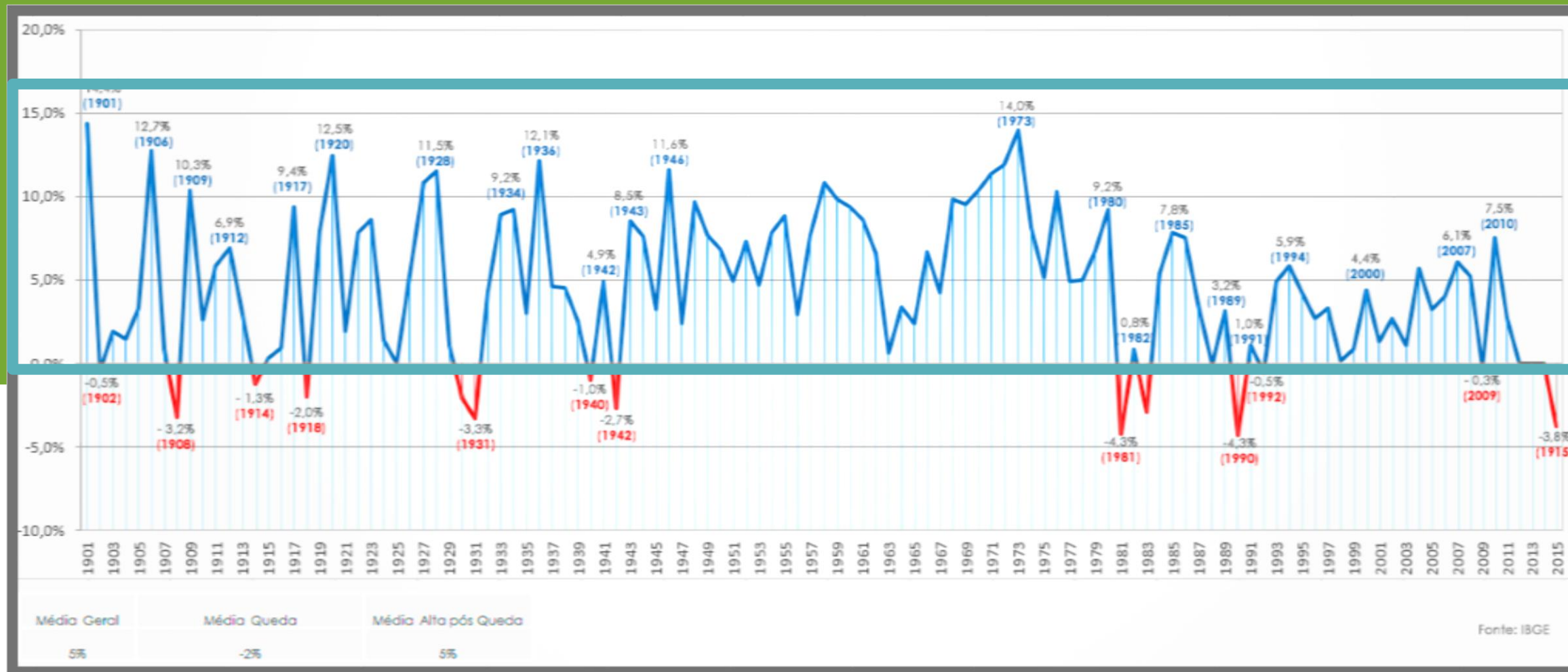
FRANCHISING GDP





Brazil IS RESILIENT

Progress is often preceded by turmoil



Brazil

challenges may
make it difficult



**OPPORTUNITIES MAKE IT
MORE THAN WORTH IT**



SOME TIPS FOR FRANCHISORS willing to do business in Brazil



BRAZILIANS DO NOT SEE THEMSELVES AS LATIN AMERICANS

We certainly are not
Hispanics, so a **“strategy
for Latin America”** will
not take you far

We speak Portuguese,
and we are very proud of our
language, our culture and
our country



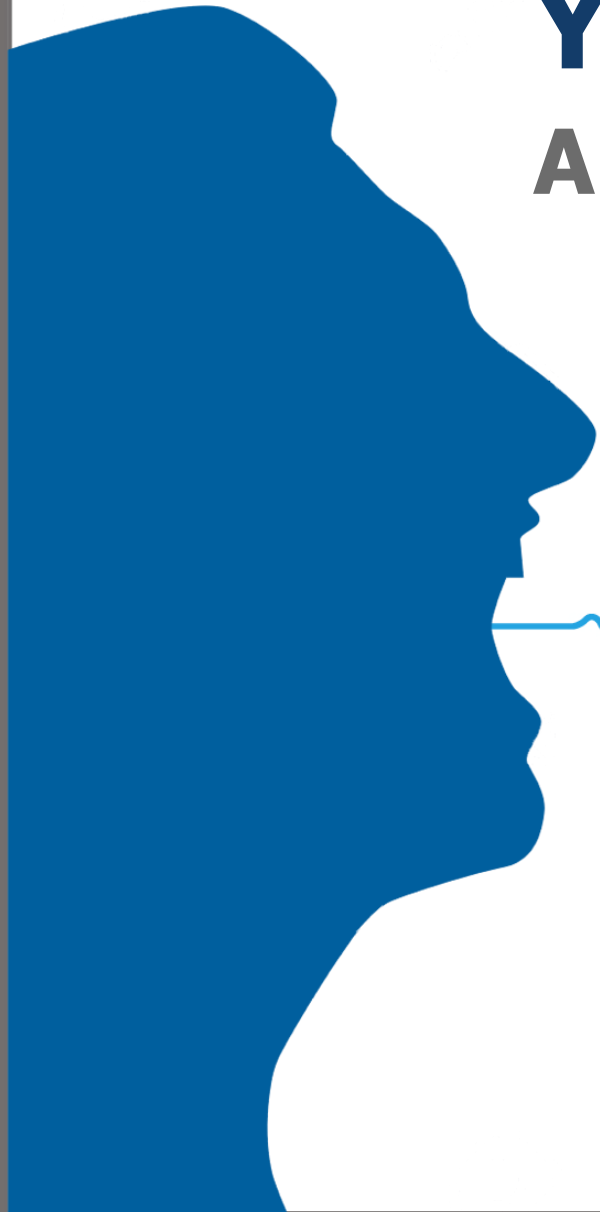
**WE LEARN FAST, WE ADAPT FAST,
WE ARE FLEXIBLE AND CREATIVE**

We are quite good at improvising and making things happen on a very tight budget

What better proof of that than the Olympics Opening Ceremony?

YES, WE ARE NOISY

AND we mix personal and business



Small talk is big – do not rush the process
Verbal face-to-face communication is
much better than e-mails, memos or letters

We stare at strangers, as eye contact is important for us



YES

**'YES' DOESN'T ALWAYS MEAN YES AND
MAYBE CAN OFTEN MEAN 'NO'**

**we touch strangers in the arms and shoulders and have a
different sense of "personal space"**

build rapport

**AVOID THE I-KNOW-EVERYTHING-
ABOUT-EVERYTHING ATTITUDE**

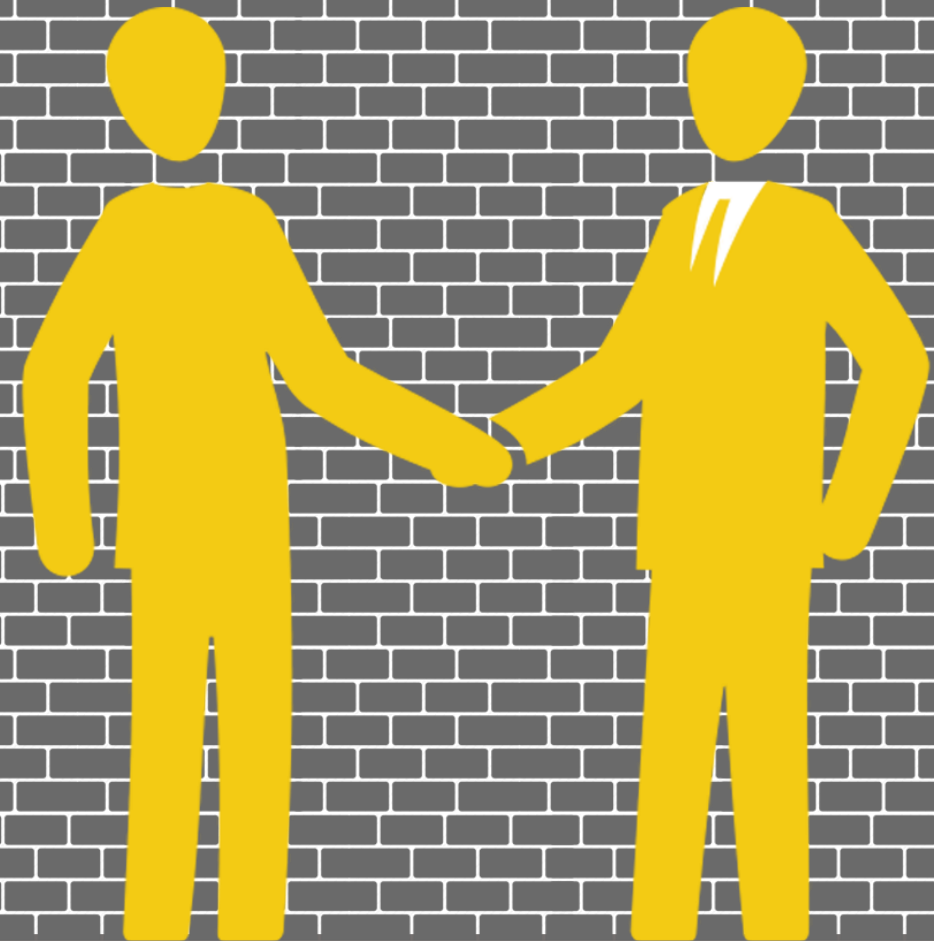
THE KNOW-WHO IS AT LEAST AS IMPORTANT AS THE KNOW-HOW

Building trust is crucial, so be careful who you associate yourself with

Do not change your team during the negotiation process

Brazilians conduct business mainly on personal connections

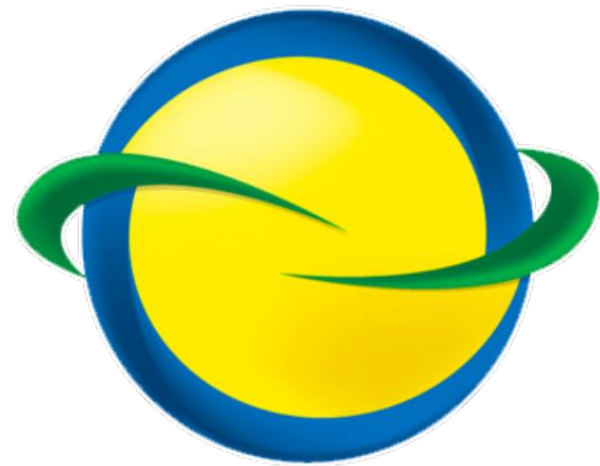
We do business with the individual, not the company



Keep in mind the African proverb
**“If you wanna go fast, go
alone. If you wanna go
far, go with someone”**

**Go with someone who knows
the way, who can help you
‘tropicalize’ your offer, can
connect you with the right
people and add credibility to
your offer and yourself**





ABF BRAZILIAN
FRANCHISE
ASSOCIATION

Remember the **Brazilian Franchise Association** is at your disposal and may open a lot of doors for you

Being associated with **ABF** will certainly add credibility to your brand

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And last, but not least...



We strongly believe that **God is Brazilian**



And will make **things go OK** in the end



If it is not OK, it is because it is **not the end yet**

Visiting for Research

- *Can U.S. trade delegations travel to Cuba?*

*Trade delegations are authorized to travel to Cuba only if each member of the delegation meets the criteria of an applicable general license authorizing travel to Cuba or has obtained a specific license from OFAC. Authorized trade delegations generally fall under one of two general licenses for travel authorization; either (1) 31 CFR § 515.533(c)(1), which authorizes travel related and other transactions incident to the exportation of certain authorized goods from the U.S. to Cuba, specifically the conduct of “market research, commercial marketing, sales or contract negotiation, accompanied delivery, installation, leasing, servicing, or repair in Cuba of items consistent with the export or reexport licensing policy of the Commerce Department,” or (2) 31 CFR § 515.564(a), which authorizes transactions related to professional research or professional meetings in Cuba. For a complete description of what these general licenses authorize and the restrictions that apply, see 31 CFR §§ 515.533(c)(1) and 515.564(a).**

FAQ on Cuba Sanction Laws, <https://www.treasury.gov/resource-center/sanctions/Programs/pages/cuba.aspx>, UPDATED JANUARY 6, 2017

* YES

Professional Meetings

“Professional research and professional meetings in Cuba.

Section 515.564 includes a general license authorizing persons subject to U.S. jurisdiction to travel to Cuba for purposes of attending or organizing professional meetings or conferences in Cuba. Today, OFAC is removing the restriction in section 515.564(a)(2)(i) that the purpose of such meeting or conference not be for the promotion of tourism in Cuba, and making additional conforming edits.”

<https://www.federalregister.gov/documents/2016/10/17/2016-25032/cuban-assets-control-regulations>

AND ONCE THERE?

A Letter of Intent - Agreements Contingent to an OFAC License

- *Contingent contracts. OFAC is adding a new general license in section 515.534 authorizing persons subject to U.S. jurisdiction to enter into certain contingent contracts for transactions prohibited by the Regulations and to engage in transactions ordinarily incident to negotiating and entering into such contracts. The performance of such contracts—making deposits, receiving payments, providing certain services or goods, etc.—must be made contingent on OFAC authorizing the underlying transactions or authorization no longer being required. Furthermore, if the transaction implicates another Federal agency's licensing requirements, then the contract must make obtaining the necessary license(s) from such agency or the removal of that licensing requirement an additional precondition of performance. OFAC is making a conforming change to section 515.533 to remove a provision in that section authorizing certain contingent contracts that are now authorized by this new general license.*
- <https://www.federalregister.gov/documents/2016/10/17/2016-25032/cuban-assets-control-regulations>

CUBA - POPULATION

- **~11.5 Million People**
- **~77% Urbanized**
- **~2.5 M in Havana**

Education expenditures:

12.8% of GDP (2010)

country comparison to the world: [2](#)

Literacy:

definition: age 15 and over can read and write

total population: 99.8%

male: 99.9%

female: 99.8% (2015 est.)

CUBA- THE OUTPUT

- GDP Official Exchange Rate (2013) USD 77.1B
- GDP (PPP 2014 est.) USD 128 B (181st World)
- GDP PPP Per Capita (2014 est.) USD 11,600

Source: CIA Factbook

CUBA: FOREIGN TRADE

Exports:

Raw Sugar, Refined Petroleum, Rolled Tobacco, Hard Liquor, Raw Nickel
Health Care Services

Partners> China, Netherlands, Spain, UK

Imports:

Wheat, Refined Petroleum, Concentrated Milk, Corn, Poultry

Partners> China, Spain, Brazil, Canada, Mexico

- First Source of USD: Services Export (Health Care)
- Second: Tourism (more than 3M yearly visitors. More than e.g. Peru
or Colombia)

Key takeaways

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- Franchisors should immediately reassess their IP protection strategy in Europe and the UK
- Brazil is a challenging environment, but the market for franchising remains very strong
- Cuba is gradually opening to American firms, but creative approaches would be required for franchisors
- Fortune favors the brave!