

# **GUIDELINES FOR THE RECORDAL OF FRANCHISE AGREEMENTS IN BRAZIL**



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The purpose of this guide is to instruct foreign companies and their legal counsels through the various steps involved in the offer of franchises in Brazil, including recordal of the franchise agreements at the National Institute of Industrial Property (INPI), which is the federal entity with the authority to record such agreements in Brazil, in accordance with Law no. 9,279, dated May 14, 1996.

The Brazilian Franchise Association (ABF) hopes that this guide will provide foreign companies with a practical and useful overview of the legal treatment of franchise agreements and also encourage such companies to structure their franchise system in Brazil.

### **1. Definition of franchise**

Article 2 of the Brazilian Franchise Law defines franchise as *“a system whereby a franchisor licenses to the franchisee the right to use a trademark or patent, along with the right to distribute products or services on an exclusive or semi-exclusive basis and, possibly, the right to use the know-how related to the establishment and management of a business or operating system developed or used by the franchisor, in exchange for direct or indirect compensation, without, however, an employment relationship”*.

### **2. Trademark filing requirement**

Since Brazil adopts the “first to file” system, a trademark is protected only after registration at the INPI. Any trademark has to be registered in order to be valid and enforceable.

Further, the INPI requires that the franchised trademarks have been at least filed with the INPI, in order to enable the parties to record a franchise agreement in Brazil.

As such, the serial number of the franchised trademarks at the INPI must be indicated in the agreement and the situation of the trademarks has to be carefully detailed in the disclosure document.

### **3. Franchise Disclosure Document**

Please note that the Brazilian Franchise Law (Law no. 8,955) requires the delivery of a Franchise Disclosure Document (FDD) to prospective franchisees containing several aspects

of the business, at least 10 days prior to the execution of any binding document related to the franchise and/or receipt of any payment.

Failure by the franchisor to supply such disclosure document at least 10 days prior to the execution of the agreement or payment by franchisee renders the agreement voidable by franchisee and penalizes the franchisor with the refund of all amounts paid by franchisee in connection with the franchise, plus recovery of damages. The franchisors tend to be conservative in relation to this requirement as the local law provides for a severe penalty in the event of default to attend to this legal obligation.

Please note that the FDD does not require registration and remains as a private document between the parties. The INPI only requires presentation of a Statement of Delivery of the FDD together with the agreement for recordal. In the referred document, franchisee should declare that it received the FDD in accordance with Brazilian Franchise Law.

Article 3 of Brazilian Franchise Law requires that the FDD contain the following 15 items:

(1) A summary of the background, business form and complete name of the franchisor and of all companies related thereto, as well as their respective trade names and addresses;

(2) Balance sheets and financial statements of the franchisor for the two preceding years (no need to be audited);

(3) A clear description of all pending lawsuits involving the franchisor, its controlling companies and subfranchisors, if any, as well as owners of licensed trademarks, patents and copyrights, relating to or arising out of the franchise agreement, which, depending on the outcome, may affect the continuance of the franchised business. Examples of lawsuits satisfying this criteria are (1) claims by a former franchisee that the franchisor did not provide the support or services promised; (2) an action where a franchisee states that the franchise relationship or that the franchise is a fraud or labor relationship; or (3) any lawsuit that affects a franchisor's ability to grant a franchise or operate its business, such as claims of trademark infringement or bankruptcy proceedings against franchisor (this applies to lawsuits filed worldwide);

(4) Detailed description of the franchise, general description of the business and the activities which will be performed by the franchisee;

(5) Characteristics of the “ideal franchisee” regarding previous experience, educational background and other characteristics which the franchisee must necessarily or preferably have;

(6) Requirements regarding the direct involvement of the franchisee with the operation and management of the business;

(7) Specifications regarding: (a) estimated initial investment necessary for the establishment and startup of franchise operations; (b) value of the initial affiliation fee or franchise fee and any guarantees (if any amount is specified by the franchisor); and (c) estimated cost of the facilities, equipment and initial inventory and respective payment conditions;

(8) Clear information regarding periodic fees and other amounts to be paid by the franchisee to the franchisor or to third parties, (including any relevant calculations or formulae) and a description of rights, products or services for which compensation is being made, specifically indicating the following: (a) periodic compensation for the use of the system, of the trademark or for services provided by the franchisor to the franchisee (“royalties”); (b) payments for lease of the equipment or premises; (c) advertising fee or similar payments; (d) minimum insurance coverage amounts; and (e) other amounts due to the franchisor or third parties related to him;

(9) Complete list of all the franchisees, sub-franchisees and sub-franchisors of the chain, as well as of all those who have disassociated themselves with it within the last twelve months, with names, addresses and telephone numbers;

(10) The following shall be described with respect to the territory: (a) if the franchisee is guaranteed exclusivity or a right of first refusal in any particular territory or activity and, if so, under what conditions; and (b) if the franchisee has the right to sell or render services outside its territory or provide such services outside Brazil;

(11) Clear and specific information regarding the obligation of the franchisee to acquire goods, services or materials necessary for the establishment, operation or management of its franchise from suppliers designated and approved by franchisor; and the franchisor is required to provide a complete list of such suppliers to the franchisee;

(12) Description of services and products offered to the franchisee by the franchisor, with respect to: (a) supervision of the chain; (b) orientation or guidance services provided by the franchisor to the franchisee for operating the business, and other services rendered to the

franchisee, aside from training; (c) training of the franchisee, specifying its duration, content and cost; (d) training of the employees of the franchisee; (e) franchise manuals; (f) assistance on the analysis and selection of the location where the franchise will be established; and (g) layout and architectural plans of the facility of the franchisee;

(13) Status before the INPI of the trademarks (and patents, if any) which the franchisee will be authorized to use by the franchisor;

(14) Consequences of the termination of the franchise agreement, including: (a) the franchisee's access to know-how or industrial secrets to which it had access to under the franchise; and (b) establishment of activities competitive with the franchisor;

(15) Model of standard franchise agreement and, if applicable, the standard preliminary franchise agreement used by the franchisor, with complete text, including its respective exhibits and expiration dates.

#### **4. Recordal purposes**

The recordal of international franchise agreements at the National Institute of Industrial Property (INPI) is indispensable. The purpose of the recordal is threefold:

- (a) make the agreement effective against third parties;
- (b) permit the remittance of payments to the foreign franchisor; and
- (c) qualify franchisee for tax deductions.

The INPI usually adopts a very liberal position in the recordal of franchise agreements and focus on the assessment of the validity of the trademarks in Brazil, the specification of their serial number at the INPI in the agreement and, in case of agreements involving parent-subsidary companies, on the approval of the applicable rate for tax deductibility and remittances.

The parties may freely set out the percentage of remuneration insofar as it stays within the price commonly practiced in the involved field and in the national and international market.

Nevertheless, royalties involving related companies (such as parent and subsidiary) are limited by the corresponding ceiling of fiscal deductibility specified by Regulation no. 436/58, which vary between 1 to 5% of the net sales price depending on the field of activity involved.

Please note that translation into Portuguese will be required for all documents that will be presented for recordal at the INPI. Local law sets forth that the disclosure document should be in a clear and precise language to the prospect franchisee. Since Portuguese is the official language in Brazil, it is possible to assume that it should be in this language. However, as long as the Brazilian party knows English fluently and expressly acknowledges that fact, we believe that the parties in international franchising may decide to adopt the English language for the disclosure document, in order to avoid translation of such document.

We highlight that the INPI has a legal term of 30 days to issue a decision regarding agreements presented for recordal. In practice, they usually take 40 days. After this term, the INPI can issue the Certificate of Recordal or an office action requesting further details of the agreement.

After the Certificate of Recordal is issued, the agreement needs registration at the Brazilian Central Bank for remittance of payments. This registration is a very simple procedure and can usually be completed in about 2 days.

Moreover, the INPI adopts a restrictive position in connection with all agreements presented for recordal and generally considers the date of presentation of the agreement at the INPI as the initial term of the Certificate of Recordal.

In practice, this position affects the agreement since sales of licensed products can only be counted from the date of presentation of the agreement at the INPI and will not be considered from the date of execution of the agreement, for example. Consequently, remittance of payments derived from sales occurred between the date of execution of the agreement and the date of presentation at the INPI will not be permitted.

Although we disagree with this position, this aspect is of difficult negotiation, as it reflects a steady position of the INPI.

The only exception is that the INPI has been recently accepting that agreements presented in a 60-day term from the date of execution can be recorded since the date of execution of the agreement. After such 60-day term, the initial term for recordal purposes will be the date of presentation of the agreement for recordal.

## **5. Documents required for recordal purposes**

The recordal of the franchise agreement can be requested by any of the parties, by presenting to the INPI the following documents:

- **Franchise Agreement**: 01 (one) original or 02 (two) certified copies. We highlight that the agreements presented at the INPI have to be executed by the parties and two witnesses. The initials of the parties and witnesses have to be placed on each page of the agreement (including the attachments) and the signature of the foreign party has to be notarized and legalized at the Brazilian Consulate. Further, the agreement has to specify the full name and title of the representatives of the parties, as well as place and date of execution. If the representative is an attorney, it will be necessary to present a copy of the power of attorney duly notarized and legalized at the Brazilian Consulate as well.
- **Official forms**: The INPI requests the presentation of 02 (two) official forms, which contains information about (i) the specific conditions of the agreement and (ii) the franchisee. For this reason, such official forms are generally fulfilled directly by the franchisee, in order to expedite the recordal proceeding.
- **Statement of Delivery of the FDD**: Such document must have been signed by the franchisee at least 10 (ten) days prior to the execution of the agreement.
- **Power of attorney**: In case the parties decide to appoint an attorney or an industrial property agent duly registered with the INPI to proceed with the agreement's recordal, it will be necessary to present the corresponding power of attorney to the INPI. We highlight that this specific document does not need to be notarized or legalized at the Brazilian Consulate.

**Law no. 8955/94 regulates the franchising contract and disciplines other matters**

**The President of Brazil**

**I announce that the National Congress decrees and I sanction the following Law:**

**Article 1** - The franchising contracts are governed by the present Law.

**Article 2** - Franchising is the system by means of which one Franchiser assigns to the Franchisee the right to use a trademark or patent, associated with the right to exclusive or semi-exclusive distribution of products or services, and, occasionally, also the right to use the implementation and business administration technology or operational system developed or owned by the franchiser, upon direct or indirect remuneration, without the establishment of any employment relationship.

**Article 3** - Whenever the franchiser is interested in implementing a franchising system, it shall provide the potential franchisee with a Franchise Offer Circular, in clear and accessible written language, containing obligatorily the following information:

I - summarized history, type of society or association, and full name or corporate name of the franchiser and of all the companies it is directly connected with, as well as the names by which they are known and addresses;

II - balance sheets and financial statements of the franchiser corporation referring to the two previous years;

III - accurate description of all the judicial claims involving the franchiser, the controlling companies and owners of trademarks, patents and copyrights related to the operation, and their sub-franchisers, questioning specifically the franchise system, or claims which may hinder its functioning;

IV - detailed description of the franchise, general description of the business and activities that will be carried out by the franchisee;

V - profile of the "ideal franchisee" in terms of previous experience, level of education and other characteristics he/she must have, obligatorily or preferably;

VI - requisites regarding the direct involvement of the franchisee in the operation and administration of the business;

VII - specifications concerning:

- a) estimate of total initial investment necessary to the acquisition, implementation and start-up of the franchise;
- b) value of the initial affiliation fee or franchise and bond charge; and

c) estimated value of the premises, equipment and initial stock, as well as payment conditions;

VIII - clear information about periodical charges and other amounts to be paid by the franchisee to the franchiser or to third parties designated by the franchiser, detailing the respective basis for the calculation of the charges and what the same remunerate or their purpose, indicating, specifically, the following:

- a) periodical remuneration for using the system, the trademark or for the services effectively provided by the franchiser to the franchisee (royalties);
- b) rent of equipment or premises;
- c) publicity fee or similar;
- d) minimum insurance; and
- e) other amounts due to the franchiser or to third parties related to it;

IX - complete list of all the franchisees, sub-franchisees and sub-franchisers of the chain, as well as those which left the chain in the twelve previous months, with names, addresses and telephone numbers;

X - as regards the territory, the following information must be specified:

- a) whether the franchiser guarantees to the franchisee exclusiveness or preference over a certain operation territory, and, if so, in what conditions; and
- b) whether the franchisee is allowed to sell products or provide services outside the operation territory or whether the franchisee is allowed to export;

XI - clear and detailed information about the franchisee's obligation to acquire any property, services or products necessary for the implementation, operation or administration of the franchise, only from suppliers designated and approved by the franchiser, providing the franchisee with a complete list of these suppliers.

XII - description of what is effectively offered to the franchisee by the franchiser, concerning:

- a) chain supervision;
- b) instruction services and others provided to the franchisee;
- c) training program to the franchisee's employees;
- d) franchise manuals;
- e) help in the analysis and selection of the area where the franchise will be installed;

and

- f) layout and architectural patterns of the franchisee's premises;

XIII - situation before the INPI – Brazil's National Institute of Industrial Property - of the trademarks or patents whose use is being authorized by the franchiser;

XIV - situation of the franchisee, after the termination of the franchise contract, regarding:

- a) know-how or industry service to which it comes to have access due to the franchise; and
- b) implementation of activity competing with the franchiser's activity;

XV - model of the standard contract and, if it is the case, also of the standard franchise pre-contract adopted by the franchiser, with the full text, including appendixes and duration.

**Article 4** - The Franchise Offer Circular shall be delivered to the potential franchisee at least 10 (ten) days before the execution of the franchise contract or pre-contract, and before the payment of any kind of fee by the franchisee to the franchiser or to a company or person related to it.

Sole paragraph. If the provisions of the caption hereof are not complied with, the franchisee can claim for the annulment of the contract and require devolution of all the amounts already paid to the franchiser or to third parties designated by the franchiser, as affiliation fee and royalties, duly adjusted for inflation by the variation of the basic remuneration of savings deposits plus damages.

**Article 5** - (vetoed)

**Article 6** - The franchise contract shall always be written and signed in the presence of 2 (two) witnesses, and shall be valid independently of having been registered at a Registry or public organ.

**Article 7** - The sanction provided in the sole paragraph of Article 4 hereof also applies to the franchiser that includes false information in the Franchise Offer Circular, and is not exclusive of the applicable penal sanctions.

**Article 8** - The provisions of this Law apply to the franchising systems installed and operating in Brazil.

**Article 9** - For the purposes of the present Law, the term franchiser, when used in any of its provisions, shall also designate the sub-franchiser, and, accordingly, the provisions referring to the franchisee shall apply to the sub-franchisee.

**Article 10** - This Law shall rule 60 (sixty) days after its publication.

**Article 11** – Any contrary provisions are hereby revoked.

Brasília, December 15, 1994; 173<sup>rd</sup> year from Independence and 106<sup>th</sup> year from the Republic.  
Itamar Franco, Ciro Pereira Gomes and Elcio Álvares – Decisions of the President of Brazil.