

FRANCHISE SAVOIR-FAIRE: CLUELESS IN AMERICA?

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Introduction

A franchise is supposed to be much more than a mere license. This axiom has often, without much attention, been a central element in the contractual practices and the law of franchising. How this notion is applied concerning training and commercial know-how is a key difference between franchising in the United States and much of the rest of the world. Consider, for example, the Dunkin Donuts and Tim Horton's brands as their contest for market share played out in Canada.

In Quebec's longest (nine years) and most significant franchise litigation of the last two decades,ⁱ the province's Superior Court in *Bertico Inc. v. Dunkin Brands Canada Ltd.* found Dunkin Donuts liable for \$16.4 million because it had failed to "protect and enhance" the Dunkin brand in Quebec.ⁱⁱ The court primarily based its June 2012 ruling on the franchisor's failure to help its franchisees compete within their market; Dunkin had failed to take appropriate measures to adapt to competition and provide its franchisees with the means to improve their standing in the local market.ⁱⁱⁱ Dunkin's market share slipped precipitously, and most stores closed.^{iv} Conversely, in *Fairview Donut Inc. v. The TDL Group Corp.*, a group of Tim Horton's franchisees attempted to bring a class action suit against the franchisor for breach of contract and related claims when Tim Horton's altered its business model resulting in, the franchisees claimed, eroded profits.^v The complaint focused on Tim Horton's new requirement to sell lunch items for an extended period of time and their switch from baking products in store to "flash freezing" half-baked products at a central location and dispersing them to individual stores.^{vi} The plaintiffs claimed that these changes caused them to pay higher than market value for the flash frozen baked goods and forced them to sell lunch items at a loss.^{vii} The Ontario Superior Court found no breach on any of the plaintiffs' claims; Tim Horton's could, the court concluded, consider the profitability of

the system as a whole and need not adopt methods which, on their own, are profitable.^{viii}

Because Tim Horton's initiated a system that earned profits, overall the company had the right to require uniformity and did not breach any duty to individual franchisees that were not, on an individual basis, so fortunate.^{ix}

The reasoning and resolution of the Tim Horton's case certainly falls in line with American franchise law principles. However, the Dunkin Donuts case - *Bertico* – rests on ideas which depend upon a strong sense of what could and should be called know-how: savoir-faire.

This article examines the differences between American and French franchise law concerning system-wide skills and practices, often known as “savoir-faire” or “know-how.”^x Savoir-faire is exceedingly important in franchise litigation abroad and is an essential element of the franchise itself. Many countries expressly recognize savoir faire and many have incorporated it into their jurisprudence.^{xi} The article begins by describing the American judicial system's role in protecting franchise know-how. It then explores the interplay, in the French courts, between the French Commercial Code, Civil Code, codes of deontology, and the EC regulations to extract rules protecting franchise know-how. The article continues with an analysis of the French courts' general determination that a franchise contract always establishes three obligations: (1) transmission of know-how; (2) transfer of a commercial sign; and (3) continuous technical or commercial assistance.^{xii} To aid in understanding the European approach, exemplified by the French system—the oldest, most developed franchising system in the Old World^{xiii} — relevant aspects of German law are juxtaposed throughout as a point of reference from another European Union country. German Law is an excellent counterpoint as it constitutes Europe's leading economy (the fourth largest in the world),^{xiv} represents the main Civil

Law jurisprudential alternative to the French system,^{xv} and clings to a business law environment in which there remains no special franchise regulation.^{xvi} The article further analyzes the legally permissible grounds, in both France and the United States, for termination, annulment, and rescission of franchise contracts. The article concludes with an explanation of how American law can improve by implementing certain aspects of French know-how protection.

I. American Franchise Law

Unlike France and most other nations, where no legal text is solely applicable to franchise agreements,^{xvii} American courts and legislatures have collaborated to safeguard franchise know-how, a subject closely related to trade secrets.^{xviii} The Uniform Trade Secrets Act (UTSA), which 46 states have adopted,^{xix} defines a trade secret as follows:

‘Trade secret’ means information, including a formula, pattern, compilation, program, device method, technique, or process, that:

- (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and
- (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.^{xx}

Because of the broad scope of the UTSA’s definition of a trade secret, American courts have attempted to define the scope of trade secrets further. Courts have ruled that trade secrets include all technology used in production as well as nontechnical information, including methods of doing business.^{xxi} Additionally, business information such as customer data (e.g., lists of names and needs), sources of supplies, confidential costs, price points, and other figures may constitute trade secrets.^{xxii}

The fact that some or even all of a business' trade secret components are well known does not preclude protection for a secret combination, compilation, or integration of these individual elements.^{xxiii} Consequently, even if all of the elements of a trade secret are publicly available, a unique combination of those elements that adds value to the information may qualify as a trade secret.^{xxiv}

In the United States, franchising falls under the jurisdiction of a number of state and federal laws.^{xxv} However, the Federal Trade Commission (FTC) requires franchisors to provide a franchise disclosure document to reveal essential information to prospective franchisees.^{xxvi} Although there are some exceptions (safe harbors),^{xxvii} the FTC mandates that the disclosure document contain specific and detailed information about the franchisor.^{xxviii} States may further require the franchise disclosure document to contain specific information beyond what the FTC mandates.^{xxix}

Member franchises in the United States voluntarily adhere to the International Franchise Association's (IFA) Code of Ethics.^{xxx} Although there is no specific mention of protection of know-how in the Code of Ethics, IFA members agree to "fulfill its obligations," to "act consistently with the interests of the brand," and not to "act so as to harm the brand and system."^{xxxi} Additionally, in an effort to self-govern, IFA has created an Ombudsman program and a Franchise Mediation Program to help franchisors and franchisees resolve disputes.^{xxxii}

In the United States, the existence of a franchise is a matter of definition. A franchise relationship exists upon the establishment of three elements.^{xxxiii} First, a franchisor must grant or license a right to use a trademark or trade name.^{xxxiv} Second, a franchisee must pay a franchise fee, or consideration, for the use of the trademark or trade

name.^{xxxv} Third, some variant of a community of interest, marketing plan, control, or assistance must exist.^{xxxvi} American courts' interpretation and application of each of these elements is discussed in further detail below.

A. Know How in the United States

1. A Preliminary Matter: Granting or Licensing the Right to Use a Trademark in America

Protecting franchises through trademarks has a firm footing in the United States because disputes are focused on one issue: whether the grantor gave permission to use the trademark. American courts have ruled that the grant of permission to use the grantor's trademark, the retention of the grantor's ownership, and the grantee's obligation to maintain quality standards are the essential terms of a trademark license.^{xxxvii} To begin, for a trademark license to exist, there must be evidence that the trademark owner intended to grant a license in its trademark.^{xxxviii} A trademark owner has an affirmative duty to supervise and control the licensee's use of its mark to protect the public's expectation that all products sold under a particular mark* derive from a common source and are of like quality.^{xxxix}

Courts determine whether a licensor has abandoned a trademark or trade name on a case-by-case basis.^{xl} The degree of control a licensor must exercise to avoid a finding of abandonment depends on the circumstances, including the nature of the trademark or trade name in question.^{xli}

In contrast with the United States, trademark protection in Germany was historically different. Prior to 2005, the German Patent and Trademark Office (DPMA)

did not make it very easy to protect retail services.^{xlii} The result was due in part to the fact that the DPMA narrowly construed the term “services.”^{xliii} Under the DPMA definition, services did not include the services provided *in addition to* the selling of goods.^{xliv} The European Court of Justice (ECJ), in an opinion dated July 7, 2005 (file number C-418/02), rectified the situation by clarifying that a business could apply for trademark protection of retail services.^{xlv} The court based its decision on the fact that retailers increasingly render many services beyond merely selling goods. Factors such as “the selection and composition of goods, their presentation, as well as their advertising, the appearance and location of the business” have become a focal point when retailers attempt to distinguish themselves from their competition.^{xlvi}

2. Franchise Fees

The FTC’s “Final Guides to Franchising and Business Opportunity Ventures to Trade Regulation Rule” provide that the “required payment” element of a franchise is designed to “capture all sources of revenue which the franchisee must pay to the franchisor or its affiliate for the right to associate with the franchisor and market its goods or services.”^{xlvii} In addition to the original franchise fees, the FTC rule also provides that a franchise fee may include costs for rent, advertising assistance, purchase of required equipment and supplies (including those from third parties where the franchisor or its affiliate receives payment as a result of such purchase), training, security deposits, escrow deposits, non-refundable bookkeeping charges, promotional literature, payments for services of persons to be established in business, equipment rental and continuing royalties on sales.^{xlviii} American legislatures and courts have defined franchise fees as

payments for the right to conduct business under a particular trade name and payment of royalties.^{xlix}

According to some American courts, ordinary business expenses,^l optional payments,^{li} and wholesale product purchases are not franchise fees.^{lii} In an attempt to reconcile differences between the FTC rule and the courts' interpretation of the franchise fee, the FTC rule and various state statutes have prescribed certain minimum thresholds.^{liii} The FTC rule and state statutes exclude certain types of payments from the definition of a franchise fee.^{liv} For instance, payments of less than \$500 made to the franchisor or an affiliate before or within six months of opening a business do not constitute a franchise fee under the FTC rule.^{lv} However, once that low dollar amount has been exceeded, courts usually have found a franchise and more specifically, a franchise fee, in the most unlikely of places.^{lvi}

3. Marketing Plan or Community of Interest

States with franchise laws sometimes require marketing plans or systems,^{lvii} and they thus define a franchise if the following three elements exist. First, the franchisor must grant the franchisee the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor.^{lviii} Second, the operation of the franchisee's business pursuant to the plan or system must be substantially associated with the franchisor's trademark.^{lix} Finally, the franchisor must require that the franchisee pay, directly or indirectly, a franchise fee.^{lx}

Alternatively, states' statutes provide that a franchise exists if a person grants to another person a license to use a trademark in which there is a community of interest in the business of offering, selling or distributing goods or services and the franchisee must pay, directly or indirectly, a franchise fee.^{lxi} For this two-part test, the community of interest element exists if there is any common or mutual financial interest involved. In particular, community of interests includes:

[T]he grant of an exclusive area and sale of goods and services at bona fide wholesale prices, the receipt of confidential operating manuals, forms and mutual opportunity of profit, the grant of exclusive territory, covenant not to compete, and training program, required purchases from the franchisor, exclusive territory, franchisor-supplied advertising and leads, and prohibitions on selling competitive products, and performance of franchisor-derived services, use of franchisor-approved forms, and the franchisor approval of all franchisee presentations.^{lxii}

American statutory and case law provides that the franchisee must operate a fixed location that requires substantial investment.^{lxiii} Courts have applied this requirement as one factor pursuant to the community of interest test or as an express requirement under the definition of a franchise. For example, a New Jersey Superior Court held that the franchisee failed to prove it operated from a geographical location as required under the New Jersey Franchise Practices Act (NJFPA), upon finding that a bakery products distributor was not a franchise by merely placing products for sale on store shelves.^{lxiv}

4. Secrecy in American Trade Secrets Law

Trade secrets are also a protected aspect of United States franchise law. The Second and Fourth Circuits agree that secrecy is the most essential element of a trade secret.^{lxv} While the courts have required a franchisor to disclose trade secrets only when its use is essential for employees or licensees,^{lxvi} the courts have also acknowledged that

such secrecy can be defeated when the alleged secret is discoverable by examination of the product.^{lxvii} Nevertheless, substantial authority exists to protect a secret misappropriated by a breach of confidence even though otherwise available to the public.^{lxviii}

The courts have determined that the owner of a trade secret must constantly take reasonable steps to prevent disclosure of the secrets.^{lxix} Consequently, constant warnings should be given and precautions should be taken to let employees and outsiders know that such secrets will be carefully guarded. In order to ensure the protection of the trade secrets, franchise agreements will generally provide for the prohibition of any disclosure of confidential material.^{lxx}

Additionally, courts typically will not protect the use of a trade secret unless the secret gives its owner a competitive advantage.^{lxxi} To determine the merits of the need for protection, courts may consider the “state of the art,” which can be determined from experts and comparable franchise systems, to determine whether a matter is a genuine trade secret.^{lxxii} Upon establishing the secrecy of the trademark, a franchisor will be required to prove that misappropriation has occurred. In such cases, the franchisor must prove the defendant acquired the secret through improper means from someone in a confidential relationship with the franchisor, and the defendant had knowledge of the confidential relationship.^{lxxiii}

American courts are likely to enforce a contract so long as the terms are reasonable.^{lxxiv} Therefore, franchise agreements often state that a franchisee may not use any of the information received from the franchisor in any other business. Although the typical franchise agreement does not define with any specificity the services the

franchisor will supply, all contracts do provide that the franchisee must conform to the franchisor's standards for operations.

B. Protection of a Franchisor's Know-How in America, Including Website Postings about Franchisee Training

Because trade secrets can range from customer information, to financial information, to information about manufacturing processes, to the composition of products, protection of the franchisor's know-how is thoroughly enforced in America.^{lxxv} In America, whether specific information constitutes a trade secret is a mixed question of law and fact.^{lxxvi} The legal issue turns on whether the information in question could constitute a trade secret under the applicable trade secret law. The factual question entails determining whether the information meets the terms of the Uniform Trade Secrets Act.^{lxxvii}

A defendant is liable for misuse of a trade secret only if the plaintiff can show the defendant (1) disclosed information that enabled a third party to learn the trade secret or (2) used a "substantial portion" of the plaintiff's trade secret to create an improvement or modification that is "substantially derived" from the plaintiff's trade secret.^{lxxviii}

However, if the defendant can show he independently created the allegedly misappropriated item with only "slight" contribution from the plaintiff's trade secret, then the defendant is not liable for misappropriation.^{lxxix}

There are no technical limitations with regard to conduct that constitutes "use" of a trade secret in America. As a general matter, any misuse of a trade secret likely to result in injury to the trade secret owner or enrichment to the defendant qualifies as "use"

of the trade secret.^{lxxx} Thus, utilizing trade secrets in marketing a product, employing trade secrets in manufacturing or production, and relying on the trade secrets to assist or accelerate research or development all constitute "use" of a trade secret.^{lxxxi}

Unauthorized use does not always extend to every aspect or feature of the trade secret. For example, the Eleventh Circuit determined that use of any substantial portion of the secret is sufficient to subject the user to liability.^{lxxxii} Additionally, the user need not utilize the trade secret in its original form for his actions to qualify as an unauthorized use of the trade secret.^{lxxxiii} A user is also liable for using the trade secret with independently created improvements or modifications if the result is substantially derived from the trade secret.^{lxxxiv} However, if the contribution made by the trade secret is so slight that the actor's product or process can be said to derive from other sources of information or from independent creation, then, the trade secret has not been "used" for purposes of imposing liability under the rules.^{lxxxv}

The extent to which companies may divulge trade secrets when attempting to attract new franchisees differs greatly by company. The fast food industry serves as an example of the variance in training information provided to potential franchisees. One hundred four fast-food franchisors were researched to see what information they provided about training. Some of the companies provided extensive information about their training program whereas other companies did not even have information about franchising their business. The disparity may be particularly significant. An examination of those same businesses' franchise contracts, as filed with the California Department of Corporations,^{lxxxvi} reveals that these companies almost all have provisions discussing franchisee training,^{lxxxvii} with 66%^{lxxxviii} specifying that training is expressly at the

franchisee's expense and 95%^{lxxxix} stating that once the franchisee's initial training ends, the franchisor remains willing to perform (again, typically for a fee) consulting services to assist the franchisee.

Of these 104 companies, seventy-four of them provided at least some online information about the training that they provide to franchisees. Some of these statements were very extensive, with whole sections just about the training program. On the other hand, about half of the seventy-four franchisors only said that training would be provided. The other thirty companies, out of the 104 *in toto*, provided no information about training. For some of these thirty websites, one could send an e-mail request for information about franchising. However, most of the thirty did not even provide information about franchising their company.^{xc}

There were several companies that seemed to describe their training process better than others. For example, on the Blimpie Sub Shops website,^{xci} the franchise section has a frequently asked questions tab that provides answers to many questions potential franchisees are likely to have.^{xcii} The question, "Do I receive training from BLIMPIE?"^{xciii} used to be thoroughly answered.^{xciv} The website noted that Blimpie provides the franchisee with three separate segments of training. The first is at least eighty hours of "hands-on practice" at a restaurant.^{xcv} The next segment is eighty hours of classroom training at "BLIMPIE University" in Atlanta, which covers many skill sets needed to run a successful franchise, such as accounting, customer relations, and hiring policies.^{xcvi} The final aspect is an additional forty hours of hands-on training in one of the restaurants.^{xcvii} The answers to other questions revealed that BLIMPIE representatives will provide assistance and make "visits regularly."^{xcviii} The page also

stated that the franchisee would get “a series of manuals” and a monthly newsletter; she would thus have all available information and be apprised of any company changes.^{xcix} From what was on its website, BLIMPIE still provides, but simply no longer discloses on its website, an extensive amount of training to its new owners and continues giving assistance once the store opens.^c Several other of the 104 examined companies – for example, Auntie Anne’s, Ben & Jerry’s, Jimmy John’s, Hungry Howies, Wing Stop, and Pizza Hut - outlined just as extensive training programs.^{ci}

Many of the 104 companies just indicated that training would be provided but did not provide in-depth information. For example, California Chicken Grill says that an “experienced staff will provide you with extensive training.”^{cii} How or where the training is to occur is left unstated. Likewise, on its website, Red Brick Pizza poses the question, “How will I learn to operate a Red Brick Pizza?”^{ciii} Its limited answer is: “A comprehensive training program provides you with everything you need to know from in store operations to business management.”^{civ} For these and other companies, the wording is very vague regarding their training program.^{cv}

The 30 companies, out of 104 altogether, that provided no online information about training simply required the interested franchisee to submit an application or to e-mail the company to find out more. Surprisingly, some companies did not even provide information about franchising their business.^{cvi} Yogen Fruz is an international company that said it is interested in franchising in many countries but gave no information about the training the company provides.^{cvii} Ruth’s Chris, a premier steak restaurant whose brand almost certainly requires extensive franchisee training, provides no website information about that training.^{cviii} In addition, Steve’s Pizza, Meal Makers, and Newco

Hawaiian Barbecue are a few of the companies whose websites required the curious would-be franchisee to contact them either by submitting a nonbinding inquiry (sending an e-mail of interest so the potential franchisee could receive a business packet) or by calling the company's main office. Although the publication of training material in the internet might serve as useful marketing tool for franchisors, there might be some reasonable explanation for the concealment of such information.^{cix}

Training managers and employees can be very costly for a franchisee.^{cx} The personnel have to get to the training facility, receive all the necessary materials, and then learn the ways of the business. Several companies mentioned on their website who would be paying for the training. For example, Auntie Anne's website declared:

For U.S. and International Opportunities: The cost for the initial training for the prospective franchisee/licensee and staff is included in the initial franchise fee for U.S. franchisees or the license fee for international licensees. However, the prospective franchisee/licensee is responsible for all other expenses incurred while attending training, including travel, room and board, and employee salaries.^{cxix}

These expenses can be quite steep. The website of the restaurant company, Bennigan's, stated that the franchisee can expect to pay anywhere between \$10,000 and \$30,000 for the wages, travel, and lodging associated with training.^{cxii} For Lee's Sandwiches, the interested franchisee is informed, "We provide this training to you as part of your Franchise Fee."^{cxiii} These examples as well as others demonstrate the cost of training and the party expected to pay for it. Depending on the length of the training and the number of employees, training costs can add up to a sizable amount of money. However, since training is almost always a required and, indeed, an unavoidable part of forming a successful franchised business, franchisees should be prepared to make some reasonable payment for that training.

While many of the companies provide initial training, less than half provide continuing, ongoing training and support for the franchise. Of the seventy-four companies that mentioned training on their website, only thirty-four said that they would provide some form of ongoing support. One of the companies that referred to ongoing training, BannaStrow's, used to proclaim that the franchisee could call the support team and receive "outstanding business advice and support."^{cxiv} Bannastrow's website also stated that an area representative would visit the franchisee on a "periodic" basis.^{cxv} Most of the other thirty-four companies who provide ongoing training had similar wording and information about the training given: advice, visits from representatives, or meetings to attend with new information. Ongoing support and training is vital for a franchisee because once the business is up and running; the problems that may arise may not have been covered in the initial training.

Of the hundred companies researched, only thirteen mentioned that the franchisor would provide the franchisee with an operations manual or a training manual.^{cxvi} According to Cheeburger Cheeburger, its operations manual "contains the essential information you'll need to run your restaurant. It's yours to use as a convenient daily reference guide and as a tool for training new employees."^{cxvii} These operations manuals provide the franchisee with an easy method to find answers to its questions. Cinnabon provides franchisees with "in depth operations manual[s]."^{cxviii} These will help the franchisee hire and train the employees and develop important customer service skills. Most of the companies that provide manuals already appeared to go above and beyond in training their franchisees, but these operations and training manuals will surely help the franchisee once it is up and running.^{cxix}

C. Termination of the American Franchise Contract: Know-How and the Ex-Franchisee's Goodwill

American franchise law provides three methods for the cessation of a franchise agreement: (1) breach of the franchise agreement by either the franchisor or the franchisee;^{cxx} (2) expiration and nonrenewal of the franchise agreement by either the franchisor or the franchisee;^{cxxi} or (3) rescission of the franchise agreement.^{cxxii} In addition, a number of states have laws that limit the ability of franchisors to terminate franchise agreements, or withhold consent to the renewal or transfer of such agreements.^{cxxiii} South Dakota, for example, requires a franchisor to provide the franchisee with thirty days' notice of termination and an opportunity to cure.^{cxxiv} Several states also allow the franchisor the right to terminate a franchisee for nonpayment of royalties notwithstanding any alleged damage claims the franchisee may have against the franchisor.^{cxxv} Similarly, states such as Illinois require a franchisee to have "good cause" to terminate a franchise contract.^{cxxvi} This standard has been the cause of much litigation due to the subjective nature of this requirement and the difficulties found by many courts in interpreting it.^{cxxvii} Many Illinois courts agree that an implied covenant of good faith restricts a franchisor's ability to terminate an agreement only to those cases where good cause exists.^{cxxviii}

In an effort to protect the franchisor's trade secrets, most well-drafted franchise contracts will clearly spell out procedures for terminating a franchise contract. The termination provisions of the franchise contract will seek to protect the franchisor's name, goodwill, know-how, trade secrets, and business methods so as to prevent the

departing franchisee from unfairly making use of them in order to compete with the franchisor and the other franchisees.^{cxxix}

The franchisor will be eager to ensure that customer contact and continuity of service are maintained with the customers of the departing franchisee. In this respect, a well-drafted franchise contract will provide for the transfer of existing contracts between the franchisee and his customers to the franchisor together with any necessary financial adjustments. Additionally, to complete the change of the visible public image reflecting the franchisor's name and goodwill, the franchisee will be required to immediately abstain from using the trademarks, trade names, service marks, and other distinguishing marks of the franchisor^{cxxx} and return all advertising, packaging, marketing and promotional materials associated with the franchise^{cxxx} and operations manuals.^{cxxxii}

Upon termination of the franchise relationship, the franchisor will be anxious to ensure that the franchisee does not disclose any confidential information imparted to him or use it in competition with the franchisor or any of the other franchisees. Consequently, similar to French franchise contracts, it is customary for American franchise contracts to exact a promise from the franchisee that the franchisee will not compete with the franchisor or any other franchisees within a certain area and stated period after termination.^{cxxxiii}

Difficulties arise in relation to the imposition of restraints on the future business activities of the franchisee and the extent to which they may become competitive with the business of the franchisor and his other franchisees. The fixing of reasonable periods and area of operation has to be done by referencing what is permitted by law, the nature of the business, and its area of operation.^{cxxxiv}

II. French Franchise Law

In France, no legal text exists that is solely applicable to franchise agreements. For example, the law of December 31, 1989, also called "Loi Doubin," applies not just to franchise agreements, but also to other exclusivity agreements.^{cxxxv} Additionally, although European Commission (EC) Regulation 4087/88, which defines the terms franchise and savoir-faire, would be relevant, it is no longer in force.^{cxxxvi} Finally, while EC Regulation 330/2010 pertains to vertical agreements,^{cxxxvii} and its guidelines predict the application of the regulation to franchise,^{cxxxviii} the regulation itself does not mention franchises specifically.^{cxxxix}

The French Civil Code provides particular rules that are applicable to contracts.^{cxl} Specifically, the Civil Code offers provisions governing the autonomy of the will (i.e., laws based on the belief that the binding force of a contract can only exist if it is the will of the parties) and those governing good faith between the parties.^{cxli} As stated previously, the courts have generally agreed that a franchise contract has three obligations: (1) the transmission of know-how; (2) the transfer of a commercial sign; and (3) the giving of continuous technical or commercial assistance.^{cxlii} These three obligations appear to form the basis of a French franchise agreement.

A. The Required Characteristics of Know-How in France

In France, there is no legal definition of know-how;^{cxliii} thus, the required characteristics of know-how have come to be determined through the interplay of the EC

Regulation on vertical agreements^{cxliiv}, the AFNOR (Association Française de Normalisation) rule, and the reflections of scholars.^{cxlv} The AFNOR norm “defines a certain number of minimal rules for franchising” including a requirement that the know-how be “original, specific, tested, transferable, evolving and monitored;” however, the norm “has not been officially ratified by the public powers, so that is only an incentive (but not a negligible one).”^{cxlvi} EC Regulation 330/2010 defines know-how as a set of information that is “secret, substantial, and identified,” but it is also more: it is “a package of non-patented practical information, resulting from experience and testing by the supplier” of that know-how.^{cxlvii} The required characteristics, therefore, are substantiality, experimentation, identification, and secrecy.^{cxlviii} Each of these elements is discussed in more detail below.

1. Substantiality in French Law

Article 1 of EC Regulation 330/2010 defines the substantiality of know-how in terms of the competitive advantage gained by the beneficiary of the know-how.^{cxlix} The regulation requires that the information be “significant and useful to the buyer for the use, sale or resale of the contract goods or services.”^{cl} However, this requirement has been tempered over time because the previous regulation insisted that the information be “indispensable” rather than “significant and useful.”^{cli}

Assessing the substantiality of know-how requires a two-prong test. First, the know-how's originality must be reviewed *in concreto* when examining the relationship between the franchisor and the franchisee.^{clii} Second, the know-how's specificity must be

assessed holistically when examining the whole of the knowledge transmitted and not each piece of knowledge individually.^{cliii}

When assessing the originality of the know-how, the franchisee's/beneficiary's initial knowledge, prior to any transmission of know-how, must be taken into account.^{cliv} In this regard, the European Court of Justice has held that "the know-how must give shopkeepers lacking the necessary experience access to methods which they would not have been able to acquire except after long research efforts."^{clv} Furthermore, the French *Cour de cassation* has held that the know-how transmitted is substantial when the beneficiary of the know-how gains a substantial competitive advantage, regardless of whether other third parties already share the same know-how.^{clvi} Indeed, "it is self-evident that know-how is destined to be transmitted to numerous franchisees. The value of know-how does not thereby diminish as the number of recipients increases; on the contrary, the value increases in proportion to the sum of experience resulting from the proliferation of franchised establishments."^{clvii} Conversely, a substantial know-how will be deemed lacking for want of originality when the franchisee already has perfect knowledge of the transmitted techniques.^{clviii} Nevertheless, the fact that franchisee may have prior partial knowledge of the information transmitted to him does not, by itself, undermine the substantiality of the know-how because it must be assessed holistically.^{clix}

When assessing specificity, the elements of know-how need not all be particular to one franchisor.^{clx} Know-how is a "package deal," a system containing multifarious elements, the whole of which must be reproduced by the franchisee.^{clxi} The extent of the originality of any one of those elements will inevitably differ from that of another.^{clxii} The specificity of the know-how will not turn on the originality of any one element, but rather

on how well each element adapts to the system as a whole and how that system adapts to the particular type of business sector chosen.^{clxiii} For this reason, in order to be successful the system has to be repeated in its entirety, regardless of whether some elements are or can be completely devoid of originality or whether the result of those elements can be achieved by means other than those favored by the franchisor.^{clxiv} The know-how must not necessarily be original or specific, but rather its consistence must be evaluated by taking into account its anteriority and the success of the business network created.^{clxv} Thus, know-how is a "sum total of interdependent elements . . . interconnected by relations such that where one relation between the elements is modified, the others are modified as well and thus the whole is transformed."^{clxvi}

Hypothetically speaking, elements may exist that when considered individually, do not attain the originality constitutive of know-how but when organized as a system and considered holistically, have the specificity of know-how.^{clxvii} In this respect, French franchise law resembles French copyright law, which protects "the authors of anthologies and collections of various works, which by virtue of their selection and their arrangement constitute intellectual creations."^{clxviii} Likewise, in franchising, as the Court of Appeals of Paris held, it is the know-how, assessed holistically, that must be "out of the ordinary" and "particular."^{clxix} Thus, as one author put it, "the specificity required of know-how resides in the system's own operational organization for the realization of the franchise's objective in the conditions deemed optimal."^{clxx}

2. Experimentation in French Law

In addition to specificity, know-how must be born out of experience and cannot exist as a purely theoretical conception.^{clxxi} Indeed, the object of the franchise contract is not the mere communication of know-how but rather the reiteration of a commercial success, which must last during the whole duration of the contract.^{clxxii}

Know-how, as the outcome of experimentation, presupposes the analysis of prior experience and the formulation of it into a system of resulting analytical conclusions.^{clxxiii} Accordingly, the franchisor has the burden of proving the experimentation for his know-how and of measuring, in financial terms, the results flowing from the competitive advantage obtained.^{clxxiv} Additionally, article L. 330-3 of the French Commercial Code mandates that, at least twenty days before a franchise contract is agreed upon, the franchisor must inform the franchisee about both (1) the franchisor's experimentation with the franchised concept and (2) the existence of any commercial success attained from that experimentation.^{clxxv}

Courts may find the franchisor's experimentation faulty if the experimentation endured for too short a duration.^{clxxvi} For example, on March 8, 1995, the Court of Appeals of Montpellier determined the franchisor had only accumulated six months of professional experience.^{clxxvii} Consequently, the court held that the franchisor's experimentation in developing know-how was insufficient and pronounced the contract to be null and void.^{clxxviii} Thus, in France, granting know-how is a validity requirement and lack of know-how is a sufficient cause to void the contract.^{clxxix}

In addition to duration, the experimentation must be adapted to the conditions in which the franchisee will implement the know-how.^{clxxx} It is erroneous for a franchisor to assume that the results of experimentation completed in one country will hold true for

another. Thus, location-specific factors, such as consumer habits and population density, must be taken into account.^{clxxxix} This requirement holds especially true for international franchisors operating in France.^{clxxxii} Such an erroneous assumption was discovered by the Commercial Tribunal of Paris in *Infotech and Infosud v. Entre*, where the directors of a French company became aware of a latent defect in the transportation methods of a system conceived by an American franchisor for the United States market.^{clxxxiii} The tribunal censured the American franchisor for its “extreme ignorance of the specific French market.”^{clxxxiv}

Moreover, the know-how of a franchisor must be placed at the franchisee's disposal once the contract is signed.^{clxxxv} Tardiness in doing so constitutes an inadequacy in the know-how.^{clxxxvi} The French courts have been equally protective of the franchisee's need for vital business know-how. In *Infotech*, the Commercial Tribunal of Paris sanctioned the franchisor for delivering promised marketing and formation files to the franchisees more than one year after entering into the contracts, and after franchisees had already opened sales outlets.^{clxxxvii} Likewise, the Court of Appeal of Paris faulted the franchisor for permitting a considerable lapse of time between the signing of the contracts and the distribution of documents that were indispensable to the successful utilization of the transmitted know-how.^{clxxxviii}

A company contemplating the development of franchise units^{clxxxix} must first resort to experimenting with "pilot establishments," which are usually stores internal to the company or branches of the company.^{cxc} Indeed, even though the *Cour de cassation* ruled that “the existence of know-how of the franchisor does not necessarily depend on the existence of pilot centers within which the know-how is experimented,”^{cxc} some

prominent scholars view pilot establishments as a requirement whose absence constitutes a contractual breach.^{excii} Also, article 2.2 of the European Code of Ethics for Franchising provides “the Franchisor shall have operated a business concept with success, for a reasonable time and in at least one pilot unit before starting its franchise network.”^{exciii} Thus, prior to beginning any franchise relationship, the franchisor needs to experiment with its know-how in a pilot establishment (also called a “laboratory”) that allows the know-how to be tested in regular operating conditions and adaptation if necessary.^{exciv} Once the know-how has been tested, it does not matter if the test produces unsuccessful results, as long as those results were not caused by a breakdown in the know-how itself;^{excv} it would only be the latter, a failure of the know-how, that would invalidate the franchise agreement.

3. Identifiability in French Law

In its first article, the European Community Regulation on vertical agreements requires that know-how be “described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils [sic] the criteria of secrecy and substantiality.”^{excvi} Know-how must be put into an identifiable form so that the franchisor may readily transmit it to the franchisee.^{excvii} To this end, franchisors record their know-how in supporting media such as documents, booklets, manuals, cassettes, software, and more.^{excviii} Because the provision of know-how is a continuous obligation, know-how must be periodically updated and transmitted in such an understandable form to the franchisee.^{excix} This franchisor requirement further protects and provides franchisee access to all necessary and relevant business know-how, which the courts have proved

willing to protect. The French *Cour de cassation* established as much when it admitted that a franchisee could have discovered or developed know-how that a franchisor failed to transmit, but that the description of methodology, technical processes, commercial aspects and network organization of a business constituted too substantial a know-how, which the franchisee could only have discovered after long and costly personal research.^{cc} The identification of know-how also plays a role in the administration of the burden of proof at trial.^{cci} In the absence of supporting media for the transmission of know-how, the burden rests on the franchisor to prove the existence and transmission of know-how.^{ccii} However, upon establishing the existence and transmission of know-how, the burden shifts to the franchisee pleading the relevance of the know-how to prove that the know-how lacked originality, specificity and experimentation.^{cciii} Thus, as the *Cour de cassation* has noted, the identification of know-how, whether through written, photographic or cassette aids, also implicates the question of substantiality; a fact that is established by the trial judges in the first instance.^{cciv}

4. Secrecy in French Trade Secrets Law

The know-how must be “secret” in two aspects. First, the know-how must not be “generally known or easily accessible.”^{ccv} Second, the franchise ought to “give shopkeepers lacking the necessary experience access to methods which they would not have been able to obtain without long research efforts.”^{ccvi} Obviously, know-how does not exist if taken as a whole, its elements are previously and easily known by the professionals and if the whole of the knowledge corresponds to information that is already commonly put into use within that market.^{ccvii} However, it is not required that

each component of the know-how be “totally unknown or impossible to obtain outside of the relationship with the franchisor.”^{ccviii}

B. Protecting the Know-How in France

1. Laying the Foundation of French Contract Law

A tradition of codification in French Law extends unbroken for over 200 years.^{ccix} For example, the law on non-commercial contracts and other obligations, *Des contrats ou des obligations conventionnelles en general*, is now codified in Article 1101-1369 of the French Civil Code. Today there are over 60 French Codes which often overlap and may not contain all the law in a given field.^{ccx} This can cause confusion when trying to decipher any particular topic. The French Civil Code embodies over 2,500 sections forming the major part of French private law, but it excludes commercial law.^{ccxi} Owing in large part to the obsolescence of the 1807 Napoleonic Code, the new Commercial Code of 2000^{ccxii} was finally enacted as a replacement.^{ccxiii} Indeed, this complete separation in the Code between the Civil Code and the Commercial Code evidences how French law distinguishes between private civil contracts and commercial contracts.^{ccxiv} In addition, since 1993 France has followed the *Code de la consommation*, which contains rules governing business-consumer relations.^{ccxv}

The French Civil Code provides the essential framework of contracts as well as the specific rules regarding the applications of contracts.^{ccxvi} Though the Codes provide the outline, there is often a lack of specific, applicable law, and thus French judges have great discretion when it comes to interpreting law.^{ccxvii} This influence allows judges to

play a pivotal role in shaping modern French contract law.^{ccxviii} In fact, judges have the right to intervene in contractual obligations between parties.^{ccxix}

In order to best understand modern French contract interpretations it is essential to recap its origins. French contract law is a combination of natural law as well as 18th century philosophy.^{ccxx} Though the era of freedom of choice has gradually declined, the trend really took shape over the past 30 years, in a sense moving the legal concepts more away from “English” principles of freedom toward “French” restrictions on choice in order to protect fundamental rights.^{ccxxi} The most significant restriction to the principle of autonomy of will was introduced in the late 1970s with the first legislative framework for consumer protection.^{ccxxii} U.S. and French contract law differ on several issues, with perhaps the most important being a French reluctance to restrict or waive certain rights even via a free choice of the parties.^{ccxxiii}

Article 1108 of the Civil Code defines the conditions necessary to make any agreement binding on the parties involved. The essential binding requirements are: the consent of the party who binds himself; his capacity to contract; a definite object which forms the subject matter of the contract; a lawful cause for each party’s obligation.^{ccxxiv} The major difference between French contract law and US contract law is the lack of required consideration.^{ccxxv}

At the heart of a valid contract in French law lies the notion of consent.^{ccxxvi} Consent means the agreement to do something. When parties give their consent they are indeed committing themselves towards each other.^{ccxxvii} French law is more interested in achieving a kind of contractual justice understood in a moral sense achieved only by examining the party’s subjective intent to determine if they have broken their

promise.^{ccxxviii} French law, under the influence of Pothier (*Treatise on Obligations*), applies a less mercantilist and more idealized approach to a contract as being ‘a concurrence of intentions between two parties, one of whom promises something to the other who on his part accepts such promise’.^{ccxxix} When comes down to it, French contract law all comes down to the mental state of the parties. Compare this to the US Restatement Second of contracts §17(1), which requires a bargain, mutual assent and consideration.^{ccxxx}

The general rule in French law is that all contracts are *consensuels*; that is to say that no written form is required for a contract to be binding.^{ccxxxi} As a result, a contract can be formed by a mere exchange of words.^{ccxxxii} This French contract theory differed sharply from Roman law of the time that required the formal declaration of a specific sequence of words by both parties, *ex nudo pacto actio non nascitur*.^{ccxxxiii} The divergence from the Roman way of thought can be traced to the Christian moral precept *respect de la parole donnée* (agreements to be kept).^{ccxxxiv} In modern times we associate this notion with consensualism.^{ccxxxv} Consensualism is premised on the notion that it is morally wrong for someone to escape a contractual obligation by simply relying on an absence of a particular formality.^{ccxxxvi}

2. Continuing Obligations During the Life of a French Franchise

The goal of the franchise contract is to enable the franchisee to utilize the know-how in developing a uniform and recognizable product or service.^{ccxxxvii} Because the franchisee essentially pays for the right to use this know-how, failing to apply it leaves a

part of his purchase unutilized.^{ccxxxviii} Moreover, the franchisee is under an obligation to use this know-how fully.^{ccxxxix} This obligation is not found directly or specifically within French law but rather is founded in the “lignes directrices” or guidelines of the European Commission’s regulations on franchising.^{ccxl} Specifically, the EC guidelines obligate the franchisee to apply and follow rules relating to the know-how of the franchisor.^{ccxli} For instance, point 44-C of the guidelines stipulates that the franchisee has to preserve the confidentiality of the know-how as long as it does not fall into the public domain.^{ccxlii} Moreover, according to point 44-f, the franchisee should not use the know-how for any other purpose than that of the franchise.^{ccxliii} The general rule in French contract law is that mere moral duties or an offer of gratuitous services, whatever the context, do not give rise to civil law obligations unless they can be classified as *Obligation naturelles*^{ccxliv}.

Failing to implement fully the franchisor’s know-how gives rise to dire consequences for the franchisee.^{ccxlv} First, this failure will authorize the franchisor to rescind the franchise contract.^{ccxlvii} For example, the Commercial Court of Paris granted a franchisor the right to rescind where the “organization put in place at the beginning was not respected by the franchisee, neither with regard to the selection of personnel, nor the method of management, nor the stock.”^{ccxlviii} This failure also deprives the franchisee of the right to file a complaint concerning the non-execution by the franchisor of its own commitments, since the franchisee’s non-conformity in implementing the know-how for which it had contracted renders the franchisor unable to perform.^{ccxlviii} Similarly, the Commercial Tribunal of Lyon held that where the franchisee company did not communicate its monthly turnover to the franchisor as provided for in the franchise

contract, the court was justified in considering that the franchisor was not able to grant the franchisee all the necessary assistance required.”^{ccxlix}

Although the franchisee is technically independent, the franchisor has a duty to control the faithfulness with which its know-how is implemented and to ensure the "operational equilibrium" among franchisees.^{cccl} Thus, franchise contracts will also contain a clause providing the franchisor the right to inspect the franchisee's premises, documents, and activities.^{cccli} Furthermore, franchise contracts provide for an affirmative duty, incumbent on the franchisee, to deliver monthly financial statements to the franchisor.^{ccclii} In return, the franchisor owes the franchisee a duty to assist him in implementing the know-how and a duty to ensure the know-how is continually updated.^{cccliii}

Some courts have interpreted this requirement more loosely. For instance, the Court of Appeal of Paris on the 19th of January 1990 held that a franchisee who has never solicited the assistance and advice of his franchisor has no ground to complain of the latter's non-assistance.^{cccliv} Other courts have held that “the franchisee cannot bring the responsibility of the franchisor into play without raising precise deficiencies, or establishing the calamitous or inconsistent character of the assistance.”^{ccclv} The franchisor’s duty of continual assistance is limited by two considerations: (1) the franchisee's potential non-execution of his commitment to implement the know-how, and (2) the virtue of the franchisee's entrepreneurial independence.^{ccclvi} The latter consideration precludes the franchisor from meddling with aspects of management not specifically regulated by the franchisor's know-how.

In light of the fact that a franchise agreement is a contract guaranteeing the repetition of success over the life of the contract and that know-how must provide a competitive advantage, the know-how proposed by the franchisor must be adopted to the evolution in technology and the market.^{cclvii} Thus, the franchisor has the affirmative obligation of updating the know-how and teaching the updates to the franchisee.^{cclviii} However, as has been held by the Commercial Tribunal of Paris, any modification of know-how must also be tested in advance via pilot establishments.^{cclix} Nothing, however, prevents a successful franchisee from volunteering to be a pilot establishment for the testing of modifications to know-how.^{cclx}

3. Liability to Third Parties and Know-How in France

The case may arise where the client of the franchisee sues the franchisor in addition to the franchisee because the franchisee has carried out a service poorly.^{cclxi} In this situation, the franchisor has two available defenses, the second of which is pertinent to our discussion of know-how. First, the franchisor may assert that he was not in privity of contract with the franchisee's client since parties to the contract were the franchisee and the client.^{cclxii} Second, and more importantly, the franchisor may claim that the franchisee breached the franchise contract through a failure to act in conformity with the know-how transmitted to him.^{cclxiii} As to the latter, it is important to note that, in French law, damages do not constitute the primary remedy.^{cclxiv} A claimant's primary resource when the other party fails to perform is to have the contract performed (*execution force*).^{cclxv} As such, the claimant has a number of remedies available, depending on the nature of the contract, to pressure the defendant to perform his obligation. These include

suspension of his own performance until the other party performs, rescission, specific performance, and when these are not available, damages.^{cclxvi}

As stated above, the franchisor may claim that the franchisee breached the franchise contract through a failure to act in conformity with the know-how transmitted to him. When a franchisor asserts this defense, the client of the franchisee, as the plaintiff, has the burden of proof to establish (1) that the franchisee adhered strictly to the transmitted know-how and (2) that prejudice thereby resulted.^{cclxvii} Where the client succeeds in doing so, the client will have a successful cause of action against the franchisee under contract law (because the contract proved to be harmful), and against the franchisor under tort law on the basis of article 1382 of the Civil Code.^{cclxviii} It is, therefore, in the franchisor's interest to establish that the franchisee has failed to conform to the know-how and that such non-conformity could not have been known to the franchisor when the client contracted with the franchisee.^{cclxix}

4. Non-Affiliation and Non-Compete Clauses in French Franchise Contracts

In French law, there are limited ways for a franchisor to protect its know-how, which is not greatly protected by any intellectual property rights.^{cclxx} One way a franchisor might seek to protect know-how is by depositing an envelope to the INPI (Institut National de la Propriété Intellectuelle) containing the elements of its know-how and constituting a proof creation with a date. The envelope will then be conserved for five years with the possibility of one renewal.^{cclxxi} However, aside from this short-term protection, and because intellectual property and trade secrets are afforded few additional safeguards in

the absence of fraudulent or criminal activity,^{cclxxii} contractual obligations are pervasively used to supplement defense of franchisors know-how.

Non-affiliation and non-compete clauses are frequently inserted into franchise contracts so as to afford the franchisor supplementary protection against the franchisee who has benefited from the franchisor's know-how and experience.^{cclxxiii} The function of the non-compete clause is to prohibit the franchisee from participating in business activities in competition with the franchisor.^{cclxxiv} Non-affiliation clauses prohibit the franchisee from using the commercial name of a network in competition with the former franchisor network for a specified period of time.^{cclxxv} Additionally, the non-affiliation clauses prohibit the franchisee from selling merchandise under the trademark of such a network within a given territory.^{cclxxvi}

The validity of the non-compete and non-affiliation clauses is subject to three conditions. First, the restriction on the type of activity concerned in the contract must be limited.^{cclxxvii} Second, the restriction must be limited in both duration and territorial scope.^{cclxxviii} Third, the restriction on competition must be proportional to the legitimate interests of the franchisor regarding the purpose of the contract.^{cclxxix} This last condition has been deemed the most important.^{cclxxx} In order to determine whether a clause meets this final condition, the court will evaluate the necessity and the proportionality of the clause.^{cclxxxi}

A court will first consider whether the clause is necessary.^{cclxxxii} In order to be valid the clause must tend to protect the legitimate interests of the franchisor.^{cclxxxiii} French case law has often espoused the definition of necessity found in article 3 § 1c of EC Regulation 4087/88 (passed in 1988): the necessity to "maintain the common identity

or the reputation of the franchise network."^{cclxxxiv} This definition, however, is in the process of being replaced by an updated definition first set out in EC Regulation 2790/1999 and repeated in the more recent EC Regulation 330/2010.^{cclxxxv} Both regulations require the contractual restriction be "indispensable to the protection of know-how transferred by the supplier to the buyer."^{cclxxxvi} Indeed, the *Cour de cassation* has used this newer definition in some of its rulings.^{cclxxxvii} The Court of Appeals of Caen, on the other hand, seems to have combined the two definitions into one: "the non-affiliation clause must be necessary to the maintenance of the common identity or the reputation of the network, which implies that it is indispensable to the protection of know-how."^{cclxxxviii}

Upon determining that the clause is necessary, the court will then examine whether the clause produces a restriction on competition proportional to the legitimate interests of the franchisor.^{cclxxxix} This requires balancing the consequences to the franchisee with the interests of the franchisor.^{ccxc} According to article 3 § 1c of EC Regulation #4087/88, the duration of the non-compete agreement should be a "reasonable period not exceeding one year."^{ccxcii} However, many French courts have upheld clauses exceeding this statutory limitation. For instance, the *Cour de cassation* upheld a decision by the Court of Appeals of Caen finding a non-affiliation clause enforceable for a period of three years within a geographical zone of five radial kilometers, which prohibited franchisee from affiliating with any regional and national networks operating in this area.^{ccxciii} Similarly, the Court of Appeals of Paris upheld a non-compete clause in a contract not affecting commerce between the member states of the European Community on the grounds that the restriction was limited to three years, to a single department of France, and only to the specific sector that was the object of the franchise contract.^{ccxciii}

On the other hand, several courts have invalidated non-affiliation and non-compete clauses where the duration was limited to less than a year. Courts have invalidated such agreements where the clause may affect commerce between the member states of the European Community by having "the purpose and effect of dissuading franchisees, through a disproportionate penalty, from rescinding the contract before term and of rendering market penetration more difficult."^{ccxciv} Likewise, courts will invalidate a clause that is overbroad and prohibits affiliation with any network or third party.^{ccxcv} The law in this area is likely to grow as franchise law in France continues to develop.

C. Termination of the French Franchise Contract

1. Nonrenewals, Annulments, and Rescissions

A franchise relationship should be capable of subsisting over a long period of time. Nevertheless, there will be occasions when it comes to an end. French law recognizes several ways by which a contractual agreement controlling a franchise may terminate.^{ccxcvi} First, as the franchise contract is generally concluded for a fixed period of time and terminates at the end of the contractual period, the contract may simply expire.^{ccxcvii} In most cases, the contract will require the franchisor to give notice to the franchisee of the non-renewal of the contract in a reasonable time prior to expiration.^{ccxcviii} Failure to notify the franchisee of non-renewal can be considered contractual default on the part of the franchisor; the advanced warning is meant to protect franchisees by providing them with time to anticipate changing circumstances, and so the lack of the notice may itself constitute grounds for the franchise's renewal of the contractual relationship.^{ccxcix} Courts have also held that the refusal to renew may

constitute abuse if the franchisor has promised to renew the contract if certain conditions are fulfilled, or if the franchisor suggested that renewal will be effective.^{ccc}

Secondly, the contract may be judicially annulled on account of its invalidity.^{ccci} Generally, the grounds for annulment consist of either a flaw in the consent of a party, the contract's violation of public policy, or the lack of cause.^{cccii} Annulment entails the retroactive destruction of the contractual relationship; that is to say, the court will attempt to place the parties back in their pre-contractual positions.^{ccciii} Thirdly, a contract may be rescinded.^{ccciv} A rescission has a prospective effect and leaves intact the validity of the contract for the period preceding the event that gave rise to the rescission.^{cccv}

a. Annulment of the French Franchise Contract for Lack of Cause^{cccvi}

Among other essential conditions, Article 1108 of the Civil Code requires that, for a contract to be valid, any obligation of the franchisee must have “lawful cause.”^{cccvii} Lawful cause, under the Civil Code, corresponds roughly to defenses found in the common law based on violations of law or public policy.^{cccviii} Moreover, lawful cause has been interpreted to relate to the party’s reason for entering the contract.^{cccix} Article 1131 of the Civil Code further expands these meanings by stating “[a]n obligation without cause or with a false cause, or with an unlawful cause, may not have any effect.”^{cccx} Thus, the sufficiency of the cause should be measured at the time the contract was executed. A franchise agreement lacking know-how may lack sufficient cause.^{cccxi} Where such know-how is lacking, the franchisee may immediately bring an action for the annulment of the contract.^{cccxi} However, logically, no lack of cause suit may be brought

immediately for lack of continuous assistance to the franchisee, because such assistance could not take place (or, therefore, be lacking) until *after* the execution of the contract.

The question of whether there was know-how within the franchisor's control at the time of the contract's performance may be highly nebulous. Some courts have held that the observation of know-how suffices to infer that it existed during the formation of the contract.^{cccxi} Other courts infer an absence of know-how from the lack of transmission of know-how during the performance of the contract.^{cccxiv} The courts then examine whether such an absence is inherent in the contract itself.^{cccxv} If the absence is inherent in the contract, the court will sustain the annulment.^{cccxvi} If, on the other hand, the failure to transmit the know-how resulted from the poor execution of a contracting party, then the action will not be sustained.^{cccxvii}

Commonly, there are two scenarios involving how courts test the sufficiency of know-how in a contract. The first scenario involves a manifestly inexperienced franchisor. In such a case, a court voided a number of contracts when the franchisor was still in the formation stage and therefore devoid of all experience.^{cccxviii} Another court voided a franchise agreement because the franchisor only had six months experience.^{cccix} In another case, a court determined that the absence of a coherent pilot program demonstrated that the franchisor did not have any specific know-how as to the objective of his contract and that he instead simply intended to transmit an idea that was to apply *in concreto*.^{cccxx} Nevertheless, as such extreme cases of missing know-how and outright fraud are becoming rarer, the courts are generally moving away from making dogmatic judgment calls as to a franchisor's experience.

The second scenario involving the court's determination of the sufficiency of a franchise contract entails the judge's detailed economic analysis of the consideration given. In *Entre Computer*,^{cccxxi} the *Cour de cassation* upheld the Court of Appeals' dismissal of an action for annulment of contract for two reasons. First, the Court found that the failure of the franchisee resulted not from any intrinsic flaw in the know-how but from the prevailing economic conditions.^{cccxxii} Second, the documentation provided to the franchisee would have permitted it to acquire immediately the useful knowledge of commercial, technical and financial management in the software sector without first having to conduct research of its own.^{cccxxiii} Therefore, despite the franchisee's failure, the know-how was useful and consequently, the contract had a valid cause. In another case, the *Cour de cassation* overturned an appellate court's affirmation that the franchisor did not present any facts establishing the transmission of know-how.^{cccxxiv} The *Cour de cassation* determined that the appellate court failed to analyze sufficiently the franchise contract, which bound the parties for five years.^{cccxxv}

The statute of limitations for an annulment action runs five years from the date the contract is signed by both parties.^{cccxxvi} Additionally, the longer the franchisee waits to bring an action, the more attenuated his claims will be.^{cccxxvii} For example, in *Phonepermanence v. Lebreton*, the Court of Appeals of Paris noted that it took four full years for the franchisee to notice that he was not receiving any know-how from the franchisor.^{cccxxviii} Where the contract has been performed over an extensive period, the *Cour de cassation* expects the lower courts to provide a detailed analysis of the cause of the obligation and has reproached at least one for failing to do so.^{cccxxix}

In any case seeking annulment, the franchisee has the burden of proof in establishing that the franchisor failed to provide any know-how^{cccxxx}. The annulment of the contract is intended to put the parties back to the same position they were in before the contract was performed.^{cccxxxi} Consequently, sums paid to perform the contract must be restituted.^{cccxxxii} For the franchisee to claim any damages aside from those on account of the contract's annulment, the franchisee must prove that the franchisor was the sole cause of the alleged prejudice.^{cccxxxiii}

b. Rescission of the French Franchise Contract

There can also be a remedy for defect of consent, called *nullité* or *rescission*.^{cccxxxiv} This concept is similar to the English equitable remedy of rescission to the extent that the parties will be restored to their original position.^{cccxxxv} Damages can be added to *nullité* where the defendant would be liable under the general rules of civil liability.^{cccxxxvi} If contract tries to disclaim *nullité*, the contract as a whole will be considered void.^{cccxxxvii} French law recognizes certain limitations on *nullité*.^{cccxxxviii} For example, where restitution is impractical or where restitution is not available to a guilty party.^{cccxxxix}

At times, it may be difficult to obtain an annulment of the franchise contract because such an action presupposes the total absence, or, at most, the derisory presence of know-how.^{cccxl} The know-how actually provided by the franchisor, though feeble, may be sufficient for the courts to reject the franchisee's claim.^{cccxli} For this reason, franchisees may instead prefer to bring a cause of action for rescission.^{cccxlii} Rescission, contrary to annulment, operates prospectively,^{cccxlili} leaving the contractual relationship

between the parties intact, up to the point of rescission. No award of restitution will be made following the rescission of a contract.^{cccxliv}

As mentioned above, the franchisee cannot *immediately* bring an action for damages on the grounds of lack of continuous assistance. First, it is important to remember that in French law damages do not constitute the primary remedy.^{cccxlv} A claimant's primary resource is in principle to have the contract performed (*execution force*).^{cccxlv} The claimant has a number of remedies available depending on the nature of the contract to pressure the defendant to perform his obligation.^{cccxlvii} Nevertheless, the franchisee may seek annulment and may use these grounds (lack of continuous aid) to obtain rescission of the contract.^{cccxlviii} It is noteworthy, however, that the Court of Appeals of Paris has held that the franchisee will not be justified in bringing such an action when the franchisee has never solicited assistance from the franchisor.^{cccxlix} In a synallagmatic (bilateral) contract the remedy of choice in pressuring the defendant to perform is suspension.^{ccccl} Basically, the non-breaching party will suspend his own performance for so long as the breaching party does not perform.^{ccccli} This exception can only be invoked by a party acting in good faith.^{cccclii} In cases of failure to perform, the plaintiff has the option to rescind the contract for breach, a remedy in French law known as *resolution*.^{ccccliii} This final ruling on the *resolution* is entirely up to the judge's discretion.^{ccccliv} A judge need not get involved if the parties have agreed to such a remedy indicated by a clause in the contract itself.^{cccclv}

One common example of a franchisee seeking rescission occurs when the franchisor has unilaterally modified conditions that had previously been commonly agreed upon by contract.^{cccclvi} In order to make modifications, the franchisor must always

obtain the franchisee's consent.^{ccclvii} However, "the operational provisions of the know-how may be modified by the franchisor so as to improve and update the know-how."^{ccclviii}

While the franchisee may request rescission, the franchisor is not left without recourse. The franchisor may also bring a cause of action for rescission. Namely, a franchisor may claim that the franchisee has failed to apply and comply with the know-how.^{ccclix} Additionally, a franchisor may claim that during the life of the contract, a franchisee violated the non-compete clause,^{ccclx} thereby threatening to disclose the know-how or to use it to the benefit of competitors.

2. Restitution of the Franchise Elements upon Termination of the Contractual Relationship in France

a. Pursuit of Civil and Even Criminal Remedies

Upon termination of the franchise relationship, the franchisee is required to cease using the distinctive signs of the franchise, including all material relating to know-how.^{ccclxi} As a result, a franchisee must take down decorations and redesign the layout of the store if these specifications were transmitted to the franchisee by the franchisor.^{ccclxii}

In pursuit of the ex-franchisee, the franchisor can act through "in chambers" proceedings and obtain an injunction to prevent the franchisee from continuing to use its distinctive signs and know-how.^{ccclxiii} However, under the provisions of article L. 716-6 of the French Code of Intellectual Property, an "in chambers" proceeding for trademark counterfeit is only admitted on the condition that a substantive action (presumably also for trademark counterfeit) has been commenced.^{ccclxiv} Therefore, when the franchisor wants to avoid having to file a prior substantive action as a condition of simultaneously

commencing "in chambers proceedings," the franchisor must focus his "in chamber" pleadings on issues other than the trademark (*la marque*), such as the commercial sign (*l'enseigne*) and the distinctive characteristics of the franchise, such as know-how.^{ccclxv}

The franchisor can also commence a lawsuit to obtain reparation for any harm caused and, if need be, to obtain restitution of the commercial sign, by using the penalty of an *astreinte* (a daily fine for delay in performance of a contractual obligation).^{ccclxvi} When suspension and specific performance are simply not an option the claimant will have to resort to damages.^{ccclxvii} Since, in French law the purpose of damages is only to compensate claimants for the loss sustained by the non-performance of the contract, damages are calculated to place them in the same situation as if the contract had been performed.^{ccclxviii} Like English law there is no provision in French law for punitive damages for a breach of contract.^{ccclxix} Where the franchisor can demonstrate the existence of misconduct, prejudice, and a causal link between the prejudice and the misconduct, an action for unfair competition will allow him to put an end to the illicit activities and to obtain damages.^{ccclxx} Case law has assessed these three conditions in a flexible manner.^{ccclxxi}

Article 1382 of the French Civil Code provides that, "[a]ny act whatsoever of man, which causes damage to another, obliges the one by whose fault it occurred to compensate it."^{ccclxxii} For example, if the franchisee violates the franchisor's know-how, he can be liable where a fault, a prejudice and a link between fault and prejudice are proven. This concerns for instance the situation where the franchisee abuses of the use of the know-how that the franchisor previously authorized. The franchisor is then entitled to introduce an action "for non-loyal competition" (*action en concurrence déloyale*).^{ccclxxiii}

Clearly, given the presence of damages to either the franchisor or franchisee, because of the contractual relationship, either party is entitled to seek restitution for such general damages in Civil Proceedings.

The franchisor may also even proceed against the delinquent franchisee by drawing on various provisions of the French Penal Code. Mainly, breach of trust^{ccclxxiv} is punishable under article 314-1 of the Penal Code.^{ccclxxv} Where the franchisor unequivocally specifies in the franchise agreement that it remains the sole proprietor of the know-how and that the know-how must be returned upon termination of the contract, then the absence of restitution will constitute a breach of trust.^{ccclxxvi} Considering France's reliance on the notion of 'intent' of the parties when forming a contract; it is no surprise that a strong emphasis is placed on good faith.^{ccclxxvii} In fact, parties can face tort liability for breaking off contractual relations in bad faith.^{ccclxxviii}

In addition to breach of trust, franchisees have sometimes been charged with theft under article 311-1 of the French Penal Code.^{ccclxxix} In one case, a franchisee in possession of documents belonging to the franchisor made photocopies of the documents unbeknownst to and against the will of the franchisor.^{ccclxxx} He was charged with and convicted of theft, which is characterized by "the appropriation of one's property against the will of its proprietor or lawful possessor, regardless of the motive which inspired its perpetrator, or the use of the apprehended good."^{ccclxxxi}

Other solutions exist that a franchisor could try, though with lesser and limited likelihood of success in the courts. The franchisor may allege a breach of trust under article 408 of the Criminal Code.^{ccclxxxii} In case of removal or abstraction of documents on the know-how, the franchisor could act on the basis of article 379 of the same

Code.^{ccclxxxiii} Finally, the franchisor may rely on article 418 of this Code where the franchisee discloses industrial secrets.^{ccclxxxiv}

b. Adequacy of Restitution Clauses in French Franchise Agreements

Quite frequently, franchise contracts contain clauses allowing the franchisee to use distinctive signs of the franchisor and guidelines for the franchisee at termination.^{ccclxxxv} A recent case from the Court of Appeals of Colmar shows just how much leeway the court has in determining franchisee compliance where such clauses lack sufficient precision.^{ccclxxxvi} In that case, the relevant clause imposed upon the franchisee the affirmative obligation that he shall "make any specific and complementary changes to the premises, their layout or decoration which would be necessary for the prevention of any association, confusion, or resemblance with the franchise network and, in particular, will *change* the specific colors (blue and white)."^{ccclxxxvii} The court read the clause narrowly so as not to completely prohibit the use of the color blue.^{ccclxxxviii} The court also noted that the franchisee was using a shade of blue that was totally distinct from that used by the franchisor.^{ccclxxxix} Thus, it was not established that the franchisee violated his contractual obligation.^{cccxc} This case stands for the proposition that the contractual freedom to set up bans relating to distinctive signs will be limited so as to "maintain a sufficient correlation between the distinctive elements which the franchisee is prohibited from using after the cessation of the contract and those distinctive elements which characterize those products and services included in the franchise contract."^{cccxc}

III. Conclusion

Franchisor protection takes on many different forms in countries around the globe. No system can likely fit every country's needs. However, in France, the country's focus on know-how (i.e. savoir-faire) raises some interesting points for American franchising law. Although there are some similarities to U.S. trade secret protections, French laws on the subject are substantially different, namely in their focus on ethics and the possibility of criminal penalties.

In France, know-how, based on the interplay between substantiality, experimentation, identification, and secrecy, provides courts with subjective yet articulable standards for determining when know-how has been transferred from franchisor to franchisee. In addition, French law seeks to protect franchisor know-how by 1) allowing judges broad latitude to interpret the laws and apply them to agreements and 2) providing franchisors with a variety of contractual and tort remedies in the event of a violation by the franchisee. As such, French law requires franchisors to transfer know-how to franchisees in order for the franchisor's rights to accrue. The franchisee, in return, is required to implement this know-how or face liability.

American franchise law is not as strict. American law, governed by the freedom of private parties to contract, does not require the franchisor to transfer know-how to the franchisee. Although the transfer of know-how to the franchisee is in the best interests of both the franchisor and the franchisee, there need not be any transfer of know-how for contractual rights to develop in the event of a breach by either party. In comparison to French law, this result seems odd. Since the franchisor is providing the franchisee with his name, reputation, and goodwill while the franchisee is providing capital and

investment into the franchisor's business, it would seem that the transfer of know-how should be required. Providing the franchisee with know-how will only further ensure the franchisee's success. Because the know-how is developed over time through extensive experimentation, it gives the franchisee a marked competitive advantage. This information is generally not discoverable by a franchisee on their own and is thus a primary incentive to participate in a franchise relationship as opposed to starting a business of one's own. Buying into a franchise relationship accords certain benefits to the franchisee – primarily, the establishment of an already successful business model. For the franchisee to be given the greatest opportunity for success and to facilitate an equal (or more equal) playing field for the parties, the potential franchisor should be provided with adequate know-how. Without adequate knowledge of the situation, the franchisee may find themselves at a marked disadvantage should a disagreement arise later with the franchisor. Accordingly, the transfer of know-how should be *sine qua non* of any franchisor-franchisee relationship rather than the mere payment of a franchisee fee or the development of a marketing plan. Contrary to the American reasoning, this requirement of know-how can only benefit both parties and does not limit the freedom to contract of either the franchisor or franchisee.

In France, once a franchisor is willing to share his secrets and the intimate parts of his business, it is then when the franchisor-franchisee relationship is established. Adopting a similar view in America might allow prospective American franchisors to be a little more in the know—at least as to when they have rights and when they do not. Because financial success is the primary purpose behind all franchise relationships, a

measure such as the know-how requirement, which protects the parties' investment in the franchise, should not continue to be ignored by the American courts.

ⁱ Fasken Martineau, *Bertico Inc. v. Dunkin' Brands Canada Ltd.*, (June 2012) <http://www.fasken.com/en/superior-court-orders-dunkin-donuts-to-pay-164m-to-21-quebec-former-franchisees/>; see also Edward Levitt & Bruce S. Schaeffer, *The Second Battle of the Canadian Donut Wars - Bertico v. Dunkin' Donuts: Lessons Learned About Franchisors' Duties, Lost Profits Calculations and the Credibility of Expert Testimony*, CCH BUSINESS FRANCHISE GUIDE, Sept.24, 2112, available at <http://www.airdberlis.com/Templates/Articles/articleFiles/778/The%20Second%20Battle%20of%20the%20Canadian%20Donut%20Wars%20-%20November%202012.pdf>

ⁱⁱ *Bertico Inc. v. Dunkin Brands Canada Ltd.*, [2012] Q.J. No. 4996 (S.C.).

ⁱⁱⁱ *Id.*

^{iv} After several decades as Quebec's predominant coffee and donut chain, Dunkin' Donuts market share in Quebec fell by nearly two-thirds in just eight years, and its number of outlets dropped in ten years from 210 to just 41 (and down to 13 by the time of the *Bertico* decision). *Q.J. No. 4996*, at paras. 26, 29 & 36-38.

^v *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 (CanLII), at paras. 141-43 & 487-88.

^{vi} *Id.* at paras. 4 & 7.

^{vii} *Id.* at paras. 7 & 619.

^{viii} *Id.* at para. 679 ("What matters, at the end of the day, is whether the franchisee makes sufficient profit overall to justify his or her investment and to remain in the business. The suggestion by the plaintiffs that the franchisor has an obligation to price every menu item so that they can make a profit on that particular item is not supported by the contract, by the law or by common sense."). For a discussion of the case by Canadian franchise lawyers, see Edward Levitt & Bruce S. Schaeffer, *Canada's Tim Hortons Case: Lessons Learned about Franchisors' Rights, Class Action Certification and Rules of Expert Testimony*, CCH BUSINESS FRANCHISE GUIDE ¶7411 (2012), available at

<http://www.airdberlis.com/Templates/Articles/ArticleEdit.aspx?ArticleID=766&page=14>

^{ix} *Fairview Donut Inc.*, 2012 ONSC 1252, at para. 532 ("the franchisor is entitled to insist on uniformity across the system [with] no obligation . . . to ensure that the franchisee makes a profit on every product it sells[;] there is no evidence that the pricing of . . . items makes the [franchisees'] stores unprofitable or unsustainable[, and their] overall performance . . . belies this proposition.")

^x Le savoir-faire désigne l'ensemble des méthodes, usages et informations pratiques (non brevetés) engendrés et validés par l'expérience du franchiseur. Observatoire de la Franchise (June 24, 2011, 12:56 AM) <http://www.observatoiredefranchise.fr/fiches-pratiques/integrer-franchise-definition-savoir-faire.htm> (*Savoir-faire denotes the set of methods, uses and practical information (non-patented) created and validated by the experience of the franchiser*) (translation by author)

^{xi} See e.g., Interview with Prof. Michael Martinek, Saarbrücken, Germany, June 12, 2011).

^{xii} Cour d'appel [CA] [regional court of appeal] Poitiers, 1^e ch., Sept. 13, 2005, Juris-Data, 287162. Indeed, a modified version of the French approach, especially concerning know-how and continuing assistance, has been adopted throughout Europe, such as in Spain. The main distinguishing features of a Spanish franchise are (1) transfer of intellectual property ("IP") rights and know-how from franchisor to franchisee, (2) the constant provision of technical and

commercial assistance from franchisor to franchisee, and (3) a contractual obligation to maintain standards and IP rights protection. Regulation of the Franchise Regime and the Registry of Franchises (R.D.L. 2006, 419) (Spain).

^{xiii} Odile Chanut, Member of the Scientific Committee, French Franchise Federation, Address at the International Society of Franchising's 26th Annual Conference, Ft. Lauderdale, Florida (May 19, 2012).

^{xiv} It is behind only the United States, China, and Japan. Andrew Bergmann, *World's Largest Economies*, CNN MONEY (Dec. 30, 2012, 2:30 PM), http://money.cnn.com/news/economy/world_economies_gdp/ (taking data from the International Monetary Fund's World Income and Financial Survey - World Economic Outlook, <http://www.imf.org/external/pubs/ft/weo/2012/02/weodata/index.aspx>).

^{xv} In contrast to the French system, the German tradition—although also grounded in Civil Law—makes less use of codification. Etienne Pfister et al., *Institutions and Contracts: Franchising*, 21 EUR. J. L. ECON. 53, 56 (2006). Indeed, one sees that in the law of franchising. *See infra* note xvi.

^{xvi} Germany – unlike France – has no statutory framework intended specifically to cover trademark licensing arrangements, especially franchising. *See, e.g.*, Loi no. 89-1008 of 31 December 1989, Journal Officiel de la République Française [J.O.][Official Gazette of France], 2 January 1990, 9; *see also* Phillip F. Zeidman, *Franchise 2011*, GETTING THE DEAL THROUGH, 2010, at 56, *available at* http://www.franchise.org/uploadedFiles/Franchise_Industry/International_Development/Germany.pdf; The reduced codification is partially due to the influence of the 18th century jurist, Frederich Carl von Savigny, who took a pragmatic view of the law and argued against codification. Pfister, *supra*, at 56. Further, the relatively late unification of Germany in 1871 allowed Germany to adopt aspects of other systems such as the French Civil Law and Common Law. *Id.*

^{xvii} As of 2010, franchise legislation has been integrated into over 30 countries' legal regimes. DLA Piper, Executive Summary of Franchise Laws Around the World (December 2008), available at <http://www.dlapiper.com/global/publications/detail.aspx?pub=3800> (summarizing the laws of the 33 nations that specifically govern franchising); *see also* INTERNATIONAL FRANCHISE ASS'N, INTERNATIONAL FRANCHISING LAWS (DLA PIPER'S SUMMARY OF FRANCHISING LAWS AROUND THE WORLD), at <http://www.franchise.org/IndustrySecondary.aspx?id=45874> (2011) (map showing the spread of franchising-specific legislation across the globe – 35 nations, including 6 in the Americas, 14 in Europe (8 European Union nations and 6 non-EU countries), and 8 in East or Southeast Asia).

^{xviii} This is typical throughout Europe as well. For example, insofar as know-how is comparable to trade secrets, it is protected by section 1 of the German Act Against Unfair Competition (“This law serves to protect competitors and consumers as well as the other market participants from unfair business actions. At the same time it protects the public interest in genuine competition.” Gesetz gegen den unlauteren Wettbewerb [German Act Against Unfair Competition] (UWG) §1 (2010)) provided the violation is made for the purpose of unfair competition. Albrecht Schulz, *An Overview of Franchising in Germany*, in FRANCHISING IN EUROPE 149, 149 (Martin Mendelsohn, ed., 1992). Protection may also be granted by section 17, which guards trade secrets in the workplace. *Id.* Although the section deals mostly with employees, section 17(2) may apply to the special situation of a franchise agreement; however, because the laws are weak, secrecy clauses should be very explicit in the contract. *Id.* An infringement of the secrecy clause during the term of a contract can justify termination without notice. *Id.* Damage claims should be based on section 823 of the Civil Code “Liability in Damages” together with section 1 of the German Act Against Unfair Competition. However, it is very difficult to prove infringement of a

secrecy clause because a plaintiff must prove that (1) the plaintiff possessed a trade secret; (2) the defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means; and (3) the defendant's use of the trade secret is to the plaintiff's detriment. 54A AM. JUR. 2d § 1071.

^{xix} Katarzyna A. Czapracka, *Antitrust and Trade Secrets: The U.S. and the EU Approach*, 24 SANTA CLARA COMPUTER AND HIGH TECH. L.J. 207, 222 (2008). With the adoption of the UTSA by New Jersey the only remaining states that protect trade secrets under unique state statutes or common law are Massachusetts, New York and Texas. N.J. Stat. Ann. § 56:15 (West 2012).

^{xx} UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 546 (1980) (amended 1985).

^{xxi} *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972).

^{xxii} HAROLD BROWN ET AL., *FRANCHISING REALITIES & REMEDIES* § 12.04[4][c], at 12-57 (2010); W. MICHAEL GARNER, *FRANCHISE AND DISTRIBUTION LAW AND PRACTICE* § 7:49 (2012-13)

^{xxiii} *See AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 2011 WL 6155037, at *3 (8th Cir. December 13, 2011) (citing UNIF. TRADE SECRETS ACT § 4(i), 14 U.L.A. 546 (1980) (amended 1985)).

^{xxiv} *Penalty Kick Mgmt. v. Coca Cola Co.*, 318 F.3d 1284 (11th Cir. 2003).

^{xxv} *See e.g. Sherman Antitrust Act*, 15 U.S.C. §§ 1-40 (2004).; Federal Trade Commission Rule, 16 C.F.R. §§ 436.1-11 (2009) [hereinafter FTC Rule]; California Cartwright Act, CAL. BUS. & PROF. CODE, §§ 16720-28 (2011); Florida Antitrust Act of 1980, FLA. STAT. §§ 542.15-31 (1980).

^{xxvi} FTC Rule , 16 C.F.R. § 436 (2009).

^{xxvii} The FTC rule and most state laws exclude some relationships from their definition of a franchise for purposes of disclosure. *See, e.g.*, 16 C.F.R. § 436.8 (2007); CAL. CORP. CODE § 31100 (West. 2011); N.Y. Gen. Bus. § 684 (McKinney 2011). For example, a “fractional franchise” safe harbor exists when a business opportunity will constitute merely a part of a company's existing business. 16 C.F.R. § 436.8(a)(2) (2007) The FTC rule allows the exemption only when the franchisee has more than two years of prior management experience in the business represented by the franchise and where the parties anticipate that sales under the franchise will represent no more than 20 percent of the dollar volume of the franchisee's projected gross sales. 16 C.F.R. § 437.2 (a)(5)(h) (2008). Rhode Island and Wisconsin exclude sales to purchasers with high net worth or high income and significant franchise experience. R.I. GEN LAWS. ANN. § 19-28.1-6(4) (West. 2011); Wis. Stat. Ann. §553.235(1). Furthermore, states like California and New York exempt sales by large franchisors from the registration requirement. CAL. CORP. CODE § 31101(a) (West. 2011); N.Y. Gen. Bus. § 684(2)(a) (McKinney 2011).

^{xxviii} The FTC Rule identifies a number of disclosures that the franchisor must provide to a prospective franchisee in a written document, ranging from the history of the franchisor to the identity of other franchisees to details of any “earnings claim” or “financial performance representations.” FTC Rule , 16 C.F.R. § 436 (2009).

^{xxix} However, the state-imposed requirements for disclosure documents must be in compliance with the federal rule that governs federal regulatory policy. The federal rule, entitled, “Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures,”

promulgated in 1979 and amended in 2007, remains a disclosure rule, not a rule mandating a filing with the government or outlining certain substantive law requirements. 16 C.F.R. §§ 436.1—36.3 (2009). There is no private right of action under the Rule, *id.*, but twelve states have statutes providing a private right of action when the franchisor fails to comply with that state’s registration or disclosure laws; injured persons can recover damages and, in some states, rescind the transaction. CAL. CORP. CODE §§ 31300, 31301 (West 2005); HAW. REV. STAT. § 482E-9 (2011); 815 ILL. COMP. STAT. 705/26 (2009); MD. CODE ANN., BUS. REG. § 14-227(b), (c) (1992); MICH. COMP. LAWS § 445.1531 (1984) (amended 1989); MINN. STAT. § 80C.17 subd. 1 (1973) (amended 1993); N.Y. GEN. BUS. LAW § 691(1) (McKinney 2012); N.D. CENT. CODE § 51-19-12 (2011); R.I. GEN. LAWS § 19-28.1-21 (1993); VA. CODE ANN. § 13.1-571 (1972); WASH. REV. CODE § 19.100.190 (2011); WIS. STAT. § 553.51 (2012). Another state, Indiana, has a franchise registration or disclosure act upon which a private right of action is more limited, with liability only arising if there is a finding that the franchisor violated the law’s antifraud provisions. *Hardee’s of Maumelle, Ark. v. Hardee’s Food Sys., Inc.*, 31 F.3d 573, 577 (7th Cir. 1994) (citing IND. CODE § 23-2-2.5-27).

^{xxx} *Join IFA*, International Franchise Association, <http://www.franchise.org/join.aspx> (last visited Feb 12, 2012) (“Membership in the IFA is for franchise professionals who are committed to excellence and who adhere to IFA’s Code of Ethics.”).

^{xxx}ⁱ INTERNATIONAL FRANCHISE ASSOCIATION’S CODE OF ETHICS (1996), *available at* <http://www.franchise.org/industrysecondary.aspx?id=16078>.

^{xxx}ⁱⁱ *Id.*

^{xxx}ⁱⁱⁱ 16 C.F.R. 436.1(h).

^{xxx}^{iv} *Id.*

^{xxx}^v *Id.*

^{xxx}^{vi} *Id.*; *see also* William K. Killion & Sarah J. Yatchak, *But It Doesn’t Walk or Talk Like A Duck: The Perils of the Hidden Franchise*, GPSOLO 1, 1 (2008).

^{xxx}^{vii} *Bunn-O-Matic Corp. v. Bunn Coffee Serv.*, 88 F. Supp. 2d 914, 921 (C.D. Ill. 2000).

^{xxx}^{viii} *In re Travelot Co.*, 286 B.R. 447, 455 (Bankr. D. Ga. 2002).

^{xxx}^{ix} *Miller v. Glenn Miller Prods.*, 318 F. Supp. 2d 923, 938 (C.D. Cal. 2004).

^{xl} 14 AM. JUR. 2d § 22; *see e.g.* *Foss v. Culbertson*, 136 P.2d 711, 719 (Wash. 1943).

^{xli} *Westco Group, Inc. v. K.B. & Assocs.*, 128 F. Supp. 2d 1082, 1091 (N.D. Ohio 2001).

^{xlii} Marco Hero, Trademark Protection for Services is Liberalised (2005), http://www.franchise-net.ru/DE/Franchise_know-how/International/E1290.htm (last visited March 13, 2011); Interview with Marco Hero, Attorney, Tigges Rechtsanwälte, Nov. 11, 2010 (Munich, Germany).

^{xliii} Paul Jones *et al.*, *2006 Year-in-Review for International Commercial Transactions Committee*, INTERNATIONAL LAWYER (forthcoming 2007) (draft at 11), <http://meetings.abanet.org/webupload/commupload/IC732000/newsletterpubs/2006YIRTransactions.pdf>

^{xliv} *Id.* at 11-12.

^{xlv} *Id.*

^{xlvi} *Id.*

^{xlvii} Federal Trade Commission, *Interpretive Guides to Franchising and Business Opportunity*

Ventures Trade Regulation Rule (“Interpretive Guides”), *Bus. Franchise Guide* (CCH) ¶ 6207, 44 *Fed. Reg.* 49966 (Aug. 24, 1979). This basic elaboration of the rule remained unchanged with the Amendment of the Rule in 2007.

^{xlviii} *Id.*; see also Federal Trade Commission, *Franchise Rule Compliance Guide*, 4-6 (May 2008)

^{xlix} See, e.g., WASH. REV. CODE ANN. § 19.100.010 (West 2012). Generally, the payment of the fee gives the franchisee a proprietary interest in the licensed mark, name, or logo. *Middle Tenn. Assoc., Inc. v. Leeville Motors, Inc.*, 803 S.W.2d 206 (Tenn. 1991) (“Some states have held that the requirement of a conveyance of the right to use the franchisor's trademark, logo or trade name means that the franchisee has a proprietary interest in the name, mark or logo and may use it as if it is the franchisee's own.”).

^l *Thueson v. U-Haul Intern., Inc.*, 144 Cal. App. 4th 664, 676 (1st Dist. 2006), as modified, (Nov. 21, 2006).

^{li} *Digital Equipment Corp. v. Uniq Digital Techs., Inc.*, No. 88-C-0644, 1993 WL 338985, at *6 (N.D. Ill. Jan. 11 1995).

^{lii} *Premier Wine & Spirits of South Dakota Inc. v. E. & J. Gallo Winery*, 644 F. Supp. 1431 (E.D. Cal. 1986), *judgment aff'd*, 846 F.2d 537 (9th Cir. 1988).

^{liii} 16 C.F.R. §436 (2008).

^{liv} See, e.g., MINN. STAT. ANN. § 80C.01 (West 2012) (Excluding “the repayment by the franchisee of a bona fide loan made to the franchisee from the franchisor” from the definition of franchise fee.) *Id.*

^{lv} 16 C.F.R. §436 (2008).

^{lvi} For example, in *Bly & Sons, Inc. v. Ethan Allen Interiors, Inc.*, Civil No. 05-668-GPM, 2006 WL 2547202 (S.D. Ill., Sept. 1, 2006), the court held that a mandatory, ongoing advertising fee constituted an “indirect” franchise fee under the Illinois franchise laws. *Id.* at *3. As a result, and because the other elements of a franchise were undisputed, the court granted partial summary judgment in favor of the alleged franchisee. *Id.* at *6. To make matters worse, the same court may determine the existence of a franchise fee in one instance and in another find it to be a business expense. In *Pool Concepts, Inc. v. Watkins, Inc.*, *Bus. Franchise Guide* (CCH) ¶ 12, 249 (D. Minn. 2002), for example, a Minnesota federal court judge decided that a payment was an advertising contribution, hence a franchise fee – a portion of the plaintiffs’ required product purchases were deposited automatically into a mandatory co-op advertising account controlled by the licensor. Conversely, in *R & A Small Engine, Inc. v. Midwest Stihl, Inc.*, Civ. No 06-877 Dsd/Jjg, 2006 WL 3758292 (D. Minn. Dec. 20, 2006), the same court found that a dealer’s payments for advertising, meeting attendance expenses, and advertising co-op contributions were ordinary business expenses, not franchise fees. *Id.* at *4 (resting its decision on the absence of proof that the dealer was required to incur these expenses for the right to enter into the franchise agreement).

^{lvii} Not all states with franchise laws include the need for a marketing plan or system in their statutes. Instead, regulations, interpretative releases, advisory opinions, and judicial decisions implicate the need for a marketing plan. See John R.F. Baer, et. al., *When Are Sales Representatives Also Franchisees?*, 27 *Franchise L.J.* 151, 152-53 (2008).

^{lviii} See, e.g., *Calderon v. Southwestern Bell Mobile Sys., LLC*, 390 F. Supp. 2d 714, 719 (N.D. Ill. 2005) (finding that plaintiffs had sufficiently alleged existence of a franchise, as defined in the Illinois law, 815 ILL. COMP. STAT. act no. 705 sec. no. 3(1), by alleging that, by virtue of agreement, a dealer was granted the right to sell the company's products and services).

^{lix} *See id.* (finding that the dealer's operation was substantially associated with company's trademark).

^{lx} *See id.* at 120 (finding that dealer was required to directly pay company a \$1000 franchise fee for right to sell company's products and services).

^{lxi} Oregon is the only state with a disclosure/registration law that does not have a franchise fee element in its definition of a franchise. California, Hawaii, Indiana, Maryland, Michigan, Minnesota, North Dakota, South Dakota, Washington and Wisconsin require the payment of some form of franchise fee, but do not set a minimum requirement. Illinois, Rhode Island, New York and Virginia include payment of a franchise fee if it meets a certain threshold. *See*, Baer, *supra* note lvii, at 160.

^{lxii} *Id.* at 154.

^{lxiii} *See, e.g.* Atlantic City Coin & Slot Serv. Co., Inc. v. IGT, 14 F. Supp. 2d 644, 658 (D.N.J. 1998) (discussing how the New Jersey Franchise Practices Act requires the franchisor and franchisee to have a “community of interest,” which ensures that the franchisee makes a substantial investment in the franchise and maintains the franchise in New Jersey; *see generally* Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc., 63 F.3d 262 (3d Cir. 1995) (analyzing the New Jersey Franchise Practices Act, N.J.S.A. § 56:10-3(a)).

^{lxiv} Bus. Franchise Guide (CCH) ¶ 12,871 (N.J. Super. Ct. Ch. Div. 2004).

^{lxv} *Heyman v. A.R. Winarick, Inc.*, 523 F.2d 584 (2d Cir. 1963); *Hoeltke v. C.M. Kemp Manuf. Co.*, 80 F.2d 912 (4th Cir.), *cert. denied*, 298 U.S. 673 (1935).

^{lxvi} *See, e.g.*, *Jet Spray Cooler, Inc. v. Crampton*, 282 N.E.2d 921, 925 (Mass. 1972) (holding that customer lists given to employees by employer were not trade secrets because the employer did not take reasonable steps to protect the secrecy of the information or inform the employees that the lists were confidential).

^{lxvii} *See, e.g.*, *Kubic, Inc. v. Hull*, 224 N.W.2d 80, 92 (Mich. Ct. App. 1974) (stating, “[t]o the extent that unrestricted product marketing, and the accompanying likelihood of reverse engineering . . . renders product design information readily available to the general public, we think it a crucial factor in the determination of trade secret status.”)

^{lxviii} *See, e.g.*, *Smith v. Dravo Corp.*, 203 F.2d 369, 373 (7th Cir. 1953).

^{lxix} *See, e.g.*, *Lowndes Products, Inc. v. Brower*, 191 S.E.2d 761, 766 (S.C. 1972) (determining that an employer was not entitled to injunctive relief against a former employee where the employer failed “to take proper and reasonable steps to protects its trade secrets.”)

^{lxx} *See, e.g.*, *American Express Financial Advisors, Inc. v. Antis*, 285 F. Supp. 2d 818 (N.D. Iowa 2005) (finding that franchise agreement provided that franchisee would not “communicate, divulge, or use for himself . . . except pursuant to the System, or for the benefit of any other person, partnership, association, or corporation any confidential information, or trade secrets, including, without limitation, Client names, addresses and data and know-how concerning the methods of operation of the System and the business franchised.”)

^{lxxi} *Cudhay Co. v. American Labs, Inc.*, 313 F. Supp. 1339, 1343 (D. Neb. 1970).

^{lxxii} *Brescia v. Angelin*, 172 Cal. Rptr. 3d 842, 849 (Cal. Ct. App. 2009).

^{lxxiii} While absolute secrecy is not required to establish that something is a trade secret, there must be a substantial element of secrecy so that a third person would have difficulty in acquiring the necessary information for manufacturing the product without resorting to the use of improper

means of acquiring the secret. *Hickory Specialties, Inc. v. B & L Labs., Inc.*, 592 S.W.2d 583, 587 (Tenn. Ct. App. 1979).

^{lxxiv} 17A Am. Jur. 2d § 222 (2011); *see, e.g.*, *Shuttleworth, Ruloff, and Giordana, P.C. v. Nutter*, 493 S.E.2d 364, 366 (Va. 1994); *Rollyson v. Jordan*, 518 S.E.2d 372, 380 (Va. 1999).

^{lxxv} By way of comparison, even though know-how is an integral component of the German franchise system, it is not specifically protected or defined under German law. Schulz, *supra* note xviii, at 149. This likewise is the approach taken in most of central or eastern Europe. For example, neither Ukrainian nor Russian franchising legislation establishes any specific rules with respect to know-how. Thus, in both countries the franchise contract is defined as the transfer of the exclusive rights on the paid ground for a purpose of production and/or sale of a certain kind of goods and/or providing services. While the Civil Code of the Russian Federation uses the term “know-how” defining the franchise contract, *Grazhdanskii Kodeks RF [GK] [Civil Code] art. 1465* (Russ.), the Civil Code of Ukraine uses a more general term, “commercial secret,” because the term “know-how” is not defined under Ukrainian legislation. Interview with Iuliia M. Kuchma, Lawyer, Baker & McKenzie – CIS, Limited, Kiev, Ukraine Offices (Feb. 19, 2010).

^{lxxvi} *See e.g.*, *Titan Intern., Inc. v. Bridgestone Firestone North America Tire*, 752 F. Supp. 2d 1032, 1038 (S.D. Iowa, 2010) (stating whether information constitutes a trade secret is a mixed question of law and fact); *Weins v. Sporleder*, 569 N.W.2d 16, 20 (S.D. 1997) (same); *Pincheira v. Allstate Insurance Company*, 164 P.3d 982, 1001 (N.M. Ct. App.2007) (same).

^{lxxvii} *Interbake Foods, L.L.C. v. Tomasiello*, 461 F. Supp. 2d 943, 964 (D. Iowa 2006).

^{lxxviii} *Penalty Kick Mgmt. v. Coca Cola Co.*, 318 F.3d 1284, 1293 (11th Cir. 2003).

^{lxxix} *Id.*

^{lxxx} *Id.* at 1292.

^{lxxxi} Restatement (Third) of Unfair Competition § 40 (2011).

^{lxxxii} *Penalty Kick Mgmt.*, 318 F.3d at 1293

^{lxxxiii} *Id.*

^{lxxxiv} *Id.*

^{lxxxv} *Id.*

^{lxxxvi} *See* The California Access to Securities Information and Franchise Information (the Cal-EASI database) at <http://www.corp.ca.gov/CalEASI/caleasi.asp> (last visited Feb. 22, 2013). For more on the franchisor contracts research, *see* Robert W. Emerson, *Franchise Phrasing: Strong Words, But Weak Faith* (Nov. 29, 2012) (unpublished manuscript, on file with author).

^{lxxxvii} It was present in 98% of the franchise agreements examined. Emerson, *supra* note lxxxvi.

^{lxxxviii} *See id.*

^{lxxxix} *See id.*

^{xc} More information is on file with the author.

^{xci} BLIMPIE OF CALIFORNIA, INC. <http://www.blimpie.com/> (last visited Jan. 29, 2013).

^{xcii} BLIMPIE OF CALIFORNIA, INC. http://www.blimpie.com/own_a_store/franchise_faq.html (last visited Jan. 2, 2013).

^{xciii} This section of the website, http://www.blimpie.com/own_a_store/franchise_faq.html (last visited Dec. 15, 2009), was actually referred to as Franchise FAQ. It was question 13 of a series of 14 questions, with other topics covering, *inter alia*, fees and investment costs, franchise length and renewal, the lack of a protected territory, and restaurant location assistance and other support, with the answers being as short as a sentence to as long as eight sentences. *Id.*

^{xciv} The Blimpie website, http://www.blimpie.com/own_a_store/franchise_faq.html (last visited Dec. 15, 2009), had through information about various aspects of training (*see infra* text accompanying notes xcv-c), but now has little if any specific disclosures on the website. BLIMPIE OF CALIFORNIA, INC. http://www.blimpie.com/own_a_store/franchise_faq.html (last visited Jan. 29, 2013).

^{xcv} Blimpie website, http://www.blimpie.com/own_a_store/franchise_faq.html (last visited Dec. 15, 2009).

^{xcvi} *Id.*

^{xcvii} *Id.*

^{xcviii} That was in question 12 of the series of 13 questions concerning support. *Id.*

^{xcix} *Id.*

^c Kerry M. Jaccard, Vice President of Operations Services for Blimpie’s parent company, of Kahala, wrote that the extensive training continues, and he also noted, “To the best of my knowledge, the information was removed because prospective franchisees very often had more questions rather than less questions about the training process based on the information on our website. We’ve found that our franchisee development team is able to answer training questions at the appropriate time in the process and guide prospects through the information in person more effectively or via an email conversation.” E-mail from Jaccard to Aaron Holman, assistant to the author (Oct. 12, 2012, 2:45 PM EST) (on file with author).

^{ci} Auntie Anne’s Inc. <http://www.auntieannesfranchising.com/Default.aspx?TabId=69> (last visited Jan. 12, 2012), http://www.benjerry.com/scoop-shops/franchise-opportunities/training_support.cfm Ben and Jerry’s Inc. (last visited Jan. 2, 2013), Hungry Howie’s, www.hungryhowies.com (last visited Jan. 2, 2013), Jimmy John’s, www.jimmyjohns.com (last visited Jan. 22, 2013), Lee’s Sandwiches, www.leessandwiches.com (last visited Jan. 22, 2013), Mr. Greek <http://www.mrgreek.com/> (last visited Jan. 22, 2013), Pizza Hut, <http://www.pizzahut.com/> (last visited Jan 22, 2013), Shakey’s Pizza, <http://www.shakeys.com/>, Wing Stop, <http://www.wingstopfranchise.com/training.aspx> (last visited Jan 2, 2013).

^{cii} CALIFORNIA CHICKEN GRILL, <http://www.californiachickengrill.com/> (last visited Jan 12, 2012)

^{ciii} RED BRICK PIZZA, <http://www.redbrickpizza.com/api/Index.cfm/cms.page/i/487/t/Franchise-FAQ/> (last visited Jan 2, 2013). Under question 9 on the website

^{civ} *Id.*

^{cv} MR. GREEK, <http://mrgreek.com/franchising> (last visited Jan. 29, 2013) (stating broadly, but with no more specificity, “MR. GREEK offers a comprehensive training program where new operators learn every element of their business. But the support doesn’t end there. National Office provides hands-on involvement in the pre-opening phase of preparing to open your store. Upon opening, we are there to help things go smoothly, and to assist in your Grand Opening event. And on an on-going basis the National Office staff will be there to provide advice and support to the running of your business”; then it gave an address for franchising inquiries). It hardly seems problematic that many franchisors keep training and support information away from the public by forcing interested franchisees to contact them for further information. This approach probably

weeds out many potential franchisees who are not fully committed to becoming informed investors and then, if persuaded to purchase a franchise, to do whatever must be done to operate a successful franchise. Perhaps the franchisors have concluded that some would-be franchisees are too easily “enticed” by all-too-accessible website information and need to take some initiative (e.g., contacting a company representative, they might be able to obtain more information about the training provided). See E-mail from Jaccard, *supra* note c.

Still, it is interesting that some franchisors, but not many, feel the need to detail the training services on their website. These franchisors may have found most worrisome not the “lazy” prospect but the diligent shopper for a franchise who has enough leads and simply may be disinclined to invest with a less Internet-friendly, ostensibly less informative franchisor, ^{cvi} Breeze Freeze, Glory Days Grill, Gandolfo’s Deli Boys, and Romio’s Pizza and Pasta are some of the companies that do not mention franchising their company on their website. BREEZE FREEZE, INC., <http://www.breezefreeze.com/> (last visited Jan 12, 2012), , GANDOLFO’S DELI BOYS LLC, <http://gandolfosontario.com/default.aspx> (last visited Jan 12, 2012), , GLORY DAYS GRILL www.glorydaysgrill.com (last visited Jan 12, 2012), , ROMIO’S PIZZA AND PASTA. <http://romios-pizza.com> (last visited Jan 12, 2012).

^{cvii} YOGEN FRUZ , <http://www.yogenfruz.com/home/franchise> (last visited Jan 12, 2012)

^{cviii} RUTH’S CHRIS STEAKHOUSE, http://www.ruthschris.com/home_office/franchising.html (last visited Jan 12, 2012).

^{cix} The franchisor waits to give specifics until there are inquiries from persons deemed to be serious prospects. E-mail from Jaccard to Aaron Holman, *supra* note c.

^{cx} See, e.g., *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 136 (7th Cir. 1990) (holding that “[c]osts incurred during training may be substantial and unrecoverable”); Stuart Hershman & Andrew A. Caffey, *Structuring a Unit Franchise Relationship*, in *FUNDAMENTALS OF FRANCHISING* 51, 74 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008) (noting how extensive a franchisor’s training program for franchisees generally should be, with, *inter alia*, a “school,” manuals, and “field experience” with training to be conducted at the franchisor’s principal office and travel and living costs an additional franchisee expense; also noting that the franchise’s principal owner, its outlet managers and assistant managers, and other employees would all typically need training).

^{cx} AUNTIE ANNE’S INC., <http://www.auntieannesfranchising.com/AboutUs/FAQ/tabid/69/Default.aspx>, (last visited Jan. 2, 2013); see Steve Rushmore, *Understanding Franchise Fees*, *LODGING HOSPITALITY*, Oct. 2009, at 18 (noting that the franchisee typically pays for training by the franchisor).

^{cxii} BENNIGAN’S, http://www.bennigans.com/franchise_domestic.html (last visited Jan. 29, 2013) (figures, in an earlier version of the Bennigan’s website at the category labeled the franchisee’s “estimated range of initial investment”).

^{cxiii} LEE’S SANDWICHES, <http://www.lsfranchise.com/main.php?act=franchise&id=27&page=2>, (last visited Jan. 29, 2013).

^{cxiv} BANNASTROW’S, http://www.lsfranchise.com/fr_faq.php#Answer07 (last visited Feb. 12, 2012) (located under step 5).

^{cxv} *Id.* The current iteration of the BannaStrow’s website has toned down the language in that it merely refers to “ongoing support” (no more characterizing it as “outstanding”) and it mentions “on site visits” as well as the franchisee’s being “called periodically for conferences and meetings to update and inform [the franchisee] of new trends and facts concerning [the franchisee’s] BannaStrow’s store.” <http://www.bannastrows.com/franchise/frequently-asked-questions/> (last visited Feb. 22, 2013).

^{cxvi} These companies were Auntie Anne's, BannaStrow's, Ben & Jerry's, Blendz, Blimpie, Blue Sky Creamery, Carvel, Cheeburger Cheeburger, Cinnabon, Mr. Greek, Mr. Pizza Man, Paradise Bakery and Café, and Wings-N-Things. AUNTIE ANNE'S INC., <http://www.auntieannes.com/> (last visited Feb. 22, 2013), BANNASTROW'S <http://www.bannastrows.com/> (last visited Feb. 22, 2013), BEN AND JERRY'S Inc., <http://www.benjerry.com/> (last visited Feb. 22, 2013), BLENDZ FRANCHISING SYSTEM, INC., <http://www.blendz.com/> (last visited Feb. 22, 2013), BLIMPIE OF CALIFORNIA, INC., <http://www.blimpie.com/> (last visited Feb. 22, 2013). BLUE SKY CREAMERY, INC., <http://www.blueskycreamery.com/> (last visited Jan. 4, 2013), CARVEL CORPORATION, www.carvel.com (last visited Jan. 4, 2013), CHEEBURGER CHEEBURGER, <http://cheeburgerfranchise.com> (last visited Jan. 4, 2013), CINNABON, INC., <http://www.cinnabonfranchising.com/>, (last visited Jan. 4, 2013), MR. GREEK, <http://www.mrgreek.com/> (last visited Jan. 4, 2013), MR. PIZZA MAN, <http://www.mrpizzaman.com/> (last visited Jan. 4, 2013), PARADISE BAKERY AND CAFÉ, <http://www.paradisebakery.com/> (last visited Jan. 4, 2013), WINGS-N-THINGS, <http://wings-n-things.tripod.com/franchise.html> (last visited Jan. 4, 2013).

^{cxvii} CHEEBURGER CHEEBURGER RESTAURANTS, INC., <http://cheeburger.com/franchise/benefits.asp> (last visited Jan. 12, 2012) (Under the “We make it Easy” heading).

^{cxviii} CINNABON, INC. <http://www.cinnabon.com/franchising/support.aspx> (last visited Jan. 12, 2012).

^{cxix} The franchise “operating manual” explains and governs every aspect of the franchise operation. This manual contains a substantial portion of the franchise’s know-how. Consequently, the franchise agreement, which incorporates the manual, generally reserves to the franchisor the power to change unilaterally the manual from time to time. *See, e.g.*, David A. Beyer, *The Franchise Relationship: Counseling Potential Franchisors and Franchisees*, in FLORIDA BAR, FLORIDA FRANCHISE LAW AND PRACTICE § 3-1, at *28 (2nd ed. 1996)

^{cxx} 16 C.F.R. § 437.1(a)(16)(viii) (2008).

^{cxxi} 16 C.F.R. § 437.1(a)(16)(vii) (2008).

^{cxxii} *See, e.g.*, *Dunn v. National Beverage Corp.*, 745 N.W.2d 549, 554 (Minn. 2008) (noting that the court previously affirmed a decision of the district court to allow rescission of a franchise agreement).

^{cxxiii} Thomas M. Pitegoff, *Franchise Relationship Laws: A Minefield for Franchisors*, 45 BUS. LAW. 289 (1989).

^{cxxiv} *Id.* (citing Bus. Franchise Guide) (CCH) P5410.01.(2002).

^{cxxv} Howard S. Wolfson, “*One Royalty Strike and You’re Out!*”: *A Franchisor’s Independent Right To Terminate a Franchise Agreement for Nonpayment of Royalties and the Remedies under the Lanham Act*, 17 FRANCHISE L.J. 1, 3 (1997) (citing *In re Arthur Treacher’s Franchisee Litig.*, 689 F.2d 1137, 1141 (3d Cir. 1982)).

^{cxxvi} Tracie A. Nicastro, *How the Cookie Crumbles: The Good Cause Requirement for Terminating a Franchise Agreement*, 28 VAL U. L. REV. 785, 785-86 (1994).

^{cxxvii} *Id.*

^{cxxviii} *See, e.g.*, *7-Eleven, Inc. v. Dar*, 757 N.E.2d 515, 522 (Ill. App. 2001) (finding an implied covenant of good faith in a convenience store franchise agreement requiring the franchisor to terminate the agreement only for good cause).

^{cxxix} See, e.g. In re Printronics, Inc., 189 B.R. 995, 999 (Bankr. N.D. Fla. 1995) (describing the termination provisions of a franchise agreement.)

^{cxxx} See *Foremost Corp. of America v. Burdge*, 638 F. Supp. 496 (D.N.M. 1986); cf. *Weight Watchers of Quebec Ltd. v. Weight Watchers Intern., Inc.*, 398 F. Supp. 1047 (E.D.N.Y. 1975).

^{cxxxii} See, e.g., *Burger King Corp. v. Duckrey*, 2011 WL 6937384, at *5 (S.D.Fla. Dec. 22, 2011) (finding clause in termination agreement barring franchisee from continuing to use promotional and advertising materials after termination to be valid).

^{cxxxiii} See *Aamco Transmissions, Inc. v. Wirth*, 2011 WL 6088671, at *1 (E.D. Pa. Dec. 7, 2011) (describing how franchisee failed return operations manual as required by the termination provision of the franchise agreement).

^{cxxxiiii} See, e.g., *Tutor Time Learning Ctrs., LLC v. Larzak, Inc.*, 2007 U.S. Dist. LEXIS 49740 (N.D. Ind. July 6, 2007) (relevant provisions of a franchise agreement and covenant not to compete upon termination of the franchise relationship).

^{cxxxv} See, e.g., *Allright Auto Parks, Inc. v. Berry*, 409 S.W.2d 361, 362 (Tenn. 1966) (finding time and territorial limits must not be greater than necessary to protect employer's interests).

^{cxxxvi} Loi no. 89-d1008 of 31 December 1989, Journal Officiel de la République Française [J.O.][Official Gazette of France], 2 January 1990, 9. Combined with Decree No. 91-337, the French law regulates disclosure, but it applies to any person who provides to another person a corporate name, trademark or trade name in furtherance of a business arrangement with an “exclusive or quasi-exclusive territory.” The Loi Doubin, however, has limited relevance to know-how because it primarily deals with the pre-contractual delivery of notification by the franchisor to the franchisee, so that the latter might be able to make an informed decision as to entering an exclusivity agreement. See UNIDROIT, *Legislation and Regulations Relevant to Franchising* (July 14, 1999), <http://www.unidroit.org/english/guides/2007franchising/country/france.htm>.

^{cxxxvii} DIDIER FERRIER, *DROIT DE LA DISTRIBUTION* 350 (6th ed. 2012) [hereinafter FERRIER, *DROIT DE LA DISTRIBUTION*].

^{cxxxviii} Commission Regulation 330/2010, 2010 J.O. (L102) 1, 1-7 [hereinafter Regulation 330/2010]; *Commission Notice: Guidelines on Vertical Restraints*, at 14, 17-19, 33, 61-63, SEC (2010) 411 final (May 10, 2010). Regulation 330/2010, similar to the now-expired EC Regulation 2790/1999, defines vertical agreement as “an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.” Regulation 330/2010 at 3; Commission Regulation 2790/1999, 1999 O.J. (L336) 21, 23 [hereinafter Regulation 2790/1999].

^{cxxxix} *Commission Notice: Guidelines on Vertical Restraints*, *supra* note cxxxviii.

^{cxxxix} *Id.* Also, more general international principles may provide guidance, but are certainly not geared specifically toward franchise relations.

The drafting principles of contract law such as the principles of international commercial contracts finalized by UNIDROIT in 1994 and the restatement since 1995 of principles of European contract law by the Land Commission were aimed to respond to current international needs and practices whilst being at the same time a source of inspiration and a potential model for community or national legislation on contract.

EVA STEINER, FRENCH LAW: A COMPARATIVE APPROACH 299 (2010).

^{cxl} STEINER, *supra* note cxxxix, at 297.

^{cxli} *Id.* at 299.

^{cxlii} Cour d'appel [CA] [regional court of appeal] Poitiers, 1e ch., Sept. 13, 2005, Juris-Data, 287162; *see supra* note xii and accompanying text.

Similarly, franchising in Germany is not regulated under a specific set of laws. The relationship is generally ruled by freedom of contract (ALBRECHT SCHULZ, GERMANY, 132-167, 133 (MARTIN MENDELSON ED., FRANCHISING IN EUROPE, 1993)); however, it is also shaped by areas of law such as trade, debt, competition and cartel law. German Franchise Association, Code of Ethics, Article 2.2, http://www.franchiseverband.com/fileadmin/dfv-files/Dateien_Dokumente/Code_of_ethics.pdf (last visited Jan. 4, 2013).

In Germany, although there are no general requirements for a model contract, every franchise agreement has to be written in accordance with specific rules. *See* James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 Yale J. Int'l L. 109, 141 (2003) (noting that Germany was a European pioneer in addressing the issue of “?standard terms”).

^{cxliii} Didier Ferrier, *La franchise: un contrat d'exploitation de droits intellectuels*, in DROITS DE PROPRIETE INTELLECTUELLE: LIBER AMICORUM GEORGES BONET 187 (LexisNexis 2010) [hereinafter Ferrier, *La franchise*].

^{cxliv} *See* European Commission, Vertical Agreements, <http://ec.europa.eu/competition/antitrust/legislation/vertical.html> (last visited Feb. 24, 2013).

^{cxlv} J-M. LELOUP, LA FRANCHISE, DROIT ET PRATIQUE 55 (2004).

^{cxlvi} PHILIPPE LE TOURNEAU, LES CONTRATS DE FRANCHISE 17 (2007). For information on the Association's missions and goals, *see* <http://www.afnor.org/en/group/about-afnor/about-us> (last visited Oct. 6, 2012).

^{cxlvii} Regulation 330/2010, *supra* note cxxxvii, at 3.

^{cxlviii} The largest European economy, Germany, has also adopted this definition of know-how. Franchisestarter.de, EG-Recht, <http://www.franchisestarter.de/franchise/recht/eg-recht/> (last visited 3/14/10).

^{cxlix} Regulation 330/2010, *supra* note cxxxvii, at 3.

^{cl} *Id.*

^{cli} Regulation 2790/1999, *supra* note cxxxvii, at 22.

^{clii} LELOUP, *supra* note cxlv, at 56.

^{cliii} *Id.*

^{cliv} *Id.*

^{clv} Case 32/88, Six Constructions Ltd. v. Paul Humbert, 1999 E.C.R. 00341.

^{clvi} Chambre commerciale et financiere [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs] July 13, 1966, JCP 1967 éd. G , 15131, note Durand. In order to enforce the protection of know-how French litigation involving franchises many times is based on the concept of unfair competition. Emmanuel Schulte, *Franchise in 33 Jurisdictions Worldwide*,

http://www.franchise.org/uploadedFiles/Franchise_Industry/International_Development/Resource/s/France%20laws.pdf (last visited Jan. 27, 2013).

clvii LELOUP, *supra* note cxlv, at 56 (“*Il est bien evident que le savoir-faire est destine à être communiqué à de nombreux franchisés : sa valeur ne diminue pas, pour un nouveau franchisé, de la révélation faite à ceux qui l’ont précédé dans le réseau. Au contraire, elle s’accroît de la somme d’expériences résultant de la multiplication des établissements franchisés*”).

clviii *Id.*

clix *Id.*

clx *Id.*

clxi *Id.* Taking a hotel franchise as an example, the know-how transmitted to the franchisee might consist of particular elements such as criteria used for the location of the hotel, the layout of access roads and parking lots, the architecture of the buildings, the construction materials, the interior layout of the guestrooms, dining room, lobby, the decoration and furniture, the informational systems used for making reservations, etc. *Id.* at 56-57.

clxii *Id.* at 57. Thus, in a hotel franchise, knowledge transmitted about the structure of a building and its landscaping, elements of the package deal, etc., might be highly original and yet the originality of knowledge transmitted about the billing method may be virtually nonexistent. *Id.* at 57.

clxiii *Id.* at 57.

clxiv *Id.*

clxv September 29, 2008, Tribunal Commerce of Rouen.

clxvi LUDWIG VON BERTALAUFFY, THÉORIE GÉNÉRALE DES SYSTÈMES, FRENCH TRANSLATION (1973), cited in LELOUP, *supra* note cxlv, at 57.

clxvii LELOUP, *supra* note cxlv, at 57.

clxviii *Id.* (quoting Art. L. 112-3, French Code of Intellectual Property (Code de Propriété Intellectuelle): “The authors of translations, adaptations, transformations or arrangements of works of the mind shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work. The same shall apply to the authors of anthologies or collections of miscellaneous works or data, such as databases, which, by reason of the selection or the arrangement of their contents, constitute intellectual creations”).

clxix *Id.* at 58 (quoting Cour d’appel [CA][regional court of appeal] Paris, April 20, 1978, Cahiers du droit de l’entreprise, 1980, 5, note- J.-M. Leloup).

clxx *Id.* at 58.

clxxi *Id.*

clxxii FERRIER, DROIT DE LA DISTRIBUTION *supra* note cxxxvi, at 356.

clxxiii LELOUP, *supra* note cxlv, at 58.

clxxiv *Id.*

clxxv CODE DE COMMERCE [C. COM.] art. L330-3 (Fr.) states:

Any person who provides to another person a corporate name, trademark or trade name, . . . , shall be required, . . . , to provide the other party with a

document giving truthful information allowing the latter to commit to this contract with full knowledge of the facts.

This document . . . shall specify in particular the age and experience of the undertaking, the state and prospects for development of the market concerned, the size of the network of operators, the term and conditions of renewal, cancellation and assignment of the contract and the scope of the exclusive rights.

When the payment of a sum is required prior to the signature of the contract[,] the benefits provided in return for this sum shall be specified in writing together with the reciprocal obligations of the parties in the event of renunciation.

^{clxxvi} LELOUP, *supra* note cxlv, at 58.

^{clxxvii} Cour d'appel [CA] [regional court of appeal] Montpellier, 1e ch., March 8, 1995, Juris-Data, 034068.

^{clxxviii} *Id.*

^{clxxix} In Germany, the obligation to grant know-how is inferred from the duty to cooperate. MARTIJN WILLEM HESSELINK, ET.AL., COMMERCIAL AGENCY, FRANCHISE AND DISTRIBUTION CONTRACTS 228 (2006).

^{clxxx} LELOUP, *supra* note cxlv, at 58.

^{clxxxi} *Id.*

^{clxxxii} *Id.*

^{clxxxiii} Tribunal de Commerce [ordinary court of original jurisdiction for commercial matters] Paris, May 31, 1988, *Infotech et Infosud v. Entre*, RDPI 1988, 20, 96.

^{clxxxiv} *Id.*

^{clxxxv} LELOUP, *supra* note cxlv, at 58.

^{clxxxvi} *Id.* Article L-330-3 of the French Commercial Code underscores this principle where it stipulates that the franchisor has to deliver to the franchisee any information about the reality of commercial success at least twenty days before any payments on or signing of the franchising contract. CODE DE COMMERCE [C. COM.] art. L330-3 (Fr.)

^{clxxxvii} Tribunal de Commerce [ordinary court of original jurisdiction for commercial matters] Paris, May 31, 1988, RDPI 1988, 20, 96.

^{clxxxviii} Cour d'appel[CA] [regional court of appeal] Paris, March 10, 1989, Gaz. Pal. 1989, 2, p. 544.

^{clxxxix} I.e., becoming a franchisor.

^{exc} DOMINIQUE BASCHET, LA FRANCHISE: GUIDE JURIDIQUE-CONSEILS PRATIQUES 31 (2005).

^{exci} Chambre commerciale et financière [Cass. com][highest court of ordinary jurisdiction over commercial and financial affairs], Oct. 19, 1999, pourvoi # 97-19.185.

^{excii} LE TOURNEAU, *supra* note cxlvi, at 228.

^{exciii} European Code of Ethics for Franchising, article 2.2:

The obligations of the Franchisor : The Franchisor shall

- have operated a business concept with success, for a reasonable time and in at least one pilot unit before starting its franchise network,
- be the owner, or have legal rights to the use, of its network's trade name, trademark or other distinguishing identification,
- provide the Individual Franchisee with initial training and continuing commercial and /or technical assistance during the entire life of the agreement.

^{cxci} BASCHET, *supra* note cxc, at 137.

^{cxcv} Cour d'appel[CA] [regional court of appeal] Paris, Feb. 23, 1979, Petites Affiches 23 Jul. 1979, n°88, p.3.

^{cxevi} Regulation 330/2010, *supra* note cxxxvii, at 3.

^{cxevii} LELOUP, *supra* note cxlv, at 59.

^{cxeviii} *Id.*

^{cxci} *Id.*

^{cc} Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs] July 1, 2003, note Didier Ferrier; see also Didier Ferrier, *D. Affaires 2005*, somm. p. 154; Cass. Com. Feb. 19, 1991, D. 992, somm., p. 392.

^{cc} *Id.*

^{ccii} *Id.*

^{cciii} *Id.*

^{cciv} Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs], July 1, 2003, CTM/Secta (réseau Autosur), #01-12699 (not published in a reporter; only published on the Legifrance website, at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT00007459729&fastReqId=769378623&fastPos=162>). Professor Ferrier confirms that this remains the law. Interview with Didier Ferrier, June 6, 2012 (Montpellier, France).

^{ccv} Regulation 330/2010, *supra* note cxxxvii, at 3.

^{ccvi} Case 161/84, Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis, 1986 ECR 00353; Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs], July 13, 1996, JCP, éd. com. 1996, 15131.

^{ccvii} Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs], Oct. 9, 1990, RJDA 1/31, 19.

^{ccviii} Ferrier, *La franchise*, *supra* note cxliii, at 3 n.22.

^{ccix} STEINER, *supra* note cxxxix, at 37. Modern reforms for the most part have dealt with electronic contract and evidential requirements. *Id.*

^{ccx} *Id.*

^{ccxi} *Id.* at 41 (noting that the French Commercial Code, described *infra* note ccxii, applies exclusively to commercial transactions). It has been contended that the Uniform Commercial Code and the American Law Institute are modeled after the French Civil Law Code. *See id.* at 42.

Certainly the French Civil Code has also influenced international accords such as the UN Convention on Contracts for International Sale of Goods, the EC Convention of Law Applicable to Contractual Obligations, and Lando Commission. United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3,19 I.L.M. 671, available at Pace Law School Institute of International Commerce Law, <http://www.cisg.law.pace.edu> (last updated Sept. 2003); 23 O.J. EUR. COMM. (No. L 266) (1980); STEINER, *supra* note cxxxix, at 299. CITATION FOR THIS SENTENCE; CITATIONS FOR THESE ACCORDS.

^{ccxii} STEINER, *supra* note cxxxix, at 298. *See* Com. Code, Art L110-1, 2. The French Commercial Code defines the commercial nature of a contract either objectively (characterizations of transaction *acte de commerce* (*see* Com. Code, Art. L121-1) or subjectively (the quality of the parties who are considered *commerçants* – persons, such as merchants, engaged in commercial deals).

^{ccxiii} STEINER, *supra* note cxxxix, at 289. In 2005, proposals for reform, titled *Avant-Projet*, were submitted to the French Minister of Justice. The purpose of the reform was not to change existing provisions but rather fill the gaps left by the original drafters in 1804. *Id.*

^{ccxiv} *See id.* at 298-99. The formal separation is exemplified by the fact that “the contractual rights of *commerçants* are enforced by special commercial courts.” *Id.*

^{ccxv} *Id.* at 298-99.

^{ccxvi} *Id.* at 297. General provisions such as Autonomy of the Will and principles of good faith are codified in Article 1134 of the French Civil Code. Specific provisions such as for the sale of goods (*vente*) or agency (*mandats*) are also provided.

^{ccxvii} *Id.* at 299 (on *obligation de sécurité*). The French judges rely heavily on case law that interprets the application and interplay of the French Commercial Code, Civil Code, codes of deontology, and the EC regulations to extract rules regarding know-how or other concepts. STEINER, *supra* note cxxxix, at 37 & 40.

^{ccxviii} STEINER, *supra* note cxxxix, at 299.

^{ccxix} *Id.* at 303. *See* French Civil Code, Art. 1152.

^{ccxx} STEINER, *supra* note cxxxix, at 300. *See* Rousseau’s Concept of *Social Contract*, Contract Social, II,6.; Jean Domat, *Les Lois Civiles Dans Leur Ordre Naturel*, Book I, Title I, section 2, VII. Some important consequences of Domat’s seminal work from 1689 (with dozens of later editions) are as follows (i) individuals are free to make any kind of agreement that they may wish, subject to the restrictions of the law and public policy. (ii) the courts cannot modify the terms of a contract or fill any gaps left by the parties thereto. (iii). individuals cannot be made to enter a contract against their free will. (iv) there are no formal requirements for the expression of each party’s will and for the terms of their final agreement. *Id.*

^{ccxxi} STEINER, *supra* note cxxxix, at 301.

^{ccxxii} *Id.* at 302. The UK passed the UK Unfair Contract Terms Act in 1977, which quickly became codified in France under Art. L132-1 *Code de la Consommation*. *See* Cass. Civ. 1, 14 May, 1991 Lorthioir, Minit Foto c/ Boucheran (holding that the judge has the power to strike down clauses in consumer contracts found to be abusive).

^{ccxxiii} STEINER, *supra* note cxxxix, at 304. *See* 1995 *Conseil d’état décisions Commune de Morsang Sur-orge*, Rec. Lebon, 372. This principle has also been adopted in Canada. *See generally* *Syndicat Northcrest v. Amsellem* [2004] 2 RCS 551. Still, one should not overemphasize these differences. Freedom-of-contract has never been absolute in the United

States, either. Courts may invoke duress, capacity, undue influence, lack of consideration or other concepts to trump individual autonomy. 16B AM. JUR. 2d *Constitutional Law* § 641 (2013).

^{ccxxiv} STEINER, *supra* note cxxxix, at 310. See Article 1108, French Civil Code.

^{ccxxv} STEINER, *supra* note cxxxix, at 311. Promissory estoppel is an example of an English contract that does not require consideration.

^{ccxxvi} *Id.* at 314.

^{ccxxvii} *Id.*

^{ccxxviii} *Id.* at 315.

^{ccxxix} *Id.* at 316.

^{ccxxx} *Id.* See also Restatement (Second) of Contracts §17 (1962).

^{ccxxxi} See JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, *PRINCIPLES OF FRENCH LAW* 297 (Oxford Univ. Press, 2nd ed. 2008).

^{ccxxxii} STEINER, *supra* note cxxxix, at 309. However, the Civil Code expressly specifies that certain contracts must be in writing to give them binding force. For example: gifts (Art. 931), regulations of assets of prospective spouses (Art. 1394), mortgage (Art. 2127), and debt assignment (Art. 1250. Currently, French law increasingly requires that the drafting of a contract as a necessary condition for a contract to be binding. See Law of 3 January 1967 *Code de la Construction*. Compare the Civil Code with the Statute of Frauds in Uniform Commercial Code requiring any contract for the sum of \$5,000 or more be in writing, signed by the party to be charged and Article 11 of the Convention on International Sales of Goods requiring no writing at all for there to be a contract. U.C.C. § 2-201 (2010); C.I.S.G., art. 11 (2011). Cf. U.C.C. § 2-201 (providing specific writing requirements for certain contracts, both private and commercial, in the United States).

^{ccxxxiii} STEINER, *supra* note cxxxix, at 309.

^{ccxxxiv} *Id.*

^{ccxxxv} STEINER, *supra* note cxxxix, at 309. See C.L. LIM & O.A. ELIAS, *THE PARADOX OF CONSENSUALISM IN INTERNATIONAL LAW*, PAGE NUMBER? (1998).

^{ccxxxvi} STEINER, *supra* note cxxxix, at 309.

^{ccxxxvii} LELOUP, *supra* note cxlv, at 60.

^{ccxxxviii} *Id.*

^{ccxxxix} *Id.*

^{ccxl} Commission Regulation 2790/1999, *supra* note cxxxvii, at 21-25.

^{ccxli} *Id.*

^{ccxlii} *Id.*

^{ccxliii} *Id.*

^{ccxliv} STEINER, *supra*, note cxxxix, at 313. See *Belhomme v. Parti Socialiste et Autres* (1994 RTDC 1995 (2), 351).

^{ccxlv} *Id.*

^{ccxlvi} *Id.*

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- ^{ccxlvii} Trib. comm. [court of original jurisdiction for commerce] Paris, Feb. 23, 1979, *Petites Affiches* #88, July 23, 1979, note J. Guyénot.
- ^{ccxlviii} LELOUP, *supra* note cxlv, at 60-61.
- ^{ccclix} Trib. comm. [court of original jurisdiction for commerce] Lyon, Nov. 30, 1978 (cited in LELOUP, *supra* note cxlv, at 61).
- ^{ccl} LELOUP, *supra* note cxlv, at 61; Cour d'appel [CA] [regional court of appeals] Paris, 16e ch. A, July 3, 2002, D. 2003 somm., 2429, obs. D. Ferrier.
- ^{ccli} LELOUP, *supra* note cxlv, at 61-62.
- ^{cclii} *Id.*
- ^{ccliii} *Id.* at 62.
- ^{ccliv} La lettre de la distribution juill.-août 1990, p. 4.
- ^{cclv} Ferrier, *La franchise*, *supra* note cxliii, at 9.
- ^{cclvi} LELOUP, *supra* note cxlv, at 62.
- ^{cclvii} *Id.* at 63.
- ^{cclviii} *Id.*
- ^{cclix} Trib. comm. [court of original jurisdiction for commerce] Paris, May 4, 2001: Lettre distrib. 2002-1. [Use Bluebook reporter cite]
- ^{cclx} LELOUP, *supra* note cxlv, at 259.
- ^{cclxi} *Id.* at 296.
- ^{cclxii} *Id.* at 296-97.
- ^{cclxiii} *Id.* at 29-97.
- ^{cclxiv} STEINER, *supra* note cxxxix, at 336.
- ^{cclxv} *Id.* This concept of “execution force” can be equated with what is known as specific performance in the United States. Specific performance is “a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate.” BLACK’S LAW DICTIONARY 1529 (9th ed. 2009).
- ^{cclxvi} *Id.* at 337-38.
- ^{cclxvii} *Id.* at 297.
- ^{cclxviii} *Id.*; CODE CIVIL [C. CIV.] art. 1382 (Fr.) “*Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.*”
- ^{cclxix} LELOUP, *supra* note cxlv, at 297.
- ^{cclxx} Article L. 62101 of the intellectual property code only protects technical knowledge if a confidentiality obligation concerning the technical knowledge has been violated.
- ^{cclxxi} *Id.*
- ^{cclxxii} *Id.*; the protection of trade secrets is limited as well. The owner of the secret is protected against its unauthorized broadcasting by third parties who obtain it by unlawful means.
- ^{cclxxiii} *See, e.g.,* Pirtek USA, LLC v. Zaetz, 408 F. Supp. 2d 81, 81 (D. Conn. 2005).

^{cclxxiv} LELOUP, *supra* note cxlv, at 110; generally, the concept is equivalent in the United States. Robert W. Emerson, *Franchising Covenants Against Competition*, 80 IOWA L. REV. 1049 (1995).

^{cclxxv} *Id.* at 110.

^{cclxxvi} *Id.* at 111.

^{cclxxvii} Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs] Feb., 22, 2000, JCP E 2001, Cah. dr. entr., 2001, n° 2, 31.

^{cclxxviii} Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs] Jul., 1st, 2003, JCP E 2004, 869.

^{cclxxix} Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs] Jan., 7, 2004, conc., consom. 2004, comm. 77.

^{cclxxx} Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs] Jul., 4, 1995, RJDA 1996, n°16.

^{cclxxxi} LELOUP, *supra* note cxlv, at 110-111.

^{cclxxxii} Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs] Jul., 4, 1995, RJDA 1996, n°16.

^{cclxxxiii} *See* Commission Regulation 4087/88, 1988 J.O. (L359) 46 [hereinafter Regulation 4087/88]. Article 3 § 1c) provides:

Article 1 shall apply notwithstanding the presence of any of the following obligations on the franchisee, in so far as they are necessary to protect the franchisor's industrial or intellectual property rights or to maintain the common identity and reputation of the franchised network: ... (c) not to engage, directly or indirectly, in any similar business in a territory where it would compete with a member of the franchised network, including the franchisor; the franchisee may be held to this obligation after termination of the agreement, for a reasonable period which may not exceed one year, in the territory where it has exploited the franchise..

^{cclxxxiv} *Id.*

^{cclxxxv} Regulation 2790/1999, *supra* note cxxxvii, at 24 (stating that “[t]he exemption provided for in Article 2 shall not apply to any of the following obligations contained in vertical agreements: ... (b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services, unless such obligation:

- relates to goods or services which compete with the contract goods or services, and
- is limited to the premises and land from which the buyer has operated during the contract period, and
- is indispensable to protect know-how transferred by the supplier to the buyer,

and provided that the duration of such non-compete obligation is limited to a period of one year after termination of the agreement; this obligation is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain”);

Regulation 330/2010, *supra* note cxxxvii, at 6 (stating that “ the exemption provided for in Article 2 shall apply to any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services where the following conditions are fulfilled:

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- (a) the obligation relates to goods or services which compete with the contract goods or services;
- (b) the obligation is limited to the premises and land from which the buyer has operated during the contract period;
- (c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer;
- (d) the duration of the obligation is limited to a period of one year after termination of the agreement.

Paragraph 1(b) is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain”).

^{cclxxxvi} Regulation 2790/1999, *supra* note cxxxvii, at 24; Regulation 330/2010, *supra* note cxxxvii, at 6.

^{cclxxxvii} See, e.g., Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs] [need region here], Feb. 22, 2000, Juris-Data #000776.

^{cclxxxviii} Cour d’appel [CA] [regional court of appeal] Caen, Sept. 29, 2005, Juris-Data #299499.

^{cclxxxix} *Id.*

^{ccxc} Interview with Didier Ferrier, June 6, 2012 (Montpellier, France).

^{ccxc}ⁱ Regulation 4087/88, *supra* note cclxxxiii.

^{ccxc}ⁱⁱ Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs], Jan. 17, 2006. Juris-Data #031799, Bull. civ. IV, #9, 8.

^{ccxc}ⁱⁱⁱ Cour d’appel [CA] [regional court of appeal] Paris, Feb. 29, 1996, Juris-Data #020858.

^{ccxc}^{iv} Cour d’appel [CA] [regional court of appeal] Caen, Sept. 29, 2005, Juris-Data n.299499.

^{ccxc}^v Cour d’appel [CA] [regional court of appeal] Rennes, Mar. 23, 2004, JCP E 2005, #11, 446.

^{ccxc}^{vi} *Id.* at 317.

^{ccxc}^{vii} *Id.*

^{ccxc}^{viii} Com.18 janvier. 1966 Bull. Civ. 3, pg. 32)

^{ccxc}^{ix} Art L442-6-1 of French Commercial Code states that non-renewal of the franchise contract may be considered as default when the franchisor did not send written notice to the franchisee in a reasonable time prior to termination. This is called “rupture brutale des relations commerciales établies”, and the court may decide to maintain the contractual relationship if the non-renewal, coupled with lack of written notice, may cause damages to the franchisee.

^{ccc} T. Com. Paris 14 fev. 1979, Cah. Dr. ent. 1979, p. 12.

^{ccci} LELOUP, *supra* note cxlv, at 317.

^{ccci}ⁱⁱ *Id.*

^{ccci}ⁱⁱⁱ *Id.*

^{ccci}^{iv} *Id.*

^{cccv} *Id.*

^{cccv}ⁱ The French concept of cause has sometimes been compared with common law consideration but remains a quite different notion. Cause has two main features: the first is an objective one

whereby cause is regarded as the abstract reason behind the debtor's promise while the second aspect of cause is subjective; it represents the main individual motive behind the promise, which will therefore be different for every contract. The absence or defectiveness of cause of a contract is usually sanctioned by the annulment of the contract. *See* DENIS TALLON, *CONTRACT LAW in INTRODUCTION TO FRENCH LAW* by G.A. BERMAN & E. PICARD, at 217 (2008).

^{cccvii} CODE CIVIL [C. CIV.] art. 1108 (Fr.) “*Four requisites are essential for the validity of an agreement:*

The consent of the party who binds himself;

His capacity to contract;

A definite object which forms the subject-matter of the undertaking;

A lawful cause in the obligation.”

^{cccviii} Charles R. Calleros, *Introducing Civil Law Students to Common Law Legal Method Through Contract Law*, 60 *J. Legal Educ.* 641, 651 (2011) (citing BARRY NICHOLAS, *THE FRENCH LAW OF CONTRACT* 118 (2d ed., Clarendon Press 1992).

^{cccix} *Id.* (citing The French Code Civil art. 1108 (John H. Crabb trans., rev. ed., Rothman 1995)); *see also* BARRY NICHOLAS, *THE FRENCH LAW OF CONTRACT* 118 (2d ed., Clarendon Press 1992)

^{cccx} CODE CIVIL [C. CIV.] art. 1131 (Fr.) “*An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect”.*

^{cccxi} LELOUP, *supra* note cxlv, at 320.

^{cccxii} ODAVIA BUENO DAAZ, *FRANCHISING IN EUROPEAN CONTRACT LAW: A COMPARISON BETWEEN THE MAIN OBLIGATIONS OF THE CONTRACTING PARTIES IN THE PRINCIPLES OF EUROPEAN LAW ON COMMERCIAL AGENCY, FRANCHISE AND DISTRIBUTION CONTRACTS, FRENCH AND SPANISH LAW* 129 n.473 (2008) (listing over a dozen French court decisions or legal commentaries concerning a franchisee's suit to annul the franchise due to the franchisor's failure to transmit know-how).

^{cccxiii} Cour d'appel [CA] [regional court of appeal] Pau, Oct. 10, 2005, *Juris-Data* 291080.

^{cccxiv} *Id.*

^{cccxv} *Id.*

^{cccxi} Interview with Didier Ferrier, June 6, 2012 (Montpellier, France).

^{cccxvii} Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs] Pourvoi, Dec. 13, 1994, 92-19.055.

^{cccxviii} Cour d'appel [CA] [regional court of appeal] Paris, Sept. 18, 1996, *De cœur/Centre des Usines de Carrelages*, *Juris-Data* 022995.

^{cccxi} Cour d'appel [CA] [regional court of appeal] Montpellier, Mar. 8, 1995, *Pace/Agecobat*, *Juris-Data* 034068.

^{cccxx} Cour d'appel [CA] [regional court of appeal] Bordeaux, Feb. 8, 1994, *Relais de la Vallée/Hôtelière Cognacaise*, *Les Annonces de la Seine*, suppl. au n#20 du Mar. 14, 1994, 8.

^{cccxxi} Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs], Dec. 13, 1994, n#92-19.055.

cccxxii *Id.*

cccxxiii *Id.*

cccxxiv Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs] Apr. 29, 1997, n#95-10-362

cccxxv *Id.*

cccxxvi LELOUP, *supra* note cxlv, at 322.

cccxxvii *Id.*

cccxxviii Cour d'appel [CA] [regional court of appeal] Paris, Apr. 14, 1995, Phone permanence/Lebreton, Juris-Data n#021571.

cccxxix Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs], Apr. 29, 1997, n#95-10-362.

cccxxx LELOUP, *supra* note cxlv, at 322.

cccxxxi *Id.*

cccxxxii *Id.*

cccxxxiii Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs], May 16, 2000, RJDA 11/00, n#974, (annulling the contract, but refusing the damages).

cccxxxiv STEINER, *supra* note cxxxix, cxl at 329.

cccxxxv *Id.*

cccxxxvi *Id.*

cccxxxvii *Id.* Cf. U.C.C. § 7.19 (describing when a seller can disclaim the implied warranty).

cccxxxviii *Id.*

cccxxxix *Id.*

cccxl LELOUP, *supra* note cxlv, at 324-25.

cccxli *Id.* at 324.

cccxlii In the United States, this concept can refer to the act of unmaking a contract or to the a court judgment resulting in the contract being ended. See BLACK'S LAW DICTIONARY 1420-21 (9th ed. 2009).

cccxlili LELOUP, *supra* note cxlv, at 325; Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs], Feb. 1, 1994, Shop Salon/Sodiam, #92-10.111, Juris-Data 000986.

cccxliv LELOUP, *supra* note cxlv, at 325; STEINER, *supra* note cxl, at 334. Under art. 1134 of the Civil Code, the contract has the force of *loi* between the parties. The parties are under obligation to perform what they have promised and the contract can be revoked *only* by mutual consent of the parties.

cccxlv STEINER, *supra* note cxl, at 336.

cccxlvii *Id.*

cccxlviii *Id.*

^{cccxlviii}LELOUP, *supra* note cxlv, at 325..

^{cccxlix} Cour d'appel [CA] [regional court of appeal] Paris, Jan. 19, 1990 La lettre de la Distribution, July-Aug. 1990, p. 4.

^{ccccl} STEINER, *supra* note cxl, at 337. A second remedy available to a claimant is specific performance (*exécution forcée*). This remedy is codified in Art. 1184 “the party towards whom the undertaking has not been fulfilled has the choice either to compel the other to fulfill the agreement when it is possible, or to request its avoidance with damages.” Generally, a claimant will serve the defendant with a *mise en demeure* notice, which urges the defendant to perform. If the court so chooses, it can attach to its decision and order, an *astreinte* which requires the defendant to pay the claimant a specified sum for the amount of time he remains in default. *See* Law of 9 July 1991, art. 33.

^{ccccli} *Id.*

^{cccclii} *Id.* *See* Cass. Soc., 7 July 1955, D, 1957, 1.

^{ccccliii} *Id.* at 338.

^{ccccliv} *Id.*

^{cccclv} *Id.* If the parties agreed to a remedy, the contract is terminated in the event of non-performance. *See generally* Part I. *See* Bell, *supra* note ccxxxii, at 357.

^{cccclvi} LELOUP, *supra* note cxlv, at 325.

^{cccclvii} *Id.* at 312.

^{cccclviii} *Id.*

^{cccclix} *Id.* at 326.

^{cccclx} *Id.*; Cour d'appel [CA] [regional court of appeal] Paris, Feb. 27, 1989. Juris-Data 020407.

^{cccclxi} FERRIER, DROIT DE LA DISTRIBUTION, *supra* note cxxxvi, at 325.

^{cccclxii} LELOUP, *supra* note cxlv, at 341.

^{cccclxiii} This procedure is known as “*référé-contrefaçon*”. *Id.* at 342.

^{cccclxiv} *Id.* at 342 (citing CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.] art. L716-6 (Fr.):

The President of the Court before which proceedings have been instituted, sitting in chambers, may provisionally prohibit a continuation of the allegedly infringing acts, subject to a daily fine, or may subject such continuation to the furnishing of securities for the purpose of ensuring compensation to the owner of the mark or to the beneficiary of an exclusive right of exploitation.

Action for prohibition or furnishing of securities shall be admissible only if the case appears well-founded and proceedings were instituted within a short time after the day on which the owner of the mark or the beneficiary of an exclusive right of exploitation obtained knowledge of the facts on which they are based. The judge may subject prohibition to the furnishing by the plaintiff of securities to provide compensation for any prejudice suffered by the defendant if the infringement proceedings are subsequently held to be unfounded.

^{cccclxv} LELOUP, *supra* note cxlv, at 342.

^{cccclxvi} BELL, *supra* note ccxxxii, at 297.

^{ccclxvii} STEINER, *supra* note cxxxix, at 337; Civil Code Art. 1142 (concerning *dommages-intérêts*).

^{ccclxviii} *Id.*

^{ccclxix} *Id.* But see *Avant-Project Catala* which proposed the introduction of new Art. 1371 providing that punitive damages should be paid in addition to compensatory damages when the defendant has broken the contract deliberately and tried to make an additional profit.

^{ccclxx} See *generally* 2 Digest of Commercial Laws of the World § 19:165 (2012) (discussing the remedies available to a franchisor for misconduct on the part of the franchisee).

^{ccclxxi} Chambre commerciale et financière [Cass. com.] [highest court of ordinary jurisdiction over commercial and financial affairs], Feb, 22, 2000, pourvoi #97-18.728.

^{ccclxxii} French Civil Code Art 1382.

^{ccclxxiii} See Frauke Henning-Bodewig, *The Approach to Regulation in the Continental EC States (Including the EC Directive on Misleading Advertising*, 54 Antitrust L.J. 551, 556-57 (1985).

^{ccclxxiv} “Abus de confiance.” LELOUP, *supra* note cxlv, at 342.

^{ccclxxv} CODE PÉNAL [C. PÉN.] art. 314-1 (Fr.):

Breach of trust is committed when a person, to the prejudice of other persons, misappropriates funds, valuables or any property that were handed over to him and that he accepted subject to the condition of returning, redelivering or using them in a specified way. Breach of trust is punished by three years' imprisonment and a fine of €375,000.

^{ccclxxvi} LELOUP, *supra* note cxlv, at 342.

^{ccclxxvii} BELL, *supra* note ccclxvi, at 333. See *generally* French Civil Code, Art. 1134 *Alinea 3* (stating contracts must be performed in good faith by the parties).

^{ccclxxviii} *Id.* The United States has a similar provision mentioned in the Uniform Commercial Code. U.C.C. § 2-203 (1977).

^{ccclxxix} *Id.* (citing CODE PÉNAL [C. PÉN.] art. 311-1 (Fr.): “*Theft is the fraudulent appropriation of a thing belonging to another person.*”)

^{ccclxxx} Chambre criminelle [Cass. crim.] [highest court of ordinary jurisdiction over criminal affairs] Dec. 8, 1998, #97-83318 D. 2000, p. 87, obs. S. Frossard.

^{ccclxxxi} *Id.* (trans. by author of the French holding: *Attendu que toute appropriation de la chose d'autrui, contre le gré de son propriétaire ou légitime détenteur, caractérise la soustraction frauduleuse constitutive de vol, quels que soient le mobile qui a inspiré son auteur et l'utilisation du bien appréhendé*)

^{ccclxxxii} See *generally*, 2 Trade Secrets Throughout the World § 14:18 (2011) (discussing criminal liability under Article 408).

^{ccclxxxiii} See *generally*, 2 Trade Secrets Throughout the World § 14:19 (2011) (discussing criminal liability under Article 379).

^{ccclxxxiv} See *generally*, 2 Trade Secrets Throughout the World § 14:10 (2011) (discussing criminal liability under Article 418)..

^{ccclxxxv} See Robert W. Emerson, *Franchise Contracts and Territoriality: A French Comparison*, 3 ENTREPRENEURIAL BUS. L.J. 315, 315-16 (2009).

^{ccclxxxvi} Cour d'appel [CA] [regional court of appeal] Colmar, Mar. 7, 2006, Juris-Data #298557.

^{ccclxxxvii} *Id.* (“Le franchisé procédera à toute modification complémentaire spécifique des locaux, de leur agencement ou décoration qui seraient nécessaires pour prévenir toute association, confusion ou ressemblance avec le réseau, et notamment modifier les couleurs spécifiques (bleu et blanc)”).

^{ccclxxxviii} *Id.* (“Attendu que si ces dispositions contraignent clairement l’ancien franchisé à renoncer à la combinaison des couleurs bleue et blanche dans l’agencement extérieur du centre de lavage, il ne peut être inféré de cette obligation une interdiction d’utiliser la couleur bleue”).

^{ccclxxxix} *Id.*

^{cccxc} *Id.* (“L’intimée utilise les couleurs jaune et bleue sur ses deux sites, étant observé que le bleu mis en œuvre est d’une nuance totalement distincte du bleu marine vers lequel semble incliner l’appelante.”)

^{cccxi} Petites affiches, Nov. 9, 2006, #224, 41.