AN INTERNATIONAL MODEL FOR VICARIOUS LIABILITY IN FRANCHISING

Robert W. Emerson, 2015*

Vicarious liability in the franchising context is a fundamental issue, both in the United States and many foreign jurisdictions. As there has been no all-encompassing, clear precedent in the United States, other nations' approaches may provide lessons for American lawmakers and the U.S. franchising community. The division between jurisdictions and the absence of uniform standards for imposing vicarious liability on franchisors together demonstrate the need for more comprehensible and predictable case law. In fact, parties to a franchise agreement can determine the accompanying risks and better plan their subsequent behavior, even accounting for approaches in a global environment, not simply at home.

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I. Introduction

Franchising is one of the most popular methods for running and expanding a business. In the United States, franchised businesses account for one-third of all retail sales,[1] with approximately 760,000 operating franchised units,[2] over 8.2 million employees,[3] another 10 million jobs indirectly,[4] and perhaps 2 trillion dollars in annual retail sales.[5] The American concept of franchising is expanding rapidly throughout the world, with an increasing share of international commerce.[6] Collectively, these businesses have accrued hundreds of billions of dollars in annual sales.[7] In response, more and more governments have decided to police those that choose to franchise, with franchise-specific legislation now integrated into forty nations' legal regimes.[8] This rise in international regulation will no doubt continue.

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[1] This has long been franchising's rough percentage of the total retail economy, since at least the year 2001. ROGER D. BLAIR & FRANCINE LAFONTAINE, THE ECONOMICS OF FRANCHISING 26–27 n.28 (2005). For earlier statistics, see LAVERNE L. LUDDEN, U.S. DEP'T OF COMMERCE MINORITY BUS. DEV. AGENCY, FRANCHISE OPPORTUNITIES HANDBOOK vii (1995); Robert W. Emerson, *Franchising Covenants Against Competition*, 80 IOWA L. REV. 1049, 1050–51 n.4 (1995) (citing numerous sources concerning the rapid growth of franchising in both the 1980s and the early 1990s).

[2] IHS GLOBAL INSIGHT, FRANCHISE BUSINESS ECONOMIC OUTLOOK: MAY 2013, at 3 (May 31, 2013), http://emarket.franchise.org/Franchise_Business_OutlookMay.pdf.

[3] *Id.*

[4] *Id.;* Int'l Franchise Ass'n, *About the International Franchise Association*, http://www.buildingopportunity.com/ (last visited July 30, 2015) (citing studies with 2007 figures finding approximately "825,000 franchise businesses across 300 business lines, which support nearly 18 million jobs and generate $2.1 trillion of economic output to the U.S. economy"); Nat'l Econ. Consulting (NEC), *The Economic Impact of Franchised Businesses, Volume II: Executive Summary and Highlights*, INT'L FRANCHISE ASS'N EDUC. FOUND., at 6-7, 11-12 (Jan. 31 2008) [hereinafter NEC, *The Economic Impact*],, *available at* http://www.franchise.org/uploadedFiles/Franchisors/Other_Content/economic_impact_documents/EconImpact_Vol2_HiLights.pdf (stating, that franchising – directly or indirectly - accounted for approximately 21 million jobs, representing an expanding proportion, 15.3%, of the total private-sector workforce). Over 8.6 million U.S. jobs are directly in franchised units. *U.S. Added 33,300 Franchise Jobs in July, According to ADP National Franchise Report*, MARKET WATCH, Aug 5, 2015, *available at* http://www.marketwatch.com/story/us-added-33300-franchise-jobs-in-july-according-to-adp-national-franchise-report-2015-08-05.

[5] As of 2006, franchising generated an overall output of $1.53 trillion. *Small Company Trends in 2007*, THE TRIBUNE (Northern Colorado), Dec. 31, 2006, *available at* http://www.greeleytrib.com/article/20061231/BUSINESS/112310347.

[6] Robert W. Emerson, *Franchise Encroachment*, 47 AM. BUS. L.J. 191, 198, 198 n.23 (2010) (detailing the numerous statistics indicating the phenomenal growth of franchising worldwide, both throughout Europe and such diverse and important national economies as those of Australia, Brazil, China, India, and Japan).

[7] *2008 Event Summary: Franchise Symposium Material Consultation Paper on Franchising Legislation Manitoba Law reform Commission*, 8 ASPER REV. INT'L BUS. & TRADE L. 181, 187 (2008) [hereinafter *2008 Event Summary*] (reporting that according to a study conducted in 2001, "more than 767,000 franchised businesses directly employ[ed] 9.8 million people, with a payroll of $229 billion and an economic output of nearly $625 billion"; also noting that franchising in 2001 accounted for 11% of the private sector payroll and 9.5% of the private sector economic output - more than $1.53 trillion).

[8] As of 2014, franchise-specific legislation has been integrated into 40 countries' legal regimes. INTERNATIONAL FRANCHISE ASS'N, INTERNATIONAL FRANCHISING LAWS, at http://www.franchise.org/international-franchising-laws (2011) ("Laws Applicable to Franchising February 2014" map showing the spread of franchising-specific legislation across the globe: 40 nations - 7 in the Americas, 15 in Europe (9 European Union nations and 6 non-EU countries), 3 in Africa, 6 in Central or Western Asia, 8 in East or Southeast Asia, and Australia).

Overall, worldwide franchising, even more so than franchising in the United States, has experienced a high rate of growth in recent years.[9] As an example, Germany, where its first McDonald's opened in 1971,[10] saw a 50.79% increase in franchisors, an 83.87% increase in franchisees, and a 40.62% growth in franchises from 1998 to 2008.[11] As franchises have increased in international popularity, crucial legal issues have emerged concerning basic jurisdictional matters, such as conflicts of law, fundamental contract disputes over interpretation or even exclusion of clauses in the franchise agreement, and the franchisor's potential vicarious liability for its franchisee's actions. The contract and tort issues arise, in part, from a tenet of franchise ownership and management: that the franchisee is not completely free to run the business as he sees fit. Besides the usual federal and state regulations governing businesses generally, the franchisee is subject to the rules imposed by the franchisor in the parties' agreement or in ancillary documents (e.g., the operations manual).[12]

This Article concerns vicarious liability in the franchising context as addressed in a number of foreign jurisdictions. As there has been a lack of clear precedent in the United States, these foreign approaches may provide lessons for American lawmakers and the U.S. franchising community.[13] The division among jurisdictions and lack of uniform standards for imposing vicarious liability on franchisors demonstrates the need for more understandable and predictable case law, such that parties to a franchise agreement can determine the accompanying risks of entering into the relationship and better plan their subsequent behavior.

Despite the lack of uniform standards in both the United States and international franchising communities, vicarious liability in general has three core requirements. First, there must be a legally sufficient relationship existing between the person causing the plaintiff's injury and the vicariously liable defendant.[14] Second, the person must act wrongfully in causing the plaintiff's injury.[15] Third, the tortious act must have occurred within the scope of the relationship between the tortfeasor and the vicariously liable defendant.[16] The first core element of vicarious liability, the legally sufficient relationship, has been the source of much of the confusion in establishing a consistent blueprint in franchising law.

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[9] Emerson, *supra* note 6, at 196-97 n.24 (detailing the numerous statistics indicating the phenomenal growth of franchising worldwide).

[10] *A brief history of McDonald's*, http://www.mcspotlight.org/company/company_history.html (last visited July 11, 2013).

[11] *Franchise-Fakten 2010*, DEUTSCHER FRANCHISE VERBAND E.V. 4 (2010), available at http://www.franchiseverband.com (last visited July 28, 2015).

[12] *See* Schlotzsky's, Inc. v. Hyde, 538 S.E.2d 561, 563 (Ga. Ct. App. 2000).

[13] *Compare* Kerl v. Dennis Rasmussen, Inc., 682 N.W.2d 328, 332 (Wis. 2004) (demonstrating the majority approach to franchisor vicarious liability, which assumes that an independent agency relationship exists between the franchisor and franchisee and focuses on the question of whether the franchisor had sufficient control over the proximate cause of harm to make it vicariously liable), *with* Myers v. Garfield & Johnson Enters., Inc., 679 F. Supp. 2d 598, 617 (E.D. Pa. 2010) (demonstrating the minority approach and holding that the franchisor was potentially liable under three different theories: (1) directly as a "joint employer" with franchisee; (2) vicariously as franchisee's actual principal under an agency relationship; and (2) vicariously as plaintiff's "ostensible" employer).

[14] Joseph H. King, Jr., *Limiting The Vicarious Liability Of Franchisors For The Torts Of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 424 (2005); RESTATEMENT (THIRD) OF AGENCY § 7.08 (2006). To this kind of claim some courts have answered that the plaintiff did not rely on the franchisor's care, at least with respect to the injuries suffered in the particular case, although others have denied the apparent-agency claim on the ground that a franchisor does not hold out the franchisee as an agent merely by licensing the trademark to him. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 433 (2d ed. 2012)

[15] King, *supra* note 14, at 424.

[16] *Id.*; RESTATEMENT (THIRD) OF AGENCY §7.07 (2006).

The legally sufficient relationship requirement can be met by establishing either the presence of an actual sufficient relationship, an actual agency relationship, or by satisfying one of the exceptions to the relationship requirement—the apparent agency exception is the most important of these in determining franchisor vicarious liability.[17] Thus, courts have identified two basic agency law theories for holding a franchisor vicariously liable: either the "actual" or "apparent" authority of the franchisee to render its franchisor liable for its conduct.[18] These concepts are based on traditional common law and have been applied to tort, statutory and contract claims, and to the franchise relationship.[19]

First, "a franchisor may be held liable for acts of his franchisee when the actual relationship between them is that of principal and agent or master and servant."[20] Through this actual agency principle, a franchisor, like any other principal, is responsible for the acts or omissions of a franchisee that is, in fact, operating as the franchisor's agent.[21] The traditional approach for determining whether an economic relationship will be legally sufficient to support the application of vicarious liability depends on the "control" test.[22] The Restatement (Second) of Agency ("Restatement Second") defines a servant as one "who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control,"[23] and considers ten factors when applying the control test.[24] While most franchise agreements explicitly assert that the parties are independent contractors and disclaim any agency relationship, the terms of the contract will not be dispositive and the courts will choose to examine the true nature of the relationship in making its judgment.[25] The courts will consider

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[17] *See* Heather Carson Perkins, Sarah J. Yatchak & Gordon M. Hadfield, *Franchisor Liability for Acts of the Franchisee*, 29 FRANCHISE L.J. 174, 176 (2010).

[18] DAVID A. BEYER, VICARIOUS LIABILITY 4 (June 11, 2013), *available at* http://www.franchise.org/sites/default/files/ek-pdfs/html_page/VICARIOUS-LIABILITY-_David-Beyer__0.pdf; *see* THOMAS LEE HAZEN & JERRY W. MARKHAM, CORPORATIONS AND OTHER BUSINESS ENTERPRISES: CASES AND MATERIALS 41 (3d ed. 2009) (discussing how the issue of the right to control in a franchise context determines whether a franchisor has opened itself up to liability under either actual or apparent agency).

[19] Hazen & Markham, *supra* note 18, at 41.

[20] King, *supra* note 14, at 429.

[21] Beyer, *supra* note 18, at 5.

[22] King, *supra* note 14, at 430.

[23] *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

[24] *Id*. *See, e.g.*, Jones v. Filer, Inc., 43 F. Supp. 2d 1052, 1056 (W.D. Ark. 1999) (applying the ten factors). The *Jones* court expounded:

> In deciding whether a given individual or entity is an agent or an independent contractor, the Arkansas courts have considered the ten factors found in § 220 of the Restatement (Second) of Agency: (a) the extent of control which, by agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

Id.

[25] Beyer, *supra* note 18, at 5; *see, e.g.*, In re FedEx Ground Package Sys., Inc., Employment Practices Litig., 662 F. Supp. 2d 1069 (N.D. Ind. 2009) (*citing* Brown v. Who's Three, Inc., 217 Ga. App. 131, 134, 457 S.E.2d 186, 191 (Ga. Ct. App. 1995)).

operations manuals and the underlying circumstances in assessing whether an actual agency relationship exists.[26]

In evaluating this holistic approach to actual agency, courts commonly require that the control of the franchisor relate to the day-to-day operations of the franchisee in order to establish vicarious liability.[27] Courts additionally distinguish between controls intended primarily to insure "uniformity and the standardization of products and services" of the franchisee, and control over the "actual day-to-day work"—the majority of courts adopt the daily-operations-control test.[28] Moreover, many of these courts have required that the franchisor's control not merely pertain to the day-to-day operations, but also that it must encompass the specific aspects of the franchisee's operations that caused the injury at issue.[29] Yet, even with this emerging majority approach, recent decisions indicate a basis for significantly expanding the scope of franchisors' potential vicarious liability by adopting an analysis wherein generalized control over the daily operations is sufficient.[30]

To compound the confusion generated by the courts' inconsistent approaches to establishing actual agency, the waters of franchisor vicarious liability are further muddied by several generally recognized exceptions to the vicarious liability requirement that the defendant and the tortfeasor have a legally sufficient relationship, such as the prevalent apparent agency exception.[31] Through the apparent agency exception, even if the franchisee is not the franchisor's actual agent, and even if the franchisor has not retained significant control over the franchised business, the franchisor may still be liable for the franchisee's actions if an "apparent" agency has been established.[32] Two aspects of franchising cause the apparent agency doctrine to be especially germane in this franchising environment: (1) because franchisors own and operate some of their own retail units and franchise others, the consuming public is often unsure as to which are owned and operated by the principal company and which are franchised by it; and (2) the trademark, uniformity, and standardization inherent of the brand name product or service precipitates the belief that the retail unit selling that product or service is operated by the principal company rather than run as an independently owned and operated franchisee.[33] For example, the lack of public knowledge about the relationship between the franchising parties has led courts to deem the franchisee's use of the franchisor's trade name as grounds for finding apparent authority.[34] As a result of these two realities, the apparent agency doctrine is the theory that poses the greatest risk of vicarious liability for franchisors.[35]

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[26] *Id*.
[27] King, *supra* note 14, at 432.
[28] *Id*.
[29] *Id.*; *see* Gregg Rubenstein, Francesca Turitto, Penny Ward & Larry Weinberg, *Vicarious and Other Franchisor Liability, in* NEW APPROACHES AND CHALLENGES IN INTERNATIONAL FRANCHISING 3, *available at* http://www.franchise.org/sites/default/files/ek-pdfs/html_page/vicariousliability(1)_0.pdf, (detailing the majority approach to franchisor vicarious liability adopting the basic agency standard that considers the franchisor's control or right of control over the instrumentality that is alleged to have caused the harm).
[30] King, *supra* note 14, at 436; *see* Awuah v. Coverall N. Am., Inc., 707 F. Supp. 2d 80 (D. Mass. 2010) (finding an employer-employee agency between franchisor and franchisee without having to show actual control over the proximate cause of the harm).
[31] King, *supra* note 14, at 438.
[32] Beyer, *supra* note 18, at 7-8; RESTATEMENT (SECOND) OF AGENCY §267 (1958).
[33] King, *supra* note 14, at 439; Jonathan E. Schulz, *You Can't Have Your Cake and Eat It Too: The Standards for Establishing Apparent Agency*, 60 S.C. L. REV. 999 (2009).
[34] Takenari Shimizu, *Japan, in* INTERNATIONAL FRANCHISING 535, 545-46 (Dennis Campbell ed., 2d ed. 2014) (discussing a district court's rejection of the franchisor's argument that it is common knowledge that major car

An apparent agency exists if a franchisor, through its action or inaction, induces an innocent third party to reasonably conclude that the franchisee is the franchisor's agent or that the third party is dealing with the franchisor.[36] Thus, the third party must prove three elements to establish an apparent agency: (1) a representation by the principal; (2) reliance on the representation by a third person; and (3) a change of position, or damage suffered by the third person.[37] Claims of apparent agency can be overcome by adequate notices of independent ownership—notices of the franchisee's separate identity and the independent ownership placed on signage, brochures, business cards, menus, checks, purchase orders, contracts, and advertising.[38] For additional protection, the franchisor can expressly disavow responsibility for employment and other franchisee matters in the franchise agreement or operations handbook, and avoid exerting control over personnel policies, such as hiring, firing, and disciplinary matters.[39] As with actual agency decisions, cases involving attempts by plaintiffs to hold franchisors vicariously liable based on apparent agency have been divided in their outcomes.[40]

As evidenced by the whirlwind of confusion generated by both apparent agency and actual agency, the division among jurisdictions and lack of uniform standards for imposing vicarious liability on franchisors demonstrates the need for more understandable and predictable case law. Given the rapid growth in franchising and its central role in the world economy, the lack of clarity, predictability, or analytical integrity in the law governing the vicarious liability of franchisors is unsettling.[41] This article seeks to reconcile the confusion caused by franchisor vicarious liability as it has been addressed in a number of foreign jurisdictions.

II. Rome I Regulations and Conflict of Law

As more businesses began to undertake international contractual obligations, there was a steady increase of conflict of laws.[42] Initially, the applicable law in the absence of choice was

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dealers are franchisees and that franchisors are generally separate entities from franchisees). In the case described by Shimizu, *supra*, the court considered the franchisee's use of the franchisor's trade name to be sufficient for apparent authority even though the trade name was not depicted in the sales agreement itself. For discussion of apparent authority issues in U.S. franchising, particularly the common knowledge doctrine, *see* Robert W. Emerson, *Franchisor's Liability when Franchisees Are Apparent Agents: An Empirical and Policy Analysis of "Common Knowledge" About Franchising*, 20 HOFSTRA L. REV. 609 (1992). A more general analysis is found in a law student's argument for eliminating apparent agency. Chad P. Wade, *The Double Doctrine Agent: Streamlining the Restatement (Third) of Agency by Eliminating the Apparent Agency Doctrine*, 42 VAL. L. REV. 341(2007).

[35] Schulz, *supra* note 33.

[36] Beyer, *supra* note 18, at 8; *see* Allen v. Greenville Hotel Partner, Inc. 409 F. Supp. 2d 672, 680 (D.S.C. 2006).

[37] Beyer, *supra* note 18, at 8.

[38] *Id.* at 9.

[39] Wyatt Maxwell & Jess A. Dance, *NLRB Freshii Memo Offers Lessons to Franchisors on Minimising Employment Liability*, LEXOLOGY (June 16, 2015), http://www.lexology.com/library/detail.aspx?g=c7beeb1a-1ffc-44a6-a767-160f0754bdb3.

[40] King, *supra* note 14, at 439-40 (noting that the outcomes of cases addressing apparent agency are fairly evenly divided and often turn on the issue of reliance); *see* Randall K. Hanson, *The Franchising Dilemma Continues: Update on Franchisor Liability for Wrongful Acts by Local Franchisees*, 20 CAMPBELL L. REV. 91, 100 (1997) (discussing several cases with differing rationales on apparent agency).

[41] King, *supra* note 14, at 484.

[42] *See* VOLKEN & BONOMI, *infra* note 74, at 199.

determined by the Rome Convention 1980 ("RC").[43] Specifically, Article 4 of the RC determined whose law would apply to settle a disputed franchise contract.[44] Article 4.1 provides, "[t]he contract shall be governed by the law of the country which is most closely connected . . . ."[45] Further, Article 4.2 continues, "[i]t shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence . . . ."[46] Attempting to determine whose law should apply was especially difficult under the RC.[47] While Article 4.1 established that the country with the closest connection should prevail, Article 4.2 also recognized that the law of the party who held the "characteristic performance" should rule.[48] Thus, the question became: was the franchisor or franchisee the party "who [wa]s to effect the performance which is characteristic of the contract?"[49]

Experts and case law were divided on this pivotal question.[50] Initially, the franchisor was found to be the party required to affect the characteristic performance of the contract.[51] Many argued that it was the franchisor who was required to undertake multiple obligations, was the true foundation of the contract, and was required to deal with a vast degree of complex contractual situations.[52] Under this position, in the event of a conflict, and in the absence of choice, the law of the franchisor's country would be applied.[53]

However, other experts argued that the franchisee was the party required to carry out the characteristic performance of the contract.[54] Essentially, these commentators compared franchise contracts to distribution contracts and noted that because "several [c]ourt decisions had deemed the obligations of the distributor to be the characteristic performance[,]" under franchise contracts, the franchisee would be the party undertaking the characteristic performance.[55] In a distribution case, a Swiss court held that because the party bringing about the characteristic performance would be the distributor, in franchise contracts the franchisee is the party that affects characteristic performance.[56]

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[43] Rome Convention on the Law Applicable to Contractual Obligations, Jun. 19, 1980, O.J. C. 027, 34-46 (1998) [hereinafter RC], available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41998A0126(02):EN:HTML (last visited July 20, 2015).

[44] VOLKEN & BONOMI, *infra* note 74, at 202.

[45] *Id.* at art. 4.1.

[46] *Id.* at art. 4.2.

[47] *See* Laura García Gutiérrez, *Franchise Contracts and the Rome I Regulation on the Law Applicable to International Contracts, in* YEARBOOK OF PRIVATE INTERNATIONAL LAW, VOL. X, at 233, 234 (2008).

[48] Gutiérrez further notes "this problem was not confined to franchise contracts, but rather was common to all contracts lacking the exchange-of-goods/services-for-money structure." *Id. See also The Rome Convention: The Contracting Parties' Choice*, 1 SAN DIEGO INT'L L.J. 127, 144 (2000) (discussing the application of the "characteristic performance" test).

[49] Case C-133/08, Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV, 2010 2 C.L.C. 396 (European Court of Justice (Grand Chamber) 2009) (alteration in original).

[50] *Id.* at 235.

[51] *Id.*

[52] *Id.*

[53] The notion that the franchisor was the party affecting the characteristic performance also found precedent in Switzerland's Federal Code on Private International Law, which addressed conflicts of law for intellectual property contracts but had an influential effect on the drafting of the RC. *See* Gutiérrez, *supra* note 47, at 243 n.7.

[54] *Id.* at 235.

[55] *Id.* at 235-36 (alteration in original).

[56] MARK ABELL, THE INTERNATIONAL FRANCHISE OPTION 295 (1990) (citing an unreported case as recounted by R. Meroni); *see also* Gutiérrez, *supra* note 47, at 236 n.9; *see* Judgment of May 15, 1962, BGE 88 II 169, 170; Judgment of Aug. 8, 1962, BGE 88 II 325,328; Judgment of Dec. 3, 1962, BGE 88 II 471, 474. *But see* Judgment of

A further group of experts were utterly divided.[57] These experts believed that because it appeared impossible to determine which party affected the characteristic performance of a contract, the "law most closely connected with the contract should be applied on a case-by-case basis."[58] In light of the continuing conflict, a compromise was achieved in the form of the Rome I.[59]

The European Parliament and the Council of the European Union ratified Regulation (EC) No. 593/2008 (Council of 17 June 2008), governing the law applicable to contractual obligations ("Rome I").[60] The purpose of Rome I is to regulate civil and commercial obligations, including franchising, in the event of a conflict of laws.[61] Unlike the RC,[62] Rome I specifically mentions "franchises" on two occasions, first in Recital 17 and again in Article 4.[63]

The significance of Rome I, Recital 17 is that it classifies franchise contracts – and distribution contracts generally - as "contracts for service."[64] Rome I, Recital 17 also establishes that these contracts "are the subject of specific rules."[65] However, the regulation is unclear. This classification of franchise contracts has remained a point of contention among many experts seeking to determine (a) which specific rules, under Recital 17, franchises are subject to and (b) whether the classification is in specific reference to Rome I's later discussion of franchises in Article 4(e).[66]

As stated above, the second citation of "franchise" within Rome I is in Article 4(e), which specifies the applicable law for franchise contract actions where no applicable law has been chosen by the parties.[67] Article 4 states, "[t]o the extent that the law applicable to the contract has not been chosen . . . (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence . . . ."[68] Thus, in the event of a conflict of laws, the law that the designated court will apply is the law of the country of residence for the principal actor carrying out the contract, in other words, the franchisee.[69]

Feb. 12, 1952, BGE 78 II 74, 81(discussing characteristic obligations in distribution contracts). These cases are all about exclusive distribution relationships and can be found at http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm.

[57] Abell, *supra* note 54, at 236.

[58] *Id.*

[59] *See* FERRARI & LEIBLE, *infra* note 76, at 41.

[60] The Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 of the Law Applicable to Contractual Obligations, OJ L. 177, 6 (Apr. 7, 2008) [hereinafter Rome I]. Rome I replaced the Rome Convention, which established uniform rules for determining the law applicable to contractual obligations in the European Union (EU). Rome I went into effect on December 17, 2009. *See id.* at art. 29.

[61] *See id.* at art. 1.

[62] *See generally* RC, *supra* note 43.

[63] *See id.* at rec. (17), art. 4.1(e).

[64] *See id.* at rec. (17).

[65] Gutiérrez notes that the definition of a franchise contract as a service contract is not necessarily accurate. However, such a definition appears appropriate in light of the conflict that ensued under the RC. *See* Gutiérrez, *supra* note 47, at 237 (noting that defining a franchise contract as a service contract comports with answering the question, "specifically, where would the service be provided in a franchise contract?").

[66] This classification of franchise contracts is highly controversial, as it would affect not only provisions on applicable law, but also those on international jurisdiction. *See id.* at 236.

[67] *See generally* RC, *supra* note 43, at art. 4.1(e).

[68] *Id.* (alteration in original).

[69] *See id.* at 238. However, Article 4.3 also notes "where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated… the law of that other country shall apply." *Id.* at art. 4.3. Thus, article 4.1(e) would give way to article 4.3 if necessary. *See* Rome I, *supra* note 60, at art. 4.3.

The rationale behind the European Community's ("EC") legislation opting to position the franchisee as the party affecting the characteristic performance of the contract is twofold.[70] First, the franchisee has commonly been viewed as the weaker party to the contract,[71] and, therefore, through this decision the EC is attempting to protect the weaker party.[72] Second, by allowing the laws of the franchisee's habitual residence to govern the contract, in the absence of choice of law, the law "[takes] into account the legal order of the State where the franchise is operated as the market affected by the contract."[73] Combining these two EC goals may, one hopes, increase the predictability of the law applicable to franchise contracts.[74]

Yet even in the face of the EC's optimistic legislation, much like Recital 17, Article 4(e)'s definition of the franchisee as the party affecting the characteristic performance is highly contentious. Many commentators prefer the RC's finding that the characteristic performance is affected by the franchisor.[75] Yet despite the debate regarding whether the franchisor or franchisee is the party who affects the characteristic performance, it is settled that answering this question depends on the level of integration of the franchisee's business into the franchisor's business—Rome I recognizes that the freedom or dependency of the franchisee from the franchisor can vary substantially.[76] While not nearly as transparent as the European approach, it seems that both China and Australia have taken a similar approach.[77]

Ultimately, while Rome I was initially heralded as the opportunity to convert the 1980 Rome Convention into a Community instrument by transforming and modernizing its provisions, commentators remain disappointed at the end result of Rome I.[78] While the rules of Rome I work well in the case of consumers and employees, they disappoint in regards to presumptively weak

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[70] These are the opinions of Gutiérrez and not the official rationale given expressly by the EC.

[71] The proposal itself implicitly states that franchisees are the weaker party and thus are deserving of protection under the regulation. Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), 15 Dec. 2005, COM(2005) 650 final, 2-7, at 11 para. 9 (2005) [hereinafter Proposal for Rome I], available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0650:FIN:EN:PDF (last visited July 20, 2015) ("As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict rules that are more favourable to their interests than the general rules.").

[72] Gutiérrez, *supra* note 47, at 238.

[73] *Id.* (alteration in original) (internal quotations removed) (discussing Proposal for Rome I, *supra* note 71).

[74] PAUL VOLKEN & ANDREA BONOMI, YEARBOOK OF PRIVATE INTERNATIONAL LAW: VOLUME X 207 (2009) (noting that the determination of the party required to effect the characteristic performance and the identification of a characteristic performance in franchise contracts is exceedingly uncertain and controversial).

[75] Including Gutiérrez, who notes that this is because the franchisor is the party responsible "for the most complex obligations." *See id.*

[76] FRANCO FERRARI & STEFAN LEIBLE, ROME I REGULATION: THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS IN EUROPE 41 (2009). However, this is the settled answer to the conflict of law question in the EC, and it should be noted that countries such as China and Australia have different resolutions to conflict of law questions. In China, when resolving conflict of law issues, courts and judges alike are unsure of whether to apply national or local regulations. Lee, *infra* note 226, at 984. Ultimately, it is crucial to note that in the absence of franchise-specific legislation, the relationship between the franchisee and franchisor is governed exclusively by the explicit terms of the franchise agreement and the law of contract. Tamara Milenkovic Kerkovic, *The Main Directions in Comparative Franchising Regulation – Unidroit Initiative and its Influence*, EUR. RES. STUD. J., Vol. XIII, Issue 1, 250 (2010), http://www.researchgate.net/publication/46542676_The_Main_Directions_in_Comparative_Franchising_Regulation__Unidroit_Initiative_and_its_Influence.

[77] Interview with Andrew Terry, Professor of Law and Chair of Discipline of Business Regulation, Univ. of Sydney Business School, and Emeritus Professor, Univ. of New South Wales School of Business Law and Taxation (June 20, 2015).

[78] Francisco J. Garcinmartín Alférez, *The Rome I Regulation: Much ado about nothing?* Eur. Legal F. 2008, I-61.

parties, such as franchisees, due to their lack of bargaining power and generally lower amount of financial freedom.[79] Even so, commentators agree that it is preferable to have rules insulating weaker parties in most cases, even if those rules do not work well in some cases, rather than not having any such rules.[80]

III. UNIDROIT's Contribution to International Franchise Law and Vicarious Liability Concepts

The International Institute for the Unification of Private Law ("UNIDROIT") is an independent intergovernmental organization of sixty-three Member States instituted to "study needs and methods for modernizing, harmonizing and coordinating private and, in particular, commercial law as between States and groups of States."[81] Harmonizing the principles set forth by UNIDROIT is largely conditional on the States' willingness to adopt them and essentially serve as non-binding general principles and rules.[82] The Preamble to the UNIDROIT principles stipulates that the principles "shall be applied when the parties have agreed that their contract be governed by them."[83] UNIDROIT was first founded as part of the League of Nations in 1926.[84] Following the collapse of the League, the Institute was re-established in 1940.[85] However, it was not until 1985 that uniform rules for franchising were proposed.[86] At this time, franchising was not a common concept in Europe, as North America was one of the only locales that had adopted the franchising concept.[87] Initially, franchisors' representatives opposed the ratification of any uniform international franchise regulations.[88] Thus, no rules were adopted at this time, and UNIDROIT agreed to monitor the international franchise situation.[89]

By 1993, however, interest in international franchising had grown tremendously.[90] Thus, the Governing Council of UNIDROIT established a Study Group on Franchising that ultimately produced two documents, the *Model Franchise Disclosure Law*, submitted to the Governing Council on September 25, 2002,[91] and the *Guide to International Master Franchise*

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[79] CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW – LIBER AMICORUM 549 (K. Boele-Woelki et al. eds., 2010).
[80] *Id*. at 549-50.
[81] *See* UNIDROIT: AN OVERVIEW, INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (2009) [hereinafter UNIDROIT], http://www.unidroit.org/about-unidroit/overview (last visited July 20, 2015).
[82] *Id.*
[83] UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS pmbl. (2010).
[84] *See* UNIDROIT, *supra* note 81.
[85] *Id.*
[86] *See 2008 Event Summary*, *supra* note 7, at 237. In fact, it was a Canadian member of the Governing Council who proposed to the organization there should be a uniformed set of rules to govern franchise contracts. *Id.*
[87] *See id.*
[88] *See id.*
[89] *See id.*
[90] This new interest "was largely due to the increased attention devoted to franchising by legislators and the consequent proliferation of franchise laws, not all of which had, in the view of the members of the Study Group, given sufficient consideration to the specific nature and characteristic of franchising, thereby unintentionally putting the future development of franchising in the country concerned at risk." *Id.* (quoting UNIDROIT, *Model Franchise Disclosure Law*, September 2002, available at http://www.unidroit.org/english/modellaws/2002franchise/2002modellaw-e.pdf (last visited July 20, 2015)).
[91] *See* UNIDROIT, *supra* note 81, at Achievements.

Arrangements,[92] initially published in February 1998 and republished in 2007.[93] At the heart of these documents was a pro-commerce, pro-franchising orientation.[94]

The 2002 *Model Franchise Disclosure Law*[95] particularly addresses the franchisor's disclosure requirements[96] and requires the franchisor to give prospective franchisees detailed information on various qualities of the potential franchisor.[97] The disclosure document must be presented to prospective franchisees at least fourteen days before the signing of any agreement or the payment of a non-refundable deposit.[98] Disclosure issues initially considered by the Study Group included "whether the franchisee has a statutory right to renew the agreement and whether the franchisee has a right to cure when [they] breach the contract."[99] The Study Group, however, chose not to address the relationship of the parties because prior experience had revealed that relationship legislation had not been positive.[100] Instead, the Group reasoned that while it could reach an agreement on disclosure provisions, "it was far more problematic to devise common norms for relationship issues in view of the great variety of relationships that existed within the context of franchising."[101] Thus, the *Model Franchise Disclosure Law* only addresses disclosure issues and excludes the relationship of the parties at the international level.[102]

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[92] UNIDROIT, GUIDE TO INTERNATIONAL MASTER FRANCHISE ARRANGEMENTS *(*1998).

[93]UNIDROIT, GUIDE TO INTERNATIONAL MASTER FRANCHISE ARRANGEMENTS (2d ed. 2007), http://www.unidroit.org/english/guides/2007franchising/franchising2007-guide-2nd-e.pdf (last visited July 20, 2015).

[94] UNIDROIT notes, "the Model Law is intended to encourage the development of franchising as a vehicle for conducting business. As a pro-commerce document, it recognizes that franchising offers the potential of increased economic development, especially among countries seeking access to know-how." UNIDROIT, MODEL FRANCHISE DISCLOSURE LAW 10 (2002), http://www.unidroit.org/english/modellaws/2002franchise/2002modellaw-e.pdf (last visited July 20, 2015).

[95] *See* UNIDROIT, *supra* note 81, at art. 3. (The *Model Franchise Disclosure Law* contains ten articles in addition to a preamble. Article 1--deals with the scope of application of the law; Article 2-definitions; Article 3—delivery of the disclosure document; Article 4—the format of the disclosure document; Article 5—exemptions from the obligation to disclose; Article 6—information which must be disclosed; Article 7—acknowledgement of receipt of the disclosure document; Article 8—remedies; Article 9—the temporal scope of application of law; and Article 10—waivers). The franchisee cannot waive her rights under this law – such attempts are void. *2008 Event Summary*, *supra* note 7, at 238; UNIDROIT, *supra* note 88, at art. 10.

[96] [T]he Model Law ensures that the prospective franchisees who intend to invest in franchising receive material information about franchise offerings, thus permitting them to make an informed investment decision. In addition, the Model Law brings security to franchisors in their relationships with franchisees, administrative authorities and courts."

UNIDROIT, *supra* note 94, at 10.

[97] The Model Franchise Disclosure Law sets out a list of information that the franchisor must include in the disclosure statement, including the franchisor's legal name, form and address, the franchisor's principal place of business (the address), and "the trademark, trade name, business name or similar name, under which the franchisor carries on or intends to carry on business in the State in which the prospective franchisee will operate the franchise business." *See id.* at art. 6 (for an exhaustive list of disclosure requirements); *see also id.* at art. 5 (for potential disclosure exemptions).

[98] *2008 Event Summary*, *supra* note 7, at 238; *see also* UNIDROIT, *supra* note 88, at art. 3. The franchisor may deliver the disclosure statement to the franchisee in any format, so long as it is provided in writing. *Id*. at art. 4. The 14-day requirement does not apply to confidentiality agreements or security deposits for confidentiality agreements. *Id*. at art. 3.

[99] *2008 Event Summary*, *supra* note 7, at 237 (quoting UNIDROIT, *supra* note88, at Explanatory Report (19)).

[100] *See 2008 Event Summary*, *supra* note 7, at 237-38.

[101] *See id*. at 238 (quoting UNIDROIT, *supra* note 88, at Explanatory Report (20)).

[102] If the franchisor fails to deliver the disclosure statement within the allotted 14-day period, or if the statement contains a misrepresentation or omission of material fact, the franchisee reserves the right to terminate the franchise

UNIDROIT's *Guide to International Master Franchise Arrangements* ("the *Guide"*)[103] focuses on the structuring of franchise agreements, including the negotiations, drafting and the legal effects of an agreement on the parties. Similar to the *Model Franchise Disclosure Law*, the *Guide* was a product of the Study Group on Franchising, organized by the Governing Council of UNIDROIT in 1993.[104] For the purposes of this Article, Chapter 14, "Vicarious Liability, Indemnification and Insurance," is the most significant.

The *Guide*, in its Chapter 14, mirrors the Restatement Third when defining the potential liability of franchisors.[105] Similar to the Restatement Third,[106] the *Guide* establishes that, "in the absence of a legal relationship on which such a claim may be based, for example an allegation that an agency relationship exists, the franchisor is not vicariously liable for the sub-franchisor's, or indeed the sub-franchisees', defaults."[107] Thus, both the Restatement Third and the *Guide* require the establishment of an agency relationship in order for the franchisor to be vicariously liable for the franchisees' torts.

Whether an agency relationship exists, according to the *Guide,* is determined by the amount of control the principal (the franchisor) retains over the agent (the franchisee).[108] Accordingly, "[f]or an agency relationship to give rise to a claim, it must be based on the right of the principal (in this case, the franchisor) to control the day-to-day operations of the business of the agent (the sub-franchisor or sub-franchisee)."[109] Moreover, "[i]n an agency relationship, the right to control will extend not only to the day-to-day business, but also to the result of the work and the manner in which the work is accomplished."[110]

A franchisor could further be liable for the torts of its franchisee under a theory of apparent (or ostensible) agency. In accordance with the *Guide*, "by using the franchisor's name, the sub-franchisor or sub-franchisee are held out to the public as agents of, or indeed as being, the franchisor and that they therefore have ostensible authority to commit the franchisor and to make the franchisor liable for their defaults."[111] The *Guide's* description of apparent agency mirrors section 7.08 of the Restatement Third.[112]

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agreement and/or claim damages. *2008 Event Summary*, *supra* note 7, at 238; *see also* UNIDROIT, *supra* note 88, at art. 8(1)(A)-(C). However, the franchisee may not lawfully terminate the franchise agreement if the franchisee, "[obtained] the information through other means, did not rely on the misrepresentation, or termination is a disproportionate remedy in the circumstances." *2008 Event Summary*, *supra* note 7, at 238; *see also* UNIDROIT, *supra* note 88, at art. 8(1)(c).

[103] *Supra* notes 90-92.

[104] *Supra* notes 81-91 and accompanying text.

[105] *See* UNIDROIT *Guide*, *infra* note 105, at 170.

[106] *See* RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006).

[107] UNIDROIT, GUIDE TO INTERNATIONAL MASTER FRANCHISE ARRANGEMENTS, 170 (2d. ed. 2007) [hereinafter UNIDROIT *Guide*].

[108] *Id*.

[109] *Id*. In master franchise arrangements there are essentially two agreements made: an international agreement between the franchisor and the sub-franchisor (the master franchise agreement), and a domestic franchise agreement between the sub-franchisor and the sub-franchisee (the sub-franchise agreement). *Id*. at 3. Usually, there is no direct relationship between the franchisor and sub-franchisee—the sub-franchisor assumes the right to license the sub-franchisees as the franchisor in the territory and retains the duties of a franchisor to the sub-franchisees. *Id*. Moreover, "[t]he franchise relationship will almost always involve the franchisor imposing a system and method of operation accompanied by controls." *Id.* at 171. *See, e.g.*, Greil v. Travelodge Int'l., Inc., 541 N.E.2d 1288 (Ill. App. Ct. 1989) (quoting Nicholas v. Arthur Murray, Inc., 56 Cal. Rpt. 728 (Cal. Ct. App. 4th. Dist. 1967)).

[110] UNIDROIT *Guide, supra* note 105, at 170.

[111] *Id.* at 171.

[112] *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 (2006) ("A principal is subject to vicarious liability for a tort

The *Guide* suggests several techniques that franchisors may implement to avoid being held vicariously liable for the actions of a franchisee. In order for the franchisor to escape vicarious liability, the *Guide* recommends the franchisor or sub-franchisor argue that the franchisee did not follow instructions and did not perform in accordance with the franchisor's or the sub-franchisor's requirements.[113] In such instances, "the extent and conduct of the franchisor's or sub-franchisor's method of regulating and monitoring the sub-franchisee's business would be examined by the court, with a view to determining whether the franchisor or sub-franchisor could escape liability on the grounds that the sub-franchisee had failed to observe the requirements."[114] Above all, the *Guide* suggests that franchisors avoid controlling the daily operations of the franchisee to ensure that the franchisor is not held vicariously liable for the acts and omissions of the franchisee.[115]

The *Guide* not only discusses how a franchisor can avoid liability, but it also discusses when a franchisor should indemnify a franchisee and assume sole responsibility for a tort. The *Guide* comments:

> [I]t is natural for the franchisor to assume sole and entire responsibility for any loss, damage, cost or expense (including court costs and reasonable legal fees) that arise out of any claim, action, administrative inquiry or other investigation that relates to its own operation of the business, independently of the reason for which it was made.[116]

Examples of when the franchisor should assume indemnification responsibility include product liability claims or actions for infringement of intellectual property rights.[117] The *Guide* notes that such indemnification assumptions by the franchisor should be documented within the franchise agreement.[118] According to the *Guide*, other such contractual assumptions or waivers consist of:

> [R]ules, specifying when the franchisor or sub-franchisor is entitled, or under what circumstances either of them is obligated, to undertake or assume the defence of any liability claim, action, inquiry or investigation, at whose risk and expense such a

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committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission.").

[113] *See* UNIDROIT *Guide*, *supra* note 105, at 171.

[114] *Id.* In making this determination, the *Guide* notes, "the court would also need to determine whether the franchisor or sub-franchisor had acted reasonably in the enforcement or non-enforcement of the requirements." *Id.* at 172. Consequently, this could place stress on the franchise relationship in light of the fact that the franchisee might believe that he had been subjected to over-regulation. While at the same time, the franchisor may find that in order to appease the court, he is required to enforce such strict legal enforcement measures in order to compel the franchisee to comply. *Id.*

[115] *Id.* It should be noted, however, that some commentators believe encouraging principals not to assert control over agents, in order to avoid liability, poses a risk to society because principals will not ensure that their agents are using due care or taking effective precautions to prevent harm to third parties. *See generally* Jennifer Arlen & W. Bentley MacLeod, *Beyond Master-Servant: A Critique of Vicarious Liability*, *in* EXPLORING TORT LAW 23 (Stuart Madden, ed., Camb. Univ. Press, 2005).

[116] UNIDROIT *Guide*, *supra* note 105, at 173.

[117] *See id.* at 173. These types of liabilities can be protected against by the franchisor's purchase of an insurance coverage policy. *See generally*, Susan Vincent & G. Thomas MacIntosh II, *Insuring Against Franchisor Vicarious Liability*, *in* INTERNATIONAL FRANCHISE ASSOCIATION 34TH ANNUAL LEGAL SYMPOSIUM (2001).

[118] *See* UNIDROIT *Guide*, *supra* note 105, at 173.

defence should be undertaken and the conditions under which a settlement might be made.[119]

The country of the party in which the action takes place is likely to assume the primary defense,[120] but the franchisor is generally "entitled to choose whether or not it should itself assume the defense against the third party's claim, always provided that this is permitted by the procedural laws of the host country."[121] If the franchisor's intellectual property rights are at issue, the situation differs from one country to the next.[122] In some jurisdictions, it is the franchisor, or the owner, who has the right to assume the primary defense; however, in other jurisdictions, it is the franchisee, or the exclusive licensee, who has the right to assume the primary defense.[123] Moreover, the *Guide* suggests that the master franchise agreement include "wording prohibiting the sub-franchisor from making any representations, or giving any warranties, with regard to any product that it has obtained from the franchisor which go beyond the representations or warranties given by the franchisor and/or beyond the standards usual in the host country."[124]

The *Guide* also recommends that franchisors obtain, and require their franchisees to possess, liability insurance.[125] It points out that in North America, Europe, and Australia, most franchise agreements require sub-franchisors to take out liability insurance against third-party claims as well as property risks.[126] Further, the franchisee is usually required to also have liability insurance to guard against potential risks.[127] A clause requiring the sub-franchisor or franchisee to obtain insurance should be included within the master franchise agreement.[128] Accordingly, it is suggested that the franchisor and sub-franchisor "discuss the liability risks that exist in the host country, not only under statutory law but also under case law, as well as what insurance coverage is available or usually taken out in that country."[129] The *Guide* advises this discussion because there are some countries in which taking out an insurance policy against third-party liability is unusual, expensive or simply unavailable.[130] Thus, discussing such potential conflicts early on will avoid future increased risk and costs associated with a conflict.

Typically, the insurance clause should be included in the master franchise agreement and should "prescribe that the sub-franchisor shall at its own expense take out and maintain full insurance cover in all cases for which it is required by law, or for which it is otherwise necessary or at least useful in order to ensure the continued existence of the sub-franchisor."[131] The *Guide*

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[119] *Id.* at 174.
[120] If the party hosting the action chooses the primary defense he is expected to provide the other party or parties with full information on the progress of the proceedings. Nonetheless, the primary defense may always be chosen by the party who is ultimately facing liability. *Id.*
[121] *Id.*
[122] *See* UNIDROIT *Guide*, *supra* note 105, at 174.
[123] *Id.*
[124] *Id.* at 175.
[125] *See* Vincent & MacIntosh II, *supra* note 115, at 10.
[126] *See* UNIDROIT *Guide*, *supra* note 105, at 174.
[127] *See id.*
[128] *See id.* at 175 (further commenting, "[s]uch contractual clauses may at times only provide for general obligation to 'take out an appropriate insurance policy,' leaving it to the sub-franchisor or sub-franchisee to decide what it considers to be 'appropriate,' but often the cover needed will be specified.").
[129] *Id.*
[130] *Id.* at 176.
[131] *Id.*

further suggests that the franchisor "fix the minimum coverage for damage to property and for damages caused by the interruption of business, as well as for third party liability risks for personal injury, death, damages to property and product liability."[132] The minimum amount of coverage the franchisor requires the sub-franchisor or franchisee to maintain should be periodically reviewed to ensure that it is in accordance with the host state's policies.[133] If needed, it should be adjusted to reflect the minimum amounts of insurance coverage required by the host state.

The franchisor should also require the insurance coverage to encompass both the franchisor generally, and "its directors, officers, shareholders, partners or other licensees whenever the interests of these persons may be affected by the risks covered by the insurance policies."[134] However, a host country must allow such an extension of insurance coverage,[135] and even if such an extension is permitted, it may not be worth the extensive costs required to do so.[136] If a host country does not permit an extension of the insurance policy, such an extension will be very costly for the franchisor. The *Guide* suggests, "it might be more appropriate for the franchisor to extend its own insurance coverage to possible risks stemming from third parties and to recover additional insurance premium through the franchise fee."[137] While stressing the importance of insurance coverage, the *Guide* maintains that this is only one of many factors in establishing a healthy commercial law environment, which is of paramount importance for franchising.[138]

In addition to these organizational considerations, the *Guide* goes on to discuss other important issues pertinent to international franchising. In particular, international legislation and rules relevant to franchising are discussed under Annex Three of the *Guide*.[139] Annex Three notes that franchise regulations are essentially divided into two categories.[140] The first category includes laws that apply to contracts in general, and the second includes laws that apply specifically to franchise regulation.[141] Encompassed by those laws that are franchise-specific are "agency law and the law regulating other distribution contracts."[142] The *Guide* explains that "[t]here may be aspects of the relationship between a franchisor and its franchisees that are covered by agency law, independently of whether the courts actually assimilate the franchise relationship concerned to one of agency, or by the law regulating other distribution contracts."[143] Therefore, the *Guide* advises that legislation that regulates agency relationships and distribution contracts be considered when analyzing a franchise relationship.[144]

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[132] *See* UNIDROIT *Guide*, *supra* note 107, at 176.
[133] *See id.*
[134] *Id.*
[135] *See id.*
[136] *See id.* at 177.
[137] UNIDROIT *Guide*, *supra* note 105, at 177.
[138] *See id.* at 276
[139] *See* UNIDROIT *Guide*, *supra* note 105, at 276.
[140] *See id.*
[141] *See id.*
[142] Other areas of law that are discussed include: general contract law, leasing and security interests, financial investments, intellectual property, competition law, fair trade practices law, corporate law, taxation, property law, legislation on consumer protection and product liability, insurance law, labor law, the law regulating the transfer of technology, legislation regulating foreign investments currency control regulations and import restrictions and/or quotas, legislation regulating joint ventures, and industry specific laws or regulations. *See generally id.* at 276-81.
[143] *Id.* at 276-77.
[144] UNIDROIT *Guide*, *supra* note 105, at 277.

Annex Three discusses as well a nation's implementation, or lack thereof, of franchise specific legislation.[145] The *Guide* notes that while an increasing number of nations have implemented franchise-specific legislation, "still only a number regulate franchising."[146] Moreover, the limited amount of franchise-specific legislation those nations have implemented generally refers to domestic regulations rather than international franchise regulations.[147] This lack of international franchise regulation is due in large part to "the complexity of the relationship and to the great number of areas of law involved in a franchise relationship."[148]

When nations adopt franchise-specific legislation, the regulations usually concern disclosure rules rather than governance of the relationship between the parties.[149] Annex Three explains that while the degree and detail of the information required to be disclosed varies from nation to nation, generally "the laws will require the franchisor to provide the prospective franchisee with information on a number of points that will enable the franchisee to make an informed decision on whether or not to enter into the agreement."[150] From a comparative analysis of the recent period of adopting franchise-specific legislation, it appears that, with the exception of the Russian Civil Code, every nation's franchise laws in some way deal with the disclosure requirements reflected in UNIDROIT's *Guide*.[151] These franchise-specific laws also usually provide a definition of which relationships constitute franchises. For example, in Malaysia, the relationship is established when the franchisee operates a business separately from the franchisor, such that he is not an agent, partner, or service contract provider.[152] One would think that the franchisor as a known separate business would not be vicariously liable for the franchisee's acts, or if treated differently as a basis for liability, a franchisor would only be liable for the acts of a third party if in a franchise relationship. Malaysian courts hold that a franchisor can be held vicariously liable under theories of actual or apparent authority when the franchisor has sufficient control over third parties *or* franchisees.[153]

Ultimately, the *Guide* is, as its name suggests, a guide to what regulations nations should implement.[154] However, although there are many differences between the types, texts, and amount of detail of instruments regulating franchising agreements, national franchising laws mostly require the same type of information as UNIDROIT recommends.[155] In analyzing the disclosure laws of various nations, the *Guide* illustrates their considerable variance.[156]

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[145] *See id.* at 281.
[146] *Id.*
[147] *See id.*
[148] *Id.*
[149] UNIDROIT *Guide*, *supra* note 105, at 281.
[150] Specifically, Annex Three notes the following points which the franchisor should disclose to the franchisee: the franchisor and the directors of the enterprise; the history of the enterprise; the legal constitution of the enterprise; the intellectual property concerned; the financial situation, with audited financial statements for the two or three preceding years; the other franchisees in the network; information on the franchise agreement, such as the duration of the agreement, conditions of renewal, termination and assignment of the agreement; as well as information on any exclusivities. *Id.*
[151] Kerkovic, *supra* note 76, at 257; LENA PETERS, INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT) 48-49 (2011).
[152] Leela Baskaran, *Malaysia*, *in* INTERNATIONAL FRANCHISING 643, 676 (Dennis Campbell ed., 2d ed. 2014).
[153] *Id.*
[154] *See id.*
[155] *Id.*
[156] Including Albania, Australia, Belarus, Belgium, Brazil, Canada (Alberta, Ontario and Prince Edward Island), Croatia, Estonia, France, Georgia, Indonesia, Italy, Japan, Kazakhstan, Lithuania, Malaysia, Mexico, Moldova,

IV. Model Nations

Although, on the whole, franchising has increased dramatically throughout the world in recent years,[157] each country that has chosen to legislate has made its own regulatory mark. Often the approach to regulation stems from a country's civil law or common law heritage. Some nations are heavily influenced by collective agreements. The following discussion highlights some of the regulatory schemes, which have emerged in some important and representative jurisdictions.

A. The European Union and Franchising Legislation

The European Union's ("EU") scope of franchising legislation was defined with the European Court of Justice's ("ECJ") decisions "in the cases of Pronuptia de Paris GmbH (Frankfurt am Main) and Pronuptia de Paris Irmgard Schillgalis (Hamburg)."[158] The German Federal Court of Justice referred these cases to the ECJ for the purposes of establishing a ruling on the interpretation of Article 85 of the European Economic Community ("EEC") Treaty. The Treaty deals with particular categories of exclusive dealing agreements.[159] The ECJ determined "the franchisor must be in a position to protect certain interests vital to the business and to the identity of the network (for example the know-how), although the provisions must be essential for this purpose."[160] Accordingly, after the *Pronuptia* case, the Commission of the European Union rendered decisions on five franchising cases[161] and ultimately accepted a Block Exemption Regulation on franchise agreements.[162]

The Block Exemption Regulation entered into force on February 1, 2000 and identified different categories of franchise agreements to which it applied.[163] Essentially, Article 2 of the Regulation indicated "to which restrictions of competition the exemption should apply"; Article 3 indicated "to which it should apply notwithstanding the presence of certain obligations"; Article 4 addressed "to which it should apply on certain conditions"; Article 5 dealt with exemptions "which it should not apply [to]."[164] Further, the Regulation also supplied an opposition procedure at Article 6.[165] The Regulation was not in force long, and was superseded

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People's Republic of China, Republic of Korea, Romania, The Russian Federation, Spain, Sweden, Ukraine, The United States of America and Vietnam. *See generally id.* at 282-301.

[157] *Supra* notes 9-11 and accompanying text.

[158] UNIDROIT, supra note 151, at 301 (citing Case 161/84 of 28 January 1986).

[159] *See* UNIDROIT *Guide*, *supra* note 105, at 301. Specifically, the conflict dealt with the franchisee's obligation to pay the franchisor arrears of fees. *Id.*

[160] *Id.* at 301-02.

[161] Including Commission Decision 87/14, Yves Rocher, of 17 December 1986 (OJ EEC L 8/49 of 10 January 1987); Commission Decision 87/17, Pronuptia, of 17 December 1986 (OJ EEC L 13/39 of 15 January 1987); Commission Decision 87/407, Computerland, of 13 July 1987 (OJ EEC L 222/12 of 10 August 1987); Commission Decision 88/604, ServiceMaster, of 20 August 1988 (OJ EEC L 332/38 of 3 December 1988) and Commission Decision 89/94, Charles Jourdan, of 2 December 1988 (OJ EEC L 35/31 of 7 January 1989). *See id.* at 302 n.131.

[162] *Id.* at 302 (citing Commission Regulation (EEC) 4087/88, 1988 O.J. (L 359/46) (explaining the application of Article 85(3) of the Treaty to categories of franchise agreements)).

[163] *See* UNIDROIT *Guide*, *supra* note 105, at 302.

[164] *Id.* (alteration in original).

[165] *Id.*

on May 31, 2000 by the Block Exemption Regulation on Vertical Restraints.[166] This newer Block Exemption, as entered into force on June 1, 2000,[167] differed from its predecessor by not specifically mention "franchising."[168] Nonetheless, "the Guidelines that accompany the text make it quite clear that it applies also to franchising."[169] These rules, affecting a wide range of sales of goods or services, address highly significant points for franchises, including intellectual property issues and in-term and post-term non-competitive provisions.[170]

B. France and Franchising Regulation

A notable distinction between agency doctrine in common law countries, such as the United States, and civil law countries, including many member states of the EU, is that in the analysis of vicarious liability claims, courts in civil law countries focus far more on the reasonable expectations of consumers, as opposed to the extent of control a franchisor has over its agent franchisee.[171] Thus, disclaimers in advertisements and at franchisee locations that function to indicate the independence of the franchise corporation, naturally play a more vital role in combating vicarious liability claims.[172] Accordingly, the absence of disclaimers as to independence of a franchise corporation can prove fatal in such liability claims.[173]

France provides an illuminating example of mature franchise law. The country boasts the largest franchising market in Europe, with total sales of U.S. $51.6 billion and more than 929 franchisors.[174] Similar to the United States, France has a rich history in franchising, which dates back to the 1930s when a knitting company started to "franchise" its business model in France.[175] Concurrently to the start of franchising, France touched on vicarious liability in the classic French case of 1937,[176] when the French Supreme Court recognized the test for vicarious liability to be one of authority and subordination, characterized by "the right to give the employee (*préposé*) orders or instructions as to the manner in which he shall undertake the

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[166] *Id.* (citing Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (Text with EEA relevance), 1999 O.J. (L 336/21)); The focus of this Regulation is the vertical agreements that fall under Article 81(3), including "agreements for the purchase or sale of goods or services where these agreements are concluded between non-competing undertakings, between certain competitors or by certain associations of retailers of goods, [and] vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights." However, the Regulation does not prohibit all restrictions on vertical agreements. In fact, some vertical restraints are permitted, including those that have a positive effect, such as "the improvement of economic efficiency." Moreover, highly anti-competitive restraints, including fixed resale prices and territorial protections, cannot reap the benefit of the exemption.

[167] *See* UNIDROIT *Guide*, *supra* note 105, at 303.

[168] *Id.*

[169] *Id.* at 303-04 (citing Commission Notice, Guidelines on Vertical Restraints (2000/C 291/01) (Text with EEA relevance), 2000 O.J. (C291/1)), available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=32000Y1013(01)&model=guichett&lg=en (last visited July 20, 2015).

[170] *Id.* (citing Commission Regulation (EC) 2790/1999 at arts. 2(3) & 5(a)(b)).

[171] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29.

[172] *Id.*

[173] *Id.*

[174] ROSE M. FARIA, INT'L FRANCHISE ASS'N, FRANCE SERVES AS A GATEWAY TO Europe, http://www.franchise.org/franchise-news-detail.aspx?id=33190 (last visited July 20, 2015).

[175] *Id.*

[176] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 4, 1937, Arret No. 95 (Fr.) (*Veuve Meyer* - DH 1937.363).

functions for which he is employed."[177] It was around the 1970s when franchising clearly started to grow and to appear in all sectors of the economy, analogous to the development patterns present in the United States. France's growing market precipitated the need for franchising specific legislation.[178]

France was the first EU member state to implement franchise specific legislation. In 1989, the Assembly passed Act. No. 89-1008, known as the Loi Doubin (codified in French Commercial Code as Art. L.330.3).[179] Loi Doubin is not franchise specific, but instead relates to all forms of commercial arrangements whose contracts contain exclusivity clauses.[180] It details the disclosure requirements placed on franchisors, including relevant dates and descriptions, but refrains from addressing any relationship issues that would arise after the initial formation of the agreement.[181] Thus, discussion of vicarious liability of franchisors is absent from Loi Doubin. Moreover, France entirely lacks formal legislation directed at the ongoing relationship aspects of franchise agreements. Instead, general contract law largely governs these issues.[182] However, in the event that a franchisor exercises a sufficient amount of control over the franchisee, the latter may be viewed as an employee, which would lead to the applicability of French labor law.[183]

This French test focuses on a "subordination link" between the franchisor and franchisee.[184] This could be the case, particularly, where the franchisee's duty merely consists of selling goods that are predominantly supplied by the franchisor, at conditions and prices set by the franchisor, in premises owned or rented by the franchisor, or where the elements entering into the franchisee's remuneration largely depend on the conditions instituted by the franchisor, or both.[185] Despite the relative clarity of the need to establish a direct subordination link, questions abound with respect to potential liability between contracting parties and third parties.

General contract law, set out in the French Civil Code, indicates that a contract may establish liabilities only between the contracting parties and not third parties.[186] This is because the French test of "subordination juridique" focuses on identifying who has the right to give orders or instructions to the employee as to how to do their job.[187] A 2006 French Supreme Court decision, however, rejected this rigid approach and moved toward a more flexible interpretation finding that a third party may have an action based in tort; therefore, a commercial tenant's managing agent (the third party) had a claim in tort against a landlord who had breached the lease with the tenant.[188] So, the power to give instructions need not have a contractual or

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[177] PAULA GILIKER, VICARIOUS LIABILITY IN TORT: A COMPARATIVE PERSPECTIVE 58-59 (2010).
[178] Faria, *supra* note 170.
[179] Loi 91-337 du 4 avril 1991 [Decree 91-337 of April 4, 1991], J. OF INT'L FRANCHISING & DISTRIBUTION L., June 1991, 1019, http://www.eff-franchise.com/IMG/pdf/French_Loi_Doubin_and_Decree_in_English.pdf.
[180] EUROPEAN FRANCHISE FED'N, NATIONAL REGULATION BY COUNTRY, tbl. 1, http://www.eff-franchise.com/spip.php?rubrique21 (last visited July 20, 2015).
[181] Decree 91-337 of April 4, 1991, *supra* note 175, at 1019-20.
[182] *See* Kerkovic, *supra* note 76, at 250.
[183] Philip Zeidman, *Franchise in 30 jurisdictions worldwide*, DLA PIPER LLP at 63 (2014) *available at* http://www.franchise.org/sites/default/files/ek-pdfs/html_page/F2014-France_0.pdf.
[184] *Id.* at 63.
[185] *Id.*
[186] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 14.
[187] GILIKER, *supra* note 173, at 66.
[188] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 14 (citing Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., Oct. 6, 2006, Arret No. 541 (Fr.)). The French court held that a third party has an action in tort against a contracting party by proving that the contracting party committed a civil wrong by breaching the contract; in other words, the third party may seek compensation, based on tort principles, by invoking the contractual fault of a party whose breach caused him damage.

legal basis, but instead may simply be found as a matter of fact—it is no longer necessary to prove that such power has been exercised, as long as the person in question is found to possess authority over the alleged subordinate.[189]

Furthermore, while French law views the franchisee as the employer of its own employees, if there is a direct subordination link between the franchisor and the franchisee's employees, there is a risk that the franchisor may be deemed to be their employer, which could lead to criminal sanctions under certain circumstances.[190] Thus, a franchisor failing to fulfill its contractual obligations towards a franchisee, which consequently is no longer able to pay the suppliers, may be confronted with an action brought by the same suppliers for the damages they suffered.[191] In hopes of avoiding this risk, it is crucial for franchisors to ensure that the franchisee is the sole decision-maker in hiring, providing work instructions, supervising, sanctioning and terminating employment contracts of the franchisee's employees.[192] Additional regulation takes form in the Code of Ethics, promulgated by the French Franchise Federation ("FFF").[193] Although FFF membership is not mandatory for French franchise corporations, the Code nevertheless provides insight into commonly recommended and expected behavior.[194]

C. Italy and Franchising Regulation

Unlike France, Italy seemed to ignore the commercial practice of franchising, declining to implement any real kind of legislative discipline until 2004.[195] Most scholars believe this lack of discipline was one of the key reasons for the rapid mushrooming of franchises in Italy and throughout Europe in the last few decades.[196] However, this utter lack of discipline made it impossible to establish a consistent definition of a franchise and consequently spawned numerous controversies.[197] Finally, thirty years after the first appearance of a franchise agreement in the country, Italy enacted a franchise law[198] and finally provided some sort of legislative framework for franchising.[199] Despite finally injecting some clarity into the franchising realm, the "Italian Law on Franchising" did not contain any specific provision on franchisor's vicarious liability.[200]

In light of Law Number 129/2004 failing to address franchisor's potential vicarious liability, scholars have turned to the Italian civil code and case law in order to determine a franchisor's vicarious liability for the acts of its franchisee.[201] Identically to French law, under a

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http://www.dissertationsgratuites.com/dissertations/Arret-De-Cass-Ass-Pl%C3%A9ni%C3%A8re-6-Octobre-2006/153221.html (last visited July 20, 2015).

[189] GILIKER, *supra* note 173, at 66.

[190] *Supra* note 180.

[191] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 14.

[192] *Id.*

[193] http://www.franchise.org/uploadedFiles/F2012%20France.pdf.

[194] *Id.*

[195] Valentina Giarrusso, *Franchise Agreements under Italian Law*, GIAMBRONE LAW, https://www.yumpu.com/en/document/view/11644525/franchise-agreements-under-italian-law-by-avv-giambrone-law.

[196] *Id.*

[197] *Id.*

[198] Decreto Ministeriale 2 settembre 2005, n. 129 /2004 (It.).

[199] *Id.* at 4.

[200] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 11.

[201] *Id.*

general rule detailed in the Italian civil code, a contract may be binding and effective only between the parties entering into it—thus, a franchisor may only be liable to a third party under particular circumstances for liability in tort.[202] Yet, just as France broadened its rigid approach, Italian case law has established two possible legal bases in order to hold a franchisor liable for the conduct of its franchisees or the franchisee's employees.[203]

First, a third party may bring suit against a franchisor for the franchisee's acts if ostensibly the franchisor and the franchisee appear to be one single entity and the third party reasonably believes that it is entering into an agreement with an agent of the franchisor.[204] Thus, Italian courts have held that a franchisor may be vicariously liable for the tortious acts of its franchisee that appears to be its apparent agent.[205] The apparent agent doctrine was first applied in the decision *Grimaldi S.p.A. v. Magatelli Effci S.a.s.*, when the Court of Milan ruled that in order to build a case of vicarious liability, the "apparent" agency relationship must be: (1) based on objective grounds; (2) generated because of franchisor instructions and contractual forms; and (3) the third party must have relied in good faith and without fault on the fact that the franchisor and the franchisee are the same entity.[206] Therefore, to avoid this risk, the franchisor and the franchisee must make it obvious to third parties that they are independent and autonomous entities and that the franchisee is not an agent of the franchisor.[207]

Second, if the franchisor has the right and power to control and manage a franchisee, then the franchisor may be liable for that franchisee's conduct.[208] The franchisor's vicarious liability, as the "controlling company," may occur when the franchisor has the right to hire and fire, set hours of work and rates of pay, and the right to give directions on the work performed the franchisee's personnel.[209] In addition, similar to some U.S. jurisdictions, a franchisor could be liable if it controls the uniformity and the standardization of products and services.[210] In a recent decision, an Italian court held that if a franchisor can contractually control the quantity, colors and products to be sold by the franchisees, that the franchisor may be held liable.[211] In this regard, the franchisor and franchisee may be re-classified, for the purposes of the labor laws, as a single unified employer—the franchise agreement is simply a surreptitious instrument to jointly manage two businesses disguised as a franchise relationship.[212] Therefore, it is in the franchisor's best interest to limit its powers to direct the franchisee's business within the franchise agreement and to avoid management of the franchisee's personnel within their day-to-day operations.[213]

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[202] *Id.*
[203] *Id. Compare* Pretura Milano, 21 luglio 1992, *in* Contratti, pag. 173 n. DE NOVA, Franchising ed Apparenza, 1993 (establishing the grounds to build a case of vicarious liability based upon the apparent agency relationship), *with* Tribunale di Milano, 25 giugno 2005, *in* Rivista giuridica del lavoro e previdenza, 97, ss, 2006 (determining the liability of a franchisor as a "controlling company" or as a company exercising direction and coordination activity).
[204] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 11.
[205] *Id.*
[206] *Id*. at 12.
[207] *Id*. at 11.
[208] *Id*.
[209] *Id*.
[210] *Id.* at 13.
[211] Tribunale di Pescara, 2 febbraio 2009, Foro it. 2009, I, 2829 (It.).
[212] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 13.
[213] *Id*. at 12.

D. Germany and Franchising Regulation

In Germany, the franchisee is ultimately liable "for all obligations resulting from his activity, especially for claims of damages of all kinds."[214] Regardless, the franchisor generally cannot escape product liability claims.[215] However, if the franchisor was not at fault for the particular defect, he may be able to exempt himself by using Product Liability Act (Produkthaftungsgesetz-ProdHaftG).[216] Section 1, Subsection 3 of the Product Liability Act states that the liability of the manufacturer of a component part is further exempt if the mistake is caused by the construction of the product, in which a part of the product is incorporated, or because of the product manufacturer's instructions.[217] In order for the franchisor, as the "quasi-manufacturer," to avoid liability, he must not allow the consumer to assume that he is the manufacturer.[218] To accomplish this, the manufacturer may attach a note to that effect to the finished product. However, this may not be the best strategy for the franchisor that strives for uniformity throughout his franchises.

Franchisors will want to weigh the importance of uniformity against avoiding liability.[219] In the case that the franchisor and franchisee are both at fault, they are both jointly and severally liable to the public. To each other, however, they are liable only for the share of damage they caused individually.[220] Ultimately, German case law no longer requires a detailed right of control for vicarious liability: "it is sufficient that the employer can at any time determine the scope and duration of the tasks of the employee, restrict them or terminate them"—the focus is no longer on the fact of instructing the franchisee how to do his job, but the *possibility* of the franchisor being able to control the franchisee's actions.[221]

In 2007, the Federal Supreme Court of Germany issued decision XZR 137/04,[222] reinforcing the concept that a franchisor may become contractually bound by contracts between its franchisee and a customer in the event that the franchisee does not disclose to the general public that it is a legally independent entity.[223] Thus, there exists a possible source of vicarious liability for the acts of the franchisee (§§ 164, 242 BGB) if a third party assumes that the franchisee is acting on behalf of the franchisor and the franchisor knows or should have known this but does not mind. The franchisee is then considered to be an agent of the franchisor.[224] This

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[214] Stefan Duhnkrack, *Germany*, *in* INTERNATIONAL FRANCHISING LAW, GER-1, GER-32 (Dennis Campbell ed., 2006).
[215] *Id.*
[216] *Id.*
[217] ProdHaftG §1 (1989), translated at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1397 (last visited July 20, 2015).
[218] Duhnkrack, *supra* note 210, at GER-33.
[219] *Id.*
[220] *Id.*
[221] GILIKER, *supra* note 173, at 66-67.
[222] An English translation of the decision is found at: http://translate.google.com/translate?hl=en&sl=de&u=http://www.telemedicus.info/urteile/Marken-und-Namensrecht/Domainnamen/689-BGH-Az-I-ZR-13704-Euro-Telekom.html&prev=/search%3Fq%3Dtelekom%2Bzr%2B137/04%26client%3Dfirefox-a%26hs%3DYZM%26rls%3Dorg.mozilla:en-US:official
[223] Zeidman & Phillip, *News from Around the World: Developments in Asia*, DLA PIPER LLP (Nov. 6, 2008).
[224] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 11.

risk could be minimized by the franchisor denying agency in the franchise agreement, ensuring that the franchisee identifies itself as an independent business (including by registering a business name), or by ensuring that the franchisee has to bear the liability in the internal relationship.[225]

E. China and Franchising Legislation

The People's Republic of China ("China") is currently experiencing rapid expansion of the franchise industry. Over the last twenty years, China has developed comprehensive franchise law, including laws dealing with both disclosure requirements and relationship issues. Yet, because of China's unique isolationist policy, the country's acceptance of franchising was not welcomed with open arms nor was it an instantaneous adoption.[226]

With China's concurrent focus on market development and commitment to political socialism, the development of franchising in China has been somewhat of an enigma, as compared to the traditional adoption of franchising law in European countries.[227] In the early 1990s, the word "franchise" had no direct Chinese translation; instead, the closest translation amounted to "chain of stores."[228] In spite of its isolationist policies, the Chinese government began to recognize the viability of these "chain of stores" (or franchises) as a business structure.[229] Even as the country cracked its doors open to foreign investment, China has maintained a cautious approach in structuring its rules governing foreign enterprises.[230]

The Chinese government did not formally regulate franchising, but in order to foster the industry, the government issued the Interim Measures on Regulating Franchise Operations (Franchise Measures) in 1997.[231] Article 5 of these measures identifies two types of franchise structures: (1) a direct franchise; and (2) a franchise that allows master franchisees to distribute the franchise out to sub-franchisees.[232] In the same year, the China Chain Store and Franchise Association (CCFA)—a quasi-government nonprofit membership association for domestic and foreign retailers, franchisers, and prominent brands—also materialized.[233] The CCFA now has 900 members with 180,000 outlets across China, generating annual sales of $300 billion in 2010—the top 120 franchisors, alone, amassed $52.4 billion.[234] Thus, with China's population gaining affluence and nurturing a stronger middle-class base, the franchise business model has burgeoned from non-existent to a desirable business option.[235]

Yet, even with the potentially promising opportunities for franchisors in the Chinese market, franchisors should be cautious of "the lax licensing regulations, vague laws, and weak intellectual property protection that could undermine the very identity of a franchise."[236]

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[225] *Id.*
[226] *See* Michele Lee, *Franchising In China: Legal Challenges When First Entering The Chinese Market*, 19 AM. U. INT'L L. REV. 949, 954 (2004).
[227] *See id*.
[228] WILLIAM EDWARDS, *The Pros and Cons of Franchising in China*, CHINA BUS. REV., http://www.chinabusinessreview.com/the-pros-and-cons-of-franchising-in-china/ (last visited July 20, 2015).
[229] Lee, *supra* note 222, at 956.
[230] *Id*. at 957.
[231] EDWARDS, *supra* note 224.
[232] Lee, *supra* note 222, at 957.
[233] EDWARDS, *supra* note 224.
[234] *Id*.
[235] Lee, *supra* note 222, at 951.
[236] *Id.* at 952-53.

Consequently, foreign franchisors should ensure they maintain as much control as possible in their business ownership, intellectual property, and contractual agreements.[237] But by ensuring this additional protection against the nebulous nature of Chinese franchising laws, franchisors are simultaneously opening themselves up to greater risks of vicarious liability by maintaining maximum control over the franchisee.[238]

Before delving into the liability of franchisors, because of China's unique franchising structure, it is crucial to first understand and appreciate the types of franchises recognized under the Chinese Franchise Measures.[239] Under Article 5 of the 1997 Franchise Measures, a franchise could be either a direct franchise or a sub-franchise.[240] Direct franchising is established through a contractual relationship in which a franchisor *directly* grants franchise rights to a candidate but does not grant the right to sub-franchise those rights.[241] In direct franchising, the franchisor directly gives the franchisee the right to operate individual or multiple franchise units in a specific location or area—this has proven successful for several foreign franchisors.[242] On the other hand, a sub-franchise operates under a master franchising agreement—this agreement grants a franchisee the exclusive rights to operate franchise outlets in a designated territory along with the right to then further sub-franchise those rights to other applicants within that territory.[243] Ultimately, the Franchise Measures have become of great interest to commentators in common law jurisdictions, providing a unique illustration of franchising law in a civil law country.[244]

The Franchise Measures have proven most interesting in regards to the potential vicarious liability for franchisors in China. These Measures require a franchisor to guarantee the quality of the products sold by its designated suppliers.[245] The Chinese government hopes to protect consumers, holding the franchisor liable for the products provided by outside suppliers.[246] This represents the practice of civil law countries focusing on the reasonable expectations of consumers when determining the vicarious liability of franchisors. Even with these seemingly straightforward protections, there is scant discussion of franchisors' vicarious liability under the Franchise Measures—these Measures instead served mainly as an industry guideline promoting franchise business.[247] Because of the rapidly developing economic and social conditions, compounded by the rampant fraud in domestic franchising activities in China, the Chinese State Council in 2007 finally enacted a law addressing more directly the rights and obligations of the parties in franchising—the Regulations on Administration of Commercial Franchise Regulations (Regulations).[248]

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[237] *Id.* at 953.
[238] *See* UNIDROIT *Guide*, *supra* note 105, at 172.
[239] *See* Lee, *supra* note 222.
[240] Bryan W. Blades, *Franchising In China: A Current Perspective*, 14 CURRENTS: INT'L TRADE L.J. 20, 22 (2005).
[241] *Id*. (emphasis added).
[242] Lee, *supra* note 222, at 957 (listing Kodak as an example of a franchisor who has successfully utilized direct franchising).
[243] Blades, *supra* note 236, at 22-23.
[244] Paul Jones, *The Regulation of Franchising in China and the Development of a Civil Law Legal System*, 2 CHINESE L. & POL'Y REV. 78 (2006) (discussing the differences between franchising law in common law and civil law jurisdictions focusing on China to illustrate these differences).
[245] Erik B. Wulff & Tao Xu, *Franchise Regulation in China*, 25 FRANCHISE L.J. 19, 21 (2006).
[246] *Id*.
[247] Zhiqiong June Wang & Andrew L. Terry, *The Impact of China's Regulatory Regime on Foreign Franchisors' Entry and Expansion Strategies*, 7 ASIAN J. COMP. L. 1, 8 (2011).
[248] *Id*.; Paul Jones & Erik Wulff, *Franchise Regulation in China: Law, Regulations, and Guidelines*, 27 FRANCHISE L.J. 57 (2007).

The Regulations apply to commercial franchises, which essentially consist of three elements: (1) the franchisor licenses to the franchisee "operational resources"; (2) the franchisee operates under a unified business format; and (3) the franchisee pays the franchisor a franchise fee.[249] Unlike the Franchise Measures, the Regulations do not explicitly address master franchise relationships and the sub-franchising administered thereunder.[250] The Regulations also require certain qualifications for a franchisor: "shall have a mature business model…[and] shall own at least two directly operated company owned outlets for more than one year."[251] Courts have applied the latter requirement, dubbed the "2+1" rule, inconsistently, and questions abound as to whether it is only an administrative provision or whether it is a substantive requirement.[252] While the Regulations made significant changes to the registration and disclosure of franchisors, the focus of this discussion is on the relationship and conduct modifications of the Regulations.

The Regulations integrate the mantra that "persons engaged in franchising must follow the principles of voluntariness, fairness, honesty, and good faith"—listing the basic rights and obligations of both franchisors and franchisees.[253] The franchisor is required to furnish a franchise operations manual to the franchisee and provide continuing operational guidance, technical support, business training and other services to the franchisee in accordance with the franchise agreement.[254] The Regulations depart from the Franchise Measures by removing the much criticized provision making the franchise jointly and severally liable for the quality of designated suppliers' products and services.[255] In China, though, these are all contract law principles. Rather than impose liability on franchisors through agency law, liability is imposed through the principles of Chinese contract law. Apparent authority derives from agency concerns and third-party rights that are distinct from the franchising contract entered into by the franchisor and franchisee. The franchisor's potential liability to franchisee customers seems to be reasonable and in line with Chinese traditions; that is, the tradition of protecting injured parties and punishing those businesses that are profitable as a result of a direct or indirect connection to the improper conduct linked to consumer injuries (e.g. selling defective goods, furnishing faulty services).

F. Australia, New Zealand, and Franchising Legislation

In stark contrast to the aforementioned civil law countries that place a greater focus on consumers' reasonable expectations when determining vicarious liability, common law countries, including Australia, place a greater emphasis on the extent to which the franchisor controls the franchisee.[256] In Australia, the general proposition remains that a principal is usually responsible for all acts within its agent's actual or apparent authority—in deciding whether an act was within the scope of an agent's authority, the amount of control is the essential factor.[257] In Australia, the doctrine of vicarious liability aims to produce fair and just outcomes and

[249] Jones & Wulff, *supra* note 244, at 58.
[250] *Id*.
[251] Wang & Terry, *supra* note 243, at 14 (alteration in original).
[252] *Id*. at 16.
[253] *Id.* at 20.
[254] *Id*.
[255] *Id*.
[256] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 26.
[257] *Id.* at 6.

comfortably sits beside a "regime that imposes liability for fault."[258]

Despite this relative progress in the application of vicarious liability in the agency context, the doctrine of vicarious liability continues to be restricted in application solely to employer-employee relationships—it does not apply to independent contractor relationships.[259] In response, Australian courts have begun to move away from the rigid "control" test and have adopted a multi-factor test to determine whether a person is an employee or an independent contractor—the "totality of the relationship" test.[260] Even with this move away from the common law control test, when applying the totality of the relationship test, courts have placed the greatest weight on control when determining whether a person is an employee or not.[261] Courts consider such factors as "stipulating hours that may be worked, whether a uniform or a particular style of clothing is required, workplace rules, detailed instructions relating to the work itself and how it is to be carried out, and quality control procedures" when determining the right to control and the actual level of control exercised.[262] This approach can be contrasted with that used in England, which also requires the franchisee to be an employee of the franchisor to hold the franchisor vicariously liable, but narrowly finds an employment relationship only when the franchisee is receiving wage compensation from the franchisor.[263]

In order for vicarious liability to apply in the franchising context, a franchisee must be in an employer-employee relationship with the franchisor.[264] This determination requires courts to examine all circumstances of the relationship in totality.[265] Yet, many scholars have been critical of the multi-factor "totality of the relationship" test as it is subjective and difficult to predict the number of factors, or combinations of factors that will cause a worker to be held as an employee, greatly varying on a case-by-case basis.[266] From the franchisor's perspective, this type of test that has its uncertainties gives the franchisor less leeway in being certain that its level of control will not amount to an employment relationship in a court's eyes. As a result, the High Court in *Hollis v. Vabu Pty Ltd*[267] adopted the "economic reality" test, which instead of considering the degree to which an employer may be said to have the right to control an employee, the court considers to extent to which a worker may genuinely be said to be in business on their own.[268] Thus, where someone is deemed an independent contractor, the court will examine whether in the course of bargaining between the two parties there was a genuine "trade-off" of advantages.[269] Ultimately, scholars have found that this "economic reality" test is a more

[258] Andrew Terry & Joseph Huan, *The Vicarious Liability of Franchisors in Australia*, Presented at the 26th Annual International Society of Franchising Conference 7 (Ft. Lauderdale, Fla., May 17, 2012).
[259] *Id.* at 8.
[260] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 6. This is in congruence with other common law countries such as Canada. The traditional Canadian test, known as the "control test," states that an individual will be considered to be an employee for vicarious liability where the employer not only tells the person what to do, but how to do it. *Id*. at 9. Yet, just as Australia has adopted a multi-factor test, Canada has embraced the "entrepreneurship test" which suggests that, besides control, other factors may determine the difference between employees and independent contractors. *Id*. at 9-10.
[261] *Id*.
[262] Terry & Huan, *supra* note 258, at 9-10.
[263] John Pratt, *England*, *in* INTERNATIONAL FRANCHISING 265, 292-93 (Dennis Campbell ed., 2d ed. 2014).
[264] Terry & Huan, *supra* note 258, at 11.
[265] *Id*.
[266] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 7.
[267] (2001) 181 CLR 263 (Austl.).
[268] *Id*.
[269] *Id*.

appropriate test against which to measure the franchising relationship.[270]

Also of marked importance in the context of franchising, Australian common law only recognizes individuals as employees.[271] Thus, there is an assumption in the Australian courts that a company cannot be an employee even if the person is a sole owner and shareholder of the company—neither a body corporate nor a partnership will be recognized as an employee.[272] Again, this classification can be compared with that used in England, which does find a franchisor vicariously liable if the franchisee is his agent or partner.[273] As a result, it is only clear that smaller franchise owned and operated by a sole proprietor that may be classified as an employee in Australia.[274] Because of the real challenges Australian plaintiffs face in bringing vicarious liability actions against franchisors due to the conduct of their franchisees based upon an employer-employee, the majority of cases move forward with agency as the basis for franchisor liability.[275]

Under Australian law, in order to establish an agency relationship between a franchisor and franchisee, plaintiffs must prove the presence of two elements: "the *consent* of both the principal and the agent, whether express or implied to the agency relationship; and *authority* given to the agent by the principal to act on the principal's behalf."[276] It is important to note that control over the agent's actions is far less decisive in Australia and is less likely to be the sole determinant of creating an agency relationship than it is in the United States.[277] Instead, the Australian position dictates that an agent is one who has *authority* to act for another.[278] Despite favoring the authority test over the control test, similarly to the United States, franchisors in Australia can be held liable under both actual agency—established by a conferral of authority—or apparent agency—established when the principal held out to a third party that a particular agent had authority.[279]

Liability under actual agency is best understood as a "creature of contract," formed by a conferral of authority by the principal to the agent to act upon the principal's behalf.[280] The main thrust of the Australian agency relationship is to allow the principal to be represented by the agent, and concurrently, to create legal relations with third parties.[281] In the franchising context, the franchisor's liability is derived from the franchisor having authorized the franchisee to act on its behalf, and not due to the inherit control that the franchisor exercises over the franchisee.[282] Ultimately, if the franchisee acts as an agent of the franchisor *and* the franchisee acts within the scope of its authority *and* the franchisor controls the channels of business, then the franchisor is

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[270] *Id*.
[271] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 6.
[272] *Id.*; Terry & Huan, *supra* note 254, at 12.
[273] Pratt, *supra* note 263, at 292.
[274] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 6; Terry & Huan, *supra* note 254, at 12.
[275] Terry & Huan, *supra* note 254, at 13; Interview with Andrew Terry, *supra* note 77.
[276] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 7.
[277] *Id*.
[278] Terry & Huan, *supra* note 254, at 13 (emphasis added).
[279] *Id.*; Interrview with Andrew Terry, Professor of Law and Chair of Discipline of Business Regulation, Univ. of Sydney Business School, and Emeritus Professor, Univ. of New South Wales School of Business Law and Taxation (June 20, 2015).
[280] *Id*. at 14.
[281] *Id*.
[282] *See id*. (contrasting the difference between the U.S. control test and the Australian authority test for actual agency liability).

vicariously liable for the franchisee's conduct by way of actual agency.[283] In order to mitigate the risk of this potential liability, the franchisor should deny agency in the franchise agreement and ensure that the franchisee identifies itself as an independent business.[284]

More central to this discussion is the theory of ostensible, or apparent, agency. In order to establish apparent agency in Australia, the plaintiff must: (1) establish that the franchisor has represented or "held out" the franchisee as possessing authority; (2) reasonably rely on the representation; and (3) suffer a detriment as a result of the representation.[285] While a franchise agreement may explicitly reject an agency relationship, this does not preclude the finding of apparent authority; however, there is limited case law on apparent agency in the franchising context.[286] In an early case on franchisor liability under ostensible agency arising in Australia's sister state of New Zealand,[287] *Fitzgerald v. H & R Block the Income Tax People Limited*,[288] the New Zealand High Court held that although the franchise agreement prevented an agency relationship between the parties, the plaintiff had the opportunity to establish that the authority bestowed upon the franchisee to trade under the name "H & R Block" amounted to the "holding out" of authority for the franchisee to function as the franchisor's agent.[289] Yet, Judge Ellis held that because the franchisee had used his own corporate letterhead, the plaintiff recognized that his dealings were with the franchisee and not with the franchisor—thus, the franchisor was not vicariously liable through apparent agency for the acts of its franchisee.[290]

In the face of the great difficulty plaintiffs face in establishing apparent agency, a possible new category of franchisor vicarious liability has surfaced in Australia—the "representative agent."[291] This intermediate category of "representative agent" does not fit within either "employee" or "independent contractor" standing, but instead falls somewhere between the two and leaves the franchisor subject to vicarious liability.[292] Under this minority approach, vicarious liability can be found where an independent contractor is a "representative," but not an agent in the technical sense, because the "representative" executes the party's functions and

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[283] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 2 (noting that in Australia control without actual authority is unlikely to satisfy the theory of actual agency in order to hold the franchisor liable for the acts of its franchisee).
[284] *Id.*
[285] Terry & Huan, *supra* note 254, at 15.
[286] *Id.*
[287] Australia and New Zealand share a common law heritage and have strong commercial and legal ties. In franchising, for example, New Zealand simply had a chapter in the Australian-based Franchise Association of Australia & New Zealand until 1996, when the Franchise Association of New Zealand was formed. FRANCHISE ASSOCIATION OF NEW ZEALAND, OUR HISTORY, http://www.franchiseassociation.org.nz/our-history.html; Owen Wright & Andrew McAuley, *Australian Franchising Research: Review, Synthesis and Future Research Directions*, 20 AUSTRALASIAN MARKETING J. 158, 158-59 (2011) (noting the formation of the Franchisors Association of Australia in 1981 and that in 1993 this association extended membership to include franchisees and was renamed the Franchise Association of Australia and New Zealand (FAANZ); after New Zealand formed its own association, FAANZ became known as the Franchise Council of Australia in 19 in 1998).
[288] This is an unpublished judgment from June 1990 noted in, among other sources, 5 J. INT'L FRANCHISING & DISTRIB. L. 37. *See, e.g.*, Michael Raine & Belinda Atkinson, *Franchisor Liability for Franchisee Misconduct*, FRANCHISING UPDATE n.7 and accompanying text (June 2007), http://www.dibbsbarker.com/publication/Franchising_Update_June_2007.aspx.
[289] *Id.*
[290] *Id.* at 16.
[291] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 8.
[292] Terry & Huan, *supra* note 254, at 18.

furthers its economic interests, effectively as part of its enterprise.[293] Thus, if a franchisee is furnished with the *authority* to act as the franchisor's representative, the franchisor should be liable for its franchisee's negligence to others acting within the scope of that *authority*.[294] If this minority view of introducing the new category of representative agent were adopted into law, the application of vicarious liability in Australia would balloon and likely encapsulate more franchisor-franchisee relationships.[295] However, this is not the current law in Australia as the majority of courts have held steadfast in the application of the traditional multi-factor, "totality of the relationship" test.[296]

V. Conclusion

International franchise law remains an unsettled topic. The rapid growth of franchising worldwide,[297] particularly in legally distinct but economically integrated regions, such as North America (with federal nations such as Canada and the United States) or Europe (with the quasi-federal structure under the European Union), has created an international need for streamlined and understandable franchising law applicable in various jurisdictions. This challenge has been met with international principles and agreements that provide a better understanding of international franchising standards as well as a model with which to clarify and reconcile different approaches to franchising and liability.[298]

As an example, Rome I offers a method for regulating civil and commercial obligations when there is a conflict of laws in the franchise context.[299] Similarly, the UNIDROIT *Guide* and amendments provide clarity as to when an agency relationship is formed between a franchisor and franchisee,[300] how a franchisor may limit vicarious liability and seek indemnity from franchisees for torts,[301] and why franchisors should have liability insurance and require their sub-franchisors and franchisees to do the same.[302] In addition, the *Guide* discusses the implementation of franchise specific legislation designed to streamline franchise law.[303] Illustrative of this type of legislation is the Block Exemption Regulation on Vertical Restraints.[304] Not only does it continue to impact how franchises operate in Europe, but is also provides a model for domestic franchise laws, both in Europe and worldwide.

Even with Rome I and the UNIDROIT *Guide*, it is readily apparent that each of the aforementioned model states[305] represents a divergent approach to franchising standards regardless of these international agreements and general principles. At one end of the spectrum, civil law countries such as France, Italy, and Germany, focus far more on the reasonable expectations of consumers when determining the vicarious liability of franchisors.[306] At the other

[293] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 8.
[294] *See id.* (emphasis added).
[295] Terry & Huan, *supra* note 254, at 20.
[296] *Id.*; interview with Andrew Terry, *supra* note 77.
[297] *See supra* notes 1-8 and accompanying text.
[298] *See supra* notes 41, 58, 90, 93 and accompanying text.
[299] Rome I, *supra* note 58, at art. 1.
[300] UNIDROIT *Guide*, *supra* note 105, at 170.
[301] *Id.* at 171, 173.
[302] *Id.* at 174.
[303] *Id.* at 281.
[304] *Id.* at 303-04.
[305] *See supra* Part III.
[306] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 26.

end, common law countries, including the United States and Australia, concentrate more on the extent of control a franchisor has over its agent franchisee when deciding the extent of a franchisor's vicarious liability.[307] An exhaustive study of each civil and common law country's approach tends to illuminate any internal inconsistencies and uncertainty, not resolve them, whether the focus is on consumer expectations or the level of control. As with any area of law where the principles are broad and relatively few in number, but the factual possibilities are, in comparison, nearly limitless, the law of franchisor vicarious liability, in its dormant state – i.e., absent active measures to reform and unify – naturally remains unsettled and uncertain.

An in-depth analysis of each country's laws can also bring the newer, emerging approaches of franchise liability to the attention of international franchise law scholars. One of the newer approaches being developed is the "representative agent" approach being evaluated in Australia, which would have the effect of making the franchisor a guarantor for any tort liability debt the franchisee incurs to a third party.[308] If the franchisee did not have the assets to pay a tort judgment against it, the franchisor as a guarantor would act as a surety and "pick up the bill" for the franchisee. Beyond tort liability debt, however, the franchisor would not be liable unless the typical forms of actual or apparent agency are found.[309] To ensure this distinction, a franchisor still must distinguish itself as a separate entity from the franchisee, by notifying customers, suppliers, and other third parties of its independent status, such that it will not become a guarantor for all liabilities and lawsuits that arise against the franchisee.[310] This would serve as a protection for the franchisor, where without a third party's justifiable reliance on the appearance of agency, that individual would not be able to sue the franchisor directly or obtain a judgment against the franchisor. This could be implemented in the form of a mandated warning that franchisees would have to make to third parties with whom they interact, similar to the custom in France and other European countries of printing a warning on receipts that informs purchasers who the true owner is of the enterprise from which they/ just purchased a good or service.[311]

A similar approach has been implemented for other business relationships and franchising contexts. In the Australian state of Victoria, liability is imposed on the principal in a real estate relationship (the franchisor) when its agent (the franchisee) acts negligently or commits a fraud.[312] Under a similar agency approach, an Israeli court found that agency theory did not warrant liability when the franchisor was never informed about the details of the franchisee's work, such that the franchisor could not have known about negligence.[313] Or under Spanish law, franchisors can be held liable when the advertising of their products leads the consumer to believe these franchisors are the enterprise with whom the consumer is dealing.[314]

The expansion of these approaches to the franchising context, through the "agent representative" approach or a similar one, would expand liability for franchisors and protect consumers in a broader way than existing agency principles. This is especially important to consider in the tort liability context (e.g. for defective products), where a tort victim may be

[307] *Id.* at 9.
[308] *Id.* at 8.
[309] *Id.*
[310] *See generally* Beyer, *supra* note 18, at 8.
[311] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29.
[312] Interview with Andrew Terry, *supra* note 77.
[313] Peggy Sharon & Inbal Natan-Zehavi, *Israel, in* INTERNATIONAL FRANCHISING 467, 475 (Dennis Campbell ed., 2d ed. 2014) (citing *Guy Ovadia v. Anglo Saxon & Others*, 31 July 2007, CA 2313/03).
[314] Rubenstein, Turitto, Ward & Weinberg, *supra* note 29, at 14.

unsuccessful in recovering from an insolvent franchisee.[315] Some countries have already circumvented this tort concern as well. In Lithuania, a products liability suit may hold a franchisor liable for both defective products and products of poor quality.[316] In Portugal, a franchisor can be held liable when a consumer suffers injury from a product defect or a misconception of know-how regarding the brand.[317] Perhaps most broadly, Malaysian courts will hold the franchisor vicariously liable when the franchisee is using the franchisor's trademark.[318]

As demonstrated earlier in this Article, in the context of German law, the focus is no longer on whether the franchisor instructs a franchisee how to do this job, but is on the possibility that the franchisor is able to control the franchisee's actions.[319] This focus has shifted because of the broad umbrella of apparent agency, which usually views the franchise relationship from the viewpoint of the consumer, similar to the "agent representative" approach. Both approaches support the extension and expansion of possible franchisor liability from the public policy rationale that consumers have a right to expect that control has been or is exercised if the franchisor could exercise that control. By establishing a franchise system, a franchisor can easily be hailed into court or expected to pay a judgment through the doctrine of apparent agency, which leaves a lot of guessing as to whether the liability will be found after evaluating the facts and circumstances. The agent representative approach would differ in that the franchisor could always expect and build a reserve for the event of tort liability incurred by the franchisee.

With divergent franchising standards existing and likely to continue between states in the United States, domestic legislators would be well served to examine these international franchising approaches and consequently to clarify and reconcile their nations' various approaches - regulatory and judicial - toward franchising standards. While the likelihood of international fluidity in franchise laws is remote, the likelihood of continuity in franchise laws across the United States is not impossible. Uniform laws have been established in other areas of law (e.g. contract law) and can serve as an example for uniform franchise laws. In observing international franchising approaches, legislators will ensure that franchise law will not vary so widely across domestic jurisdictions. The result of disputes will be more predictable, and franchisors, as well as franchisees, will benefit through a better understanding of the legal consequences or their decisions.

[315] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. E (1998).
[316] Rita Kambleviciene & Paulius Markovas, *Israel*, *in* INTERNATIONAL FRANCHISING 581, 597 (Dennis Campbell ed., 2d ed. 2014).
[317] Magda Mendonça Fernandes & Mónica Pinto Candeias, *Portugal*, *in* INTERNATIONAL FRANCHISING 779, 789 (Dennis Campbell ed., 2d ed. 2014).
[318] Leela Baskaran, *Malaysia*, *in* INTERNATIONAL FRANCHISING 643, 677 (Dennis Campbell ed., 2d ed. 2014).
[319] GILIKER, *supra* not 173, at 66-67.