International Lawyer

Volume 42
Number 2 *International Legal Developments in Review: 2007*

Article 12

2008

International Commercial Transactions

Pamela Fuller

Paul Jones

Stefanie Monge

Ezekiel Solomon

Andrew Wiseman

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Pamela Fuller, Paul Jones, Stefanie Monge, Ezekiel Solomon, Andrew Wiseman*

This year we report on a number of developments in Asia and Europe. In particular, we highlight China's new franchise regulations and guidelines; revisions to Japan's laws regulating retail stores; amendments to the Franchising Code in Australia; and a new product safety law in Switzerland.

I. China: New Franchise Regulations and Guidelines

Effective May 1, 2007, China adopted a new Tiaoli[1] from the State Council and two new Banfa[2] from the Ministry of Commerce to govern all franchises operating in China.[3] These replace the somewhat controversial Measures for the Administration of Commercial Franchising that came into effect February 1, 2005.[4] The new Tiaoli and Banfa hopefully represent a new stability for franchise regulation in China—one that satisfies both the need to implement market order and the prevention of fraud internally and the need of less restricted access by foreign franchisors.[5]

* Pamela A. Fuller, J.D., LL.M. (Tax Law) prepared the section on Japan. She is a New York-based attorney, specializing in international taxation and cross-border investments. Stefanie Monge prepared the section on Switzerland.

1. Shangye Texujingying Guanli Tiaoli [Commercial Franchise Administration Regulation] [hereinafter Tiaoli]. Translations of the Tiaoli, the two Banfa, and the Questions & Answers are available at http://www.jonesco-law.ca under "Publications."

2. Shangye Texujingying Xinxi Pilu Guanli Banfa [Commercial Franchise Information Disclosure Administrative Measures] (promulgated by the Ministry of Commerce, Apr. 6, 2007, effective May 1, 2007) [hereinafter "Disclosure Banfa"]; Shangye Texujingying Bei' an Guanli Banfa [Commercial Franchise Registration Administrative Measures] (promulgated by the Ministry of Commerce, Apr. 6, 2007, effective May 1, 2007) [hereinafter "Registration Banfa"].

3. Tiaoli, *supra* note 1, at art. 2.

4. Shangye Texujingying Guanli Banfa [Commercial Franchise Administrative Measures] (promulgated by the Ministry of Commerce Dec. 31, 2004, effective Feb. 1, 2005) [hereinafter Previous Measures].

5. For a discussion of this regulatory tension, *see* Guowuyuan Fazhiban, Shangwubu Fuzeren Jui, Shangye Texujingying Guanli Tiaoli, Youguan Wenti Dazhong Guo Zhengfu Wangwen [Questions and Answers Regarding the Commercial Franchise Administration Regulation as presented by Members of the State Council Legislative Affairs Office and the Ministry of Commerce], *available at* http://www.ccfa.org.cn/end.jsp?id=36040 (P.R.C.) [hereinafter Questions & Answers].

One of the highlights of the changes is the amendment of the requirement that a franchisor have operated two locations in China for a minimum of one year.[6] The new Tiaoli now provides that "[f]or a franchisor to be engaged in franchising it must have at least 2 directly-operated company-owned stores and have operated them for at least 1 year."[7] This new wording is interpreted as permitting franchisors to qualify if they have operated two units outside China for at least one year.[8]

While the specific wording of the required elements of a disclosure document in the Tiaoli have been changed from that of the previous measures, it must be remembered that the Tiaoli and Banfa are simply regulations and that franchisors and their franchise agreements must still comply with the requirements of China's Contract Law[9] and the General Principles of the Civil Law.[10] In particular, Article 42 of the Contract Law contains what is known in civil law as the doctrine of *culpa in contrahendo* or "pre-contractual good faith." In other civil law jurisdictions, this doctrine has been interpreted as requiring the disclosure of all material facts in the sale of franchises.

While the Tiaoli has a definition that is similar to the definitions of a "franchise" that appear in many American franchise laws, there may still be issues of interpretation.[11] The concept of a franchise fee does not explicitly exclude payments for goods supplied by the franchisor at bona fide wholesale prices, and thus product distribution franchises may be subject to these regulations. Chinese courts have used the term "*texujingying*" when discussing such arrangements.[12] Article 7 of the Tiaoli sets out the basic qualifications necessary to commence franchising in China. Aside from having operated two locations for at least one year, as mentioned earlier, a franchisor must have a mature business model and be able to support the franchisees. Within fifteen days of a franchisor signing the first franchise agreement, it must register[13] as a franchisor with the relevant Commerce Department.[14] Among the items to be filed to obtain such registration is a copy of the trademark registration certificate.[15] As there is currently a significant backlog of trademark applications waiting to be examined, this may present a problem for franchisors wishing to set up in China quickly.

Franchise agreements prepared for use in China must comply with the requirements of both the Contract Law and the Tiaoli. Articles 11 to 13 of the Tiaoli set out what must be in the franchise agreement, and include a cooling off period and a minimum term of three years. Article 17 has provisions regarding the use of advertising funds. It also prohibits

6. Previous Measures, *supra* note 4, at art. 7(4).

7. Tiaoli, *supra* note 1, at art. 7, para. 2.

8. *See* Registration Banfa, *supra* note 2, at art. 5(6).

9. Hetong Fa[Law on Contracts] (promulgated by the Nat'l People's Cong. Mar. 15, 1999, effective Oct. 1, 1999) [hereinafter Contract Law].

10. Zhonghua Renmin Gongheguo Minfa Tongze [General Principles of Civil Law in the P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong. Apr. 12, 1986, effective Jan. 1, 1987) [hereinafter Civil Law]. This has been made clear in the Questions & Answers.

11. Tiaoli, *supra* note 1, at art. 3.

12. *See, e.g.*, Hu Aihe v. Salt City Pavilion Lake Thrifty Blind Co., No. 63 (Jiangsu Province Higher People's Court, June 2, 2006).

13. The Chinese phrase "bei an" means literally "set up a file" or "set up a record." Some feel that in this context, however, the word "register" better conveys the meaning, as there are significant consequences for failing to "set up a file."

14. Tiaoli, *supra* note 1, at art. 8.

15. Registration Banfa, *supra* note 2, at art. 5(5).

the inclusion of representations regarding the earnings of franchisees in any advertising, although such information must be provided in the disclosure document.[16] There are reports of one Chinese franchisor being fined 30,000 RMB and another being sued for including earnings claims in their advertising.[17]

Chapter 3 of the Tiaoli sets out the general[18] and specific obligations of the franchisor with respect to disclosure. Arguably, Chapter 3 is the interpretation in a regulation of the disclosure obligations of a franchisor under Article 42 of the Contract Law. As such, readers should be cautioned against interpreting the disclosure obligations in a narrow common law manner.

Franchisors are required to set up a complete disclosure system[19] and to provide a prospective franchisee with all information required pursuant to Article 22 not less than thirty days before the signing of the franchise agreement.[20] The required disclosures under Article 22 include basic information about the franchisor, its system, and its ability to deliver support to the franchisee; the cost and terms and conditions for items to be purchased from the franchisor; and financial statements. Article 22(8) specifically requires disclosure of the existing franchise outlets in China and "an assessment of their business performance." There initially was considerable discussion as to the meaning of this phrase, but the Disclosure Banfa issued later made it very clear that this meant an earnings or financial performance claim.[21] In other words, this phrase should be interpreted broadly.

Chapter Four of the Tiaoli sets out the administrative penalties for breaches of the various provisions of the Tiaoli. In addition to these penalties, a franchisor is also liable under the General Principles of the Civil Law,[22] the Contract Law,[23] and other laws, and an aggrieved franchisee may bring an action against the franchisor in the courts in addition to any administrative penalties that may be levied.[24]

In summary, the Tiaoli, the Registration Banfa, and the Disclosure Banfa mark a major advance in the regulation of franchise activities in China.

II. Japan: Restrictive Amendments to Large Retail Stores Laws Take Effect

In November 2007, revisions to Japan's laws regulating retail stores went into force, effectively banning further construction and expansion of the giant Western-styled shopping malls and amusement facilities that began proliferating in Japanese suburbs during

16. Disclosure Banfa, *supra* note 2 art. 5(8)(2).

17. Shou li wie fan texu tiaoli an te xu jia meng bu de xuan gao shouyi" [First Violation of the Franchise Regulation by Advertising High Earnings], BEIJING DAILY, Sept. 11, 2007, *available at* http://www.texul.com/ShowArticle.asp?ArticleID=17308; 5 wan jia meng 5 ge yue shou hui tou zi? [50,000 to Join, Investment Recovered in 5 Months?], Aug. 24, 2007, *available at* http://www.texul.com/ShowArticle.asap?ArticleID=16516.

18. *See* Tiaoli, *supra* note 1, at art. 23.

19. *Id.* at art. 20.

20. *Id.* at art. 21.

21. Disclosure Banfa, *supra* note 2, at art. 5(VIII)(2). *See also* Paul Jones & Erik Wulff, *Franchise Regulation in China: Law, Regulation and Guidelines*, 27 Franchise L.J. 57, 61 (2007).

22. Civil Law, *supra* note 10.

23. Contract Law, *supra* note 9.

24. *See* Questions & Answers, *supra* note 5 (particularly the response to the fourth question, last paragraph).

the 1990s.[25] Although the amendments might be adequately explained as simple zoning ordinances, the Liberal Democratic Party's (LDP) sixty-five year history of insulating its loyal constituency—small and medium-sized merchants—from larger retail chains and foreign competitors provokes deeper circumspection, leaving some to wonder if Japan might return to the days when its excessive legal and informal controls enforced Japan's Byzantine, woefully inefficient, and impenetrable distribution system.[26]

The significance of the new 2007 restrictions is rooted in the relevant laws' history. Less than one decade has passed since Japan's former Ministry of International Trade and Industry (MITI)[27] repealed its infamous Large-Scale Retail Stores Law (LSRSL),[28] replacing it with a liberalized three-part legislative package informally known as the Store Location Act, of which the City Planning Law is a part.[29] On its face, the former LSRSL required large retailers to notify MITI of their plans, and if MITI determined that the new store would significantly impact local small and medium merchants, MITI was to fairly weigh the various competing interests, giving due regard to consumers' needs and to the well being of the retail industry as a whole.[30] But during the years the LSRSL was in force, MITI's informal administrative guidance created barriers to entering Japan's retail industry that far surpassed the restrictions imposed by the statute's language.[31] The 1998 repeal of the LSRSL was largely due to the U.S. Government's objections to it, which were voiced in the Japan-U.S. Structural Impediments Initiative talks,[32] and to threats the

25. In 2006, Japan's Diet (national legislature) passed the revisions into law, effectively banning construction of large shopping centers with a total floor space of more than 10,000 meters in suburban areas. Under the new law, the areas where such facilities can be built are commercial districts in city centers. Construction of such facilities in non-urban areas requires town and village governments to change their city plans and create entirely new commercial districts—something few are likely to do. The 2006 amendments revise two of the three laws that are collectively known as the Store Location Act. The two revised statutes are: Toshi Keukaku Hou [City Planning Law], Law No. 100 of 1968; and Chushin Shigaichi Kasseika Hou [Town Revitalization Law], Law No. 101 of 1998.

26. *See* FRANK UPHAM, PRIVATIZING REGULATION: THE IMPLEMENTATION OF THE LARGE-SCALE RETAIL STORES LAW, IN POLITICAL DYNAMICS IN CONTEMPORARY JAPAN 264, 265-67 (Gary D. Allinson & Yasunori Sone eds., 1993) (explaining that for many years, Japan's distribution networks "were organized along *keiretsu* (affiliated enterprise) lines in which long-term relationships and uniform and inflexible pricing reduced bargaining . . . and provided an effective barrier to both non-keiretsu consumer goods and new entrants into the industry, including foreign entrants").

27. MITI's name was officially changed to the Ministry of Economy, Trade and Industry (METI) on Jan. 6, 2001, when Japan's central government's reorganization took effect.

28. Daikibo kouri tenpo in okeru kourigyou no jigyou katsudou no chousei ni kansuru horitsuu [Law Concerning the Adjustment of Retail Business Activities of Large-Scale Retail Stores], Law No. 109 of 1973.

29. The Store Location Act's three-part legislative package consists of: (1) the Large-Scale Retail Location Law (Daiten-Ricchi Ho), Law No. 91 of 1998; (2) substantial revisions to the City Planning Law (Toshi Keikaku Hou), Law No. 100 of 1968; and (3) the Town Revitalization Law (Chushin Shigaichi Kasseika Hou), Law No. 101 of 1998. The most recent 2006 amendments were made to the latter two laws and went into force in November 2007 [hereinafter all three laws are collectively referred to as the Store Location Act].

30. *See* UPHAM, *supra* note 26, at 270-79 & 285-87 (explaining, in rich detail, how MITI used informal administrative guidance to effectively retain control over the nature of retail regulation, and how supposedly liberalizing reforms of the statute in 1991 effectively integrated the protection of small merchants' interests into the city planning process).

31. *See id.*

32. *See* JOINT REPORT OF U.S.-JAPAN WORKING GROUP ON STRUCTURAL IMPEDIMENTS INITIATIVE 2 (June 28, 1990); USTR, NATIONAL TRADE ESTIMATE REPORT OF FOREIGN TRADE BARRIERS 107 (1990).

LSRSL would be found to violate Japan's international trade obligations as a member of the World Trade Organization.

The Store Location Act (SLA)[33] was enacted to replace the LSRSL on the same day the latter was repealed. Although the SLA ostensibly transferred the day-to-day regulation of large stores to local prefectures, the Act limited the towns' powers to merely recommending alternatives to retail developers based on the towns' assessments of the prospective stores' environmental impacts (*i.e.*, noise, waste, and traffic effects) and prohibited a consideration of economic factors. Moreover, the real enforcement power—the ability to stop a store from opening—was retained by the ministry bureaucrats who were ever mindful that they served at the pleasure of elected LDP politicians.[34]

From the perspective of large retailers, the SLA no doubt represents a huge improvement over its predecessor—the LSRSL. In the seven years the SLA has been in force, Japan's complex distribution *keiretsu* has deteriorated; the number of large retailers, foreign retailers, and even discount retailers has multiplied;[35] and Japan's retail industry has developed in closer conformity with the natural demands of the marketplace, rather than solely in response to the interests of small and medium-sized domestic retail cartels.

While the 2007 amendments to the SLA may not portend Japan's return to the dark ages of retailing with its rigid distribution *keiretsu*, the restrictions are expected to impose a real barrier to further expansion in the suburbs. In the months leading up to the restrictions' November 2007 effective date, applications for building permits filed by large retailers surged to over 90 percent of the number of applications filed during the same period the year before.[36] The amendments' effective ban on further suburban large-scale retail development suggests that, despite Japan's broad efforts to privatize, deregulate, and infuse market principles into its retailing, franchising, and commercial distribution systems, Japan's conservative bureaucrats and politicians remain reluctant to let free market forces loosen their tight control over the direction and pace of economic reforms.[37]

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33. *See* Store Location Act *supra* note 29.

34. *See* Mark J. Ramseyer & Frances McCall Rosenbluth, Japan's Political Marketplace 129 (1993). The authors, revisionist scholars, challenge the conventional notion that Japan's bureaucrats, who actually draft the laws, are more powerful than the elected parliament members themselves. Arguing to the contrary, the authors contend it is the bureaucrats who "faithfully implement [the ruling party] policy preferences" to avoid adverse consequences. *Id.* at 136.

35. The shopping mall culture has clearly hit Japan, as evinced by the hundreds of super-sized malls that have sprung up on the outskirts of major cities like Tokyo. There, developers have clearly embraced a myriad of foreign retailers like Talbots, Nike, Benetton, and Toys "R" Us. But meanwhile, Japan's revolution in retailing has hurt the small and medium-sized retail shops and department stores, especially in the downtown urban areas. While Japanese city streets were formerly lined with Mom-and-Pop groceries, many are now shuttered, with a growing number of smaller entrepreneurs turning to franchising to survive. Capitalizing on this trend, McDonalds Inc. recently announced that it plans to dramatically increase its proportion of franchise restaurants in Japan from 30% percent to 70% in the next five years. *See McDonald's Japan to Lift Percentage of Franchises to 70% in 5 Yrs*, Nikkei Weekly, Mar. 16, 2007.

36. *See July-Sept. Filings for Big-Store Openings Jump 90% Ahead of Law Change*, Nikkei Weekly, Nov. 14, 2007.

37. For an overview and circumspect analysis of Japan's sweeping 2006 Privatization Act, a major piece of legislation ostensibly aimed at opening up Japan Post—one of the world's largest state subsidized institutions—to private and foreign competition over a ten-year period, *see* Pamela A. Fuller, *International Legal Developments in Review: 2006—Asia and Pacific Law—Japan*, 41 Int'l Law. 711, 717-26 (2007).

III. Australia: Amendments to the Franchising Code of Conduct and Important Caselaw

The most noteworthy developments in Australia in 2007 in the law surrounding sales, franchising, distribution, and agency arrangements have centered on franchising and distribution agreements, with franchising especially stealing the limelight. There have been four events—the release of the much anticipated amendments to the Franchising Code of Conduct and three superior court decisions—that are of particular significance.

A. Significant Changes to the Franchising Code of Conduct

The Franchising Code of Conduct was introduced to Australia in 1998.[38] It requires certain provisions, and prohibits other provisions, from being included in franchising agreements. It also creates a disclosure document regime. On August 7, 2007, Trade Practices (Industry Codes—Franchising) Amendment Regulations 2007 (No. 1) were issued.[39] These became effective March 1, 2008.[40] They make a number of important changes to the Code.

1. *Foreign Franchisors*

Foreign franchisors with only one franchisee in Australia will no longer be exempt from the application of the Code.

2. *Prohibition on General Waivers of Representations*

The amendment prohibits any waiver of any verbal or written representations made by a franchisor prior to the agreement.[41] It seems that the prohibition will apply to any existing franchise agreements entered into after October 1, 1998. Even if it does not have retrospective effect, any franchise agreement entered into after March 1, 2008, must not include one of these general waivers.

3. *Disclosure of Materially Relevant Facts*

Presently, Clause 18 of the Code requires certain franchisor information to be continuously disclosed to franchisees (within sixty days of it changing or becoming known). These are known as "materially relevant facts." They include change in majority ownership or control, a judgment against the franchisor. and material changes to a franchise system's intellectual property (or ownership of it). Under the new regulations, nothing changes in terms of the substance of required disclosure of materially relevant facts, with

38. The Franchising Code is more formally known as Trade Practices (Industry Codes—Franchising) Regulations, 1998, *available at* http://www.comlaw.gov.au/comlaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/21A1E712585B40FACA256F71004E4CD8/$file/TradePracIndCodeFran1998.pdf

39. Trade Practices (Industry Codes—Franchising) Amendment Regulations (No. 1), 2007, *available at* http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/A92ED2649648F253CA2573330021DAF3/$file/0705101A070802EV.pdf.

40. *Id.* at cl. 2.

41. *Id.* at sched. 1, No. 18.

the exception of contraventions of the Corporations Act (discussed below). The time line, however, has been reduced dramatically, from sixty days down to fourteen days.[42]

4. *Extension of Scope of Franchise Agreement:*

It is clear under the new regulations that an "extension" of a franchise agreement means an extension to scope (*i.e.*, territory, additional sites, etc) as well as term of the franchise agreement. As an extension of a franchise agreement is regarded as a franchise agreement in itself—triggering, amongst other things, the disclosure obligations—a disclosure document and the new franchise agreement will now have to be provided at least fourteen days before any extension to a franchisee's sites or territory.[43]

5. *New Disclosures*

Certain new disclosures are also required, including any contraventions of the Corporations Act (rather than merely "serious offences," for both franchisor companies and their directors)[44] and the names and contact details of past franchisees (rather than just numbers of past franchises which may have transferred or ceased operation).

B. KETCHELL V. MASTER OF EDUCATION SERVICES PTY

In July 2007, the New South Wales Court of Appeal held in Ketchel that a franchising agreement will be unenforceable and illegal if, in contravention of Clause 11(1) of the Code, a franchisor fails to obtain from a proposed franchisee the required written statement that the franchisee has received, read, and had a reasonable opportunity to understand the Code.[45] The appellant claimed in defense that the franchisor had failed to comply with Clause 11. The question was whether this contravention rendered the contract unenforceable for statutory illegality.

In *Cheesecake Shop v. A & A Shah Enterprises*,[46] Justice Windeyer held that Part VI of the Trade Practices Act, when viewed as a whole, failed to evince an intention that contravention of the Code would spell unenforceability of the agreement.[47] Part VI of the Trade Practices Act provides for remedies for such contraventions, including a power to declare a contract void. According to Justice Windeyer, if a contract breaching a Code was void for illegality, there would be no need to provide for this remedy in Part VI.[48]

Clause 11(1) states, relevantly, that the franchisor: "must not: (a) enter into, renew or extend a franchise agreement . . . unless the franchisor has received from the franchisee . . . a written statement that the franchisee or prospective franchisee has received, read and had a reasonable opportunity to understand the disclosure document and this code."

The Court of Appeal overruled the *Cheesecake Shop* case, preferring the general rule "that if the legislature prohibits the making of a contract, the making of the contract does

42. *Id.* at sched. 1, No. 24.
43. *Id.* at sched. 1, No. 15.
44. *Id.* at sched. 1, No. 3.
45. Ketchell v. Master of Educ. Servs. Pty Ltd. (2007) N.S.W.C.A. 161 at para. 39.
46. Cheesecake Shop v. A & A Shah Enters. (2004) N.S.W.S.C. 625.
47. Id. at paras. 37-41.
48. *Id.* at para. 41.

not give rise to an enforceable right or obligation."[49] Here, Clause 11(1) of the Code expressly prohibited entering into, renewing, or extending a franchise agreement unless certain things have been done. A contract made in breach of this prohibition is illegal and unenforceable unless the statute provides otherwise. The Court held that there were no words in Clause 11(1) to displace the presumption of illegality and unenforceability.[50]

The *Ketchell* decision is currently on appeal to the Australian High Court. The very clear message, however, is that so long as *Ketchell* remains good law, franchisors must be extremely careful to ensure compliance with Clause 11 of the Code in order to fulfill their disclosure requirements.

C. ACCC v. Kyloe Pty Ltd.

A further development in Australian franchising law in 2007 was the decision of Justice Tracey, sitting in the Federal Court of Australia, in the case of *ACCC v. Kyloe Pty Ltd.*[51] In this case, the applicant (Australia's consumer watchdog) claimed the respondents breached the Franchising Code of Conduct by failing to provide disclosure documents, as required by that Code, to sub-distributors. The respondents, in turn, claimed that their business arrangements with the sub-distributors did not constitute franchise agreements and therefore did not fall within the purview of the Code.

In determining when a distribution agreement or trademark license is also a franchise agreement and is, therefore, regulated by the Code, Justice Tracey was bound by the four cumulative criteria for a franchise agreement, which are set out in Clause 4 (1) of the Code: (a) the agreement is written, oral or implied in whole or in part; (b) the franchisor must grant to the franchisee "the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an *associate* of the franchisor;" (c) the franchisee's business operation is "substantially or materially associated with a trade mark, advertising or commercial symbol" that is either "owned, used, specified or licensed by the franchisor;" and (d) "before starting business or continuing the business, the franchisee must pay or agree to pay to the franchisor or associate of the franchisor" a fee—excluding, relevantly, "a payment for goods or services" at or below their wholesale price.

Much of Justice Tracey's attention was directed towards establishing whether the last mentioned requirement, the system or marketing plan requirement, had been fulfilled. In reaching his determination, he considered a non-exhaustive[52] list of factors, which were "helpful indicators" of the presence of a "system or marketing plan,"[53] including mandatory sales training regimes, use of recommended retail prices, restrictions on sale of products, sales quotas, eliciting information from customers, a comprehensive advertising and promotional campaign, approval rights over personnel to be engaged by sub-distributor, guidance concerning the operation/management of the franchise, and assistance in conducting "opportunity meetings."

49. Ketchell, N.S.W.C.A. 161 at para. 28 (citing Trade Practices Comm'n v. Milreis Pty Ltd. (1977) 29 F.L.R. 144, 158).

50. Ketchell, N.S.W.C.A. 161 at para. 33.

51. ACCC v. Kyloe Pty. Ltd. (2007) F.C.A. 1522.

52. *Id.* at para. 40.

53. *Id.* at para. 40.

Justice Tracey held that as these factors were absent from the sub-distribution agreements before him in the *Kyloe* case, the respondent had not granted to the sub-distributors the right to carry on the relevant distribution business "under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an *associate* of the franchisor."[54] Instead, he held that the contractual arrangements in the case before him bore "the hallmarks of a distributorship."[55] The sub-distributors were confined to no particular territory; there was no ongoing support; marketing, merchandising, and sale decisions were left, "to a great extent," to the sub-distributors; and no royalties were payable to Kyloe.[56] Furthermore, the sub-distributors were able to develop their own business plans, and distributors were only able to make what the court described as "some helpful suggestions on a few aspects of what might be incorporated in such a plan."[57] The respondents' activities were found to fall well short of a "system or marketing plan," especially in light of the fact that they did not have any right to inspect sub-distributors' records or premises, conduct audits, and sub-distributors did not need to produce business plans.[58]

D. J.F. Keir Pty Ltd. v. Priority Management Systems Pty Ltd.

A final noteworthy development in Australian franchising law is the decision of Judge Rein in the New South Wales Supreme Court case of J.F. *Keir Pty Ltd. v. Priority Management Systems Pty Ltd.*[59] In this case, the question was whether a franchising agreement entered into between the plaintiff franchisee and the defendant franchisor had been validly terminated by the defendant.

The plaintiff claimed that the defendant was subject to a duty obliging it to exercise the powers conferred on it by the agreement, including the power to terminate, "in good faith and reasonably, and not capriciously or for some extraneous purpose."[60] The plaintiff claimed the defendant had not discharged such a duty of good faith in terminating the agreement. The court accepted that the franchising agreement imposed a duty of good faith on the franchisor in exercising the power of termination[61] and proceeded to examine the content of this duty.

In *Pacific Brands Sport & Leisure Pty Ltd. v. Underworks Pty Ltd.*,[62] Justice Finkelstein held that a good starting point in determining whether the impugned conduct (here, the termination) involved a breach of the duty of good faith is to see whether it was "for an ulterior motive or, if it be any different, whether the defendant acted arbitrarily or capriciously."[63] The court in *Keir* accepted that this was the case.[64] Central to the court's holding that the duty had been breached was the finding that the defendant had termi-

54. *Id.* at paras. 55–61.
55. *Id.* at para. 61.
56. *Id.*
57. *Id.* at para. 60.
58. *Id.* at para. 55.
59. J.F. Keir Pty Ltd. v. Priority Mgmt. Sys. Pty Ltd. (2007) N.S.W.S.C. 789.
60. *Id.* at para. 24 (citing Far Horizons Pty Ltd. v. McDonald's Australia Ltd. (2000) V.S.C. 310).
61. *Id.* at para. 26.
62. Pacific Brands Sport & Leisure Pty Ltd. v. Underworks Pty Ltd. (2005) F.C.A. 288.
63. *Id.* at para. 65.
64. J .F. Keir, N.S.W.S.C. 789 at para. 27.

nated for an ulterior purpose. The court concluded that the termination occurred not as "the result of a bona fide belief that . . . [the plaintiff] was in breach of the franchise agreement but for reasons connected to Sparks' interests in North Sydney and matters extraneous to PMS's legitimate interests as franchisor."[65] A number of factors, including Sparks' very direct material interest in North Sydney and the fact that the defendant had failed to provide any particulars of the grounds for termination when these were sought (without providing any explanation for such failure), pointed to "a motive for the giving of notice which was ulterior and quite outside the proper boundaries of PMS's interests as franchisor."[66]

IV. Switzerland

A. New Federal Law on Product Safety

On May 2, 2007, the Federal Council took note of the result of the consultation procedure regarding the draft federal law on product safety and instructed the Federal Department of Economic Affairs to prepare the explanatory notes on the law.[67] The draft federal law on product safety aims at making product safety in Switzerland compatible with European standards, facilitating the cross-border transfer of goods and creating a comprehensive law on product safety.[68]

The following changes are to be implemented by revising the existing law: (i) the scope of the new law will be extended to cover products in general (and not only technical equipment and devices); (ii) a product must be safe with respect to any normal and reasonably foreseeable use; (iii) upon placing a product in the market the manufacturer or importer is obliged to take adequate measures to identify risks and to inform the law enforcement agencies of such risks; (iv) the law enforcement agencies are authorized to prohibit the further placement of dangerous goods on the market and to order the recall, the confiscation or the withdrawal of such goods.[69] The date of enactment of the new law has not been determined yet.

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65. *Id.* at para. 62.

66. *Id.*

67. Message of the Federal Department of Economic Affairs, *available at* http://www.evd.admin.ch/themen/00433/00437/00453/index.html?lang=de.

68. *See* Directive 2001/95/EC of the European Parliament and of the Council of December 3, 2001 on general product safety, 2002 O.J. (L11) (EC), *available at* http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/l_011/l_01120020115en00040017.pdf.

69. Report of the Federal Department of Economic Affairs of June 4, 2007 on the Results of the Consultation Procedure Regarding the Revision of the Federal Law on Security of Technical Equipment and Devices, *available at* http://www.evd.admin.ch/themen/00433/00437/00453/index.html?lang=de.