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International Contracts

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This article describes significant contract issues and legal developments that arose during 2019.

I. Introduction

In this article, the authors describe some of the contract issues and legal developments that arose during 2019. In light of the continued evolution of technology and the implementation of General Data Protection Regulation (GDPR) throughout 2019, Section II offers a timely discussion of the legal and ethical implications that arise when companies begin using artificial intelligence (AI), and it describes some issues that could be addressed in contracts that deal with AI. Section III discusses significant developments in franchise law, in the United States and internationally. Finally, Section IV examines legal developments in Sweden, including a Swedish Supreme Court case that, in a thought-provoking opinion, used concepts from the United Nations Convention on Contracts for the International Sale of Goods (CISG) to resolve a dispute that arose from a domestic issue relating to a commercial lease.

II. Artificial Intelligence *Ante Portas*: Exploring Legal and Ethical Implications

"It makes me indignant when I hear a work blamed not because it's crude or graceless, but only because it's new. Had the Greeks hated the new the way we do, whatever would have been able to grow to be old?"[1] As the Latin lyric poet Horace said, we tend to be skeptical in front of what is new and we do not know. This challenge is even more considerable in a world where borders and regulatory differences between countries remain, and there is no universal consensus on ethics. For instance, in human rights friendly countries—such as the European Nations, where the new President of the European Commission declared that "the cornerstone of the European AI

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1. HORACE, THE EPISTLES OF HORACE: BILINGUAL EDITION 117 (David Ferry, trans. 2001).

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plan will be to develop 'AI made in Europe' that is more ethical than AI made anywhere else in the world"[2]—the legislature will limit AI intervention in the personal life of its citizens and establish criminal liability for the most dangerous violation of personal interests. Other countries instead focus more on the development of AI technologies, which could, for example, even be used to prognosticate illegal behavior, even if they might violate private interests. Countries such as the United States, China, Japan, Israel, and Chile use sophisticated software to predict crimes—recalling sometimes the construction of the world described in George Orwell's novel "1984."

Benjamin Franklin said that sometimes "[t]hose who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety,"[3] but is it true? Different legal frameworks definitely reflect and promote society's values. For example, the European Union's General Data Protection Regulation (GDPR)[4] reveals that Europeans value individual privacy, and the First Amendment to the United States Constitution[5] reveals that Americans value free speech.

According to the European Commission,[6] "AI should be developed, deployed, and used with an 'ethical purpose,' grounded in, and reflective of, fundamental rights, societal values and the ethical principles of Beneficence (do good), Non-Maleficence (do no harm), Autonomy of humans, Justice, and Explicability. This is crucial to work towards Trustworthy AI."[6] To realize this goal, requirements should address data governance, human oversight, nondiscrimination, privacy, safety, and transparency. Both ethics and law are sources of information regarding norms, and both help people in decision-making.

On July 24, 2019, the European Commission published a report looking at the impact of the GDPR, a single set of rules with a common EU approach to the protection of personal data directly applicable in the member states after one year of its entry into application.[7] "The report concluded that most members have set up the necessary legal framework and that the new system strengthening the enforcement of the data protection

2. Daniel Castro, *Europe Will Be Left Behind if it Focuses on Ethics and Not Keeping Pace in AI Development*, EURONEWS.COM (July 8, 2019), https://www.euronews.com/2019/08/07/europe-will-be-left-behind-if-it-focuses-on-ethics-and-not-keeping-pace-in-ai-development.

3. BENJAMIN FRANKLIN, THE PAPERS OF BENJAMIN FRANKLIN, VOL. 6 238-43 (Leonard W. Labaree, ed., 1963).

4. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1.

5. U.S. CONST. amend. I.

6. *Draft for Regulation of the European Parliament and of the Council Concerning the Ethics Guidelines for Trustworthy AI*, at ii, COM (Dec. 18, 2018).

7. *Communication from the Commission to the European Parliament and the Council*, COM (2019) 374 final (July 24, 2019); European Commission Press Release IP/19/4449, General Data Protection Regulation Shows Results, But Work Needs to Continue (July 24, 2019).

rules is falling into place."[8] "At the same time, convergence towards strengthened data protection standards is progressing at the international level."[9] "The GDPR has made EU citizens increasingly aware of data protection rules and of their rights, as indicated by a Eurobarometer survey published in May 2019."[10]

The United States House of Representatives introduced House Resolution 153 in February 2019, with the intent of supporting "the development of guidelines for ethical development of artificial intelligence" and emphasizing the "far-reaching societal impacts of AI" as well as the need for AI's "safe, responsible, and democratic development."[11] Moreover, on April 10, 2019, U.S. Senators Cory Booker and Ron Wyden introduced the "Algorithmic Accountability Act," which "requires companies to study and fix flawed computer algorithms that result in inaccurate, unfair, biased[,] or discriminatory decisions impacting Americans."[12] Rep. Yvette D. Clarke introduced a companion bill in the House.[13] "The bill stands to be the United States Congress's first serious foray into the regulation of AI and the first legislative attempt in the United States to impose regulation on AI systems in general."[14]

Current approaches to the ethics of AI technologies essentially concern responsible use of AI,[15] professional codes of conduct,[16] and human-robot interaction.[17] Several of these relevant ethical issues of concern could be addressed by provisions in legal contracts between parties, including:[18]

- Implications for employment: How will robots affect healthcare workers? In the United States, on September 11, 2019, Senator Sherrod Brown introduced Senate Bill 2468, the "Workers' Right to Training Act," which would require employers to provide training to

8. European Commission Press Release IP/19/4449, *supra* note 7.

9. *Id.*

10. *Id.*

11. H.R. Res. 153, 116th Cong. (2019).

12. Press Release, Cory Booker, Booker, Wyden, Clarke Introduce Bill Requiring Companies To Target Bias In Corporate Algorithms (Apr. 10, 2019), https://www.booker.senate.gov/?p=press_release&id=903; *see also* S. 1108, 116th Cong. §2 (2019).

13. H.R. Res. 2231, 116th Cong. (2019).

14. H. Mark Lyon et al., *2019 Artificial Intelligence and Automated Systems Annual Legal Review*, GIBSON, DUNN & CRUTCHER LLP, https://www.gibsondunn.com/wp-content/uploads/2020/02/2019-artificial-intelligence-and-automated-systems-annual-legal-review.pdf (last updated Feb. 11, 2020).

15. Michael Anderson & Susan Anderson, *The Status of Machine Ethics: A Report from the AAAI Symposium*, 17 MINDS AND MACH. 1, 1–10 (2007).

16. Terrell Ward Bynum, *Very Short History of Computer Ethics*, AM. PHIL. ASS'N NEWSL. ON PHIL. & COMPUTING (2000), http://www.cs.utexas.edu/~ear/cs349/Bynum_Short_History.html (last visited Mar. 11, 2019).

17. *See* Gianmarco Veruccio, *The Birth of Roboethics*, IEEE INT'L CONF. ON ROBOTICS & AUTOMATION 1, 1-4 (2005).

18. *See* Bernd Carsten Stahl & Mark Coeckelbergh, *Ethics of Healthcare Robotics: Towards Responsible Research and Innovation*, 86 ROBOTICS & AUTONOMOUS SYS. 152, 152–61 (2016).

employees whose jobs are in danger of being changed or replaced due to technology (defined as automation, artificial intelligence, robotics, personal computing, information technology, and e-commerce).[19]

- Responsibility: Assuming robots cannot be morally responsible, who will be responsible? On April 8, 2019, the High-Level Expert Group on AI adopted the Ethics Guidelines for Trustworthy Artificial Intelligence, where it identified traceability as an important way to operationalize responsibility.[20]
- Trust and reliability: Shall we trust the care provided by robots? "AI-based healthcare technologies are being developed and deployed at an impressive rate. But harnessing their full potential will first require overcoming patients' skepticism of having an algorithm, rather than a person, making decisions about their care."[21]
- Privacy and data protection: Which data are collected? Who can access the data? Who owns the data? Even in this domain there are regulatory differences between countries. From a dispute between Google and a French privacy regulator, for instance, the European Court of Justice in September 2019 ruled that Google does not have to apply the right to be forgotten globally, but just in the EU.[22] "Currently, there is no obligation under EU law, for a search engine operator who grants a request for de-referencing made by a data subject to carry out such a de-referencing on all the versions of its search engine," the European Court of Justice ruling said.[23]

Moreover, on November 12, 2019, the European Data Protection Board (EDPB) adopted final guidelines on the territorial scope of the GDPR.[24] Regarding the "establishment" criterion used in Article 3(1) of the GDPR, the Guidelines clarify that there are limitations to it. For example, a single employee in the EU may constitute an "establishment" in the sense of the GDPR, but the presence of an employee in the EU as such does not trigger the application of the GDPR. The GDPR only applies to data processing activities that are related to the activities of the EU-based employee and not to data processing activities that relate to the activities of a controller outside the EU.[25] Furthermore, the mere fact that a non-EU entity has a website

19. *See* S. 2468, 116th Congress (2019).

20. *Report of the Unit of Robotics and Artificial Intelligence on the Ethics Guidelines for Trustworthy AI*, EUR. COMM'N (Apr. 8, 2019), https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai.

21. Chiara Longoni & Carey Morewedge, *AI Can Outperform Doctors. So Why Don't Patients Trust It*, HARV. BUS. REV.: TECH., (Oct. 30, 2019), https://hbr.org/2019/10/ai-can-outperform-doctors-so-why-dont-patients-trust-it.

22. Case C-507/17, Google Inc. v. Comm'n Nationale de l'informatique et des libertés (CNIL), 2019 E.C.R. I-722.

23. *Id.*

24. Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3), Eur. Data Protection Bd. 1, 1-23 (Nov. 16, 2018).

25. *See id.* at 4.

accessible to users in the EU is not sufficient to conclude that this entity is established in the EU.[26]

- Discrimination: Stanford researchers created a facial recognition analysis program that can detect sexual orientation.[27] The start-up Faception says its machine learning (ML) technology can spot character traits in a person's face.[28] Such applications raise ethical and legal questions related to discrimination. For instance, is an employer allowed to use facial recognition software in the recruitment process?[29]
- Copyright laws: "Intelligent systems affect intellectual property (IP) rights and may require updating IP law. For example, recently Christie's sold an AI-created artwork painted using an algorithm. This raises questions about who should get the IP rights."[30] "Creative works qualify for copyright protection if they are original, with most definitions of originality requiring a human author."[31]
- Moral agency: Robots do not have the ability of critical thinking or of dealing with ethically problematic issues.[32]
- Safety of robots in the working environment.[33]

Using AI for legal contracts allows companies to review contracts more rapidly and easily and gain competitive advantages; however, the goal for the machine is to recognize context, which can be very hard because of the subtleties of humankind's different languages.[34] In this scenario, the comprehension of the current and future legal framework is very important because it allows individuals to understand the most important challenges related to the expansive introduction of autonomous systems, and consequently encourages governments to develop rules about the proper use of AI systems and which types should be banned in safeguarding the observance of human rights.

"We live in a nation of laws and the government needs to play an important role in regulating facial recognition technology."[35] No country, however, seems to have a coherent strategic approach to governance and

26. *Id.* at 14.

27. *See* Heather Murphy, *Why Stanford Researchers Tried to Create a 'Gaydar' Machine*, N.Y. TIMES (Oct. 9, 2017), https://www.nytimes.com/2017/10/09/science/stanford-sexual-orientation-study.html.

28. *See id.*

29. ASHER WILK, TEACHING AI, ETHICS, LAW AND POLICY, 5 Tel Aviv Uni. 1, 2 (2019), https://arxiv.org/abs/1904.12470.

30. *Id.*

31. *Id.* (citing Andres Guadamuz, *Artificial Intelligence and Copyright*, WIPO MAG. (2017), https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html.).

32. *Id.* at 3.

33. *Id.*

34. Beverly Rich, *How AI is Changing Contracts*, HARV. BUS. REV.: TECH., (Feb. 12, 2018), https://hbr.org/2018/02/how-ai-is-changing-contracts.

35. Brad Smith, *Facial Recognition Technology: The Need for Public Regulations and Corporate Responsibility*, MICROSOFT: MICROSOFT ON THE ISSUES BLOG (July 13, 2018), https://

regulation of AI yet, and there is a growing consensus in academia that traditional government regulation is insufficient for the oversight of emerging technologies, such as AI and robotics.

> In Canada, for instance, the Treasury Board Secretariat of Canada (the Board) is looking at issues around the responsible use of AI in government programs and services. On March 2, 2019, the Board released a Directive on Automated Decision-Making, which took effect on April 1, 2019, to ensure that AI driven decision-making is compatible with core administrative law principles such as transparency, accountability, legality, and procedural fairness.[36]

While government regulators and policymakers still play a crucial role, it is also necessary to cultivate new institutions and methods that are more holistic, reflexive, agile, and inclusive. "Soft law," for instance, can be seen as a strategy that helps overcome limitations and challenges of traditional government regulation for emerging technologies. Whereas "hard law" consists of legally enforceable requirements imposed by governments, "soft law" consists of measures that are not directly enforceable. Soft law can be promulgated by a plethora of stakeholders, including governments, NGOs, professional societies, think tanks, public–private partnerships, business actors, or any combination of the above creating a cooperative approach.[37] "Examples of soft law include voluntary programs, standards, codes of conduct, best practices, certification programs, guidelines, and statements of principles."[38]

International human rights law can provide another tool. "Although international human rights law does not impose binding obligations on digital platforms, it offers a normative structure of appropriate standards by which digital platforms should be held to account."[39]

The spread of misinformation via social media threatens the fabric of modern societies. Laws to address this spread of misinformation should be vigorously implemented. "Websites and media influence us and affect our minds."[40] "Social media are systematically exploited to manipulate and alter public opinion,"[41] and their tools can be abused and can produce fake news

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blogs.microsoft.com/on-the-issues/2018/07/13/facial-recognition-technology-the-need-for-public-regulation-and-corporate-responsibility/.

36. Todd Burke & Scarlett Tarzo, *Emerging Legal Issues in an AI-Drive World*, GOWLING WLG (July 17, 2019), https://gowlingwlg.com/en/insights-resources/articles/2019/emerging-legal-issues-in-an-ai-driven-world/.

37. Wendell Wallach & Gary Marchant, *Toward the Agile and Comprehensive International Governance of AI and Robotics*, 107 PROCEEDINGS IEEE 505, 506 (2019).

38. *Id.*

39. KATE JONES, ONLINE DISINFORMATION AND POLITICAL DISCOURSE: APPLYING A HUMAN RIGHTS FRAMEWORK 4 (2009), https://www.chathamhouse.org/sites/default/files/2019-11-05-Online-Disinformation-Human-Rights.pdf.

40. Wilk, *supra* note 29, at 5.

41. *Id.* (citing Emilio Ferrara, *Disinformation and Social Bot Operations in the Run Up to the 2017 French Presidential Election*, 22 FIRST MONDAY (2017), https://arxiv.org/pdf/1707.00086.pdf.).

(e.g., the bots used during the 2016 U.S. elections to influence voters). To ensure that false content is not amplified across platforms, there is an urgent need for some "regular auditing of what the platforms are doing" and "a new system of safeguards."[42] The same concerns exist for robot journalism. increasingly, news companies will be using automatic news writing services, even on challenging subjects.[43] "This raises new ethical issues—for instance, the accuracy of the data and the legal rights to the data."[44] "Will the fact that a story was automatically produced be disclosed? Will a human editor check every story before it goes out? Can we program ethical concerns into robot journalism algorithms?"[45]

"The rights to freedom of thought and opinion without interference are critical to delimiting the appropriate boundary between legitimate influence and illegitimate manipulation. When digital platforms exploit decision-making biases in prioritizing bad news and divisive, emotion-arousing information, they may be breaching these rights."[46]

> The rules on the boundaries of permissible content online should be set by nations and should be consistent with the right to freedom of expression. Digital platforms have had to rapidly develop policies on retention or removal of content, but those policies do not necessarily reflect the right to freedom of expression, and platforms are currently not well placed to take account of the public interest.[47]

Expertise in international human rights law should be integral to their systems.[48]

In summary, successful innovation in the legal sector requires collaboration between legal communities across the world. An important step towards the need for international cooperation to shape a policy environment that fosters trust in and adoption of AI was made by the OECD Recommendation of the Council on Artificial Intelligence, the first intergovernmental standard on AI, adopted by all OECD members and by several partner countries on May 22, 2019.[49] "The Recommendation identifies five complementary values-based principles for the responsible stewardship of trustworthy AI: inclusive growth, sustainable development, and well-being; human-centered values and fairness; transparency and explain-ability; robustness, security, and safety; and accountability."[50]

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42. *Id.* (citing David Lazer, et al., *The Science of Fake News*, 359 SCI. 1094, 1096 (2018), https://www.researchgate.net/publication/323650280_The_science_of_fake_news.).

43. *See id.*

44. *See id.*

45. Wilk, *supra* note 29, at 5.

46. Jones, *supra* note 39, at 2.

47. *Id.* at 3.

48. *Id.*

49. *See* Organization for Economic Co-operation and Development [OECD], *Recommendation of the Council on Artificial Intelligence*, OECD/LEGAL/0449.

50. *Id.*

> The Recommendation also provides five recommendations to policymakers pertaining to national policies and international co-operation for trustworthy AI: investing in AI research and development, fostering a digital ecosystem for AI, shaping an enabling policy environment for AI, building human capacity and preparing for labor market transformation, and international co-operation for trustworthy AI.[51]

A month later, these principles were adopted also by the G20 Ministerial Meeting on Trade and Digital Economy.[52] "Meanwhile, the Council of Europe's Committee of Ministers, Parliamentary Assembly, and Commissioner for Human Rights have launched a series of normative discussions and initiatives."[53]

An antidote may be increasing awareness and fighting ignorance, as the Italian political leader and novelist Ignazio Silone said: "There is no worse slavery than the one you ignore."[54]

III. Franchise Industry Updates

A. Developments in the United States

With a few exceptions, franchise law in the United States was largely unchanged in 2019. Issues surrounding no-poach provisions in franchise agreements continued to garner attention and scrutiny from state regulators.[55] Some industry professionals expressed alarm that California has potentially upended the franchise model in California with the passage

51. *Id.*

52. *See* G20 Ministerial Statement on Trade and Digital Economy (2019), https://www.mofa.go.jp/files/000486596.pdf.

53. Camino Kavanagh, *New Tech, New Threats, and New Governance Challenges: A Opportunity to Craft Smarter Responses* 18 (Carnegie Endowment for Int'l Peace, Working Paper, 2019)(citing Council of Europe Committee of Ministers, "Technological Convergence, Artificial Intelligence and Human Rights: Recommendation 2102," 2017; Council of Europe Committee of Ministers, "Technological Convergence, Artificial Intelligence and Human Rights: Reply to Recommendation," October 19, 2017; Council of Europe Commissioner for Human Rights "Unboxing Artificial Intelligence: 10 Steps to Protect Human Rights," May 2019; and Council of Europe Committee of Ministers, "Declaration by the Committee of Ministers on the Manipulative Capabilities of Algorithmic Processes" February 13, 2019. All three of these documents are available on the Council of Europe's webpage on artificial Intelligence. *See* Council of Europe).

54. Ignazio Silone, Uscita di Sicurezza, (1965).

55. *See generally A Fresh Approach to No-Poach Provisions in Franchise Agreements*, Akin Gump (April 2, 2019), https://www.akingump.com/en/news-insights/a-fresh-approach-to-no-poach-provisions-in-franchise-agreements.html.

of AB-5 during 2019.[56] The Federal Trade Commission (FTC) continued its review of the amended FTC Franchise Rule.[57]

1. *No-Poach Provisions*

In general, a "no-poach" provision prohibits franchisees from soliciting or hiring the employees of the franchisor or other franchisees.[58] During 2019, the Washington Attorney General continued his efforts toward his "goal of eliminating no-poach clauses nationwide" by continuing to investigate and entering into Assurances of Discontinuance (AODs) with several franchisors in different industries.[59] The AODs generally provided that the franchisors would agree to a number of conditions, including amending franchise agreements with Washington-state franchisees to remove no-poach provisions from their franchise agreements, removing no-poach provisions from franchise agreements with all franchisees nationwide as those franchise agreements came up for renewal or amendment, and eliminating no-poach provisions from all future template franchise agreements on a nationwide basis.[60]

As of October 28, 2019, the Washington Attorney General had entered into legally binding agreements with 155 franchisors.[61] Whereas during 2018, the emphasis of these CIDs appeared to be on quick-service restaurants, during 2019, the Washington Attorney General expanded his effort to include franchisors in all types of industries, such as gyms, automotive services, and convenience stores.[62]

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56. *See, e.g.*, Press Release, Int'l Franchise Ass'n, IFA Statement on California AB-5 Passage and Approval (Sept. 18, 2019), https://www.franchise.org/media-center/press-releases/ifa-statement-on-california-ab-5-passage-and-approval (last visited June 2, 2020) ("With this bill's passage, California has upended an entire business model and thrown thousands of small business owners' livelihoods into flux. AB-5's overly broad language makes franchising's future uncertain in California.").

57. *See, e.g.*, Press Release, Federal Trade Commission, FTC Seeks Public Comment as Part of its Review of the Franchise Rule (Feb. 13, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftc-seeks-public-comment-part-its-review-franchise-rule (last visited June 2, 2020) (soliciting comments from the public regarding whether to make changes to the FTC's franchise rule).

58. Press Release, Off. of the Att'y Gen. AAG to Testify to Congress as AG Ferguson's Anti-No-Poach Initiative Reaches 155 Corporate Chains (Oct. 28, 2019), https://www.atg.wa.gov/news/news-releases/aag-testify-congress-ag-ferguson-s-anti-no-poach-initiative-reaches-155-corporate.

59. *See id.*

60. *See, e.g.*, Assurance of Discontinuance, In re Franchise No Poaching Provisions (2018) (No. 18-2-17232-2SEA) (setting forth the conditions under which this franchisor would operate with respect to no-poach provisions on a going-forward basis).

61. *See* Press Release, Off. of the Att'y Gen., *supra* note 58.

62. *See id.*

2. *California AB-5*

In September 2019, Governor Gavin Newsom of California signed California Assembly Bill 5 (AB-5), which was enacted to codify a three-part test for determining whether a worker is an employee or an independent contractor.[63] Under AB-5, a worker is considered an employee unless the hiring entity can demonstrate three conditions are satisfied:

> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[64]

AB-5 went into effect on January 1, 2020.[65] Although AB-5 exempts several classes of workers—such as physicians, lawyers, investment advisers, and insurance agents, among others—from the applicability of the three-part test, there is no exemption for franchisees or their employees.[66] As such, many in the franchise industry have expressed concern that the law is so expansive that it "could potentially turn the franchise model—where an independent franchisee hires and oversees its own employees—into a corporate model, where the franchisor would effectively absorb all franchisees and their employees into a single company."[67] Despite these types of doomsday declarations, the impact on franchising will not be known until AB-5 goes into effect in 2020.

3. *FTC's Scheduled Review of the Franchise Rule is Ongoing*

Finally, during 2019, the FTC continued the process of reviewing the amended FTC Franchise Rule, which it began in 2018.[68] By law, every ten years the FTC is scheduled to initiate a review of, and solicit public comments on, the current FTC Franchise Rule.[69] In March 2019, the FTC

63. *See* A.B. 5, 2019 Leg., Reg. Sess. (Cal. 2019).
64. *See id.* at § 2(a)(1)(A)-(C).
65. *See id.* at § 3(h)(1).
66. *See id.* at § 2(a)(3)(B).
67. *See* Press Release, Int'l Franchise Ass'n, IFA Statement on California AB-5 Passage and Approval (Sept. 18, 2019), https://www.franchise.org/media-center/press-releases/ifa-statement-on-california-ab-5-passage-and-approval.
68. *See, e.g.*, Press Release, *supra* note 57.
69. *See* Press Release, Federal Trade Commission., FTC Announces Regulatory Review Schedule (Feb. 14, 2018), https://www.ftc.gov/news-events/press-releases/2018/02/ftc-announces-regulatory-review-schedule.

solicited public comments on the FTC Franchise Rule as part of its review.[70] In all, forty-one comments were submitted by the public before the comment period deadline of May 13, 2019.[71] Notably, all forty-one comments supported the continued existence of the FTC Franchise Rule in some form.[72] As of the writing of this article, the FTC has given no further indication on timing for a decision on any changes it may make to the FTC Franchise Rule, so franchise counsel is well advised to continue to monitor this issue.

B. INTERNATIONAL DEVELOPMENTS

1. *Indonesia Simplifies its Franchise Regulations*

In a welcome development for franchisors wishing to conduct business in Indonesia, in September 2019, the Minister of Trade issued Government Regulation No. 71 of 2019 on Franchise (MoTR 71/2019).[73] MoTR 71/2019 simplifies what has traditionally been rather onerous provisions of Indonesian franchise law.[74] For instance, under prior Indonesian franchise regulations, franchised businesses were required to use at least eighty percent locally sourced raw materials, equipment, or products.[75] Under MoTR 71/2019, franchisors are only obligated to encourage the use of local goods and services.[76] In another example, under prior regulations, franchisors could not appoint affiliates as franchisees.[77] MoTR 71/2019 eliminates that rule, so a franchisor can now enter into a franchise agreement with the franchisor's affiliate or subsidiary.[78]

2. *Saudi Arabia Enacts a New Franchise Law*

Finally, in a long-awaited development in Saudi Arabia, on October 8, 2019, the Council of Ministers approved the Saudi Arabia Franchise Law,[79] which is scheduled to go into effect on April 22, 2020. The provisions of the Saudi Arabia Franchise Law apply to any franchise agreement within the

70. *See* Disclosure Requirements & Prohibitions Concerning Franchising, 84 Fed. Reg. 9,051 (proposed Mar. 13, 2019) (to be codified at 16 C.F.R. pt. 436).

71. *See* Peter Lagarias & Jonathan Solish, *How Should the FTC Rule Be Restructured, If at All?*, A.B.A. 42ND ANN. F. ON FRANCHISING, Oct. 2019, at 3.

72. *See id.* at 4.

73. Minister of Trade Regulation No. 71 of 2019 (Indon.) [hereinafter *MoTR 71/2019*].

74. *See id.*

75. *See* Minister of Trade Regulation No. 53/M-DAG/PER/8/2012, art. 19 (Indon.) [hereinafter Regulation 53]; Dara Lukiantono, *Client Alert: New Franchise Regulation*, HHP L. FIRM 1, 2 (Oct. 2019), https://www.bakermckenzie.com/-/media/files/insight/publications/2019/10/new-regulation-on-franchise-october-2019.pdf.

76. *See* MoTR 71/2019, *supra* note 73, at art. 18(B)-(C); Lukiantono, *supra* note 75.

77. *See* Regulation 53, *supra* note 75.

78. *See* MoTR 71/2019, *supra* note 73, at art. 18(B)-(C); Lukiantono, *supra* note 75.

79. Faisal Daudpota, *Saudi Arabia: An Overview of its Commercial Franchise Law*, SSRN 1, 3 (Nov. 24, 2019), https://ssrn.com/abstract=3492577.

Kingdom of Saudi Arabia.[80] Article 2 lays out four general purposes behind the new law: (1) to regulate the relationship between franchisors and franchisees; (2) to afford protection to franchisees upon the termination of the franchise agreement; (3) to ensure disclosure of the rights, obligations, and risks related to franchise opportunities; and (4) to ensure the quality of goods and services offered within the Kingdom.[81]

Among other requirements, the Saudi Arabia Franchise Law requires franchisors to register the franchise agreement and a disclosure statement with the Ministry of Commerce and Investment.[82] Franchisors must provide prospective franchisees with a copy of the disclosure statement at least fourteen days before the franchisee signs a franchise agreement or pays any consideration to the franchisor.[83] The Saudi Arabia Franchise Law also provides that a franchisor may not terminate a franchise agreement without good cause and provides several categories of events that would constitute good cause.[84]

3. *Dutch Government Announces Franchise Act with Mandatory Provisions*

On July 12, 2019, the Minister for Economic Affairs and the Minister for Legal Protection (one of the two Dutch Justice Ministers) announced that they had sent a proposed Franchise Bill to the High Council of State (*Raad van State*) for their legally required consideration and advice.[85] The actual contents of the bill will not be known until the ministers introduce it in the *Tweede Kamer* (Lower house of representatives); however, a consultation proposal of the bill was published on December 12, 2018.[86] Based on that consultation proposal and on a government report on the consultation results,[87] a general idea can be given on the bill's content.

a. Brief Background

As the Explanatory Memorandum[88] to the consultation proposal states, the reason for introducing the bill lies in the unequal position of power between franchisor and franchisee, where the franchisor is usually the dominant party. This inequality can lead (and has led[89]) to excesses whereby

80. *See id.* at 14 (citing art. 3 of CFL'19).
81. *See id.* at 3 (citing art. 2 of CFL'19).
82. *See id.* at 5–6.
83. *See id.* at 5.
84. *See id.* at 12.
85. *See* Nieuwe *wet Franchise naar de Raad van State [New Franchise Act to the State Council]*, RIJKSOVERHEID (June 12, 2019, 7:30 AM), https://www.rijksoverheid.nl/actueel/nieuws/2019/07/12/nieuwe-wet-franchise-naar-de-raad-van-state.
86. *See Wet franchise*, OVERHEID.NL, https://www.internetconsultatie.nl/wet_franchise (last visited Nov. 27, 2019).
87. *See id.*
88. *See id.*
89. *See* Memorie van Toelichting, Wijziging van Boek 7 van het Burgerlijk Wetboek in verband met de invoering van regels omtrent de franchiseovereenkomst (Wet franchise) [Explanatory Memorandum to Amendment to Book 7 of the Dutch Civil Code in connection

the franchisor abuses its power to make unreasonable demands from the franchisee. The franchisor thereby often makes use of a lack of transparency in the obligations resting on the franchisee.[90]

Although the Dutch Franchising Association (*Nederlandse Franchise Vereniging*) maintains a "Code of Honor," based on a translation of the European Franchising Code of Ethics,[91] its provisions could not be enforced, and Dutch Courts (including the Dutch Supreme Court as recently as 2018[92]) have generally refused to recognize its provisions as binding. An attempt in 2017 to enact an industry-generated Dutch Franchise Code (*Nederlandse Franchise Code*) into Dutch law foundered, since franchisors and franchisees had points of view on the Code that were too widely divergent.[93] The franchisors (who were generally opposed) preferred formal legislation.[94] The present bill proposes to add eleven articles (911 through 921) to Book 7 of the Dutch Civil Code.[95]

b. Mandatory Provisions

Proposed Article 7:921 BW (*Burgerlijk Wetboek*, Dutch Civil Code) declares that no derogation of the preceding ten articles is allowed, if the derogation is to the disadvantage of the franchisee.[96] The franchisee can declare such disadvantageous stipulation null and void.[97]

c. Breakdown of Provisions

i. Definitions and "Good Franchisor and Franchisee"

Article 911 contains definitions, such as "franchise formula," "franchisor," "franchisee," and so on.[98] As a result of franchisors' comments in the consultation, a definition of "handbook" and an obligation to provide the handbook to the franchisee in advance were eliminated.[99]

Article 912 obliges parties to act towards each other as "good franchisor/ franchisee."[100] In light of the general requirement of Dutch law to behave

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with the introduction of rules regarding the franchise agreement (Franchise Act)] (2019-2020), 35392, No. 3 (Neth.), *available at* https://zoek.officielebekendmakingen.nl/kst-35392-3.html [hereinafter Explanatory Memorandum].

90. *See Wet franchise*, *supra* note 86.

91. *The European Code of Ethics for Franchising & its national Extensions & Interpretations*, EUROPEAN FRANCHISE FEDERATION (Dec. 6, 2016), http://www.eff-franchise.com/Data/Code%20of%20Ethics.pdf.

92. HR 21 september 2018 NJB 2018/1767 m.nt. ([eiseres]/ ALBERT HEIJN FRANCHISING B.V.) (Neth.).

93. *See* Explanatory Memorandum, *supra* note 89.

94. *See id.* at 5.

95. *See id.*

96. *See* Explanatory Memorandum, supra note 89, at Art. 7:921.

97. *See id.*

98. *See id.* at Art. 7:911.

99. *See Wet franchise*, *supra* note 86.

100. *See* Explanatory Memorandum, supra note 89, Art. 7:912.

according to the "demands of reason and fairness,"[101] this may seem a bit superfluous, but this requirement (borrowed from Dutch employment law,[102] where it plays a significant part) implies a somewhat stricter norm than the general one.

ii. Disclosure Obligations

The bill contains extensive disclosure obligations, both precontractual and during the term of the contract. Article 913, in general, obliges parties "to provide each other, in a timely fashion, both before concluding of and during a franchise agreement, with all information that they know, or can reasonably suppose to be or to become of interest in connection with concluding or executing the franchise agreement."[103] The information must be disclosed in written form and be clearly formulated and arranged to allow the other party to understand its consequences for the franchise agreement.[104]

In particular, Article 915 obliges parties to disclose to each other, before signing the agreement, all relevant information on their financial positions.[105] Furthermore, the franchisor must give the franchisee, again before signing the agreement:

- its name and contact data (and those of possible contact persons);
- financial data concerning the intended franchise location (it is yet unclear whether this includes projected turnover; according to a recent Dutch Supreme Court decision, under present law no such obligation exists.);
- a draft franchise agreement, with all annexes;
- contact data and locations of other franchise locations;
- contact data of a franchisee's representative body, if one exists; and
- information concerning (i) franchisor/franchisee meetings, (ii) possible competing activities of the franchisor, (iii) the extent, frequency, and method by which the franchisor collects financial data of the franchisee, and (iv) investments required from the franchisee.[106]

Additionally, according to Article 916, during the time the agreement is in force, the parties must inform each other of changes in their finances and certain changes in the operation of the franchise. The franchisor must inform the franchisee of intended changes in the franchise agreement and further investment required of the franchisee.[107]

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101. *See id.*
102. *See id.* at Art. 7:611.
103. *See id.* at Art. 7:913.
104. *See id.*
105. *Id.* at Art. 7:915.
106. Explanatory Memorandum, *supra* note 89, at Art. 7:915.
107. *See id.* at Art. 7:916.

iii. Precontractual Information Period

According to Article 914, the precontractual information must be provided at least four weeks before the parties sign the agreement.[108] During this four-week period, the franchisor cannot change the draft agreement (unless to the benefit of the franchisee) or force the franchisee to sign the agreement or make payments or investments.[109]

iv. Franchise Agreement Clauses

Article 919 stipulates that the franchise agreement must state how goodwill in the franchisee's business is assessed, that the goodwill that can be attributed to the franchisee is paid to the franchisee on termination of the franchise agreement and how this will be done (after the bill's consultation: only if the business is taken over by franchisor), and that there must be consultation between parties at least once a year.[110] A non-competition clause after termination may only stipulate a prohibition for a maximum period of one year and will only be valid in the franchisee's franchise area.[111]

v. Consent Obligations

Under section 4 of Article 919, a material change in the franchise agreement (outside a range stipulated by the franchisor in the agreement itself) requires the consent of a majority of the franchisee's representative body, if one exists, or the consent of the affected franchisee.[112] Furthermore, under Article 920, an action by the franchisor, not foreseen in the franchise agreement, concerning the franchise formula, which has or threatens considerable consequences for the franchisee's franchise business, also requires the consent of a majority of the franchisee's representative body, if one exists, or the consent of the affected franchisee.[113]

d. Transitional Law

Article II of the proposed bill (the above-described proposed articles are in Article I) gives parties a period of a to-be-specified number of years (presumably one) to bring their existing agreements in line with the act.[114]

e. Reactions from Franchise Community

According to the consultation report, franchisees were overwhelmingly in favor of the bill becoming an act.[115] Franchisors were critical, questioning the need for introduction of the bill at all, pointing out possible negative effects on the Netherlands' business environment compared to other

108. *Id.* at Art. 7:914.
109. *Id.*
110. *See id.* at Art. 7:919.
111. *Id.*
112. *See* Explanatory Memorandum, *supra* note 89, at Art. 7:915 para. 4.
113. *See id.* at Art. 7:920.
114. *See id.* at Artikel II.
115. *See Wet franchise*, *supra* note 86.

countries.[116] They also pointed out that the projected franchisee protection seems to be mostly geared to retail franchises and that other forms may have different needs.[117]

f. Way Forward

As stated above, the bill is now with the *Raad van State* for advice.[118] The Dutch government hopes to introduce the bill with the *Tweede Kamer* in December 2019, after which there will be first a written procedure and then a debate and vote in the Chamber, where members can propose and vote on amendments (it is also not uncommon for the government to introduce changes during the written procedure).[119] After that, the matter will be discussed (again first in writing) and debated in the *Eerste Kamer* (First Chamber, Senate).[120] Only if the bill has been passed in both houses and the King has signed it (which he never refuses), it will become an act, and the introduction date will be set.[121]

Final enactment will probably occur in 2021 at the earliest, and what the Act will look like is far from clear. Franchisors may be trying to have sympathetic members of parliament push through amendments to satisfy their wishes, and franchisors should keep an eye on developments.

IV. Sweden

A. Trademark Law, Counterfeit Products

On January 1, 2019, several amendments to the Swedish trademark legislation entered into force.[122] The aim of the legislation is to modernize, simplify, and conform trademark law to EU legislation.[123] One important change is that the Trademark Act[124] will now include forms of trademarks other than those reduced to a graphic design. By way of example, a

116. *See id.*
117. *Id.*
118. *See New Franchise Act to the State Council*, *supra* note 85.
119. *See Nota van wijziging [Change Note]*, Parlement.com, https://www.parlement.com/id/vid1ivwcfonn/nota_van_wijziging.
120. *See Hoe Komt Eeen Wet Tot Stand [How Does a Law Come About?]*, Rijksoverheid, https://www.rijksoverheid.nl/onderwerpen/wetgeving/hoe-komt-een-wet-tot-stand (last visited June 15, 2020).
121. *Id.*; *see also Wet franchise*, *supra* note 86.
122. *See* Lag om ändring i varumärkeslagen (Svensk författningssamling [SFS] 2018:1652) (Swed.), *available at* https://svenskforfattningssamling.se/sites/default/files/sfs/2018-11/SFS2018-1652.pdf.
123. *See Modernare regler om varumärken och en ny lag om företagsnamn [More Modern Rules on Trademarks and a New Law on Company Names]*, Regerinskansliet (Apr. 20, 2018), https://www.regeringen.se/rattsliga-dokument/lagradsremiss/2018/04/modernare-regler-om-varumarken-och-en-ny-lag-om-foretagsnamn/.
124. *See* Varumärkeslag (2010:1877) (Svensk författningssamling [SFS] (2010:1877) (Swed.), *available at* https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/varumarkeslag-20101877_sfs-2010-1877.

trademark in the form of a sound or combination of sounds can now be registered, which was not possible before.[125]

From an international contracts point of view, one of the more interesting aspects of the new legislation is that trademark protection now includes counterfeit goods that are simply passing through Sweden without being released into the common market of the European Union, i.e., goods in transit.[126] Consequently, even goods that are intended for distribution in countries outside of the European Union can be seized by Swedish customs based on a suspicion of trademark infringement.[127] If there is reason to suspect that goods in transit passing through Sweden are counterfeit, the customs authority shall take action on its own initiative.[128] The party declaring the goods will then have to object, and the trademark owner may initiate legal proceedings.[129] As a general rule (in the case of presumed trademark infringements), the declaring party will have the burden of proof to show what country the goods are bound for and that there is no corresponding trademark protection in the country of destination.[130]

Another update regards the right for a trademark licensee to take legal action against someone suspected of infringing on the trademark. The new legislation stipulates that the licensee is not entitled to initiate legal proceedings unless the licensor has first approved.[131] If, however, the licensor fails to take action within a reasonable period of time after being notified of the infringement by the licensee, an exclusive licensee is entitled to take action.[132] The provisions are not dispositive, and the parties may thus agree on other terms in their license agreement, with the exception of a statutory right for the licensee to claim damages from the infringer in the event that the licensor initiates infringement proceedings.[133]

B. FUNDAMENTAL BREACH, ARTICLE 25 CISG

Although the case itself dealt with a domestic issue relating to a commercial lease contract, it is interesting to note that in case number T 4179-18, the Supreme Court made a reference in its judgement[134] to Article

125. *See id.* at ch. 1, § 4.

126. *See id.* at ch. 1, § 10, ¶ 3.

127. *See id.*

128. *See id*; Proposition [Prop.] 2017/18:267 Modernare regler om varumärken och en ny lag om företagsnamn (Swed.), *available at* https://www.regeringen.se/49d0bb/contentassets/bd6076c0db824da194c29004eadd5321/prop-201718-267.pdf.

129. *See* Varumärkeslag (2010:1877) ch.1, § 10; Proposition [Prop.] 2017/18:267.

130. *Id.*

131. *See* Lag om ändring i varumärkeslagen ch.10, § 2.

132. *See id.*

133. *See id.*

134. *See* Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2019 p. 445 T 4179-18 (Swed.), *available at* https://www.domstol.se/hogsta-domstolen/avgoranden/2019/20814/.

25 of the Swedish International Sale of Goods Act.[135] This piece of legislation is more or less a direct incorporation of the United Nations Convention on Contracts for the International Sale of Goods (CISG). The relevant provision reads as follows in the English version (the corresponding provision in the Swedish legislation has the same wording[136]):

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.[137]

In the case at hand, the claimant was a branch office of a German corporate entity (the landlord), and the defendant was a Swedish limited liability company, operating a retail business for sports equipment (the tenant).[138] The claimant sought payment for rent due in relation to a commercial lease contract.[139] The tenant, on the other hand, disputed payment, arguing that extensive refurbishment works had deprived him of his right to use the premises as intended.[140] Further, the tenant argued that the disturbances were of such material importance that the tenant had the right to terminate the lease contract prematurely.[141]

In its judgement, the Supreme Court discussed whether the refurbishment works constituted a breach of contract and, if so, whether the breach was of fundamental importance.[142] If the answer to both questions was affirmative, the tenant would be entitled to terminate the lease agreement.[143] After having concluded that there was indeed a breach of contract, the Court stated that the assessment of whether the breach is fundamental shall be based on the interests of the injured party.[144] Of particular interest in the case at hand were the provisions of the lease contract and the purpose of the lease. In other words, continued the Supreme Court, it was a matter of determining whether "the tenant fundamentally is deprived of what he was entitled to expect under the contract"[145]—and it is here that the court referenced Article 25 of CISG. In the end, the Court found in favor of the

135. *See* LAG (1987:822) OM INTERNATIONELLA KÖP (Svensk författningssamling [SFS] (2012:602) (Swed.), *available at* https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1987822om-internationella-kop_sfs-1987-822.

136. *See id.* at art. 25.

137. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, art. 25.

138. *See* Lag (1987:822) om internationella köp, at 1.

139. *See id.* at 2, ¶ 3.

140. *See id.* at 3, ¶ 2.

141. *See id.* at 3, ¶ 3.

142. *See id.* at 6, ¶ 15.

143. *See id.* at 6, ¶¶ 15–16.

144. *See* Lag (1987:822) om internationella köp, at 6, ¶ 16.

145. *Id.*

defendant,[146] but the greater interest from a general commercial contract point of view lies in the fact that a general principle of CISG was referenced in a case of rental law regarding a property situated in Sweden, albeit with two parties from different countries.

C. Marketing of Consumer Products Intended for Consumption and Containing Alcohol

Marketing, sale, and distribution of alcoholic beverages are strictly regulated in Sweden, mainly for reasons of social welfare and health concerns.[147] Two fundamental principles govern Swedish alcohol policy: maintaining high prices and restricting access to alcoholic beverages.[148] The former is achieved through a high level of taxation and the latter mainly through a retail monopoly, owned and controlled by the state. Although during the last few years, several new products with an alcohol content and intended for consumption have emerged, both on the Swedish market and internationally. Among them are ice cream with a five percent alcohol content and flavors heavily influenced by traditional alcoholic drinks, cream products, olives, and powder intended for mixing with beverages, all with alcoholic content.[149] This development was not foreseen when the Swedish legislation on alcoholic beverages[150] was adopted,[151] and the new non-liquid alcoholic products were thus not covered by the retail monopoly.

This has now been addressed through amendments to the existing legislation.[152] As of July 1, 2019, any product containing a certain minimum percentage of alcohol that from a consumer perspective is similar to alcoholic beverages or that can otherwise be presumed to be used for the purpose of intoxication, shall be treated as an alcoholic beverage.[153] This includes restrictions on the sale, marketing, and distribution of such products.[154] From a practical point of view, certain products, such as "alco-ice-cream" are unlikely to be sold at all in the future, due to the retail monopoly and the character of the products.

146. *See id.* at 2, ¶¶ 1–2.

147. *See* Proposition [Prop.] 2018/19:59 Reglering av alkoglass m.fl. produkter, at 60, ¶ 9 (Swed.), *available at* https://www.riksdagen.se/sv/dokument-lagar/dokument/proposition/reglering-av-alkoglass-mfl-produkter_H60359/html.

148. *See id.* at 54, § 4.4.

149. *See id.* at 57–58.

150. *See* Lag om ändring i alkohollagen (2010:1622) (Svensk författningssamling [SFS] (2019:345) (Swed.), *available at* https://svenskforfattningssamling.se/sites/default/files/sfs/2019-05/SFS2019-345.pdf.

151. *See* Proposition [Prop.] 2018/19:59, at 53.

152. *See* Lag om ändring i alkohollagen (2010:1622).

153. *See id.* at ch. 1, § 1.

154. *Id.*