

The Ethics of Franchising: How Codes of Ethics Compare and What to Consider in Deciding Whether to Subscribe to Them

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Franchising involves not only legal obligations (imposed by regulation, by statute, by contract, and by common law) but also ethical obligations. In recent decades, franchise associations around the world have established codes of ethics designed to codify certain core ethical values. Membership in these franchise associations is often contingent upon accepting and applying their codes of ethics. Although the codes focus primarily on franchisors, they also affect, to varying extents, franchisees and other participants in the franchise relationship, from attorneys, accountants, consultants, and other professionals servicing the franchise industry to the franchise associations themselves and employees and customers of the franchisees.¹



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This article first discusses the application of codes of ethics in franchising and particularly their interplay with the duty of good faith and fair dealing, which is recognized in many jurisdictions. It then examines certain codes of ethics from some of the most prolific franchising jurisdictions. It compares their key features, considers the impact they may have on franchising practices, and weighs the pluses and minuses of accepting the obligation to adhere to a franchise association's code of ethics.

CODES OF ETHICS SUPPLEMENT THE LEGAL DUTY OF GOOD FAITH

In essence, codes of ethics mirror and supplement the duty of good faith and fair dealing imposed by law. Thus, as a starting point, franchisors should review all applicable laws that may affect their ability to operate or expand their franchise systems into a target jurisdiction to identify those laws that may directly or indirectly impose such a duty. Franchise-specific statutes, such as Canada's franchise disclosure statutes, impose a duty of fair dealing. But other statutes not confined to franchising also impose a general duty to act in good faith. The Civil Code of Québec,² for example, has been interpreted to require franchisors in that province to advise prospective franchisees of any pertinent information that would affect their decision to purchase a franchise. Courts may also interpret statutes and contracts in

ways that impose new obligations on franchisors and franchisees based on the duty of good faith and fair dealing.³ Reliance on this duty seems to have become more prevalent in recent years: an increasing number of plaintiffs and defendants cite the breach of this duty in their pleadings.⁴

In addition to the legal obligations imposed by statute or by court decision with respect to the duty of good faith and fair dealing, franchisors may agree voluntarily, by contract with their franchisees, master franchisees, area developers, and area representatives, to address issues typically dealt with by codes of ethics. That said, however, both ethical franchising and the duty of good faith are arguably concerned with the inequality in bargaining power often found between parties to a franchise contract.

FAIR DEALING AND GOOD FAITH IN CANADA AND THE UNITED STATES

The duty of fair dealing and good faith has long been a part of the common law in Canada. Some provinces have codified this common law requirement in their respective franchise disclosure statutes as well. For example, the Arthur Wishart Act (Franchise Disclosure) in Ontario and the Franchises Act in Prince Edward Island each provides a specific remedy, namely, damages for breaches of the duty of fair dealing.⁵

In *1117304 Ontario Inc. v. Cara Operations Ltd.*,⁶ the Ontario Superior Court of Justice outlined what the duty of good faith and fair dealing in a franchise relationship should entail:

- A party "may act self-interestedly," but it must also consider the "legitimate interests of the other party."⁷
- As long as one party "deals honestly and reasonably," the interests of the other party are "not necessarily paramount."⁸
- "Good faith is a minimal standard," in that the duty is breached "only when a party acts in bad faith."⁹
- "Good faith is a two way street. Whether a party has breached its duty of good faith will depend in part on whether the other party has acted fairly."¹⁰
- "The duty of good faith in a franchise relationship requires that the party with more power [typically, the franchisor] consider the other party's interests as well as its own before exercising that power."¹¹

Notably, the foregoing statutes' provisions on good faith expressly impose the duty in the performance and enforcement of franchise agreements but make no mention of it in the negotiation of agreements. The one exception to this rule is the Civil Code of Québec, which has been interpreted to require good faith

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not only in the performance and enforcement of agreements but also during their negotiation.¹² Courts, likewise, have yet to recognize a duty to negotiate a franchise agreement in good faith.

In the United States, the duty of good faith and fair dealing generally cannot create new obligations where none exist within the contract. Thus, any bad faith alleged must relate to a specific provision of a contract because it “cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.”¹³ Known as the implied covenant of good faith and fair dealing, the doctrine dictates that where a party to a contract maintains discretion as to performance of certain contractual terms, that party may not exercise its discretion arbitrarily, capriciously, or in any manner inconsistent with the reasonable business expectations of the other party.¹⁴ Further, the covenant of good faith has been described as the “duty to avoid taking advantage of gaps in a contract in order to exploit vulnerabilities that arise [during its performance].”¹⁵ This implied covenant of good faith and fair dealing has been used to confer substantive rights in franchise relationships, particularly in areas such as exclusivity and encroachment, renewals, and terminations.¹⁶

The statutory and common law duties of good faith and fair dealing highlight important ethical considerations in the franchisor-franchisee relationship, such as the duty to act with honesty, fairness, and respect in dealing with others. The codes of ethics for franchising arguably fill certain gaps left by the treatment of good faith and fair dealing in the current legal and contractual regimes.

RATIONALE FOR PROMOTING A CODE OF ETHICS

Both public and private groups use codes of ethics to help promote certain ethical values and ideals. They embrace such codes to temper what some view as the tendency of a capitalistic society, “left unbridled,” to “seek profits rather than altruistic goals.”¹⁷ In franchising, such codes are intended to safeguard franchisees from unscrupulous franchisors during the presale process, throughout the term of the franchise agreement, and after termination or expiration of the franchise agreement. Codes of ethics attempt to encourage honest and open dialogue and communication and good faith behavior among parties to a franchise relationship and their respective suppliers. They attempt to discourage deceptive, unethical, and discriminatory conduct.

The core ethical values regularly addressed by codes of ethics include the following:

- **Compliance with all applicable laws and regulations.** Codes of ethics typically require compliance with laws of general application and, in certain jurisdictions, with franchise-specific laws and regulations. In jurisdictions that impose no franchise disclosure requirements by law or regulation, a franchise association’s code of ethics still may require disclosure to prospective franchisees as a condition of membership.
- **Ethical franchising.** Codes of ethics attempt to formalize the ethical standards, values, and commitments that are to

govern how members of the franchise association interact with each other and with the public. The code of ethics of the International Franchise Association (IFA) is notable for the specific guidance it gives regarding the code’s underlying moral and ethical principles. It speaks of the values of “sharing ideas and information”; “sincerity”; “trust, truth and honesty”; “respect and consideration”; “effective communication”; and “openness, candor and trust.”¹⁸

- **Dispute resolution.** Codes of ethics encourage conflict-resolution procedures intended to minimize and promptly resolve disputes among franchisors and franchisees and their respective suppliers. IFA’s code of ethics, for example, requires that members be “committed to the amicable and prompt resolution” of any disputes that may arise in any franchise relationship.¹⁹

Franchisors may have self-interested yet legitimate reasons for promoting codes of ethics. They may point to voluntary standards of conduct already in place to dissuade legislators and regulators from imposing new or stricter laws or regulations. They may cite codes of ethics to enhance public confidence in franchising. They may also use their membership in established, reputable franchise associations as a tool for marketing their systems—displaying, for example, an association’s seal of approval.

Speaking in the analogous context of the code of ethics for a profession, Mark Frankel observed thus: “A profession’s code of ethics is perhaps its most visible and explicit enunciation of its professional norms. A code embodies the collective conscience of a profession and is testimony to the group’s recognition of its moral dimension.”²⁰ Frankel identified eight potential functions for a code of ethics, many of them equally applicable to the codes promoted by franchise associations worldwide:

- Providing group guidance for an individual when that individual faces a novel situation
- Providing a basis for public expectations and evaluation of the profession
- Strengthening a sense of common purpose among members
- Enhancing the profession’s reputation and public trust
- Preserving entrenched professional biases
- Deterring unethical behavior by identifying sanctions and by creating an environment in which reporting unethical behavior is affirmed
- Providing support for individuals when they face pressure to behave in an unethical manner²¹
- Serving as a basis for adjudicating disputes among members of the profession and between members and nonmembers.²²

Other experts suggest an additional reason for developing codes of ethics: to satisfy external criticism.²³ It is quite feasible that franchise associations promote codes of ethics both to confront detractors of franchising and to raise the standards of good and ethical franchising practices on a voluntary, preemptive basis. By encouraging self-imposed standards of conduct, associations may be better-positioned to rebut criticisms of poor franchising practices and respond to calls for additional regulation of the industry.

It is important to recognize each of these rationales for franchise associations because the codes of ethics are interpreted and enforced with these objectives in mind. Before joining a franchise association, a franchisor should examine carefully the association's code of ethics and consider the consequences of adopting it by becoming a member of the association.

Likewise, franchisors looking to expand into foreign jurisdictions should carefully examine and compare the codes of ethics applicable to their current territory and their target destination as there may be significant legal, marketing, and other practical consequences associated with such codes that deserve serious attention. These differences are discussed below.

COMPARATIVE ANALYSIS OF CODES OF ETHICS

The analysis that follows will focus on the codes of ethics emanating from arguably the world's most prolific franchising jurisdictions, namely Australia,²⁴ Canada,²⁵ the European Union (EU),²⁶ Japan,²⁷ the United Kingdom (which adopts and supplements the EU code),²⁸ and the United States.²⁹ When these codes are compared, certain trends quickly emerge. Common issues within the codes that warrant special focus are discussed below.

Relationship Between the Parties

The relationship-oriented provisions of these codes of ethics generally impose an obligation on the parties to engage in fair dealing with each other. For example, the franchise associations of the EU, Canada, and Japan require franchisors to give franchisees written notice of any contractual breach and an opportunity to cure the breach, where reasonably appropriate. The codes of the United States, Australia, and Canada contain provisions encouraging more effective communication among the parties. Each of the codes promotes principles such as openness and honesty.

Disclosure Obligations

Among the codes considered here, franchise disclosure obligations are imposed by law in the United States; certain provinces of Canada; Australia; Japan; and five of the EU's member states, namely, Belgium, France, Italy, Spain, and Sweden. The codes of ethics of Canada, the United States, the EU, and Japan also contain fairly detailed provisions relating to a franchisor's duty to disclose. Generally, the codes of ethics mandate full and accurate disclosure of all information material to the franchise relationship, delivered to a prospective franchisee within a reasonable time before the execution of any agreements. The Japanese and EU codes of ethics also specify the precise information that should be disclosed.

For jurisdictions such as the United Kingdom and other members of the EU that do not currently impose disclosure obligations by law, this voluntary obligation is particularly significant as it may affect a franchisor's costs, time commitment, and risk of liability. The same may be said for certain provinces of Canada. Currently, only the provinces of Ontario, Alberta, and Prince Edward Island impose statutory disclosure obligations. But franchisors that are members of the Canadian Franchise Association must provide disclosure to prospective franchisees even in provinces where no such statutory disclosure obligations currently exist.

Business Management and Operation

Certain codes of ethics speak of the due diligence that franchisors should conduct when recruiting and selecting potential franchisees. In particular, the Japanese code of ethics lists specific factors that franchisors should consider in selecting qualified franchisees, including the "candidate's ability, personality, financial resources and motivation."³⁰ Some codes of ethics also emphasize the need to disclose the constituent elements of a franchise agreement. The Japanese code of ethics, for example, requires that all of the parties' rights and obligations be clearly stipulated and that the franchise agreement be executed by both parties "on the basis of a comprehensive understanding and substantive agreement on the contractual contents."³¹ The code of ethics for the EU gives more specific guidance on the terms of franchise agreements. It provides that every agreement within its jurisdiction must not only outline the general rights and obligations of the parties but also include certain specified terms.³²

Conflict Resolution

All of the codes of ethics address processes for resolving conflicts and encourage parties to resolve their disputes through good faith negotiations. They widely recommend mediation and arbitration for resolving disputes between the franchisors and franchisees. Franchise associations in the United States, Canada, and Britain also provide ombudsman services designed to help their members resolve disputes. IFA recommends using the National Franchise Mediation Program "when a more structured mediation service is needed to help resolve differences."³³

Proven Experience

The codes of ethics of the EU and Japan are the only ones among those surveyed here that require a franchisor to have some level of proven experience as a condition for membership in their respective franchise associations. The Japanese code requires that any "good, service or know-how that the franchisor provides to the franchisee in exchange for consideration shall be evidenced by past experience and track record."³⁴ A franchisor can conceivably satisfy this condition by proving that it has generated a minimum level of experience even within a single corporate unit; it need not show any experience actually franchising the concept.³⁵ Yet, the Japanese Franchise Association's own membership rules, imposed independently of the code of ethics, require as a condition of full membership that a franchisor have ten or more franchises in operation for more than two years.³⁶ Associate membership requires franchisors to have more than one year of operational experience.³⁷

The EU code extends the Japanese code's "proven experience" obligation a bit further and requires that the franchisor "shall have operated a business concept with success, for a reasonable time and in at least one pilot unit before starting its franchise network."³⁸ Thus, the EU code requires a sustained level of success in at least one corporate unit, and it may be read to require evidence of successful replication of the concept even though that requirement is not expressly stated.³⁹

Requiring franchisors to show a record of success and experience to attain membership in a franchise association offers clear benefits to prospective franchisees in that it gives them some

measure of assurance that a particular franchised concept has attained a certain level of success, measured by staying power. On the other hand, this prerequisite may hurt inexperienced franchisors because even if they operate a profitable business, they may not obtain the marketing benefits of full membership for a time. Inexperienced franchisors are still eligible for associate membership, however, and the experience requirement may spur them to grow and develop their business in order to obtain the benefits of full membership. Thus, the benefits of requiring franchisors to have proven experience seem to outweigh the limited drawbacks.

The proven-experience requirement poses a different question for franchisors seeking to enter foreign jurisdictions. If they have been successful at home but have little or no experience franchising in the foreign jurisdiction in which they intend to grow, will franchise associations permit them to fulfill the proven-experience requirement by virtue of their domestic experience alone?

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Intellectual Property

Intellectual property rights and obligations are invariably governed by statute; and because all of the codes of ethics require compliance with applicable laws, it may be assumed that the obligation to respect intellectual property rights is, thus, subsumed in that requirement. Nevertheless, the codes of ethics for Japan and Australia expressly address the need to protect certain intellectual property rights. The Japanese code stipulates that the “franchisor shall recognize that the protection of the logo or the service mark symbolizing the franchise system is a common interest of both the franchisor and the franchisee and shall use the best efforts to prevent any infringement or unfair competition by third parties.”⁴⁰ The Australian code includes provisions regarding franchisees’ use of franchisors’ marks and of one franchisor’s use of another franchisor’s marks, stating that “no member shall imitate the trade mark, trade name, corporate name, slogan, or other mark of identification of another member of business in any manner or form that would have the tendency or capacity to mislead or deceive.”⁴¹

Support Services

Attorneys, accountants, consultants, and others who supply support services to franchisors and franchisees can play an integral role in franchising, and their conduct may have far-reaching effects. When suppliers provide professional advice and thoughtful guidance, they can help maintain a mutually beneficial relationship between franchisors and franchisees. But when suppliers behave carelessly, aggravate disputes, or act only for their own benefit, they can inflict serious damage on franchise relationships. Thus, it seems only logical that if suppliers are granted membership in franchise associations, they, too, should be subject to the associations’ codes of ethics. Yet among the codes surveyed here, only those of Canada and Australia include provisions expressly aimed at suppliers. Australia’s code

requires supplier members to behave in a manner consistent with the guidelines of the code and to “not seek to inflame any dispute, incite litigation, generate media coverage or otherwise act in any way which is unprofessional or may create a misleading impression of the system.”⁴² Canada’s code requires supplier members to encourage the franchisees to comply with the spirit of the code.⁴³

Translations of Franchise Documents

Some codes of ethics impose requirements regarding translations of franchise agreements, operations manuals, and other legal documents when used in foreign markets. The EU code of ethics, for example, requires that “all agreements . . . in connection with the franchise relationship [] be written in or translated by a sworn translator into the official language of” the franchisee’s country.⁴⁴ The British Code of Ethical Conduct (Extension and Interpretation) further requires that franchisors “seek to ensure that they offer to franchisees contracts

in a language in which the franchisees [sic] is competent.”⁴⁵ This requirement actually may conflict with the EU code in the case of franchisees unfamiliar with the local language of their territory.

Master Franchising

A code of ethics may not necessarily apply to a master franchising scenario. The EU code of ethics, for example, specifically excludes the application of the code to a relationship between a franchisor and its master franchisee.⁴⁶

Compliance with Codes of Ethics

Codes of ethics vary in how they demand compliance, if at all. The EU code makes compliance a condition of membership.⁴⁷ The codes of Japan and Canada simply require their existing members to promise or agree to abide by their codes.⁴⁸

Many codes of ethics, with the notable exceptions of those of Australia and IFA, provide no enforcement mechanism that can be invoked when a party violates the code.⁴⁹ IFA’s code states that “[m]embers who feel that another member has violated the Code in their U.S. operations may file a formal written complaint with the President of the IFA.”⁵⁰ But the IFA code does not specify any powers that the IFA president has to address such violations, and, in fact, he or she is likely to act merely as a facilitator, not unlike IFA’s ombudsman in this situation. Thus, the franchise association will investigate the complaint and facilitate communication among the parties involved to try to resolve it. Although the IFA code is generally silent as to how the code may be enforced, in practice, the president of IFA may file a report with IFA’s executive committee after conducting an investigation into the alleged violation. This committee may impose sanctions against a member company, ranging from a simple reprimand to suspension or, in some extreme cases, termination of IFA membership.⁵¹ Nevertheless, parties are not likely to use this mechanism for addressing significant disputes. Other franchise associations’ codes of

ethics provide for mandatory mediation or arbitration.⁵²

The widely varying processes for ensuring compliance highlight an inherent shortcoming of the franchise associations' codes of ethics: they lack governmental authority and are arguably binding only on those who have voluntarily accepted their provisions by virtue of membership. Thus, a franchise association's code of ethics cannot protect a franchisee unless the franchisor has joined the association. Franchisors prone to subvert or avoid their obligations are not likely to join in the first place. Moreover, the penalties of suspension or revocation of membership are relatively lax and may not provide sufficient deterrence. In light of this inherent weakness, parties with a strong commitment to making a code of ethics enforceable may wish to consider incorporating the code, or at least its substantive provisions, into their franchise agreements.

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COST-BENEFIT ANALYSIS

In the end, franchisors expanding into a target jurisdiction and determining whether to join that jurisdiction's franchise association must balance the benefits of membership against the costs.

On the benefit side of the ledger, membership in a franchise association can enhance the franchisor's reputation in its current jurisdiction and in jurisdictions into which it seeks to expand. It gives the franchisor a means to communicate its commitment to ethical franchising or, at least, to an established association that purports to take ethical franchising seriously. Conversely, membership may help the franchisor avoid any negative inference that it is not committed to ethical franchising because it has not joined an association that promotes a code of ethics.

Franchise associations give franchisor members other benefits as well. Franchisors may broaden their exposure to prospective franchisees by advertising on the association's website and in its publications and by networking at association events. Franchisors may take advantage of seminars, workshops, and other educational opportunities not only on ethical issues but also on best practices in franchising. In short, to the extent that the goals of encouraging ethical conduct and growing business align, franchisors may join franchise associations "not necessarily because it is the right thing to do, but also because it is good business practice."⁵³

On the cost side of the ledger, membership in a franchise association and adoption of its code of ethics may impose obligations on a franchisor beyond those it would otherwise have by law. In the United Kingdom, certain other members of the EU, and certain provinces of Canada, for example, codes of ethics may impose additional disclosure requirements on franchisors. In the EU and Canada, codes of ethics may require franchisors to undertake more stringent notice and cure obligations before terminating a franchisee.⁵⁴ Some codes of ethics may require franchisors to amend their franchise agreements and disclosure documents to ensure that they are consistent with the franchise relationship provisions of the codes. Certain codes of ethics,

such as those of New Zealand, even require that franchise agreements be amended to include an obligation for both franchisor and franchisee to comply with the codes.⁵⁵ Before undertaking these enhanced obligations, franchisors must factor in any related costs and potential legal exposure involved.

Franchisees may use codes of ethics as a sword (and, on occasion, as a shield) in legal proceedings against franchisors. For instance, if a franchise association's code of ethics requires members to abide by all laws and regulations of a jurisdiction, it may be argued that membership in the association constitutes a representation of compliance with those laws and regulations, as well as with other standards promulgated by the code. This may exacerbate the repercussions for a franchisor if it violates any such laws, regulations, or standards.

IFA attempts to refute any notion that its code creates a potential source of liability with the statement that "the Code is not intended to establish standards to be applied by third parties, such as courts, but to create a framework under which IFA and its members will govern themselves."⁵⁶ The Franchise Council of Australia (FCA) Member Standards similarly states that "it is not intended that breach of the Member Standards have any legal consequences other than potentially in relation to membership of the FCA."⁵⁷

Although there are no known successful attempts by franchisees to parlay a breach of IFA's code of ethics, standing alone, into a claim against a franchisor, this risk certainly exists. As one commentator has observed,

decisions of European courts have quoted provisions of the [European Franchise Federation] Code with approval, and provisions of applicable codes are routinely offered into evidence in franchise disputes. Most franchisors recognize that as much as they may seek to limit the impact of codes via disclaimers, courts may very well look to them as representative of commonly understood standards of practice between parties to a franchise agreement.⁵⁸

Finally, loss of membership in a franchise association for failure to abide by a code of ethics may seriously undermine the value of a franchisor's brand within the applicable jurisdiction.

FURTHER RECOMMENDATIONS

Franchisors can and should take additional steps beyond conducting a cost-benefit analysis to determine whether to join a franchise association and adopt its code of ethics. They should examine their current franchise documentation (including franchise agreements, disclosure documents, and operations manuals) to determine whether it is consistent with applicable codes of ethics and whether all parties (franchisor, franchisees, and suppliers) are adhering to these codes. Regardless of whether a franchisor intends to join a franchise association, it may use the

association's code of ethics as a measure of industry standards that its system will strive to meet.

Franchisors should also examine the practical implications of not following a code of ethics. If a franchise association's code does indeed contain repercussions for noncompliance and a franchisor cannot conceivably abide by its standards, then the franchisor should reconsider the merits of obtaining membership in the association in the first place.

Franchise associations, for their part, should carefully and periodically reexamine their codes of ethics to ensure that the codes adequately promote their underlying core values and are consistent with the values espoused by the franchise association and the franchising community in general. They should consider whether their code of ethics adds real and substantial value to their membership and to the franchising industry.

Franchise associations should also evaluate how effectively their codes of ethics are communicated and enforced. This inquiry would consider whether the codes are simply grandiose pronouncements, discounted by the members of the association or the public, or whether they are meaningful tools for guiding the conduct of franchisors, franchisees, and suppliers. To that end, franchise associations may wish to consider insisting that, as a prerequisite for membership, their provisions be incorporated by reference into the franchise agreements of franchisor members. This recommendation, although admittedly aggressive, should be seriously considered if for no other reason than to preempt the passage of further legislation in jurisdictions where none currently exists.

CONCLUSION

Franchise association codes of ethics are a useful tool for promoting ethical practices, ideals, and aspirations in the franchise industry. But they should not be adopted blindly. Franchisors should weigh the costs and benefits of joining any franchise association and thereby adopting its code of ethics. In many cases, this analysis may reveal obligations that the franchisors did not anticipate. Nevertheless, a robust code of ethics, if properly structured and implemented, can offer significant benefits to every participant in the franchise industry.

ENDNOTES

1. *See, e.g.*, the Canadian Code of Ethics, which specifically prohibits discriminatory practices by members of the Canadian Franchise Association: "Franchise systems and franchise support services members of the Association should not discriminate based on race, colour, religion, national origin, disability, age, gender or any other factors prohibited by law." CANADIAN FRANCHISE ASS'N, CODE OF ETHICS, available at www.cfa.ca/About_Us/Code_of_Ethics/.

2. Civil Code of Québec, S.Q. 1991, C.64.

3. Canadian courts, for example, increasingly recognize a duty of good faith in contracts of adhesion, such as employment contracts and franchise agreements. *See, e.g.*, Shelanu Inc. v. Print Three Franchising Corp. (2003), 64 O.R. (3d) 533 (C.A.) (holding that in a franchise relationship, a franchisor has a duty of good faith in exercising its discretion, which requires the franchisor to consider the interests of the franchisee as well as its own).

4. This assertion is based on the experience of the author and that of his firm.

5. Section 3(2) of the Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3; Section 3(2) of the Franchises Act, R.S.P.E.I. 1988, c. F-14.1.

6. [2008] O.J. No. 4370; *see also* Shelanu Inc. v. Print Three Franchising Corp. (2003), 64 O.R. (3d) 533 (C.A.) (the threshold Ontario Court of Appeal decision supporting the proposition that the duty of fair dealing applies to the power imbalance so often found between a franchisor and a franchisee).

7. [2008] O.J. No. 4370.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* (quoting Gerami v. Double Double Pizza Chicken Ltd., [2005] O.J. No. 5252).

12. *Supra* note 2, art. 1375: "The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished."

13. *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089, 1110 (Cal. 2000).

14. *See, e.g.*, Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 92 (3d Cir. 2000).

15. Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies Ltd., 970 F.2d 273, 279–80 (7th Cir. 1992).

16. Joel Iglesias, Comment, *Applying the Implied Covenant of Good Faith and Fair Dealing to Franchises*, 40 HOUS. L. REV. 1423 (2004).

17. Gordon Storholm & Eberhard E. Scheuing, *Ethical Implications of Business Format Franchising*, 13 J. BUS. ETHICS 181 (1994).

18. INT'L FRANCHISE ASS'N, CODE OF ETHICS & ENFORCEMENT MECHANISM, available at www.franchise.org/industrysecondary.aspx?id=3554.

19. *Id.* ("Conflict Resolution").

20. M. S. Frankel, *Professional Codes: Why, How, and with What Impact*, 8 J. BUS. ETHICS 109–15 (1989).

21. Although for Frankel, one key rationale for establishing codes of ethics is to influence behavior, others have questioned this assertion, and some have examined the normative foundations for the existence of codes and their application. *See, e.g.*, Muel Kapstein & Mark Schwartz, *The Effectiveness of Business Codes: A Critical Examination of Existing Studies and the Development of an Integrated Research Model*, 77 J. BUS. ETHICS 111–27 (2008).

22. Frankel, *supra* note 20, at 111–12.

23. Muel Kapstein & J. Wempe, *Twelve Gordian Knots When Developing an Organizational Code of Ethics*, 17 J. BUS. ETHICS 853–69 (1998).

24. FRANCHISE COUNCIL OF AUSTRALIA, MEMBER STANDARDS, available at www.franchise.org.au/scripts/cgiip.exe/WService=FCAWWW/ccms.r?PageId=10032.

25. CFA, *supra* note 1.

26. EUROPEAN FRANCHISE FED'N, EUROPEAN CODE OF ETHICS FOR FRANCHISING, available at www.eff-franchise.com/spip.php?rubrique13.

27. JAPAN FRANCHISE ASS'N, CODE OF ETHICS, available at http://jfa.jfa-fc.or.jp/jfas_Code_of_Ethics_English.html.

28. BRITISH FRANCHISE ASS'N, CODE OF ETHICS, available at www.thebfa.org/codeofethics.asp. The European Union code is adopted by all national members of the European Franchising Federation, including the United Kingdom. Thus, the British Code of Ethical Conduct adopts in whole the code of ethics of the European Union, but it

also supplements the EU code with additional provisions called the Extension and Interpretation.

29. IFA, *supra* note 18.

30. JFA, *supra* note 27 (“Franchisee qualification” (heading 3)).

31. *Id.* (“Understanding of and agreement on contractual substance” (heading 4)).

32. EUROPEAN FRANCHISE FED’N, *supra* note 26 (“The Franchise Agreement” (heading 5)).

33. IFA, *supra* note 18 (“Conflict Resolution”).

34. JFA, *supra* note 27 (“Proven experience and track record”).

35. The Code of Ethics of the Japan Franchise Association does not explicitly specify that franchising experience is in fact a prerequisite to membership in its association but only that a franchisor have “past experience” and a “track record.” *Id.*

36. *See* JAPAN FRANCHISE ASS’N, MEMBERSHIP CATEGORIES AND CRITERIA (“Full Membership”), available at http://jfa.jfa-fc.or.jp/Membership_English.html.

37. *Id.* (“Associate Membership”).

38. EUROPEAN FRANCHISE FED’N, *supra* note 26 (“Guiding Principles 2.2”).

39. In Britain, full membership requires that a franchisor be “established,” but the criteria for associate membership are somewhat less demanding. The test of what constitutes “established” varies depending on the industry sector in which the business operates.

40. JFA, *supra* note 27 (“Assurance of quality and preservation of reliability”).

41. FCA, *supra* note 24.

42. *Id.*

43. CFA, *supra* note 1 (“Introduction of the Code”).

44. EUROPEAN FRANCHISE FED’N, *supra* note 26 (“The Franchise Agreement” § 5.2).

45. BFA, *supra* note 28 (“Contract Language,” point 4).

46. EUROPEAN FRANCHISE FED’N, *supra* note 26 (“The Code of Ethics and the Master Franchise System” § 6).

47. *Id.* (“The Franchise Agreement” § 5.1).

48. CFA, *supra* note 1; JFA, *supra* note 27.

49. The Franchise Council of Australia (FCA) Member Standards provide for a certain disciplinary process, although it is unspecified:

“If a member does not comply with the requirements of the Member Standards then investigation and disciplinary procedures are in place to handle the matter.” The Australian code of ethics also has disclaimer language similar to that of the IFA Code of Ethics: “It is not intended that breach of the Member Standards have any legal consequences other than potentially in relation to membership of the FCA. Clause 2.10(1)(b) of the Constitution of the FCA empowers the FCA Board by three-quarter majority to censure, suspend or expel from the FCA a member who fails to comply with any Standards of Conduct applying to them.” Australia and Canada simply offer a more informal dispute resolution process, which remains unspecified in their codes of ethics.

50. IFA, *supra* note 18 (“Support of IFA and the Member Code of Ethics”).

51. *Id.*

52. *See, e.g.*, the Franchise Association of Southern Africa Code of Ethics and Business Practices, which provides at Item 9.10 that failing amicable resolution, “all complaints, grievances and or disputes may be referred to FASA for mediation,” available at www.fasa.co.za/content/About%20Us/Code.pdf.

53. Section 3(2) of the Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3; Section 3(2) of the Franchises Act, R.S.P.E.I. 1988, c. F-14.1.

54. EUROPEAN FRANCHISE FED’N, *supra* note 26; JFA, *supra* note 27.

55. *See, e.g.*, Section 6.1 of the New Zealand Franchise Association Code of Practice, which requires each franchise agreement to “contain provisions requiring both the Franchisor (and each Master Franchisee/Sub-Franchisor) and the Franchisee to observe and comply with the provisions of the Rules, the Code, and the Code of Ethics.” FRANCHISE ASS’N OF N.Z., INC., CODE OF PRACTICE, available at www.franchiseassociation.org.nz/fanz-codes-and-rules.html.

56. IFA, *supra* note 18 (“Introduction”).

57. FCA, *supra* note 24 (“The new member standards promote excellence in franchising.”).

58. Philip Zeidman, *Codes of Ethics and International Franchising: Who Cares?* FRANCHISING WORLD, Apr. 2004, available at www.entrepreneur.com/tradejournals/article/115844195.html.