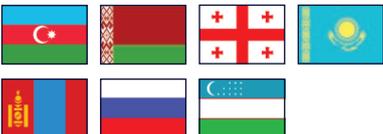




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SPECIFICS OF CONCLUDING A LICENSE AGREEMENT





Today, the success of a business largely depends on the search for high-tech and innovative solutions that contribute to the growth and development of the campaign.

When buying expensive software to perform certain business operations or automate business processes, you need to remember about the legal consolidation of the transfer of rights to the software to the buyer. Intellectual property provides its owner with a significant competitive advantage in the market, which forces competitors to infringe intellectual property rights. For this reason, copyright holders face the challenge of protecting intellectual property rights to curb infringement and recover damages.

The brochure is devoted to the peculiarities of concluding licensing agreements for intellectual property objects in the field of IT technologies (software, online games, etc.), the issues of concluding licensing agreements with individuals, foreign organizations in Azerbaijan, Belarus, Georgia, Kazakhstan, Mongolia, Russia, Uzbekistan.

SPECIFICS OF CONCLUDING A LICENSE AGREEMENT IN AZERBAIJAN



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I. Definition of a license agreement

A license agreement is a written contract by which one party that owns certain Intellectual Property (IP) gives another party permission to use that IP. The two parties involved in this agreement are a licensor and a licensee.

The licensor is the party that permits another party to use IP.

The licensee is the party that gains such permission. By the types of IP being licensed, the license agreement can be divided into:

- trademark license agreement;
- patent license agreement;
- copyright license agreement.

The legal definition of the Trademark License Agreement is provided in Art. 28 of the Law on trademarks and geographical indications dated 12 June 1998 No. 504-IQ (hereinafter “**The Law on Trademarks**”) and in Art. 1.8 of the Decree of the Cabinet Ministers of the Republic of Azerbaijan on “Approval of the procedure on the registration of the agreements on trademarks” dated 15 September 2009 under No. 139 (hereinafter “**Decree No. 139**”).

Under a trademark license agreement owner of the trademark (a licensor) grants the other party (a licensee) permission to use a trademark in relation to the goods and services specified in the agreement.

According to a patent license agreement, the patent owner (licensor) grants the right to exploit an invention, utility model and industrial design to another legal entity or individual (licensee) in a scope stipulated by the agreement.

II. Exclusivity of a license agreement

Upon granting or receiving a license under intellectual property rights (IPRs), the parties need to consider the degree of exclusivity that will be granted. Thus, the license agreement can be divided into:

- exclusive license agreement;
- non-exclusive license agreement;
- sole license agreement.

Under an exclusive license agreement, a license can be granted only to one licensee (Art 1.8. of Decree No. 139). An Exclusive License means that no person or company other than the named licensee can use the relevant IP.

Notably, the licensor is also excluded from exploiting the intellectual property rights.

According to the said Article of Decree No. 139, the licensor reserves the right to use the trademark and the right to issue licenses to other persons under a non-exclusive license. So, the licensor can license the IP out to more than one licensee in a non-exclusive license.

The local laws also provide the legal definition of a sole license agreement. Under Decree No. 139, the sole license is issued to only one licensee. In this case, the licensor retains the right to use the trademark in connection with the goods and services specified in the contract and loses the right to issue licenses to other persons.

The widespread form of licensing is a non-exclusive license agreement in practice.

III. Key terms of a License Agreement

A License Agreement must include the following essential elements:

- subject matter;
- duration;
- territory allowed for the IP use;
- license fee;
- parties' obligations;
- quality control.

The subject matter of a License Agreement is a registered IP:

- patent;
- trademark;
- copyright.

As with any agreement, a License Agreement must specify the period during which the parties' obligations will enter in force and expire. A license under the Trademark License Agreement can be issued for a validity period of a trademark or a shorter period.

The licensed territory is a territory where the licensee uses the granted rights under the agreement. It is essential to state in the License Agreement that a right to use a trademark is vested in Azerbaijan. Otherwise, upon submission of the documents for the registration of the License Agreement,

the Intellectual Property Agency will refuse registration due to the absence of the relevant provision covering the territorial right.

According to Article 1.11 of Decree No. 139, the quality of the goods or services of the licensee must not be lower than the quality of the goods or services of the licensor, and the licensor must monitor the fulfillment of this condition. The existence of such provision (quality assurance) in the License Agreement protects the trademark owner's reputation by specifying certain minimum quality standards that the licensee must meet. Quality control is, therefore, the essence of trademark licensing. The absence of the relevant clause will lead to rejection in the registration of the License Agreement.

IV. Registration of a Licensing Agreement

The disposal of IPRs requires enhanced legal protection. In light of this, an important aspect here is the state registration of a License Agreement.

The application for the registration of the license agreement is submitted in the Azerbaijani language. The supporting documents can be submitted in Azerbaijani and other foreign languages. Upon submitting the documents in a foreign language, the translated documents in Azerbaijani have to be submitted within one month.

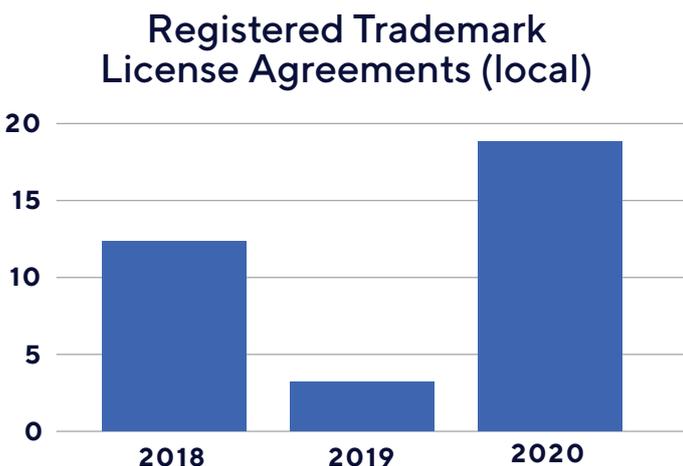
The list of the required documents is:

- application form;
- license Agreement;
- copy of the Trademark Certificate, patent, etc.;
- corporate documents of the applicant (TIN, Extract from the Registry, Charter) (upon submitting of the documents on behalf of the legal entity);
- ID card and a TIN of the individual (upon submitting of the documents by the individual);
- PoA (if the document is submitted by the representative).

The documents are reviewed within one month. The information on the License Agreement is registered in the State Registry.

Information on the registration of the License Agreement in the State Registry is published on the official bulletins of the Trademark Agency.

The chart/table illustrating the registered trademark/patent license agreements can be seen as below:



V. Taxation under a License Agreement

The status of the license fee should be clarified from the Azerbaijani tax regulations perspective. It should be noted that the license fee for the right to use IP rights objects falls within the definition of the royalty provided for in the Azerbaijani Tax Code.

Under the Tax Code, “royalty” means any kind of payments received as consideration for the use of, or the right to use, (i) copyrights on works of literature, art or science; software and cinematograph films and other intangible assets; (ii) any patent, trademark, design or model, plan, secret formula or process, or information concerning industrial, commercial or scientific experience; (iii) industrial, commercial or scientific equipment (Art. 13.2.23).

Thus, license fees paid by a licensee to a licensor under a license agreement will qualify as royalty payments for taxation purposes.

Periods	2010	2011	2012	2013	2014	2015	2016	2017
Issued patents	126	118	111	78	97	88	131	67
Active patents	496	451	289	248	288	203	345	236
License Agreements	1	-	4	-	1	-	-	2

Taxation of non-resident licensors. Taxes applicable to non-resident licensors are described in the table below.

Tax	Tax rate	Tax agent	Reference
WHT	14%	Resident entity	(Arts. 13.2.16.10, 124.1, 125.1.7, Tax Code)
VAT*	18%	Resident entity	(Arts. 168.1.5, 169, 173.1, Tax Code)

*disputable: recipient’s country of incorporation: transfer of title on a license, patent, trademark (Art. 168.1.5)

Withholding Tax. As per Article 125.1.7 of the Tax Code, payments of resident licensees made for the use of IP objects to non-resident licensors are subject to WHT at a rate of fourteen (14) percent. It is the local licensee's (tax agent) obligation to withhold 10% WHT from the license fee payable to the foreign licensor. It should be noted that the WHT applies to the gross income of a foreign licensor (i.e., decreases the amount of payable fees) unless the agreement provides for a "gross-up" clause.

VAT. Article 168 of the Tax Code determines the place of service for VAT purposes. As per the said Article, the place of services in case of the transfer of title on a license (including patent, trademark etc.) will be the place where the recipient of a license is incorporated. As the definition of the royalty does not include the transfer of title over an IP object, accordingly Article 168.1.5 of the Tax Code should not apply to royalty payments. Meaning that the local licensee may not pay VAT while making royalty payments to foreign licensors based on the language of Article 168.1.5 of the Tax Code.

Tax officials however interpret that transfer of title referred to in Article 168.1.5 of the Tax Code also concerns the right to use an IP right. In other words, they insist that VAT must apply to the royalty payments made to foreign licensors.

If we rely on the strict language of the Tax Code, VAT should not apply to royalty payments as Article 168.1.5 (to which the tax authority is making a reference) applies only if the full ownership on an IP right is transferred, which is not the case in a license agreement.

Based on the research into the public database of court judgments, there is a case (#2-1(102)-463/2021) with this respect where the Supreme Court of Azerbaijan has made a decision in favor of the taxpayer. The Supreme Court has held up the position of the lower court, which was stating that VAT could not be charged on the royalties as they do not include the transfer of full ownership right over IP objects.

The current position of the tax authority leads to the displeasure of taxpayers. We hope that the tax authority will change its approach in practice, or respective provisions of the Tax Code will be amended for eliminating such inconsistency.

Avoidance of Double Taxation. Double Tax Treaties to which Azerbaijan is a party provide lower tax rates (e.g., 5%, 8%, 10%) for royalty payments. It is worth to note that the lower tax rates do not automatically apply. To benefit from a lower tax rate specified in DTTs, the non-resident (or its authorized representative) shall submit a specific application form (DTA-03) to the relevant tax authority. The DTA-03 form shall be submitted before the payment is made by the local licensee. If it is not submitted and an approval is not received from the tax authority, the local licensee is obliged to withhold the tax at a higher rate specified in the Tax Code (i.e., 14%) and remit it to the state budget.

SOFTWARE LICENSE AGREEMENT IN BELARUS: MANDATORY LEGAL REQUIREMENTS



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In the modern world, any company in its activities is faced with the issues of obtaining rights to software (hereinafter referred to as software), which it needs to perform certain business operations or automate business processes. The granting of such rights in the vast majority of cases is carried out on the basis of licensing (sublicense) agreements. It is common practice to conclude such contracts and transfer rights between companies located or registered in different states. In this regard, when a resident of Belarus concludes license agreements with foreign companies, it is necessary to comply with the mandatory requirements of the Belarusian legislation.

License agreement or exclusive rights assignment agreement?

First of all, it should be noted that the license agreement formalizes the granting of exclusive rights to another person for a limited time. If the exclusive right is transferred in full for the entire duration of such a right, then an agreement on the assignment of the exclusive right is concluded. It is common practice to conclude such contracts and transfer rights between companies located or registered in different states.

Subject of the license agreement

An essential condition that must be contained in any contract, including a license one, is its subject. However, the definition of the subject in the license agreement has its own specifics.

According to paragraph 2 of Art. 984 of the Civil Code of the Republic of Belarus (hereinafter - the Civil Code), the license agreement must contain an indication of the specific rights granted under it. Rights that are not indicated in the contract as transferable will be considered non-transferable, unless proven otherwise.

In accordance with paragraph 1 of Art. 44 of the Law of the Republic of Belarus of 05/17/2011 "On Copyright and Related Rights" (hereinafter referred to as the Copyright Law), the license agreement must provide for specific ways of using the software.

Under the license agreement, the party with the exclusive right to use the intellectual property object (the licensor) grants the other party (the licensee) permission to use the corresponding intellectual property object (clause 1 of article 985 of the Civil Code). With respect to software, such an exclusive right of the licensor consists in allowing the licensee under a license agreement to carry out:

- installing software on a computer or other device;
- software launch;
- work with software (use of functional capabilities embedded in a computer program);
- other actions in accordance with Article 16 of the Copyright Law (other property rights): reproduction, distribution of copies of software, import of copies of software into Belarus, processing (modernization) of software, etc.

The subject matter of the license agreement must also specify the software for which the rights are granted to the licensee. Therefore, it is equally important to correctly and fully identify the corresponding software in the license agreement.

Other material terms of the license agreement

In addition to the subject matter, the essential terms of the license agreement are the following:

- about the period of its validity;
- about the territory in which the use of the software is allowed (clause 5 of article 44 of the Copyright Law).

Risks of non-negotiation of material terms in a license agreement

If the license agreement does not contain all the essential conditions required by law, such an agreement may be recognized as not concluded.

Remuneration under the license agreement

As a general rule, a license agreement is assumed to be compensated. An exception to this rule, for example, is open licenses, which are free of charge in accordance with paragraph 2 of Art. 45 of the Copyright Act, unless otherwise provided by their terms.

In a licensing agreement between commercial parties, it is imperative to agree on the remuneration for the granted right to use the software in accordance with the requirements of clause 1 of Art. 985 GK, unless otherwise provided by law.

Otherwise, the license agreement may be invalidated (the fact that such an agreement is null and void has been established).

Remuneration can be determined in a license agreement as a percentage of income for using the software either in the form of a fixed amount or in another way (clause 4 of article 44 of the Copyright Law).

It is important to provide in the license agreement:

- a condition on whether the granted license is exclusive or non-exclusive (simple). In the absence of such a condition in the license agreement, the transferred license will be considered simple (non-exclusive) (clause 2 of article 985 of the Civil Code);
- whether or not the licensee has the right to transfer the right to use the software to other persons (the right to issue sub-licenses).

Sublicense agreements

The granting by the licensee of the right to use the software to the sublicensee is limited by the powers that are granted to the licensee himself under the license agreement. Therefore, when concluding sublicense agreements, it is necessary to make sure that the licensee has received from the licensor the corresponding rights transferred under the sublicense agreement, as well as the licensee's very right to conclude sublicense agreements.

Written form of the license agreement

As a general rule, a licensing agreement must be concluded in writing (clause 7 of article 44 of the Copyright Law), with the exception of an accession agreement and open licenses.

At the same time, a foreign economic transaction, which also includes a license agreement between a resident of Belarus and a foreign company, must also be made in writing (clause 2 of article 1116 of the Civil Code).

Currency Legislation Requirements for a License Agreement

In Belarus, license agreements with foreign companies (non-residents) refer to foreign exchange (foreign trade) agreements subject to foreign exchange control.

By Decree of the President of the Republic of Belarus dated March 27, 2008 No. 178 "On the Procedure for Executing Foreign Trade Agreements", license agreements with non-residents are classified as foreign trade agreements that contain the following mandatory conditions:

- 1) The amount (approximate amount) of the monetary obligations of the parties under the contract.

If the license agreement provides for remuneration for using the software not in the form of a lump-sum payment (one-time payment), but in the form of royalties (periodic payments), then in such an agreement it will be necessary to indicate the total (approximate) amount of royalties for the entire duration of the license agreement.

- 2) The terms of settlements, which are understood to mean the obligation of one party to settle the settlement prior to execution or upon the fulfillment of obligations by the other party.

The settlement procedure to be reflected in the license agreement is related to the fact of fulfillment of obligations to transfer rights to software. Therefore, this fact will need to be documented, for example, by drawing up and signing by the parties of the Certificate of Acceptance and Transfer of Rights to Software.

Article 10 of the Law of the Republic of Belarus of 22.07.2003 "On Currency Regulation and Currency Control" provides for the obligation to indicate in currency contracts, which, in particular, include license contracts with non-residents,

the timing of the fulfillment of obligations by non-residents:

- to pay for the rights to the software transferred to a non-resident;
- on the return by the non-resident of the prepayment made by the resident in the event of non-fulfillment or incomplete fulfillment by the non-resident of the obligations to transfer the rights to the software.

Repatriation of currency values

As a general rule, foreign exchange operations both in Belarusian rubles and in foreign currency between a resident of Belarus - a legal entity and a non-resident - a foreign company are carried out in a non-cash form without restrictions.

However, a resident of Belarus is obliged to repatriate currency values, i.e. the obligation to ensure crediting to your accounts opened with banks in Belarus:

- for export - Belarusian rubles and (or) foreign currency payable for the rights to software granted to a non-resident;
- when importing - Belarusian rubles and (or) foreign currency in case of a refund in case of non-fulfillment or incomplete fulfillment by a non-resident of its obligations to transfer rights to software.

The repatriation period is determined on the basis of the deadline for the fulfillment of the above obligations by a non-resident established by the license agreement, with the addition to it of the period for making a payment and transfer of funds, which, in turn, is determined according to the settlement conditions contained in the agreement and should not exceed 30 calendar days.

The extension of the repatriation period, release from the obligation to repatriate and its termination are carried out in the cases and in the manner directly provided for in Art. 19 of the Law of the Republic of Belarus of 22.07.2003 "On Currency Regulation and Currency Control".

Registration of a license agreement on the web portal of the National Bank of Belarus

As stated above, the license agreement with a non-resident must provide for the total (approximate) amount of the licensor's remuneration for the entire period of its validity. If such a total amount of monetary obligations under a license agreement with a non-resident for the entire period of its validity is equivalent to 4,000 base units or more (approximately 38,000 euros), then such a license agreement must be registered on the web portal of the National Bank of Belarus. Accordingly, the registration of the license agreement is carried out by the resident of Belarus or, on his behalf, by the bank serving him.



END-USER LICENSE AGREEMENT AND PERSONAL DATA PROTECTION IN GEORGIA



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License agreement is subject to regulation under the Law of Georgia on Copyright and related rights and the Civil Code of Georgia. As in most cases end-user agreements include situations when the licensee is an individual and not a legal entity, protection of personal data may become one of the important moments between the copyright holder and the licensee end-user

The Laws of Georgia consider two types of license agreements. Those are exclusive licenses and conventional licenses. Generally, in most cases with end-user license agreements there are situations when conventional agreements are entered.

First of all, what should be noted is that the license agreement, even with the end-user, should be entered in writing. It is a mandatory requirement under the Laws of Georgia. In writing does not mean that the parties will have to sign the hard copy and send it to the counterpart. The agreement can be signed in any type of writing form, which allows identification of the signatories.

There is no requirement that the end-user agreement is governed by the Laws of Georgia. The parties are free to choose governing law. What should be kept in mind is that any provisions contradicting general “over-imperative” principles of the Laws of Georgia should prevail over the agreement.

In case of entering into the end-user agreement the important issue which should be taken into consideration is personal data processing as the copyright holder or licensor receives access to the personal data of end-users or a personal data of employees of end-user.

The following personal data protection regulations must be taken into consideration in relation to end-user license agreements:

1. Privacy notice:

Privacy notice is a consent of a data subject on processing of his / her personal data. In most cases it is either an annex of the license agreement or a part of the license agreement. The end-user should be properly informed which data of the data subject will be processed. Generally, such personal data includes a name, surname, email, place of work, or any other data allowing identification of the data subject.

Data processing is allowed in cases when there is a legitimate basis for data processing. It means that data processing is necessary for a specific purpose, which cannot be achieved without processing the personal data.

The data subject should be properly notified if the data is shared and the extent of this sharing. The data subject should be informed, who the data controller is, and whether the personal data should be transferred abroad and kept abroad etc.

2. Trans-border Transfer of Personal Data

The detailed regulation on obtaining the State Inspector consent on trans-border transfer of personal data has been recently adopted in Georgia.¹

For a cross-border data transfer consent of personal data subject is required. In certain cases consent of the personal inspector's service is also necessary. The State Inspector has adopted a "white-list" of countries with adequate guarantees of personal data protection. Those are mostly the countries of EU. Transfer of personal data to white-list countries does not require consent of the State Inspector service. Among them are not CIS countries and the USA.

The term of receipt of the consent from the State Inspector is 2 months and requires filing the following information to the local regulatory:

- an agreement between a data subject and an applicant;
- excerpt (certificate of incorporation) from an entrepreneur or legal entity's registry of an applicant and a data controller (apostilled and translated into Georgian if prepared offshore);
- apostilled and translated power of attorney in case the application is submitted through a proxy;
- a document providing information on a business activity carried out by a data controller, e.g., Articles of Association. The copy of the document should be apostilled and translated into Georgian;
- an agreement between a data controller and a data processor, if an applicant is a data processor - a person carrying out data processing for a data controller;
- data Subject's consent on a cross border transfer of personal data;
- any other information on personal data protection guarantees, such as a personal data protection policy;
- an application should be submitted in a form pre-approved by the State Inspector Service. All foreign language documents attached to the application should be translated into Georgian.



¹ Decree #07 of the State Inspector from 23 July 2021.

FEATURES OF CONCLUDING LICENSING AGREEMENTS IN THE FIELD OF IT TECHNOLOGIES IN KAZAKHSTAN



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In the modern world it is difficult to imagine life without IT technologies. Almost every area of this industry needs to process a large amount of information and data services. All modern IT technologies are based on software (computer programs). Many entrepreneurs working in the field of IT programming enter into licensing (author's) agreements with distributors, resellers, users, and also act as users themselves.

At the same time, in practice, when concluding such license agreements, the parties may make some omissions, which subsequently lead the parties to litigation.

In this article, we would like to reveal the concept of "computer program" (software) and focus on the mandatory conditions that a license agreement must contain in order to avoid unwanted litigation between the parties.

Definition of "program for electronic computers"

The legislation of the Republic of Kazakhstan operates with the term "computer program".

In accordance with Article 2 of the Law of the Republic of Kazakhstan dated June 10, 1996 No. 6-1 "On Copyright and Related Rights" (hereinafter

referred to as the "Copyright Law"), a computer program (hereinafter referred to as the "Software") is a set of commands, expressed in the form of words, diagrams or in any other form of expression, the recording of which on a machine-readable material carrier ensures the performance or achievement of a computer of a certain task or result, including preparatory materials, the nature of which is such that the computer program is their result at a later stage.

For ease of understanding, software is understood as a set of instructions that allows the user to interact with the computer, its hardware, and perform tasks. Computers are useless without software.

Legal protection of software

In accordance with Article 2 of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, software is an object of intellectual property and is subject to protection as a literary work by a special section of law - copyright.

Software protection extends to all types of software (including operating systems), which can be expressed in any language and in any form, including source code and object code.

Do we need to register software?

Based on Article 9 of the Copyright Law, software is not subject to mandatory registration with the authorized body; copyright in software arises by virtue of the fact of its creation.

To notify about their exclusive property rights, the author and (or) the right holder has the right to use the copyright protection sign, which is placed on each copy of the work and necessarily consists of three elements:

- the Latin letter "C" in a circle;
- the name (name) of the owner of exclusive copyrights;
- the year of the first publication of the work.

In our opinion, software registration is still advisable, since the Certificate of entering information into the state register of rights to objects protected by copyright (author's certificate):

- confirms that the object indicated in it is a work and is protected as an object of copyright;
- identifies the software author;
- contains information about the date of creation of the software and the date of registration of the software with the authorized body;
- has the status of an official state document, which is recognized by the courts in Kazakhstan and abroad.

Among other things, software copyright registration allows you to compare "disputed software" with the author's original software.

Thus, a copyright certificate for software can be a good source of evidence in a lawsuit or arbitration.

License agreement and its parties

The transfer of rights to the software from the copyright holder/author to the user is carried out on the basis of a license (author's) agreement.

The subject of the license agreement will be software. Accordingly, the provisions of the Civil Code of the Republic of Kazakhstan ("CC RK") and the Copyright Law will apply to the contract.

The license agreement implies the transfer of an intellectual property object (for example, software) in the appropriate amount for temporary use.

The license agreement has 2 parties - this is the licensor, who transfers the right to use the software, and the licensee, the one who temporarily receives these rights.

The fee for loaning the Software is referred to as a licensor's fee, license fee, or royalty.

Common schemes for transferring rights to software from the right holder to the end user

The transfer of rights to the software can be carried out directly from the copyright holder to the end user under a license agreement.

However, intermediaries are often included in the software distribution scheme: a distributor and/or reseller. This structure is typical for situations with product promotion to foreign markets.

Typically, the distributor is a company that has significant resources and connections with regional partners, which allows for a wide distribution of the product.

A reseller is a smaller distributor who sells a product to end users.

An agreement is concluded between the licensor and the distributor, which establishes the scope of the distributor's powers in relation to the distributed software. As a rule, such contracts are subject to foreign law.

Exclusive or non-exclusive (simple) license?

In practice, 2 types of license are used:

1. Exclusive.
2. Non-exclusive (simple).

An exclusive license implies the transfer of the right to use the software without the licensor (right holder) retaining the right to issue licenses to other persons, and a non-exclusive license assumes the licensor retains this right.

A simple non-exclusive license, as practice shows, is the most popular tool in the IT product market.

Ways to conclude a license agreement

You can conclude a license agreement in various ways: on paper, in electronic form via e-mail or electronic document management.

Any of these methods guarantees the contract a legal force.

One of the most popular ways to conclude a license agreement, which almost all entrepreneurs have encountered, is the acceptance of an offer or the acceptance of the terms of a license agreement.

The copyright holder (author) invites the user to read the license agreement, and the user ticks the box, accepting its terms.

For example, any individual intends to purchase an antivirus. It goes to the site of the copyright holder and downloads the program. During the installation of the antivirus, he is prompted to agree to the terms of the license agreement. An individual reads the terms of the agreement, clicks the checkbox "I agree with the terms of the agreement", and then the "next" button. From this point on, it is considered that this individual has accepted the terms of the license agreement.

Registration of a license agreement

A license (author's) agreement on the transfer of rights to software is not subject to mandatory state registration.

Registration of a license agreement is necessary when the subject of the agreement is the transfer of industrial property (trademarks, patents, and so on).

Essential terms of the license (author's) agreement

The license (author's) agreement under the legislation of the Republic of Kazakhstan must contain the following essential conditions.

1. Ways of using the software (specific rights transferred under this agreement).

Uses are defined in section 16 of the Copyright Act and include:

- software playback;
- distribution of the Software by selling or otherwise disposing of its original or copies;
- import of the original or copies of the software for distribution purposes;
- bringing the software to the public;
- other actions that do not contradict the legislative acts of the Republic of Kazakhstan.

It is worth noting here that the rights to use the work that are not directly transferred under the author's agreement are considered not transferred.

2. Term of the license agreement.

The contract can specify any period of its validity. As a rule, the parties set the term of the contract for the entire duration of the exclusive (property) rights to the software (ie, throughout the life of the author and 70 years after his death).

If the term is not specified in the contract, then the contract can be terminated by the author after one year from the date of its conclusion, provided that the user is notified in writing 3 months before the termination of the contract.

3. Territory to which the right applies.

If the territory is not specified, then the effect of the right transferred under the agreement is limited to the territory of the Republic of Kazakhstan.

4. The amount of remuneration (or the procedure for determining the amount of remuneration for each way of using the work).

The remuneration is determined in the contract in the form of a percentage of the income for the corresponding method of using the work or, if this is not possible due to the nature of the work or the peculiarities of its use, in the form of an amount fixed in the contract or otherwise.

It is important to note that the subject of an author's agreement cannot be the right to use works that the author may create in the future. In other words, you cannot transfer a license for an unfinished product, you need to create software, and then transfer it.

Recommendations when concluding a license agreement

When concluding a license agreement, many entrepreneurs make a number of mistakes, which in the future can lead to various legal consequences for the parties to the agreement.

In this regard, we will designate several conditions that, in our opinion, must be provided for in a license agreement.

1. Be clear about what you are lending and how much.

If it is software, then it is desirable to indicate the full name of the software. If the software is registered, please indicate the copyright certificate number and the date of state registration.

In addition, we propose to describe the software functionality that will be available to the licensee when using the software. It is possible to indicate the brief functionality of the software in the contract.

If you intend to restrict the licensee's access to certain functions, then indicate in the agreement that access to them is not provided. This is done so that in the future there are no claims from the counterparty for the operation of the software.

Functionality in the contract can be described in various ways:

- in the subject of the license agreement;
- attached to it;
- make a link to the site where it will be placed.

2. Include the licensor's (right holder's) warranties.

Often, the licensor does not own the software itself, but has received the software from another licensor. That licensor, for example, received rights from another primary licensor. This chain of licenses can be very long, and it is difficult, and sometimes even impossible, for the client to trace it.

Therefore, in order to eliminate the risks, it is necessary to include provisions for the licensor's warranties in the license agreement. Specify that the licensor is the sole owner of property (exclusive) rights to the software, and that the rights of third parties are not violated by him.

3. Determine the scope of transferred rights. As already noted, rights that are not specified in this agreement as transferable are considered not transferred.

Previously, we mentioned user rights such as making the software available to the public, implementing the software, importing the software, reproducing, modifying the software, and so on.

4. Agree on terms of payment that are clear to both parties.

Often, the terms of payment under the contract are not clearly or incomprehensibly formulated, which can negatively affect both parties.

The license fee can be paid once for the entire period of the contract or periodically during the term of the contract (monthly, quarterly, annually).

If the payment is one-time, then indicate the period for which it is paid. For example, if the contract is concluded for a year, then determine that the license fee is paid at a time and covers a certain period.

If the payment is periodic, then enter the term "billing period" and indicate that the billing period is a month (quarter), and the remuneration is paid after the expiration of the billing period within 3-5 business days from the moment the licensor issues an invoice to the licensee for payment.

5. Include the AS IS principle in the contract.

The AS IS principle is widely used in international practice.

The "AS IS" principle means that your intellectual property is transferred to the property without any guarantees of quality.

This provision protects the licensor. This is protection against those users (licensees) who try to terminate the contract, referring to the fact that the transferred intellectual property object does not meet expectations and is of poor quality.

We cannot predict what exactly the licensee (customer) wants, what product he wants to receive, therefore IT companies, especially large ones, include the "AS IS" principle in their license agreements.

6. Determine the moment of transfer of license rights.

In the agreement, you can fix that the license rights are transferred to the licensee from the moment specified in the agreement (for example, from October 1, 2021).

You can specify that the rights to the software are transferred from the moment the certificate of completion or the certificate of transfer of license rights is signed.

7. Specify the term for granting license rights.

Be sure to indicate at what point you grant the license rights and at what point they terminate.

Please note that the term for granting rights may not coincide with the term for concluding the contract. In accordance with the legislation of the Republic of Kazakhstan, the contract may contain retrospective conditions. For example, the contract comes into force from the date of signing, but in terms of mutual settlements, it applies to relations that arose from October 1, 2021.



SPECIFICS OF CONCLUDING LICENSING AGREEMENT IN MONGOLIA



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According to the Procedure on registration of the licensing agreement and other agreements related to the use of intellectual property, the Licensing agreement is a written agreement on the temporary use of an invention, product design, utility model, or trademark by another person. To be valid in the territory of Mongolia, the Licensing agreement for patent and trademarks shall be registered in the Intellectual Property Organization on mandatory basis; other agreements related to the use of intellectual property shall be registered on a voluntary basis.

General provisions of the Agreement shall be agreed by the Parties by negotiations and the followings can be considered during the negotiation of the Licensing agreement:

1. It is important for the Parties to have a common understanding of the terminologies and definitions of the agreement as a separate section or article within the Agreement in order to avoid using them in different meanings and prevent disputes between the Parties on elaboration of meaning. This section shall include, for example, meanings or legal definitions like “invention”, “licensed technology”, “licensed product”, “technical documentation” etc.

2. Depending upon types of licenses, form and scope of use of the object under the license, the form and scope of use of the invention shall be determined clearly. For the use of invention, utility model, and industrial designs, according to paragraph 1 of article 51 of the Patent Law of Mongolia, there are two types of licenses that can be given to the Licensee: exclusive and simple. Exclusive licensing agreement is an agreement that is concluded by the patent owner/Licensor/ on the conditions that the license shall not be used by a third party at the same time. Simple licensing agreement is an agreement that is concluded by the patent owner on the conditions that the patent is not restricted to be used by a third party at the same time.

For the use of a trademark, the type of the license is not provided. The exclusive trademark holder right will be granted after registration of the trademark at the Intellectual Property Organization.

3. Basic rights and obligations of the Parties: The basic right of the Licensee is using the object (including industrial design or trademark) of the Licensing Agreement within certain limitation /entirely or partially/ in the stated form

/production, use, sale/ and using in the defined territory / in where the patent or trademark is valid/. The possibility of concluding a dependent licensing agreement /dependent license/ is a simple license issued by the exclusive Licensor to a third party on agreed terms to the Licensee for use.

The main obligation of the Licensee is to pay (the amount and procedure for payment must be specified in a special article) agreed fee of using the object (which is included in the Licensor's obligation).

For patent licensing agreement: There are two basic forms of payment for patents transferred under the Licensing agreement: a lump sum payment or royalty fee. In addition, technical assistance fees shall be charged separately. Also, there can be a combination of lump sum and royalty fee.

1. The lump sum payment is made in one lump sum or in several installments within a certain period of time by concluding the licensing agreement with the full transfer of the right to use the invention or patent. The lump sum payment is usually used when the main invention under the Licensing agreement is relatively simple and the Licensee is able to use the invention or trademark directly in production and then sell it.
2. In the case of royalty fee, it is important to specify the principle of determining the percentage to be paid in detail. The amount of the royalty fee shall be calculated based on the amount of product produced, the price of the product or the earned profit.

For trademark licensing agreement: The Parties may agree to one or more of the following fees under trademark licensing agreement.

2. License Issue Fee. The initial payment by the Licensee for the right to the license of the Licensed Trademark. This payment shall be paid after execution of Licensing agreement by the Parties.

2. Royalties. Essentially, the Licensee will pay a percentage of every sale it makes on Licensed Services or Products to the Licensor. The Party can change this to be a per-unit royalty (i.e., a set fee every time a sale is made) or make the percentage rate variable over the Term (e.g., increasing over the Term based on an assumption that sales will increase over time). This is a matter of negotiation between the Parties.
3. Minimum Royalty. To make sure the Licensor receives at least something every year in exchange for its agreement to license its marks. This type of fee establishes a minimum required annual payment. Note that if this payment is not made, the Licensor has the right to terminate the Agreement. In the second option, the Licensor will receive a set payment in exchange for the license it provides.
4. The main obligation of the Licensor is to issue a license to the Licensee in an agreed form, with all the necessary technical documents especially for patent or industrial design, which shall be stated or included in an Appendix of the Licensing Agreement. Under the Licensing Agreement, the Licensor's special obligation is to provide technical assistance to the Licensee in regards with use of inventions, utility models and industrial designs.
5. Technical assistance includes training and consulting (on technical operation, services, trade and marketing, management, planning, research) on use of the trademark as well as the provision of the necessary equipment and materials on use of the patent. The size, conditions and form of payment for training and consultations shall be determined and charged separately. The payment for training and consulting is usually borne by the Licensee.
6. Termination of the Agreement. The Parties may terminate the Licensing Agreement both unilaterally and bilaterally. Since the legislation does not contain special rules on liability and termination of agreement in relation to the Licensing Agreements, these rules shall be governed by the Civil Code of Mongolia.

7. Dispute resolution. All disputes arising in connection with the Licensing agreement shall be resolved within 3 months by the Dispute Resolution Commission (hereinafter “the Commission”) of the Intellectual Property Organization, then the Party, which disagrees with the decision of the Commission has the right to file a complaint to the court within 30 days from the date of the decision of the Commission.

Registration of the Licensing Agreement.

The Intellectual Property Organization registers the Licensing Agreements and enters the information of the Licensing Agreements into the database. The following documents are required for registration:

- application form L-1, L-2;
- the original agreement related to the invention, product design or utility model, or a notarized copy of the agreement;
- a notarized copy of the relevant part of the Agreement related to the trademark or a statement signed and certified by the licensor and licensee;
- basic license agreement for a sub-license;
- translation;
- power of attorney;
- a statement that each co-owner, who is not a party of the license agreement, has agreed to and signed the license agreement;
- receipt of state stamp duty and service fee payment.

The applicant shall submit all necessary documents online or in person to the Intellectual Property Organization. Within 10 days after the submission of the documents, the Intellectual Property Organization notifies the applicant about the registration of the Licensing Agreement for Patent and Trademark. However, if the documents submitted by the applicant are incomplete or do not meet the requirements, then the applicant will have 20 days to eliminate the incompleteness and resubmit the documents.



Also, in accordance with Mongolian legislation, it is necessary that all changes or additional agreements, as well as termination of the Licensing Agreement on patent and trademark, shall be registered in the Intellectual Property Organization.

LICENSE AGREEMENTS IN ONLINE GAMING: LACK OF APPROPRIATE REGULATION AND RISKS OF AMBIGUITY IN RUSSIAN LEGISLATION” (SAINT-PETERSBURG)



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The volume of the Russian video games market in 2020 amounted to 163.4 billion rubles (equivalent to 2.1 billion USD), which is 35% more than in the previous year, according to a study by MY.GAMES, the gaming division of Mail.ru Group, based on data from analytical companies NewZoo, Superdata, AppAnnie, Sensor Tower and others.

However, the regulation of legal relations in Russia’s online games industry is at an early stage of development and therefore contains many controversial issues. One of them is the issue of regulating licensing agreements.

A computer game or a game intended for another gaming platform is not a simple, but a complex object of intellectual property rights, which includes many different independent results of intellectual activity - music, script, plot, video, game characters. In addition, the logo of the company that created the game, game’s title, various slogans and the packaging can also be considered as an independent protected result of intellectual activity. So, for example, on February 2, 2019, there was a virtual concert for the first time in the online game Fortnite. The organizer was DJ Marshmello together with the creators of the game Epic Games. The concert was 10 minutes long. There were more than 10 million spectators-players.

In most cases, the legal relationship between the player and the game operator is regulated under a public agreement - a license agreement (click-wrap), according to which the administrator of the game resource acts as the copyright holder of the game (computer program), and the player is the licensee of the game. The player, on the basis of the agreement, reproduces the client part of the game on his computer, the purchase of game objects is made under the terms of the general license agreement. A license agreement is a civil law contract under which one party, which is the owner of the exclusive right to the result of intellectual activity or to a means of individualisation (licensor), grants or undertakes to grant the other party (licensee) the right to use such result or means of individualization.

Click wrap agreement is an agreement on the use of a program / site / service, which is concluded with the user as a result of clicking by the user on “I agree / accept the agreement on the use of the program / site / service”.

First of all, it is necessary to pose the question - what is the object of the relationship between the user and the developer? The object in their relationship is a computer game. Despite the two points of view regarding the question of what a computer game is, their identity lies in the fact that whether it is

a computer program or a multimedia product, it is in any case the result of intellectual activity, and therefore it is intellectual property, in connection with which it is subject to regulation by Part 4 Civil Code of the Russian Federation. In Art. 1233 of the Civil Code of the Russian Federation stipulates that the rightholder can dispose of his exclusive right in any way that does not contradict the law and the essence of such an exclusive right.

One of the ways to dispose of an exclusive right is to provide another person with the right to use the result of intellectual activity. There are two main types of a license agreement: 1) a simple (non-exclusive) license, when the right to use can be granted by several persons; 2) an exclusive license, when the right to use can be granted only to one person. If the game is the result of intellectual activity, therefore, in order to use it, it is necessary to conclude an agreement with the copyright holder. Online play is most subject to the contractual design of a non-exclusive license. For example, Wargaming states in its license agreement: "a licensee of the Games to Wargaming under a non-exclusive license (hereinafter referred to as the " User ") ...". Blizzard Entertainment, Inc. uses similar wording in its license agreement. As a result of all that we have said, the object of the relationship between the user and the developer is the result of intellectual activity - a computer game, and the relationship that develops between these entities is based on a license agreement.

As soon as the character acquires this or that item, then, within the framework of the whole legal relationship based on the license agreement, a simple connection arises - an obligation - between the player and the developer. Conclusion from the contrary seems to be a supporting argument. In his license agreement, he pointed to non-activated data and commands that are provided for a paid license. Meanwhile, we believe that they have already been included in the client part of the game.

Consequently, within the framework of the user agreement, two legal relationships arise. At first glance, in contrast, we can say that the specified Wargaming license agreement contains two agreements on a gratuitous and a paid license at once, therefore, these are two independent legal relationships. In fact, within the framework of one game and continuous gameplay, the player has different legal relationships with the developer.

The dominant position is that the developer owns copyrights to such objects as the program code for the computer base and audiovisual displays - these two parts are the object of virtual property. The proliferation of the rules on licensing agreements on controversial relations, in contrast to the "proprietary model" of regulation, has a positive property - recognizing that in closed virtual worlds (of which the majority) all rights to in-game objects belong to the copyright holder of the game or the game designer, we protect the turnover from the destructive tendency endowing the copyright holders of virtual worlds with excessive responsibility for the actions of third parties and players (of whom, as we have already noted, there can be several tens of millions in the virtual world, and whose behavior is difficult to control by the operator of the game process).

However, it is also possible to highlight the disadvantages of regulating relations that mediate the transfer of game objects through the conclusion of license agreements:

1. By recognising the agreement between the copyright holder and the user of the license agreement, we will complicate the relationship by the fact that the further "resale" of virtual objects will be, by legal nature, a sublicense agreement, which does not correspond to the will of the parties. For example, it is obvious that the player (licensee) has no motives to bear responsibility to the licensor for the actions of the sublicensee under the concluded sublicense agreement. In

addition, it is worth noting that the consent of the licensor is required to conclude a sub-license agreement, and the user agreements of most online games provide for an explicit prohibition on the transfer of rights from the license agreement.

2. User agreements in essence are accession agreements developed exclusively by the copyright holder, the operator of the game process, in which he has full discretion. The user is a vulnerable, weak side, and in disputes with the copyright holder, he deliberately loses. Such an agreement plays the role of law for virtual space.
3. The purchase of additional game objects (that is, a part of the game's program code) and the payment of a license fee by themselves do not give the user any guarantees of access to these objects. In the licensing relationship, the obligation of the licensor is fulfilled in the moment of providing, crediting game values, the further "fate" of the provided objects remains outside the scope of the responsibility of the copyright holder and constitutes the user's problem. In addition, if the account is blocked, there will be no refund from the gameplay operator.
4. It is incorrect to reduce the legal relations developing around game objects solely to regulation by the norms of contract law, since this contradicts the idea of a legal relationship as a relative one, binding only its participants. It is impossible to assign all responsibility to the organizer of the gameplay, the developer of the game, since they do not have sufficient capabilities to control the virtual world. They do not stand between a user with a virtual object and an indefinite circle of persons from whom an encroachment on the game object can come. Unconsciously, society uses a property-legal model to regulate relations with game objects, in other words, the norms of the real world on property rights are transferred.

In judicial practice and in theory, there is no unambiguous approach to emerging relationships. In theory and practice, 3 main approaches have been formed:

1. The user agreement is a license agreement between the user and the copyright holder, and the regulation of relations in this case is carried out by the provisions of Chapter 4 of the Civil Code of the Russian Federation. Accordingly, all income from the provision of a license to use a computer program is not subject to taxation in accordance with paragraphs. 26 p. 2 of Art. 149 of the Tax Code of the Russian Federation. And the new options provided are nothing more than an extension of the license agreement. It should be noted that this position is quite common and, based on the literal interpretation of the law, is quite applicable.
2. An online game is recognised as an entertainment event, the organization of which is carried out by the administrators (copyright holders) of this game and their activities are recognized as activities for the provision of (entertainment) services.
3. Recognition of an online game as a game within the meaning of Art. 1062 of the Civil Code of the Russian Federation. The rights of participants with such a legal approach are not subject to judicial protection (it should be especially noted that such a position was developed as a result of users' attempts to judicially challenge the deprivation of certain opportunities in the game, as well as restrictions on the use of the game).

In 2015, the Supreme Court of the Russian Federation in a tax dispute came to the conclusion that providing players for a fee the opportunity to use additional game functionality in order to facilitate the gameplay and faster development of the game character is an independent service for organizing the game process.

The case concerned the payment of value added tax by Mail.RuGames (a division of Mail.ru), which provided additional game functionality in its online games for a fee (digital goods). The company tried to take advantage of the VAT exemption for the sale of software, databases and the rights to use them (clause 26, clause 2, article 149 of the Tax Code of the Russian Federation). The Supreme Court upheld the decisions of the lower courts and the Federal Tax Service, which interpreted the sale of virtual objects and services as a service, which destroyed the basis for the application of the tax break. Starting from the 4th quarter of 2016, the Federal Tax Service still exempted Mail.Ru Group from paying VAT for the sale of currency and items in online games. Thanks to this, the company received about 342 million rubles.

In January 2017, in response to an appeal, the Federal Tax Service confirmed its new position: "Taking into account that in relation to non-activated data and commands under the Agreement, LLC (Licensor) transfers the rights to an individual (Licensee) to use a computer program, and an individual (Licensee) transfers to the LLC (Licensor) the corresponding remuneration for the specified right, the application of VAT exemption for the specified transfer of rights on the basis of subparagraph 26 of paragraph 2 of Article 149 of the Code is lawful."

Thus, it turns out that in 2015 the Supreme Court of the Russian Federation determined that the sale of additional gaming functionality is the sale of a service, and in 2017 the Federal Tax Service changed its approach to gaming facilities, calling them part of the computer program that the licensor (operator and copyright holder of the game) transfers to the licensee (player) on the terms of the license, so their sale is not subject to VAT.



Thus, in current legal framework and litigation practice there is no single approach to determining the legal nature of the contractual relationship between the User and the owner of the game. Also controversial is the issue of legal regulation of the agreement concluded by the User with the Copyright Holder of the game. The emerging relationships are much broader and more diverse than licensed ones in their content.

PECULIARITIES OF CONCLUDING LICENSE AGREEMENTS, STAGES AND SPECIAL ASPECTS OF THE REGISTRATION PROCEDURE IN UZBEKISTAN



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It is well known that the transfer of intellectual property rights can be formalized in various ways. A license agreement is the most common way of transferring the rights to use intellectual property objects.

According to Article 1036 of the Civil Code of the Republic of Uzbekistan, under a license agreement, the party having the exclusive rights to the results of intellectual activities or the means of individualization (licensor) grants the other party (licensee) the right to temporarily use the corresponding intellectual property object.

According to Uzbek laws, from the point of view of the scope of the transferred rights to the licensee, license agreements are divided into two types:

1. **Simple non-exclusive license.** This license implies the right to use the intellectual property object and the right to issue a license to other third parties by the licensor. Accordingly, upon the issue of a simple non-exclusive license, the intellectual property object can be used by the licensor, the licensee and, at the same time, by third parties, who have received an exclusive right to use the intellectual property object from the rightsholder.
2. **Exclusive license.** The peculiarity of this type of license is that the licensee has no right to transfer it to any third party after entering into such

an agreement. Accordingly, with an exclusive license, the licensor and the licensee can simultaneously use the intellectual property object; however, the licensor does not have the right to enter into a license agreement and transfer the right to use to third parties.

It should be emphasized that before entering into the license agreement, the parties are obliged to register an intellectual property object in the Republic of Uzbekistan by submitting an application to the Agency on Intellectual Property under the Ministry of Justice of the Republic of Uzbekistan (the "Agency") or have an international registration with a coverage area in the Republic of Uzbekistan.

The next important stage is the conclusion of the license agreement.

Requirements for drafting the license agreements

According to Uzbek laws, the license agreement must be concluded in writing and registered with the Agency. The formalization and registration procedure of the license agreement is determined by the *"Rules of the registration of agreements on the transfer of rights to an invention, utility model, industrial design, selection achievement, trademark, service mark and license agreements for their use, agreements on the full or partial transfer of rights to the integrated circuit layout, complete or partial*

assignment of all property rights and transfer of property rights to a program for electronic computers, a database” approved by the Order of the Director of the State Patent Office No.48 dated May 11, 2005 (the “Rules of the registration of license agreements”).

Under the Rules for the license agreements registration, license agreements must contain the following conditions:

- information on the parties to the agreement (details and names of the parties);
- subject of the agreement (the number of the registration certificate);
- type of transferred rights;
- scope of the transferred rights under the agreement (the scope of the use of the intellectual property object by the licensee);
- territory of the validity of the agreement;
- amount of remuneration (or a provision confirming the existence of an agreement on remuneration);
- duration of the agreement.

It should be noted that one of the critical conditions of the license agreement is the obligation of the licensee to ensure the exact conformity of the quality of the goods produced, the services rendered, the work performed to the quality of similar goods, services or work produced, rendered or performed directly by the licensor.

Registration of license agreements

In practice, the registration procedure of license agreements is carried out in 3 stages that include the following:

1. Filing of the documents. the following documents are filed with the Agency for registration of a license agreement:

- application for registration of a license agreement;
- 3 (three) copies of the license agreement in the Uzbek or Russian languages, certified in the established manner;

- document confirming the legal succession or the right of inheritance (if the author has inherited the work);
- power of attorney (if the application is submitted through a representative);
- document confirming the payment by the applicant of the State fee for the consideration of the application.

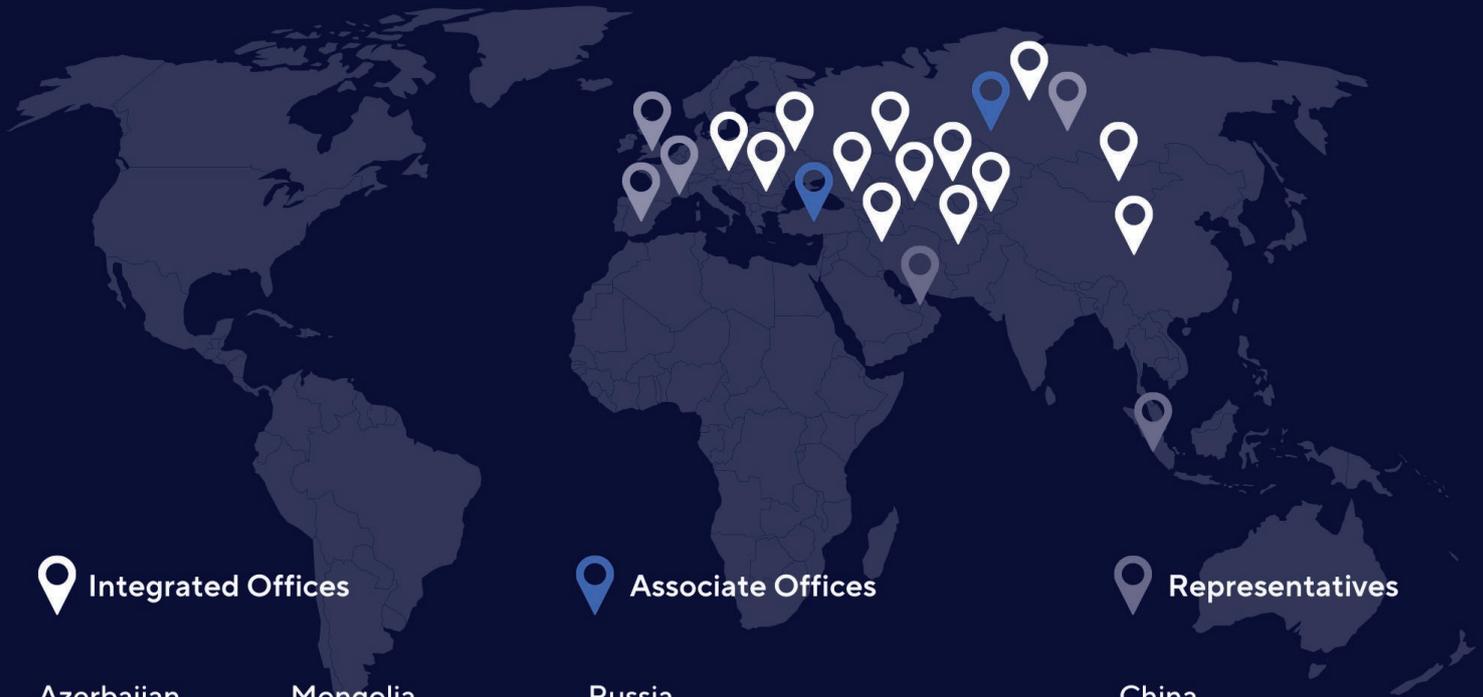
2. Examination of the documents. Upon receiving the documents, the Agency checks the availability of all the necessary documents and their compliance with the requirements established by the Rules of the registration of license agreements within 15 (fifteen) days. In case of absence of the necessary documents or violation of the established procedure, the Agency sends the applicant a letter requesting to provide the missing or corrected documents within 3 (three) months from the date of notification.

If the filed documents meet the requirements of the Rules of the registration of license agreements and the license agreement undergoes a corresponding examination, the Agency registers the agreement and includes information on the registration of the license agreement into the State register. Moreover, the Agency sends the applicant 2 (two) copies of the license agreement with a registration number and a certificate with a registration mark.

3. Publication of registration data. Information on the registration of a license agreement is published in the official bulletin of the Agency and on its official website.

Therefore, upon concluding license agreements, it is necessary to pay special attention to the drafting and examination procedure of license agreements to correctly stipulate the parties' positions, rights, and obligations to minimize the risks of disputes between the parties.

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