



ICLG

The International Comparative Legal Guide to:

Franchise 2018

4th Edition

A practical cross-border insight into franchise law

Published by Global Legal Group, with contributions from:

Anderson Mori & Tomotsune
Badertscher Attorneys at Law
Cuatrecasas
Daniel Legal & IP Strategy
Dickinson Wright LLP
DLA Piper
Faegre Baker Daniels
FLINN
Gardere Wynne Sewell LLP
Gorodissky & Partners (Ukraine)
GRATA International

GUNER | legal
Hoffmann Liebs Fritsch & Partner Rechtsanwälte mbB
Horten Advokatpartnerselskab
Jones & Co.
Kanga & Co
Marsh & Maher Lawyers
Persia Associates
Rechtsanwaltskanzlei Dr. Amelie Pohl
RUBIN MEYER DORU & TRANDAFIR
Smit & Van Wyk, Inc.
The Richard L. Rosen Law Firm, PLLC



global legal group

Contributing Editor

Iain Bowler, DLA Piper

Sales Director

Florjan Osmani

Account Director

Oliver Smith

Sales Support Manager

Toni Hayward

Senior Editors

Suzie Levy, Rachel Williams

Chief Operating Officer

Dror Levy

Group Consulting Editor

Alan Falach

Publisher

Rory Smith

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Ashford Colour Press Ltd
September 2017

Copyright © 2017
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-911367-73-4

ISSN 2055-8082

Strategic Partners



General Chapters:

1	Franchising as a Means to Access New and More Lucrative Markets – Iain Bowler, DLA Piper	1
2	Five Key Difference Makers: Best Practices in Enhancing the Likelihood of Your International Franchise Success – Brian Schnell & Lucie Guyot, Faegre Baker Daniels	4
3	Mergers & Acquisitions Involving Franchise Systems: Key Due Diligence Considerations – Joyce Mazero & Sarah Walters, Gardere Wynne Sewell LLP	9

Country Question and Answer Chapters:

4	Australia	Marsh & Maher Lawyers: Robert Toth	16
5	Austria	Rechtsanwaltskanzlei Dr. Amelie Pohl: Dr. Amelie Pohl	24
6	Belgium	FLINN: Benoit Simpelaere & Leonard Hawkes	30
7	Brazil	Daniel Legal & IP Strategy: Hannah Vitória M. Fernandes & André Ferreira de Oliveira	38
8	Canada	Dickinson Wright LLP: Edward (Ned) Levitt & Andrae J. Marrocco	46
9	China	Jones & Co.: Paul Jones & Xin (Leo) Xu	55
10	Denmark	Horten Advokatpartnerselskab: Peter E. P. Gregersen	63
11	England & Wales	DLA Piper: Iain Bowler	69
12	Germany	Hoffmann Liebs Fritsch & Partner Rechtsanwälte mbB: Christoph Schmitt	79
13	India	Kanga & Co: Preeti Mehta & Chetan Thakkar	86
14	Iran	Persia Associates: Dr. Alireza Azimzadeh	94
15	Japan	Anderson Mori & Tomotsune: Kenichi Sadaka & Aoi Inoue	101
16	Kazakhstan	GRATA International: Saule Akhmetova & Timur Berekmoinov	109
17	Portugal	Cuatrecasas: Vasco Bivar de Azevedo & Mónica Pimenta	118
18	Romania	RUBIN MEYER DORU & TRANDAFIR: Cristina Tararache	127
19	Russia	GRATA International: Yana Dianova	134
20	South Africa	Smit & Van Wyk, Inc.: Esmari Jonker	143
21	Switzerland	Badertscher Attorneys at Law: Dr. Jeannette Wibmer	150
22	Turkey	GUNER legal: Haşmet Ozan Güner	157
23	Ukraine	Gorodissky & Partners (Ukraine): Nina Moshynska	164
24	USA	The Richard L. Rosen Law Firm, PLLC: Richard L. Rosen & Leonard S. Salis	174

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Russia

GRATA International

Yana Dianova



1 Relevant Legislation and Rules Governing Franchise Transactions

1.1 What is the legal definition of a franchise?

Instead of a “franchise” or “franchising”, the term “commercial concession” is used in the Civil Code of the Russian Federation (the Civil Code) for this type of agreement. Article 1027 of the Civil Code provides that under the contract of commercial concession, one party (the right-holder) undertakes to grant the other party (the user), for a remuneration and for a definite or an indefinite term, the right to use in business a complex of exclusive rights owned by the right-holder, including trademark and/or service mark rights, and other intellectual property rights provided for by the contract, such as trade name rights and trade secret (know-how) rights. The commercial concession contract shall provide for the use of a complex of exclusive rights, the business reputation and commercial know-how of the right holder in a definite scope, with an indication or without indication of the territory of use, with reference to a certain sphere of business activity (sales of goods obtained from the right-holder or produced by the user, other trade activity, performance of works and provision of services).

It follows from the above definition that the subject matter of a commercial concession (franchising) agreement should include a trademark/service mark, otherwise the contract will not be deemed a commercial concession (which is confirmed by the ruling of the Highest Arbitration Court of the Russian Federation (HAC) dated 27.09.2013 No. BAC-10862/13, case No. A40-50960/12-23-457).

As an alternative option, in Russia franchise relations may be established by a licence agreement between a franchisor and a franchisee for certain copyright objects (logos, brand books, corporate styles, etc.) and trade secrets (know-how) combined with consulting services to be provided by the franchisor. Such agreement, unlike the contract of commercial concession, is not subject to state registration as long as the complex of exclusive rights granted by the franchisor to the franchisee does not include registrable rights (i.e. to a trademark or a service mark).

1.2 What laws regulate the offer and sale of franchises?

General provisions regarding commercial concession (franchise) contracts are contained in Chapter 54 of the Civil Code.

Furthermore, the provisions of the Civil Code regulating granting licences to copyright, rights to trademarks, service marks, trade names and other means of individualisation of goods, works and

services, as well as know-how (commercial secrets) apply to the relations of the parties under commercial concession contracts.

The Federal Law dated 26.07.2006 No. 135-FZ “On Protection of Competition” (the Competition Law) establishes the restrictions on restricting terms and conditions that are applicable to commercial concession contracts.

Since the granting of a complex of exclusive rights under commercial concession contracts is subject to state registration with the Federal Service for Intellectual Property (Rospatent), the respective administrative regulations apply.

In addition, depending on the subject matter of a commercial concession contract, it may be subject to the laws and regulatory acts in the specific domain, e.g. the hotel, restaurant and catering sector (HoReCa), the retail trade or medicines’ circulation.

1.3 If a franchisor is proposing to appoint only one franchisee/licensee in your jurisdiction, will this person be treated as a “franchisee” for the purposes of any franchise disclosure or registration laws?

A commercial concession contract may provide for the obligation of the right holder (hereinafter – a “franchisor”) not to grant other persons with similar complexes of exclusive rights for their use in the territory assigned to the user (hereinafter – a “franchisee”) or to refrain from its own similar activity in this territory (Article 1033 p. 1 of the Civil Code). In connection with this, the franchisee will not have a specific status for the purposes of the state registration of the commercial concession contract under Russian laws. According to the Rospatent recommendations approved by the order dated 29.12.2009 No. 186, the documents for the state registration of a commercial concession contract may be filed by the franchisee even if such obligation is not provided for by the respective contract, or by the franchisor even if the contract provides that the application for the state registration shall be filed by the franchisee.

1.4 Are there any registration requirements relating to the franchise system?

Under Article 1028 of the Civil Code, a commercial concession contract shall be made in writing and granting of a complex of exclusive rights under the respective contract shall be registered with Rospatent.

According to the Administrative regulation for the provision by Rospatent of state registration of a contract for disposal of the exclusive right for invention, utility model, industrial design, trademark, service mark, registered integrated circuit topography,

computer software and databases approved by the order of the Ministry of Economic Development dated 10.06.2016 No. 371 (the Administrative regulation), the application for state registration may be filed by any party to a contract of commercial concession. The Administrative regulation sets forth the exhaustive list of documents to be filed with Rospatent together with the application, the term of 68 days from the date of provision of the application for providing the state registration, and the amounts of state duty to be paid by the applicant.

1.5 Are there mandatory pre-sale disclosure obligations?

Under Article 1031 of the Civil Code, the franchisor shall provide technical and commercial documentation as well as any other information necessary for the franchisee and its employees to be able to carry out the franchising activities under the franchise agreement. As long as no specific term is established for the performance of this requirement, the information may be disclosed either before or after the franchise agreement is concluded; accordingly, pre-sale disclosure obligations are not mandatory.

In order to interest potential franchisees, franchisors often provide, in the course of negotiations with the latter, certain business-related information (e.g. financial results, royalty rates), as well as demonstrate equipment, work techniques and operating principles, at their own discretion. The confidentiality obligations and liability of the franchisee to whom such information is disclosed in such cases is commonly established by a separate confidentiality agreement. In the absence of such an agreement, a potential franchisee – as a party to negotiations – may be held liable for disclosure of the confidential information of the franchisor, or misuse thereof under Article 434.1 p. 4 of the Civil Code.

1.6 Do pre-sale disclosure obligations apply to sales to sub-franchisees? Who is required to make the necessary disclosures?

In the event that a franchisor wishes to appoint a master franchisee (i.e. a franchisee granted with an exclusive licence and authorised by the franchisor to make sub-franchising agreements) to develop the franchise network in the country, pre-sale disclosure obligations to sales to sub-franchisees may be provided for in the commercial concession contract with the master franchisee, in accordance with the franchisor's circumstances and wishes.

Unless otherwise is provided for in the commercial concession contract with the master franchisee, the latter shall be jointly and severally liable before the franchisor for the damage caused by sub-franchisees (Article 1029 p. 4 of the Civil Code).

1.7 Is the format of disclosures prescribed by law or other regulation, and how often must disclosures be updated? Is there an obligation to make continuing disclosure to existing franchisees?

According to Article 1031 p. 2 of the Civil Code, unless otherwise is stipulated by the commercial concession contract, the franchisor shall be obliged to render technical and consultative assistance for the franchisee, including assistance in training and upgrading the skills of its employees. Otherwise, Russian laws neither prescribe any specific format of disclosures nor establish requirements for the disclosure update during the term of the franchise agreement. In practice, however, these conditions are specified in detail in the franchise agreement (commercial concession contract) in order to

provide for transparency in the relations between the franchisor and the franchisee.

1.8 Are there any other requirements that must be met before a franchise may be offered or sold?

Under Russian law, only profit-making organisations and natural persons registered as individual entrepreneurs may be parties to a commercial concession contract (Article 1027 p. 3 of the Civil Code). This requirement does not apply if the parties choose the alternative option for formalisation of their franchisor-franchisee relations (please see question 1.1 above).

In the event that a commercial concession contract is entered into, the exclusive rights to trademark(s), service mark(s) and any other intellectual property objects that are subject to the registration under Russian law being granted under such contract should be either registered in Russia or enjoy protection in Russia under the Madrid Agreement Concerning the International Registration of Marks.

1.9 Is membership of any national franchise association mandatory or commercially advisable?

There is the Russian Franchise Association (RFA) established in 1997, which does not have regulatory power but provides for information support and consultation of its members, represents them before government authorities, non-profit and profit-making organisations and individuals, and maintains the National Register of Franchises (the official website is <http://www.rusfranch.ru/en/>).

1.10 Does membership of a national franchise association impose any additional obligations on franchisors?

Members of the Russian Franchise Association are obliged to pay annual contributions and to comply with the Code of Ethics (the Russian version of which is available at: http://rusfranch.ru/chlenstvo/kodeks_etiki/).

1.11 Is there a requirement for franchise documents or disclosure documents to be translated into the local language?

In the event that a contract of commercial concession is entered into, in order for the granting of a complex of exclusive rights under the respective contract to be registered by Rospatent, the contract should be either in Russian or bilingual, and all the documents filed with Rospatent should be either in the Russian language or, if executed outside Russia, apostilled (or legalised) and translated into Russian, and such translation be notarised.

2 Business Organisations Through Which a Franchised Business can be Carried On

2.1 Are there any foreign investment laws that impose restrictions on non-nationals in respect of the ownership or control of a business in your jurisdiction?

Federal Law No. 57-FZ “On Procedures for Foreign Investments in Companies of Strategic Significance for National Defence and Security of the Russian Federation” establishes the restrictions and requirements for preliminary approval of transactions involving

the establishment of control by foreign investors over companies engaged in activities in the sectors which are deemed strategic (“Strategic Companies”), including geological research of subsoil and/or mineral exploration and extraction of federal subsoil; activities in the nuclear industry and the storage of nuclear and radioactive materials; activities in connection with aviation equipment and security; and space activities. Certain transactions involving the acquisition of control by a foreign investor or its agents over Strategic Companies are subject to the preliminary approval of the Government Commission for Strategic Investments. Restrictions on ownership and/or control by non-nationals are also established in respect of banking, media, insurance, diamond extraction, aviation and private detective and security business.

2.2 What forms of business entity are typically used by franchisors?

Under Russian law, only profit-making organisations and persons who have the status of individual entrepreneurs may be parties to a commercial concession contract and conduct business activity on a permanent basis.

Most often, in particular in the HoReCa sector, a non-Russian franchisor chooses a partner among Russian market majors and establishes a joint venture to co-own the franchise network with such a partner. This scheme is beneficial because the partner is familiar with the peculiarities of conducting business in Russia.

2.3 Are there any registration requirements or other formalities applicable to a new business entity as a pre-condition to being able to trade in your jurisdiction?

A business entity is deemed established in Russia from the date of its state registration; that is, the entering of information about such a business entity in the Unified State Register of Legal Entities (USRLE).

A non-Russian franchisor may also engage in business activities in Russia through a branch that is subject to accreditation by the authorised state agency (with respect to branches of foreign credit organisations – by the Bank of Russia; with respect to other representative offices and branches – the Federal Tax Service of the Russian Federation (FTS of Russia)) and registration with the tax authority at the place of its location in Russia.

3 Competition Law

3.1 Provide an overview of the competition laws that apply to the offer and sale of franchises.

Under Article 1033 of the Civil Code, a commercial concession contract may provide for different restrictions and covenants for the parties – for instance, an obligation of the franchisee to sell goods or provide services at prices imposed by the franchisor. However, such restrictions may be rendered invalid if they are found to contravene the antimonopoly laws.

The Competition Law, Article 11, in general prohibits “vertical” agreements (that is, agreements between commercial entities one of which purchases goods and another provides (sells) goods) that provide for an obligation of the purchaser to abstain from selling the goods of an entity-competitor with the seller, except for agreements on organisation of sales of the goods by the purchaser under the trademark, or another means of individualisation of the

seller. Article 12 of the Competition Law also permits “vertical” agreements in the form of commercial concession contracts.

3.2 Is there a maximum permitted term for a franchise agreement?

A commercial concession contract may or may not provide for the term of its effectiveness.

Article 1037 of the Civil Code states that if a commercial concession contract is entered into without limitation of its term, either party may terminate the contract at any time by notifying the other party thereof six months in advance, unless the contract provides for a longer period. If a commercial concession contract is entered into for a definite term or without indication of the term of its effectiveness, either party may terminate the contract at any time by notifying the other party thereof at the latest 30 days in advance, if the contract provides for the possibility of its termination by way of paying a specified break-up fee.

If the right to the trademark, the servicing mark or the commercial designation owned by the franchisor is included in the complex of exclusive rights granted to the franchisor under the commercial concession contract and such right is terminated, without the terminated right’s replacement by a new similar right, the commercial concession contract also terminates.

3.3 Is there a maximum permitted term for any related product supply agreement?

Russian law does not establish any limitations on the term of validity of a product supply agreement. As a general rule, it is concluded for the same term as the related franchise agreement (commercial concession contract).

3.4 Are there restrictions on the ability of the franchisor to impose minimum resale prices?

According to Article 1033 of the Civil Code, a commercial concession contract may provide for the obligation of the franchisor to sell, in particular to re-sell, commodities which are made and/or bought, to carry out works or render services at the prices fixed by the franchisor. However, in the event the respective condition results or may result in restriction of competition on a certain commodities market, the Federal Antimonopoly Service of the Russian Federation may bring both parties to the commercial concession contract (franchise agreement) to administrative liability and issue a prescription to exclude or modify the respective condition.

3.5 Encroachment – are there any minimum obligations that a franchisor must observe when offering franchises in adjoining territories?

Under Article 1033 of the Civil Code, a commercial concession contract may provide for an obligation of the franchisor not to offer and sell the same franchises to other persons in the territory allocated to the franchisee, or to refrain from carrying out similar activities within the respective territory.

It may also establish the obligations of the franchisee to sell goods, carry out works or render services solely within the boundaries of a definite territory and not to compete with the franchisor within the designated territory using the exclusive rights granted to the franchisee.

As a matter of practice, the franchisor and franchisee generally do not openly compete within the same territory, since it contradicts the goals of each of the parties. In the event the franchise agreement does not provide expressly for a non-compete covenant, the franchisee is entitled to refer to general principles of civil law, such as good faith and fairness, as well as to the customary business practice.

3.6 Are in-term and post-term non-compete and non-solicitation of customers covenants enforceable?

Both in-term and post-term non-compete restrictive covenants are enforceable in a commercial concession contract in Russia (please see question 3.5 above). The general limitation period is three years commencing from the moment when a party to a contract becomes or should have become aware of the violation of the obligation by a counterparty. A non-solicitation of customers covenant is not enforceable because it constitutes a waiver of rights which, according to Article 9 of the Civil Code, as a general rule applicable to a commercial concession contract, does not result in the termination of such rights.

4 Protecting the Brand and other Intellectual Property

4.1 How are trade marks protected?

The following trademarks enjoy legal protection in Russia: (a) trademarks that have been duly registered in the State register of trademarks and service marks of the Russian Federation (the Trademarks Register); and (b) trademarks with an international registration (designating Russia) under the Madrid Agreement and Madrid Protocol, to which Russia is a signatory.

To have a trademark registered in Russia it is necessary to file a trademark application with Rospatent. Russian law allows for registration of a trademark only in the name of a legal entity or an individual entrepreneur. If there is no bilateral international agreement between the Russian Federation and the applicant's country of origin, a non-Russian applicant shall be represented by a Russian authorised trademark attorney.

Within one month from the date of filing the application and the required documents, Rospatent conducts the formal expert examination, in the course of which the experts verify compliance of the application and documents with the established requirements.

Subject to positive results of the formal expert examination, Rospatent proceeds to the expert examination of the claimed designation of the trademark, which lasts about 12 months. The experts examine whether the trademark complies with registrability criteria, and whether prior identical or confusingly similar trademarks have been registered.

Within one month following the registration of a trademark, Rospatent issues a certificate confirming such registration.

Information about registered trademarks is included in the Rospatent database, which is available at the official website: www1.fips.ru/wps/portal/Registers/.

A trademark's registration is valid for 10 years from the filing date. It may be renewed for a further 10 years, an indefinite number of times. To renew a trademark registration, the owner must file a renewal application and pay the corresponding fee to Rospatent within one year before the expiry date.

The date of priority of the trademark shall be the date when all the required documents are filed with Rospatent or, if the applicant

claims conventional priority or exhibition priority under the Paris Convention, the date of the first application filing for the trademark registration in a member state of the Paris Convention, or public exhibition of the goods marked with the trademark in such a member state, respectively.

Russian law also allows for protection of a famous (well-known) trademark. Should a person deem a trademark he/it uses to be "a trademark generally renowned in the Russian Federation", a trademark protected in the territory of Russia on the basis of its state registration or under an international treaty to which Russia is a party or designation that does not have legal protection in the territory of Russia, it may be deemed "a trademark generally renowned in the territory of the Russian Federation" by a decision of Rospatent. The benefits of the recognition of a trademark "generally renowned in the Russian Federation" are that the legal protection of such trademark has infinite duration and extends to goods other than those for which the trademark has been declared generally renowned, if the use of this trademark by another person in respect of the said goods is going to be associated by consumers with the holder of the exclusive right to the generally renowned trademark, and it may infringe the lawful interests of the holder.

Currently, there are fewer than 200 generally renowned trademarks currently registered in Russia, and almost all of them were protected as regular trademarks first.

4.2 Are know-how, trade secrets and other business-critical confidential information (e.g. the Operations Manual) protected by local law?

Know-how is protected in Russia. A trade secret (know-how) is information of any nature (manufacturing, technological, economic, organisational and other), including information on the results of intellectual activities in the area of science and technology and on the methods of carrying out professional activities that has a real or potential commercial value due to the fact that it is not known by third persons, which is not freely accessible to third persons on legal grounds (Article 1465 of the Civil Code).

Know-how is not subject to registration; however, the owner must take certain reasonable measures to maintain the confidentiality of the relevant information, in particular, by the implementation of the so-called "commercial secret regime" in accordance with the Federal Law on Commercial Secrets which includes a number of technical and legal measures for know-how protection. The owner of confidential information, in particular, must define the list of information constituting commercial secrets, adopt the internal regulations on commercial secrets, affix a "Commercial Secret" classification mark on the documents and keep a record of persons who had access to the confidential information.

The exclusive right to know-how shall remain effective as long as the respective information is confidential. Once the relevant information is no longer confidential, the exclusive right to the trade secret is terminated for all right-holders.

4.3 Is copyright (in the Operations Manual or in proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement) protected by local law?

Under Russian law, copyright in the Operations Manual or in proprietary software developed by the franchisor shall arise provided that the respective works have been (a) published for the first time by the author(s), or exist in any objective form in the territory of Russia (irrespective of nationality of the author(s)), or (b) published for the

first time by the author(s), or exist in any objective form beyond the territory of Russia, if the author(s) are Russian nationals, or non-Russian – in accordance with international treaties of the Russian Federation (Article 1256 of the Civil Code).

Registration or other formal procedures are not required for copyright to arise. Upon discretion of the right-holder, software and databases may be registered with Rospatent.

To protect its copyright, the right-holder may also have a copy of the respective works notarised by a Russian public notary and/or have them deposited in an organisation providing such services, e.g. the Russian Authors' Society (www.rao.ru).

5 Liability

5.1 What are the remedies that can be enforced against a franchisor for failure to comply with mandatory disclosure obligations? Is a franchisee entitled to rescind the franchise agreement and/or claim damages?

In the event that a commercial concession contract is entered into and the franchisor has failed to provide to the franchisee commercial and technical documentation and other information required for exercise of the rights under the contract or to consult the franchisee thereunder, the franchisee may file a lawsuit against the franchisor for rescission of the contract and return of the fees paid to the franchisor.

The franchisee is also entitled to demand compensation of damages sustained by it in connection with a failure by the franchisor to perform its disclosure obligations. Such damages shall be awarded by a Russian court or arbitration provided that a cause-and-effect connection between the sustaining of damages by the franchisee and a breach by the franchisor of its obligations to convey the required information (and/or assistance) to the franchisee and the amount of damages are proved.

5.2 In the case of sub-franchising, how is liability for disclosure non-compliance or for misrepresentation in terms of data disclosed being incomplete, inaccurate or misleading allocated between franchisor and master franchisee? If the franchisor takes an indemnity from the master franchisee in the Master Franchise Agreement, are there any limitations on such an indemnity being enforceable against the master franchisee?

In general, under Russian law a sub-franchisee shall have claims against the franchisee as the sub-franchisor for a disclosure non-compliance or for misrepresentation in terms of data disclosed being incomplete, inaccurate or misleading, and may not have recourse directly to the franchisor. If the court/arbitration satisfies the sub-franchisee's claim for payment of penalties and/or compensation of damages to the former, the franchisee may then take recourse upon the franchisor for reimbursement of the respective costs. The franchise agreement may provide for limitation of the franchisor's liability in such cases.

5.3 Can a franchisor successfully avoid liability for pre-contractual misrepresentation by including disclaimer clauses in the franchise agreement?

It is possible to limit the liability of the franchisor for pre-contractual misrepresentation, i.e. by the amount of actual losses

sustained by the franchisee not exceeding the amount of the fees under the franchise agreement. However, a complete waiver of such liability is not likely to be enforceable in Russia due to the rules of the Civil Code on provision of incomplete or false information in the course of pre-contractual negotiations (Article 434.1) and on representations (Article 431.2).

5.4 Does the law permit class actions to be brought by a number of allegedly aggrieved claimants and, if so, are class action waiver clauses enforceable?

Class actions (i.e. actions brought by a group of legal entities and/or individuals) are possible under chapter 28.2 of the Arbitrazh Procedural Code of the Russian Federation. Such actions are not commonly used in the domain of franchising, however.

A contractual waiver of the right to file a claim with a court does not involve termination of the respective right under Russian civil law, therefore class action waiver clauses will be unenforceable.

6 Governing Law

6.1 Is there a requirement for franchise documents to be governed by local law? If not, is there any generally accepted norm relating to choice of governing law, if it is not local law?

There is no such requirement, and the parties are entitled to agree on the governing law of a contract on the whole or a part thereof (Article 1210 of the Civil Code). If the parties have not reached an agreement on the applicable law, the contract shall be subject to the law of the country with which the contract has the closest relation. With respect to a commercial concession contract, the law of the country in the territory of which the franchisor is permitted to use the complex of exclusive rights of the franchisor or, if such use is permitted in the territories of several countries simultaneously, the law of the country where the franchisor's principal place of residence or place of business is located, shall apply (Article 1212 of the Civil Code).

6.2 Do the local courts provide a remedy, or will they enforce orders granted by other countries' courts, for interlocutory relief (injunction) against a rogue franchisee to prevent damage to the brand or misuse of business-critical confidential information?

Upon application of a claimant, an arbitrazh (state commercial) court may issue a ruling on an injunction prohibiting a defendant from taking actions with respect to the subject matter of the judicial dispute (Article 91 of the Arbitrazh Procedural Code).

A judgment of a court of another jurisdiction or a foreign arbitral award may be enforced in Russia in accordance with the relevant international treaty to which Russia is a party. Russia is a signatory to many multilateral and bilateral international treaties for the recognition and enforcement of foreign courts judgments and arbitral awards, including the Kiev Convention of 1992 and the New York Convention of 1958.

In the absence of the relevant international treaty, a Russian court may recognise and enforce a foreign judgment or arbitral award on the basis of the international principle of reciprocity and comity (*comitas gentium*).

7 Real Estate

7.1 Generally speaking, is there a typical length of term for a commercial property lease?

According to Article 651 p. 2 of the Civil Code, an immovable property lease contract, entered into for a term of one year and more, is subject to state registration. In order to avoid this formality, it is a common practice to conclude commercial property lease contracts for a term of less than one year, e.g. 11 months. The major drawback of this approach is that upon expiry of the term, the lessor may not be forced to enter into a new lease contract on the same terms and conditions, unless the parties entered into an option agreement, or the lessor granted to the lessee an option for entering into a new lease contract.

7.2 Is the concept of an option/conditional lease assignment over the lease (under which a franchisor has the right to step into the franchisee/tenant's shoes under the lease, or direct that a third party (often a replacement franchisee) may do so upon the failure of the original tenant or the termination of the franchise agreement) understood and enforceable?

In general, such a concept is not recognised in Russia. However, a provision on conditional lease assignment may be included in the lease contract based on the provisions of the Civil Code regarding assignment of the contract (Article 392.3) and conditional performance of obligations (Article 327.1).

7.3 Are there any restrictions on non-national entities holding any interest in real estate, or being able to sub-lease property?

Foreign citizens, persons without citizenship and foreign legal entities may not own land plots located in the border territories recorded in the list approved by the President of Russia, in other territories of Russia specified by the Federal Laws, or within the boundaries of a sea port.

Furthermore, under the Federal Law dated 22.07.2002 No. 101-FZ "On Circulation of Agricultural Land", foreign citizens, foreign legal entities, persons without citizenship as well as legal entities, more than 50% of the charter capital of which is owned by the latter, may possess agricultural land plots only on the right of lease.

7.4 Give a general overview of the commercial real estate market. Specifically, can a tenant reasonably expect to secure an initial rent free period when entering into a new lease (and if so, for how long, generally), or are landlords demanding "key money" (a premium for a lease of a particular location)?

As a matter of practice in Russia, franchising and lease issues are very little interconnected; commonly, franchisees enter into lease contracts on their own (provided that the respective premises meet the requirements of the franchisor). An initial rent-free period when entering into a new lease may be granted by a lessor, if renovation of the leased premises is performed by the lessee and the respective improvements shall become the property of the lessor upon termination of the lease contract.

8 Online Trading

8.1 If an online order for products or request for services is received from a potential customer located outside the franchisee's exclusive territory, can the franchise agreement impose a binding requirement for the request to be re-directed to the franchisee for the territory from which the sales request originated?

Such provision, if included in a contract of commercial concession, is likely to be unenforceable since, under Article 1033 p. 2 of the Civil Code, the condition obliging the franchisee to sell goods or provide services solely to customers located or residing in the contracted territory, shall be void.

8.2 Are there any limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement?

If the franchise agreement contains a provision on mandatory transfer of domain administration right by the franchisee to the franchisor, the latter shall be entitled to demand such an assignment. In the absence of such a provision in the franchise agreement, the franchisor may require a former franchisee to assign local domain names to the franchisor if the domain name in question replicates the wording of the trademark the exclusive right to which belongs to the franchisor, on the basis of Article 1484 p. 2 of the Civil Code. In practice, however, there is no guarantee that the respective claim filed with a court will be successful.

9 Termination

9.1 Are there any mandatory local laws that might override the termination rights that one might typically expect to see in a franchise agreement?

Under Article 1037 p.4 of the Civil Code, if the right to the trademark, the servicing mark or the commercial designation belonging to the franchisor is included in the complex of exclusive rights granted to the franchisee under the commercial concession contract and such right is terminated and is not replaced by a new similar right, the commercial concession contract shall also be terminated. The commercial concession contract shall also terminate automatically in the event the franchisor or the franchisee is declared insolvent (bankrupt).

10 Joint Employer Risk and Vicarious Liability

10.1 Is there a risk that a franchisor may be regarded as a joint employer with the franchisee in respect of the franchisee's employees? If so, can anything be done to mitigate this risk?

According to the Labour Code of the Russian Federation, an employer is deemed a person that enters into an employment contract or factual employment relations with an employee. Accordingly, as long as the franchisor does not enter into employment relations with the employees of the franchisee, that is, they do not perform any labour duties under the franchisor's management and supervision, the latter may not be deemed their employer.

10.2 Is there a risk that a franchisor may be held to be vicariously liable for the acts or omissions of a franchisee's employees in the performance of the franchisee's franchised business? If so, can anything be done to mitigate this risk?

In the event that any harm or damages are inflicted to third parties by actions or omissions of the franchisee's employees, such third parties shall have recourse against the franchisee as their employer, and not the franchisor.

It should be noted, however, that according to Article 1034 of the Civil Code, the franchisor shall bear subsidiary liability for claims against the franchisee in connection with inconsistency in the quality of goods (works, services), sold (performed or rendered) by the franchisee under the commercial concession contract. The franchisor shall be liable jointly with the franchisee for the claims filed against the latter as the manufacturer of the products (goods) of the franchisor.

11 Currency Controls and Taxation

11.1 Are there any restrictions (for example exchange control restrictions) on the payment of royalties to an overseas franchisor?

In the event that a commercial concession contract is entered into between a franchisee who is a resident of Russia and a franchisor who is a non-Russian resident, payments may be made without restrictions in foreign currency provided that the franchisee has a relevant currency account opened with an authorised bank in Russia, in accordance with the Federal Law dated 10.12.2003 No. 173-F "On Currency Regulation and Currency Control".

Furthermore, if a commercial concession contract is entered into, granting of the complex of exclusive rights thereunder must be properly registered with Rospatent. Such registration shall be required, in particular, for the franchisee's bank to effect the respective currency transfers.

11.2 Are there any mandatory withholding tax requirements applicable to the payment of royalties under a trade mark licence or in respect of the transfer of technology? Can any withholding tax be avoided by structuring payments due from the franchisee to the franchisor as a management services fee rather than a royalty for the use of a trade mark or technology?

The standard rate of companies' income tax in Russia is currently 20%. If a Russian franchisee makes payments under a franchise agreement to a non-Russian franchisor which does not have any permanent subsidiary or branch/representative office in Russia, the Russian franchisee will act as its tax agent and will withhold and remit the relevant amounts of the tax to the budget (Article 310 of the Tax Code of the Russian Federation).

If payments due from the franchisee to the franchisor are structured as management services fees, it does not affect the obligations of the franchisee to withhold companies' income tax.

11.3 Are there any requirements for financial transactions, including the payment of franchise fees or royalties, to be conducted in local currency?

If both a franchisor and franchisee are Russian residents, financial

settlements between them should be effected in Russian rubles. Financial settlements between a franchisee who is a resident of Russia and a franchisor who is a non-Russian resident may be made in a foreign currency.

12 Commercial Agency

12.1 Is there a risk that a franchisee might be treated as the franchisor's commercial agent? If so, is there anything that can be done to help mitigate this risk?

Under Article 184 of the Civil Code, a commercial agent is deemed a person who constantly and independently represents and acts on behalf of businessmen in concluding agreements in the sphere of business activities. A commercial agency relationship generally arises under an agency contract or a commission contract, which is different from a contractual relationship arising under a commercial concession contract under Russian law. Therefore, the risk that a franchisee might be treated as the franchisor's commercial agent is insignificant.

13 Good Faith and Fair Dealings

13.1 Is there any overriding requirement for a franchisor to deal with a franchisee in good faith and to act fairly in its dealings with franchisees according to some objective test of fairness and reasonableness?

The Civil Code expressly provides that good faith is one of the basic principles of Russian civil law (Article 1) and obliges the parties to act in good faith and taking into account rights and legitimate interests of one another, by providing the necessary assistance for the purpose of attaining the aim of the obligation and providing to each other the necessary information (Article 307). These provisions apply in the full extent to franchise relationships.

14 Ongoing Relationship Issues

14.1 Are there any specific laws regulating the relationship between franchisor and franchisee once the franchise agreement has been entered into?

Once the franchise agreement has been entered into, it will be subject to the provisions of the Civil Code regulating use of copyright, rights to trademarks, service marks, trade names and other means of individualisation of goods, works and services, as well as know-how (commercial secrets), as well as the Competition Law, the Federal Law on Advertising, the Tax Code and, depending on the subject matter of the franchise agreement, it may be subject to the laws and regulatory acts in the specific domain, e.g. HoReCa, retail trade or medicines circulation.

15 Franchise Renewal

15.1 What disclosure obligations apply in relation to a renewal of an existing franchise at the end of the franchise agreement term?

No special disclosure obligations in relation to the renewal of an existing franchise at the end of the franchise agreement term are

established by Russian law. As mentioned above, there is the general obligation of the franchisor to provide to the franchisee the technical and the commercial documentation, and to supply other information necessary to the latter for exercising the rights granted to him under the contract of commercial concession, and also to instruct the franchisee and its employees on the issues involved in exercising these rights. Special disclosure obligations may be provided for in the franchise agreement if the parties agree so.

15.2 Is there any overriding right for a franchisee to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term irrespective of the wishes of the franchisor not to renew or extend?

Yes, Article 1035 of the Civil Code provides for the franchisee's priority right to enter into a commercial concession contract for a new term upon the expiry of the validity term of the contract, provided that the franchisee has discharged its obligations thereunder properly.

15.3 Is a franchisee that is refused a renewal or extension of its franchise agreement entitled to any compensation or damages as a result of the non-renewal or refusal to extend?

Yes, if the franchisor has refused to enter into a commercial concession contract for a new term with the franchisee and within a year since the date of expiry of the validity term of the contract with the latter entered into a commercial concession contract with another person, granting the same rights as those granted to the franchisee under the terminated contract and under the same terms, the franchisee shall be entitled to file a claim with a court at its discretion either for the transfer to him of the rights and duties under the contract entered into with a third party and compensation of damages caused by the refusal to renew a commercial concession contract with him, or solely for compensation of damages.

16 Franchise Migration

16.1 Is a franchisor entitled to impose restrictions on a franchisee's freedom to sell, transfer, assign or otherwise dispose of the franchised business?

If the franchise agreement does not provide for the franchisee's right to transfer or assign or otherwise dispose of the franchised business to a third party, such transfer or assignment shall be subject to a prior written consent of the franchisor. Transfer or assignment of the franchised business will necessitate the respective amendment of the commercial concession contract, which is subject to state registration with Rospatent (Article 1036 of the Civil Code).

16.2 If a franchisee is in breach and the franchise agreement is terminated by the franchisor, will a "step-in" right in the franchise agreement (whereby the franchisor may take over the ownership and management of the franchised business) be recognised by local law, and are there any registration requirements or other formalities that must be complied with to ensure that such a right will be enforceable?

Such "step-in" right at termination of a franchise agreement is not expressly recognised by Russian law. A franchise agreement (commercial concession contract) may, however, provide for the obligation of the franchisee to assign to the franchisor the ownership and management of the franchised business upon demand of the latter. In this case, the franchisor shall have to get the relevant amendments to the commercial concession contract registered with Rospatent.

If contracts of the commercial sub-concession have been entered into by the franchisee, unless otherwise is provided for by the commercial concession contract, concluded for a definite term or without limitation of a term, the rights and obligations of the franchisee under such contracts upon termination of the commercial concession contract shall pass to the franchisor unless the latter refuses to assume the respective rights and obligations (Article 1029 of the Civil Code).

16.3 If the franchise agreement contains a power of attorney in favour of the franchisor under which it may complete all the necessary formalities required to complete a franchise migration under pre-emption or "step-in" rights, will such a power of attorney be recognised by the courts in the country and be treated as valid? Are there any registration or other formalities that must be complied with to ensure that such a power of attorney will be valid and effective?

Such power of attorney will not be recognised by the Russian courts. In order to enter into the powers of the former franchisee, the franchisor shall have to get the relevant amendments to the commercial concession contract registered with Rospatent.



Yana Dianova

GRATA International
Office 4061
21/5, Kuznetsky Most Street
Moscow, 107996
Russia

Tel: +7 495 660 11 84
Email: ydianova@gratanet.com
URL: www.gratanet.com

Director of Corporate and Commercial Law Department

Yana Dianova was admitted to practise in Russia in 2002, and prior to joining GRATA International worked as in-house counsel for Nissan Motor Rus, as an Associate in the Tax and in Legal Department of Mazars, and the Moscow office of an international law firm Squire Sanders. Ms. Dianova graduated with a specialist in law degree from the International Law faculty of the Moscow State Institute of International Relations (University), an M.B.A. degree in Management and Business Law from the Moscow International Higher School of Business (MIRBIS), and an LL.M. in Corporate Finance Law from the University of Westminster.

Practice focus areas include:

- Antitrust Law;
- Commercial Law;
- Corporate Law/Mergers & Acquisitions;
- Intellectual Property;
- Life Science; and
- Personal Data Protection.

Ms. Dianova speaks Russian, English and French.



GRATA International Law Firm was founded in 1992 and it is now a leading legal counsel in the Eurasian region, with offices in Russia (Moscow), Azerbaijan (Baku), Kazakhstan (Almaty, Astana and other large cities), Kyrgyzstan (Bishkek), Tajikistan (Dushanbe), Uzbekistan (Tashkent), as well as a country desk in Turkmenistan (Ashgabat). GRATA International Law Firm also has associated offices in Belarus (Minsk), Czech Republic (Prague), Georgia (Tbilisi), Latvia (Riga), Turkey (Istanbul), Switzerland (Zurich), and Ukraine (Kyiv).

Lawyers of GRATA International Law Firm have been recognised by leading international ratings including *The Legal 500*, *Chambers Global*, *Chambers Asia-Pacific*, *IFLR1000*, *Who's Who Legal*, and *Asialaw Profiles*.

The lawyers of GRATA International Law Firm provide access to top-tier legal talents with experience in the following sectors:

- Banking & Finance.
- Construction & Infrastructure.
- Industry & Trade.
- Natural Resources.
- Telecommunications & Transport.

GRATA International Law Firm is a full-service law firm with the following areas of expertise:

- Antitrust Law.
- Contract Law.
- Corporate Law.
- Disputes Resolution.
- Environmental Law.
- Finance & Securities.
- Intellectual Property.
- International Trade, Customs & WTO Law.
- Labour Law.
- Licences & Permits.
- Project Finance & Public-Private Partnerships.
- Real Estate.
- Restructuring & Insolvency.
- Subsoil Use.
- Tax Law.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com