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# THE FRANCHISE LAW REVIEW

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## Chapter 34

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# KAZAKHSTAN

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### I INTRODUCTION

Franchising has been used as a route to the Kazakhstan market by overseas businesses since the 1990s when brands such as Coca-Cola, Adidas and InterContinental appeared on the market.<sup>2</sup> Over the past few years the country's strong economic growth, rising household incomes and the government's ambitious diversification plan<sup>3</sup> have prompted other foreign franchisors to turn their sights to the country, which is quickly becoming a leading market in Central Asia. International brands such as Zara, Pizza Hut, Debenhams, Mothercare, Mango, Regus, Gap, Next, Burberry, Cinnabon and KFC are currently represented in the market, and major player Alhokair Fashion Retail recently increased its investment in Kazakhstan with the opening of two new New Look stores and further Accessorize, F&F and Blanco outlets. It is estimated that the number of foreign brands franchising in Kazakhstan will reach 550 by 2022.<sup>4</sup>

Franchising is used as a business system by foreign and domestic brands in nearly every industry that contains small and medium-sized businesses, but as in other Central Asia markets it is most common in the fast-food and casual dining, retail and leisure, and services

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1 Nick Green is an associate at Bird & Bird LLP and Saule Akhmetova is a partner at GRATA Law Firm LLP.

2 Beknur Kisikov, 'In 2014 one expects demand on Restaurant franchise', MinTax (1 January 2014). Accessible at: <http://mintax.kz/eng/files/v-2014-godu-budet-spros-na-restorannye-franshizy.html>.

3 Central Intelligence Agency, 'The World Factbook: Kazakhstan'. Accessible at: <https://www.cia.gov/library/publications/the-world-factbook/geos/kz.html>.

4 Raissa Kaziyeva, 'Franchise Expectations: Case of Kazakhstan', CBU, International Conference Proceedings 2014: Innovation, Technology Transfer and Education (3–5 February 2015).

sectors. Many foreign franchisors prefer to work on the basis of subfranchising agreements with master franchisees in other countries rather than contracting directly with Kazakhstani partners, although the number of direct franchises is growing.

There is a range of agencies and associations with an interest in promoting franchising and foreign business in Kazakhstan. The Kazakhstan Franchise Association was created with the support of the US Agency for International Development as a non-governmental industry group to promote franchising by offering a variety of services, including consultation, information, matchmaking programmes and other educational events,<sup>5</sup> although associations such as the Eurasian Franchise Association and Central Asian Franchising and Licensing Agency have also previously taken on similar roles. The Franchise Union of Kazakhstan also provides education and referral services and general advice on franchise arrangements and practices.

The Entrepreneurship Development Fund JSC (EDF) was established by the Kazakhstan government in 2001 with the objective of supporting and promoting small businesses in Kazakhstan, providing financial and non-financial support to small to medium-sized enterprises. The EDF also works alongside the state to improve financial resource management and the allocation of funding to small businesses.<sup>6</sup>

## **II MARKET ENTRY**

Franchising in Kazakhstan is regulated by specific franchise legislation and general commercial law that varies between sectors and according to the structure of the commercial relationship.

One of the most important steps for franchisors contemplating entering the Kazakhstan market to take is protecting their intellectual property – in particular any trademarks or know-how that will be licensed to and used by a local franchisee. Kazakhstan's intellectual regime is relatively sophisticated, recognising that exclusivity arises in relation to a variety of types of intellectual property. Kazakhstan is a member of many of the major international organisations – including the Singapore Treaty of the Law of Trademarks, the Trademark Law Treaty, the Berne Convention and the Madrid Agreement Concerning the International Registration of Marks<sup>7</sup> – and trademarks, service marks, utility models and other industrial designs are generally capable of being registered.

In most areas of business, Kazakhstan law does not require any approvals and does not contain any restrictions on franchisors entering the local market. In fact, the law provides for the support and promotion of franchising in the country. Kazakh legislation is not burdened with details and nuanced obligations, nor does it provide detailed restrictions governing the

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5 Andrei Chursov, 'New Legislation Improves Franchising Opportunities in Kazakhstan' Business Information Service for the Newly Independent States. Accessible at: [www.ad-mkt-review.com/public\\_html/govdocs/bis/wmfs/wmfs02111.html](http://www.ad-mkt-review.com/public_html/govdocs/bis/wmfs/wmfs02111.html).

6 DAMU Entrepreneurship Development Fund JSC, 'Development Strategy for 2014–2023' (2014). Accessible at: [www.fund-damu.kz/content/files/FundDamuStrategy2014\\_2023EngFinal.pdf](http://www.fund-damu.kz/content/files/FundDamuStrategy2014_2023EngFinal.pdf).

7 IP-Coster, 'Intellectual property protection system in Kazakhstan' (April, 2015). Accessible at: <https://www.ip-coster.com/IPGuides/c/intellectual-property-kazakhstan>.

relationship between the parties to a franchise agreement. In this regard, there are no specific restrictions or limitations on a foreign entity granting a master franchise or development rights to a local entity.

In most cases, the law does not impose restrictions on foreign franchisors owning equity in a local business or owning real property. Certain restrictions, however, can be specified in respect of owning equity, where the business is associated with areas of strategic importance for the state, such as telecommunications, and other issues relating to national security and public safety. In addition, there are some restrictions on ownership of real estate in Kazakhstan by foreign nationals and entities.

Franchisors should also keep in mind the geographical issues involved in entering the Kazakhstan market. Kazakhstan is a large country but has a very low population density with less than six people per square kilometre.<sup>8</sup> Almaty and the capital, Astana, are the largest cities by population but account for a very small fraction of the country's total population. Franchisors should therefore undertake careful due diligence on the geographic reach of any potential local partner, and consider how best to treat any potential exclusive arrangement.

Payments made between Kazakhstan residents (whether entities or individuals) must be made in the local currency, Kazakh tenge. Under the Law on Currency Regulation and Control No. 57-III dated 13 June 2005, payments made between residents and non-residents may generally be in any currency, although certain transactions must be notified to or registered with the National Bank of the Republic of Kazakhstan (the Bank). A franchise agreement falls under currency regulation as an import (or export) of goods (or works or services) operation. Depending on the terms and payment obligations of the parties under a franchising agreement (e.g., an obligation on a resident to pay more than US\$500,000, or on a non-resident to pay more than US\$100,000), the agreement may need to be registered with or notified to the Bank, in accordance with the relevant regime.

### **III INTELLECTUAL PROPERTY**

Recently Kazakhstan has been taking significant steps to attract foreign investment into the country, including through changes to its intellectual property-specific legislation. For example, in April 2015 the law was amended to reduce the amount of time it takes to register a trademark, and to simplify the procedure for transferring trademark rights (among other measures). To date, the government has developed a draft law to introduce amendments to some legislative acts on intellectual property (the Draft Law). The principal agency involved in regulating intellectual property matters is the Department for Intellectual Property Rights (DIPR) of the Ministry of Justice of the Republic of Kazakhstan. Under the Draft Law, the principal agency in the area of intellectual property rights will be the expert panel, the functions of which are currently performed by the Republican State Enterprise 'National Institute of Intellectual Property', which reports to the DIPR.

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8 The World Bank Group, Data: Population density. Accessible at:  
<http://data.worldbank.org/indicator/EN.POP.DNST>.

**i      Intellectual property searches**

Preliminary searches should be made to establish whether there are any similar or identical marks already on the register. Kazakhstan is a ‘first to file’ and not a ‘first to use’ jurisdiction, so it is important to register intellectual property rights as soon as possible, to protect them.

**ii      Intellectual property protection**

Patents must be registered with the DIPR to be protected. Patent protection is given to an invention if it is new, involves an inventive step and is industrially applicable. Patent protection can be granted for inventions, utility models, industrial designs and selection achievements. The duration of protection varies for each protected item.

As of 1 January 2015, a party can choose to apply for a national patent or a Eurasian Patent – a unitary patent that, if registered in one of the eight contracting states (Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan and Turkmenistan), is valid upon grant in each of those jurisdictions (provided that corresponding annual fees are paid for the selected countries after the issuance of the patent).

Trademarks should also be registered with the DIPR although they may also be protected without national registration under international treaties to which Kazakhstan is a party. Trademark and service mark registration is granted for 10 years, renewable every 10 years.

Applications for registration of patents or trademarks should be filed with the National Institute of Intellectual Property of the DIPR, which will prepare an expert opinion. The DIPR will then decide, on the basis of the expert opinion, whether the intellectual property application meets the relevant criteria. Assignments and licences for patents and trademarks must be registered with the DIPR to be valid.

Copyright items are protected by virtue of their creation without registration or other formalities (although it is advisable to register them with the DIPR where possible). The DIPR will not examine the materials or verify the information in a copyright application. Copyright applies during an author’s lifetime plus 70 years. An author is free to assign his or her copyrighted work.

Confidential know-how and trade secrets are protected provided that the information: (1) has an actual or potential commercial value by virtue of its being unknown to third parties; and (2) cannot be freely accessed on a legal basis. It is also necessary for the holder of such information to take measures to protect its confidentiality.

**iii     Enforcement**

While Kazakhstan is a signatory to most major international agreements and conventions on intellectual property, enforcement of the law is not always strong. A number of state authorities protect and enforce intellectual property rights, including customs. Owners of certain intellectual property rights (e.g., trademarks) can ask the customs authorities to add their trademark to the customs register of intellectual property rights. Following such a registration, the customs authorities can suspend the import of any objects bearing that trademark for 10 business days. They will also alert the rights holder of the importation so that the rights holder may challenge the import or request interim relief.

The legislation of Kazakhstan provides for civil, administrative and criminal forms of protection of intellectual property rights.

### *Civil protection*

Civil remedies – including damages and injunctive relief – can be claimed through court proceedings for infringement of intellectual property rights. The damages calculation process is subject to the usual civil remedies limitations. Both direct losses and loss of profits can be claimed, although the process of proving loss of profits in court is fairly complicated. Pursuant to the Draft Law, instead of damage recovery a right holder may make a claim for the infringer to pay compensation of a sum ranging from 500 to 10,000 monthly calculation indexes as ruled by the court, depending on the nature of the infringement, or up to twice the value of the goods unlawfully bearing the trademark.

### *Administrative protection*

Alternatively, infringement can constitute an administrative offence. Such offences can be pursued via an application from the rights holder to the relevant authority. The primary administrative sanction is a fine calculated in accordance with the size of the infringing entity.

From 1 January 2015, administrative proceedings may also be initiated by the state revenue authorities for infringement of intellectual property rights.<sup>9</sup> Previously, only the judiciary and financial police authorities had the right to initiate administrative cases.

### *Criminal protection*

Infringement of intellectual property rights can constitute a criminal offence in some circumstances, the consequences of which can be severe. For example, criminal liability for illegal use of a trademark can result in either a fine or correctional labour, or a sentence of community service, or arrest.

The elements that need to be established to constitute an administrative or criminal offence are similar. Whether a particular act will qualify as a crime is dependent on the scale of the damage and whether an administrative sanction was imposed in the previous year.

## **IV FRANCHISE LAW**

### **i Legislation**

There are two key areas of legislation that franchisors need to be aware of when entering the Kazakhstan market. The Law of the Republic of Kazakhstan No. 330-II on Complex Entrepreneurial Licence (Franchise) (the Franchise Law) was passed in 2002, and is a law specifically regulating franchises in Kazakhstan. The legislation defines a franchise (a ‘complex entrepreneurial licence’) as ‘entrepreneurial activity, in which a holder of the complex of exclusive rights provides it into use on a paying basis to another individual or entity’. The legislation also sets out the general rights and obligations of a franchisor and franchisee, in particular in relation to the requirement for the franchisor to provide to the franchisee a set of exclusive rights (such as know-how, trademarks, service marks, etc.) for the franchisee to utilise in its entrepreneurial endeavours.

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9 Resolution of the Government of the Republic of Kazakhstan, dated 14 August 2014, No. 933.

The Civil Code of the Republic of Kazakhstan also sets out general principles of contract law that apply to every commercial agreement, and the Civil Code (Special Part) No. 409-I dated 1 July 1999 requires certain businesses to obtain a business licence before commencing operations.

## **ii Disclosure**

There is a pre-contractual disclosure requirement under the Franchise Law, which is specific and unusual. Under the Franchise Law, a franchisor must provide the franchisee with details of the bundle of exclusive rights being granted to the franchisee, and must inform the potential franchisee of the confidential nature of this information. This provision of the Law, however, can be interpreted by courts both as a franchisor's right and as a franchisor's obligation, as the case may be. The Franchise Law does not prescribe how much information has to be provided, however, nor how much detail has to be given or what format the information is to be provided in. Best practice, therefore, is to provide as much information as the franchisor considers sufficient to allow the prospective franchisee to make an informed decision on the viability of the franchised business. Franchisors contemplating master franchise arrangements should also be aware that master franchisees will need to provide similar information to their subfranchisees.

The absence of a comprehensive pre-contractual disclosure requirement does not give franchisors a 'free pass' with regards to pre-contractual sales and recruitment activity, however. Franchisors may be held liable for losses suffered by a franchisee as a result of fraud or wilful misrepresentation by the franchisor. The franchise agreement may also be held invalid if the franchisee can demonstrate it entered into the arrangement either based on an error material to the transaction, or as a result of fraud. A consequence of invalidity of the agreement may, at the court's discretion, be that the parties are obliged to return to the other all benefits received during the relationship, or financially compensate the other party where such a return is not possible. Damages may also be awarded in addition.

## **iii Registration**

The Franchise Law detailed above requires any franchise agreement that contains a trademark licence (for trademarks having a Kazakhstani registration certificate) to be registered with the DIPR. The Draft Law also provides for obligatory registration of franchise agreements relating to trademarks having international registration. To register the agreement, the relevant marks themselves must first be registered with the DIPR. The franchise agreement should be submitted for registration no later than six months after it is signed by both parties. Failure to register the agreement may result in it being deemed unenforceable and, in addition, a franchisee might be restricted from making royalty payments to an overseas franchisor as the agreement may need to be provided to the bank as evidence for the transfer of funds. The parties may also be prevented from claiming tax relief under applicable double tax treaties for similar reasons.

Until recently, the registration process required that the full franchise agreement had to be submitted to the DIPR. On 20 April 2015 new legislation came into effect<sup>10</sup> that made a number of important amendments to the IP regulatory regime in Kazakhstan. One of the

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<sup>10</sup> The Law on Amendment to Some Legislative Acts of the Republic of Kazakhstan on the Issues of Legal Regulation in the Area of Intellectual Property.

most significant amendments is the harmonisation of the country's IP legislation with the provisions of the Singapore Treaty on the Law of Trademarks 2006 (the Treaty), meaning that if one of the parties to the franchise agreement is based in a contracting member country of the Treaty, only a summary of the main terms of the agreement need be registered rather than the full agreement. As the law has only recently been passed, the said procedure is not yet widely used by the DIPR. The Draft Law does, however, now describe in detail the requirements of the simplified registration procedure for franchise and licence agreements, having removed the requirement to provide the full text of an agreement and reduced the list of documents filed for registration. This modernisation will simplify the process for all foreign and local franchisors and reduce the amount of commercially sensitive information required to be provided for the register.

Franchisors should note that the Law of the Republic of Kazakhstan dated 11 July 1997, No. 151-I on Languages in Kazakhstan requires that all agreements are written in the Kazakh language and a language acceptable to the parties (usually English). For the purposes of registration, the agreement, or a notarised translation, must be provided in Kazakh. The Draft Law will allow registration documents to be submitted with a Russian or an English translation.

#### **iv      Mandatory clauses**

Franchisors and franchisees are generally free to determine the terms of the agreement between them in accordance with the principle of freedom to contract. This includes the ability for the parties to elect that the agreement is governed by a foreign law and subject to a foreign jurisdiction.

There are some restrictions, however, on this general freedom. One key area often found to be of concern to foreign franchisors is the limitation on the scope of the franchisee's indemnity to the franchisor for liability to third parties. This is a common clause in many international franchise agreements, but under Kazakhstani law non-contractual liability to third parties falls on the person responsible for the action causing the third party's loss, which may be the franchisor or franchisee.

Another key area is in relation to provisions in the agreement dealing with intellectual property. As mentioned above, a franchisor may only license a trademark to a franchisee if the trademark itself is registered in Kazakhstan and the period of protection for such a trademark will determine the term of the agreement. The franchise agreement should also clearly define what intellectual property rights are being transferred or licensed, the scope of any exclusive territory, the specific purposes for which the rights may be used and when the grant of the rights will expire. The franchisor should also be sure to include audit and inspection rights in respect of goods and services provided by the franchisee and any premises from which the franchisee operates to ensure they are adequate and comply with brand standards.

#### **V      TAX**

Kazakhstan's tax regime is set out in the Code No. 99-IV of the Republic of Kazakhstan on Taxes and Other Obligatory Payments to the State Budget dated 10 December 2008 (the Tax Code), which was rewritten in 2009. It provides for a relatively simple framework based on self-assessment with inspections and audits. Franchisors should note, however, that the penalties for non-compliance (such as improper declaration or non-payment) are high – even if unintentional – and that keeping proper documentation to evidence proper reporting and

payment is critical. A difficulty both residents and non-residents often encounter is the lack of coherence between the Tax Code and widely accepted international taxation principles (on which many of the double taxation treaties Kazakhstan is party to are based). This ambiguity can lead to an inconsistent approach both by parties to an agreement and by the relevant tax authorities across the country, causing uncertainty.

Often of most importance to foreign franchisors is the application of withholding tax to payments made by a resident to a non-resident legal entity. In Kazakhstan the withholding tax rate depends on the type of payment in question, although the rules on what rate applies to the different type of source income paid to non-residents are complex and at times inconsistent. Non-residents' business income is generally subject to a 20 per cent withholding tax. This includes (among other things) income from the sale of goods or services or generally for the performance of work in Kazakhstan, income from management, consultancy, legal and audit services performed outside Kazakhstan, and capital gains from a sale of shares or interest in a Kazakhstan registered entity. Royalties<sup>11</sup> (traditionally the main fee type to be earned by a franchisor), however, are subject to a 15 per cent withholding tax, as are dividends, capital gains and interest. If a franchisor is to provide a level of management or consultancy, or supply goods or services, the franchise agreement should be clear on the anticipated rates applicable to the different fees due, or – for tax efficiency and administrative ease – separate the arrangement into individual agreements.

Franchisors should also be aware that different rules apply to non-residents depending on where the non-resident is tax registered. Any payments being made to a resident of a recognised tax-haven jurisdiction are subject to a 20 per cent withholding tax rate. The List of Tax Haven Jurisdictions approved by Decree of the Government of the Republic of Kazakhstan No. 1318 dated 31 December 2008 sets out those jurisdictions that are considered to be tax havens, and the list is updated annually by the central tax authorities. As of 1 January 2015, Kazakhstan had concluded and ratified 46 double taxation treaties (DTTs) – with another five currently pending – which typically reduce the applicable withholding tax rate on dividends, interest and royalties. Most royalty rates are reduced to 10 per cent–15 per cent, provided the conditions in the relevant treaty are met. These conditions are largely administrative requirements set out in the Tax Code, and include ensuring the franchisee has been provided with a tax resident certificate confirming that the franchisor is a tax resident in a DTT country before the end of the year in which the relevant income was paid. The tax certificate must include the franchisor's full and accurate name and address, state the period in which the franchisor was a tax resident, be signed by an authorised employee of the franchisor and the signature and company seal must be notarised and apostilled. The practice shows that the most tax-efficient franchising structure is one implemented through countries that have effective double tax treaties with Kazakhstan, such as the Netherlands, Luxembourg and the UAE. Such a structure will allow reduced withholding tax rates to be paid on royalty payments.

In addition, franchisors working in the education sector should note that royalty payments made by a resident franchisee that is recognised as an autonomous educational organisation are exempt from withholding tax in Kazakhstan. An 'autonomous educational organisation' means a non-commercial organisation established by the decision of the Parliament of Kazakhstan and engaged in educational, healthcare or scientific activity.

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11 Defined by the Tax Code as a payment for the use of trademarks, patents, copyright, software, designs, models, know-how and other similar rights.

Royalty payments for the use or right to use trademarks, patents, know-how, technologies or other similar types of right are also subject to the reverse-charge value added tax (VAT) at a rate of 12 per cent. Under the Kazakh tax law, services are subject to VAT if they are deemed to be supplied in the territory of Kazakhstan under the ‘place-of-supply’ rules and if such services are supplied by a taxpayer registered as a VAT payer. Under the place-of-supply rules, services on transfer of right to use trademarks, patents, know-how, technologies or other similar types of right are deemed to be rendered at a location of the acquirer’s business (i.e., the Kazakh franchisee) and, consequently, constitute a VAT-able operation in Kazakhstan. As a result, the Kazakh franchisee will be required to self-assess and pay VAT in Kazakhstan at a rate of 12 per cent on the amount of royalties payable to the non-resident franchisor under the franchise agreement. Subject to certain conditions, the amount of the reverse-charge VAT can be offset.

The franchisee is the party responsible for retaining and paying withholding tax (acting as a ‘tax agent’ for the franchisor), and must pay in accordance with the strict time frames established under the Tax Code. The franchisee must also be provided with confirmation from the franchisor of its tax residency status.

## **VI      IMPACT OF GENERAL LAW**

### **i       General**

The Civil Code contains a general requirement for citizens and entities to abide by the moral principles of Kazakhstan society and act in good faith, reasonably and fairly when exercising their rights. These requirements cannot be contracted out of or excluded in an agreement, even if subject to a governing law that is not Kazakhstani law. There is no objective test for these terms, however, so in each case their meaning will depend on the circumstances and the interpretation of the courts.

### **ii       Agency distributor model**

Provided the franchise agreement is clearly and expressly stated to be a franchise agreement, and is carried out by the parties as a franchise arrangement, then it should not risk being interpreted as a commercial agency agreement. In practice, franchisors – particularly those supplying goods – should be careful when imposing minimum purchase requirements on franchisees and should ensure that franchisees act at all times on their own behalf and at their own financial risk.

### **iii      Employment**

Kazakhstani employment law is prescriptive and enforces a Labour Code, which sets out certain minimum requirements that an employment contract must contain. It is rare for a franchisee to be classified as an employee, so in most instances this will not be an issue, but franchisors should take care to structure the documentation so that the relationship of the parties is not in any doubt.

### **iv       Consumer protection**

Franchisees do not fall under the definition of ‘consumers’ under Kazakhstani consumer law as they purchase goods and services for the purposes of business rather than for their own personal needs. Accordingly, consumer legislation does not apply to franchise arrangements.

For additional protection franchisors may consider only entering into franchise agreements with franchisees that are legal entities (rather than individuals) to confirm that it is a business-to-business relationship. However, bear in mind that a consumer has the right to proper quality of goods and services, including when buying them from a franchisee. Furthermore, the Civil Code provides for a subsidiary liability of the franchisor for consumer claims against a franchisee in respect of the quality of goods and services provided.

**v      Competition law**

Kazakhstan's competition law is primarily set out in the Entrepreneurial Code of the Republic of Kazakhstan dated 29 October 2015, No. 375-V (the Entrepreneurial Code). The Entrepreneurial Code expressly prohibits anticompetitive practices, abuses of dominance and monopolistic activity. The Entrepreneurial Code does, however, generally permit vertical agreements – including franchise agreements – and the Civil Code provides certain restrictive conditions that may be included in a franchise agreement even though they are considered in other circumstances to be anticompetitive. This includes the ability for the parties to agree that the franchisee has the exclusive rights to the franchised business in a particular territory to the exclusion of both third parties and the franchisor, and in-term and post-term non-compete restrictions on the franchisee. Resale price maintenance is prohibited in all agreements, however, as are exclusivity arrangements that seek to carve up a market based on specific categories or types of customer.

**vi      Termination**

The respective termination rights of the parties will generally be determined by the governing law to the agreement. If the agreement is subject to Kazakhstani law then the Civil Code provides restrictions and conditions for termination rights. If the agreement is for a fixed term, then it may only be terminated by mutual consent, where one party is in material breach or in circumstances clearly detailed within the agreement. In many franchise agreements, therefore, the parties include a schedule detailing 'termination events' or grounds upon which one or both parties may end the arrangement. Franchisors should note, however, that in most cases one month's notice is required to terminate an agreement. The Civil Code also states that if the agreement is for an indefinite term then both parties may terminate with six months' notice (or such other longer period as may be stated in the agreement).

**vii     Anti-corruption**

Kazakhstan has a broad range of legislation designed to combat corruption including, among others, the Law on Fighting Corruption (1998), the Law on Preventing Legalisation (Laundering) of Illegal Proceeds and Financing of Terrorism (2009) and the Law on Law Enforcement Bodies (2011). The Law on Fighting Corruption sets out the fundamental principles of the anti-corruption regime, defining what 'corruption' is, what constitutes a corruption offence and the liability for committing such offences. A new Criminal Code also came into effect on 1 January 2015, which introduces additional sanctions for corruption-related crimes, such as loss of rank and a lifetime ban on holding public office. The government has also implemented programmes, such as its 2015–2025 strategy, to help foster an anti-corruption culture.

At an international level, in 2008 Kazakhstan ratified the UN Convention against Corruption and the UN Convention against Transnational Organized Crime and all of

its protocols. The ratification of these significant anti-corruption conventions serves to effectively prevent corruption and ensure alignment between national legislation and international principles.

Additionally, Kazakhstan entities, specifically their joint venture partners, suppliers, agents and service providers, are required to comply with the provisions of the US Foreign Corrupt Practices Act (1977) and the UK Bribery Act (2010). Under this legislation, future partners or contractors of US and UK companies must have anti-corruption compliance policies in place. These policies will be thoroughly examined before any contract is concluded. Complex due diligence is undertaken by the US and UK companies to ensure they do not assist in any corruption, and such an examination is a key aspect of this process. Therefore, both of these foreign laws contribute to efforts to reduce the prevalence of corruption in Kazakhstan.

## **ix Dispute resolution**

Kazakhstan legislation does not require a particular dispute resolution forum to be used, so the parties may agree on the resolution method that will apply to disputes arising in relation to the franchise agreement.

Arbitration, mediation and other forms of alternative dispute resolution (ADR) are used in Kazakhstan to varying effect. Arbitration is the most commonly used ADR method, whether through the Kazakhstani International Arbitrage (KIA) or other arbitral regimes. The KIA may be selected as a dispute forum if at least one party is a non-resident of the Republic of Kazakhstan and the parties have agreed in the franchise agreement – by way of an arbitration clause – that the KIA will have jurisdiction.<sup>12</sup> Mediation is available in Kazakhstan, and is offered as a resolution forum by the KIA, although it is not currently as popular as arbitration or litigation.

Kazakhstan is a signatory to a number of international treaties providing for or relating to the enforcement of foreign court judgments and arbitral awards, including:

- a* the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958;
- b* the European Convention on International Commercial Arbitration (Geneva, 1961);
- c* the Agreement on the Procedure for Settling Disputes Relating to Economic Activities (Kiev, 1992); and
- d* the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Chisinau, 2002).

A foreign judgment may be filed for enforcement within three years of the date the decision became effective, and will only be enforced by a local court if provided for by Kazakhstani law (very limited grounds are detailed in the Civil Procedure Code, mostly relating to family and marital law) or an international treaty.

The Civil Procedure Code provides that a party in receipt of an arbitral award may apply to a Kazakhstani court for its enforcement if the other party does not perform its obligations voluntarily. The court will review the application within 15 days of receipt and provide notice to the parties of the time and date of the review for the parties' attendance (although attendance is not required). The court may issue an enforcement order that may

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12 KIA Rules of Arbitration, Section 1, Article 1. Accessible at: [www.arbitrage.kz/145](http://www.arbitrage.kz/145).

be used by the claiming party as the basis for initiating enforcement proceedings. The Civil Procedure Code and the Kazakhstan arbitration legislation set out the circumstances in which a court may refuse to enforce an arbitral award, which reproduce the grounds for refusal detailed in the New York Convention.

## VII CURRENT DEVELOPMENTS

Although franchising in Kazakhstan is still relatively new compared with other jurisdictions, its popularity as a route to market for foreign brands continues to grow. The number of foreign brands currently franchising in Kazakhstan is close to 500, estimated to equate to over 3,000 franchising outlets generating an annual turnover of US\$1.2 billion. Those 500 are expected to rise to 550 by 2022.

The rapidly developing infrastructure of retail outlets – in particular new shopping malls and hypermarkets – is one key element of this growth, as it opens up opportunities for franchisors to target more easily large groups of consumers in one space, particularly those with mid-market and premium brands that require quality retail space. Several new hypermarkets have opened in Almaty and Astana over the past few years and this scale of development looks likely to be repeated in other major cities, with 550,000 additional square metres of retail space anticipated by 2017. Recent challenges for Kazakhstan include the significant currency depreciation in August 2016 triggered by China's economic slowdown, which resulted in higher inflation and living costs and a decrease in consumer confidence. With increased government support for business development and an improving regulatory environment, including stronger intellectual property protection, Kazakhstan looks set to remain an attractive prospect to foreign and domestic franchisors.

## Appendix 1

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# ABOUT THE AUTHORS

### NICK GREEN

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Nick is an associate in the commercial group, based in London.

He advises on a range of commercial contracts focusing on the food and beverage, retail, education and technology sectors. Nick has worked with UK and international clients on a wide range of commercial areas, with a particular focus on advising, drafting and negotiating franchising, licensing and distribution agreements and other hybrid growth strategies. He regularly works with lawyers in other jurisdictions to ensure agreements and structures comply with local regulations.

Nick's recent project experience includes working as part of a team providing drafting and strategic legal support to a major US restaurant brand on the sale of its UK franchise business, and advising a multinational workspace provider on its international strategy and in-country arrangements.

Nick has published articles in the *International Journal of Franchising Law* and authored chapters in *The Franchise Law Review* on Africa and Kazakhstan.

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