

TO: Clients and Friends of the Firm
FR: Frishberg & Partners
RE: Franchising

I. Introduction

As a general observation, Ukraine takes a somewhat European approach to franchising whereby a franchise is viewed as an economic relationship, regulated by several contracts between franchisors and franchisees, rather than one straightforward franchise agreement, cut and dry, on a franchisor's fill-in-the-blank form. These various agreements include:

1. a franchising agreement;
2. a license agreement for the use of the trademark of the franchise;
3. a license agreement for the transfer of know-how;
4. a sales-purchase (supply) agreement for equipment; and
5. a supply agreement for raw materials, disassembled products and accessories required for the production of a franchise's products.

Since these agreements more or less deal with import-export transactions, they must be formalized in writing in accordance with Article 6 of the Law of Ukraine "On Foreign Economic Activities". Accordingly, if an individual enters into an international contract, only the signature of the individual is necessary. If a legal entity concludes an international contract, then the individual authorized by the charter of such legal entity must sign on to the transaction.

The parties to an international contract have the right to choose foreign arbitration for settlement of disputes. The rights of the parties and other substantive law issues likewise can be resolved in Ukraine under foreign law by agreement of the parties. If the parties do not agree as to choice of law, however, then Ukrainian law applies by default. One notable exception applies to agreements for construction or the acquisition of immovable property in Ukraine: such agreements must be governed by Ukrainian laws.

Order No. 201 of the Ministry of Economy and Issues of European Integration "On Approval of the Form of Foreign Economic Agreements (Contracts)," dated September 6, 2001, registered with the Ministry of Justice on September 21, 2001 under No. 833/6024, sets out the form of foreign economic agreements to be observed with respect to franchising agreements as well.

II. Discussion

A. The Franchising Agreement

A typical franchising agreement made in Ukraine should include such provisions regarding the long-term goals pursued by the parties, the term and the territory of the franchise, among others. Significantly, Ukrainian law does not permit general purpose clauses such as “any legal activity under Ukrainian law.” Thus, the franchise agreement must detail all of the franchisor’s current and potential activities.

Because the law does not permit “catch all” clauses, the description of the franchise’s purpose should be very broad. The franchise agreement should state that for each stage of relations the parties will enter into separate contracts, specifying such stages, and that such contracts will be an integral part of the franchising agreement. Importantly, all of the legislative restrictions and special provisions the parties agree upon should be set forth in the original franchising agreement. This way, all subsequent contracts will not contradict the original intent of the parties.

The franchising agreement is concluded in the form of a joint activity agreement in accordance with Article 23 of the Law of Ukraine “On the Foreign Investment Regime.” This joint activity agreement more closely mirrors corporate by-laws than the classic franchising agreement because Ukrainian law views each franchise as a corporate structure, whereby the franchisor earns income not from the franchise itself, but from its business activities on the territory of Ukraine.

A. License Agreement for the Use of the Trademark of the Franchise

Intellectual property is accorded protection by the Laws “On Protection of Rights to Inventions and Utility Models”, “On Protection of Rights to Industrial Designs” and “On Protection of Rights to Marks for Goods and Services,” as well as by the Presidential Edict “On Approval of the Temporary Regulation of Legal Protection of Objects of Industrial Property.” Intellectual property is given additional international protection via Ukraine’s participation in the 1883 Paris International Convention on Protection of Industrial Property and the 1891 Madrid Convention on Registration of Trademarks.

In order to effectively protect intellectual property such as trademarks, names, patents, etc., it is necessary to register such intellectual property with the State Department for Intellectual Property at the Ministry of Education and Science of Ukraine. Additionally, all licensing agreements for the transfer of any intellectual property between non-resident franchisors and Ukrainian franchisees must be registered with the appropriate state authorities.

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