

## **Franchise Agreements – issues to consider**

### **What type of Franchise Agreement is needed?**

- Franchise Agreement – one tier of licensing from a franchisor to a franchisee.
- Master Franchise Agreement – the owner of Intellectual Property (IP) grants rights with an obligation on the licensee to operate the franchise itself within a particular territory and to grant sub-franchises to third parties within that territory.

### **Ensure that franchise agreement is negotiated between parties**

- Generally terms should not be varied between different franchisees – consistency means less administrative burden for the franchisor and the franchisee's brand and reputation is not diluted.

### **Franchise Manual**

- A Franchise Manual will need to be drafted which sets out how the franchise is to be run – ensure this includes all necessary information as it is an essential part of the agreement between the parties. How detailed the obligations you impose will vary greatly depending on the nature of goods/services on offer. Please contact us if you would like further guidance on the content of a Franchise Manual.

### **Exclusive or non-exclusive rights?**

- Will the rights granted by the franchisor to the franchisee be exclusive or non-exclusive? Franchisors will want to grant exclusive rights as it will be easier to sell the franchise. Exclusivity for franchisees will mean protection from competition from the franchisor and other franchisees.
- If exclusivity is granted, care should be taken in establishing the exclusive territories to be granted.

### **Intellectual Property rights**

- Franchisors and franchisees will have a shared interest in protecting the value of the franchisor's IP. However, there is also the possibility of conflict if either party does not dedicate adequate resources to protecting IP in relation to the franchise.
- The franchisor will want to ensure that the value of its IP is not weakened in any way as a result of the franchisee's practices.

- The franchisee will want to ensure that the franchisor has valid and valuable IP rights, and that no unauthorised competitors will be able to profit from unauthorised association with the franchise brand.
- Consider whether a trade mark licence needs to be entered into or whether the trade mark licence can be set out in the Franchise Manual – the franchisor’s trade marks should be protected by way of trade mark registration if not already registered. **It is very important that trade mark applications have been filed in all relevant territories prior to entering into a Franchise Agreement.**

### **Commencement date and term of Franchise Agreement**

- Decide on commencement date and term – most franchises are for an initial term of 5 years. The European Code of Ethics for Franchising requires that the duration of a Franchise Agreement should be long enough to allow individual franchisees to benefit from their initial investments specific to the franchise.
- Most franchisees will need to be VAT registered before the commencement date of the Franchise Agreement due as most Franchise Agreements now fall within the scope of the Trading Schemes Act 1996.

### **Contract renewal**

- Make sure the basis for contract renewal is set out in the agreement – will this include an indefinite number of times of renewal or only one renewal?

### **Payment**

- Set out payment terms and make sure they are clear – this is likely to include an initial fee. How are payments to be made by the franchisee?

### **Franchisor and franchisee obligations**

- Decide on both franchisor and franchisee obligations and make sure these obligations are set out in the Franchise Manual or Franchise Agreement – it is normal practice for detailed operating restrictions and obligations to be imposed on franchisees to ensure uniform quality across a franchise.

### **Training**

- Decide on training obligations of the franchisor – initial training is usually provided at no cost to the franchisee but further training during the term of the franchise is usually provided subject to payment to the franchisor.

### **Accounting records**

- Consider what accounting records a franchisee must keep in respect of the franchise and what, if any, accounting information needs to be reported to the franchisor by the franchisee.

### **Advertising obligations**

- Decide on advertising obligations. A franchisor will want to ensure that franchisees do not use advertisements which are not permitted that could bring their brand into disrepute, or be inconsistent with other advertising undertaken by the franchisor.
- A franchisee will normally be required to carry out advertising strictly in accordance with the franchisor's instructions.

### **Insurance**

- The franchisor should specify what insurance the franchisee needs to have in place. This will normally cover insurance for liability of employees and to third parties, damage to property and loss of profits.

### **Premises**

- Arrangements should be made in relation to any premises which the franchisee is going to occupy.
- If there is a lease consider how this is to be dealt with in the Franchise Agreement. Will the franchisor also be a landlord and the franchisee a tenant?
- If there is no lease who will search for and select premises? Who will be responsible for maintaining the premises?

### **Data protection**

- Franchisors should ensure that franchisees comply with data protection laws and have appropriate systems and security measures and policies in place.
- Appropriate Data Protection notifications will need to be in place.
- Appropriate Data Protection clauses will be required in the Franchise Agreement.

## **Termination**

- Consider in what circumstances the Franchise Agreement could be terminated – if a franchisee is not performing adequately a franchisor will want to be able to terminate quickly. What would be a material breach allowing for termination?
- Discuss and decide what would happen if franchisee is not longer able to run the franchise – for example due to incapacitation or death.

## **Restrictions**

- Franchisors provide a considerable amount of confidential information to franchisees, which enable a franchisee to be an effective competitor. Accordingly restrictive covenants should be imposed on franchisees where relevant e.g. limiting a franchisee's ability to carry on a similar business with existing customers for an agreed period after the Franchise Agreement has been terminated.

## **Liability**

- Consider where liability needs to be excluded – e.g. if employees are on the franchisor's premises can liability be excluded on behalf of the franchisee?

## **International franchise agreements**

- Consider competition law issues and attitudes to Franchise Agreements in the relevant territory.