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The International Comparative Legal Guide to:

Franchise 2017

3rd Edition

A practical cross-border insight into franchise law

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Archer & Angel
Christodoulou & Mavrikis Inc.
Cuatrecasas, Gonçalves Pereira
Daniel Advogados
DBB
DLA Piper
Dubler Attorneys at Law
Gorodissky & Partners (Ukraine)
Gorrissen Federspiel

GRATA International
HLG Avocats
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Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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Germany

Jacobsen + Confurius Rechtsanwälte

Dr. Kay Jacobsen



1 Relevant Legislation and Rules Governing Franchise Transactions

1.1 What is the legal definition of a franchise?

There is no statutory definition of franchising. A franchise is usually understood to be *a system of marketing goods and/or services and/or technology whereby the franchisor grants a franchisee the right, and imposes the obligation, to conduct a business in accordance with the franchisor's concept, in exchange for a direct or indirect financial consideration. Essential elements are joint know-how, and the provision of support services by the franchisor. The type and nature of the franchisee's business is usually prescribed, and the franchisor will monitor business operations on a continuing basis. The right entitles and compels the individual franchisee and the franchised business to use the franchisor's specified industrial and intellectual property rights.*

There are similar definitions provided by the German Franchising Association (*Deutscher Verband für Franchising eV*, Berlin (DFV)) and the European Franchise Federation (EFF).

“Know-how” means *a body of non-patented practical information, resulting from experience and testing by the franchisor, which is secret, substantial and identified.*

“Secret” means that *the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; it is not limited in the narrow sense that each individual component of the know-how should be totally unknown or unobtainable outside the franchisor's business.*

“Substantial” means that *the know-how includes information which is indispensable to the franchisee for the use, sale or resale of the contract goods or services. The know-how must be useful for the franchisee by being capable, at the date of conclusion of the agreement, of improving the competitive position of the franchisee, in particular by improving the franchisee's performance or helping it to enter a new market.*

“Identified” means that *the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality; the description of the know-how can either be set out in the franchise agreement or in a separate document or recorded in any other appropriate form.*

1.2 What laws regulate the offer and sale of franchises?

There is no specific statutory law that governs franchising. General statutory provisions under the law of obligations governing contracts and analogous application of the provisions to different

areas of obligations (sale of goods, rental law, etc.) are applied to franchise law. The provisions of commercial agents' law and EU competition law in the form of the EU Block Exemption Regulation for Vertical Agreements also apply. The latter contains important provisions if there are restrictions on freedom of competition. The law on pre-contractual obligations of the vendor to disclose information, Section 319(2) of the German Civil Code (BGB) and the law governing standard business terms (Sections 305 *ff.* of the BGB), are of particular practical relevance.

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 purposes of any franchise disclosure or registration laws?

There is no difference between only one franchisee and multiple different franchisees.

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

There are no statutory provisions governing registration of a franchise system in Germany. However, the general provisions governing the practice of certain professions in Germany must be observed: for example, the Trade Code (*Handwerksordnung*) stipulates that certain trades may only be practised by persons who have passed the corresponding master craftsman's examination. Licensing and admission requirements also apply to other jobs, such as in the areas of health care, banking, brokerage, etc. If such professional admission requirements or authorisations are required, the potential entrepreneur must demonstrate that he/she will be allowed to carry out the specified job.

1.5 Are there mandatory pre-sale disclosure obligations?

Under German franchise law, for many years the higher courts have imposed a pre-contractual requirement on the franchisor to disclose comprehensive information pursuant to Section 311(2) of the German Civil Code (BGB). In essence, the franchisor has a responsibility to provide a potential purchaser with all information that the franchisee cannot acquire on its own, and such information is to be **disclosed voluntarily**. This covers, in particular: information about the performance and benefits of the franchise system; the development and distribution of the system; the franchisor's commercial property rights; the number of existing franchise systems and franchisees in operation; the level of entry and franchise fees; the figures governing revenues, costs and anticipated

income in system operations, taking into account any actual figures; information about expected investment costs; and information about financial requirements. However, courts have also stressed that the franchisor is not a business start-up advisor. The extent of these obligations may be controversial in some cases. Basically, the franchisor is required to give complete, unequivocal and correct information about all circumstances that are clearly significantly important for the investment decision of the franchisee. Franchisors are advised to draw up documentation that contains the information that needs to be disclosed to franchisees.

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

The obligations set out under question 1.5 above apply to the master franchisee as soon as it begins to exercise its own rights under a master franchise agreement. Essentially, in this case the master franchisee, as a contractual partner of the sub-franchisee, is obliged to fulfil these obligations. Under such circumstances, the master franchisee may use the information provided by the franchisor that underlies its own contractual obligations.

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?

There is no standard format for pre-contractual disclosure. Basically, it is recommended that the franchisor should draw up detailed documentation and have the franchisee acknowledge receipt of the individual documents. If no reliable information is available, as the franchise system is new, there should be advice stating that this is a pilot franchise operation, that no reliable experience is available, and that this constitutes a special risk for the franchisee. It is recommended that such advice should be included in contractual agreements for the first 3–5 franchise outlets.

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

There are no real requirements that must be met before a franchise is offered or sold, provided the franchisor is not setting up a branch within Germany. If the franchisor is setting up its own domicile (branch) in Germany, it must register as a business and complete taxation registration formalities. In this respect, the franchisor must ensure that it has the necessary authorisations needed to carry out certain professions or jobs (see question 1.4 above).

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

Membership of the German Franchise Association (*Deutschen Franchiseverband eV* (DFV)) is recommended and advisable. The DFV offers a range of opportunities for the exchange of advice and information. In all cases, care should be taken to ensure that the master franchisor in Germany is a member of the Association.

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

The German Franchise Association checks that its members comply with certain minimum standards. Franchise systems are also subject

to a franchise check, by which the system's contracts and handbooks are checked to ensure they meet the Association's standards. Therefore, membership of the DFV is a seal of quality.

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

No. Franchise documents do not normally have to be in German. However, it is recommended that they be written in one of the more common languages, particularly in English. A franchisor should take steps to ensure that any future franchisee possesses the necessary language capabilities. If the potential franchisees are a start-up company, who run a small operation that does not have language capabilities, it makes sense to have the contract and any necessary documentation translated into German. However, there is no legal obligation to do so.

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?

No. In principle, there is no distinction made between German investors and foreign investors.

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

The legal form of the company is usually selected by the franchisor. Possible options are the *Gesellschaft mit beschränkter Haftung* (GmbH), which is similar to a Ltd. company, or the *Aktiengesellschaft* (AG), which is comparable to a PLC or corporation. Both business entities are characterised by having shareholders, who have no representative function, and Managing Directors (for the GmbH) or Board Members (for the AG), who run daily business operations as directors of the company.

It is also possible for a branch office of a foreign corporation to be registered in the Commercial Register of companies in Germany.

It is not uncommon for the franchisor to invest in the master franchisor's company in Germany in order to ensure that it receives information rights guaranteed to a shareholder. Many companies set up German subsidiaries in the form of a corporation in order for that company to act as franchisor. Before a master franchise agreement is signed, Area Development Agreements are often concluded to allow for the basic requirements for the establishment and necessary amendment of a foreign franchise system to statutory requirements in Germany.

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?

In principle, there is no requirement for a foreign company to be registered in Germany. However, if a German domicile is to be set up, this must be registered for tax purposes.

3 Competition Law

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

EU law applies in Germany, and vertical agreements in particular are governed by Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (VABER). This applies in particular with respect to Articles 4 and 5 (prohibition of determination of sale prices, and restrictions on duration of competition prohibitions). However, there is some leeway here for franchise agreements, insofar as a franchise system requires variations (see *Pronuptia* decision of the German Supreme Court, the Federal Court of Justice – BGH).

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

Franchise agreements are not usually for a period of longer than five years, in order not to conflict with Article 5a of the Block Exemption Regulation for Vertical Agreements (see question 3.1 above). However, longer periods may be agreed in exceptional circumstances, such as when a longer amortisation of the franchisee's investment makes this necessary.

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

The remarks in question 3.2 above also apply to purchase commitments. The recommendation is to agree an exception for purchase commitments for approximately 20 per cent of requirements.

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

As already stated in question 3.1 above, Article 4a of VABER does not allow specification of minimum prices. However, legal decisions have established that short-term marketing actions are not subject to this restriction. Nevertheless, maximum sales prices or non-binding sales prices may be stipulated.

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

There is no provision requiring a franchisee to be given a specified contractual area. Where a specified distribution territory is allocated, anyone may offer goods or services outside of this territory, unless the territory is already reserved for the franchisor which plans to offer the territory to another franchisee. However, if there is a contractual non-compete clause, a franchisor is prohibited from supporting its own or third-party competitive business in the protected territory.

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

During the period of a contract, in accordance with the law governing authorised agency agreements, a general non-compete prohibition applies to the franchisee. A post-contractual non-compete clause requires express agreement. It shall only be valid if such a non-

compete clause covers the scope and content of the previous activity, and if adequate compensation is paid. With respect to the agreed retrospective non-compete clause, the franchisor can dissociate itself from the obligations of the non-compete agreement by giving notice to the franchisee. These obligations are legally enforceable by injunctions.

4 Protecting the Brand and other Intellectual Property

4.1 How are trade marks protected?

Trade marks are protected in Germany by the Trade Marks Act (*Markengesetz* – MarkenG). Almost all trade marks can be protected. The same applies for business designations, but restricted only to the corresponding area of distribution. The Trade Marks Act gives the owner of the trade mark the right to protect against identical or confusing trade marks, and creates a right for injunctive relief and claim for damages. Trade marks can be protected for a period of 10 years. However, the protection of a trade mark can be cancelled if it has not been used for a period of five years. Determination of unfair competition can lead to a court issuing an injunction for misleading or confusing business designations within a very short timeframe (a few days).

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

Business and trade secrets enjoy protection under Sections 17 and 18 of the German Unfair Competition Act (UWG). The unauthorised use of entrusted knowledge or documents is punishable by law, and can also be subject to a civil action. However, it must refer to secret information not in the public domain that has been entrusted to another.

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?

Written works such as the franchise handbook, the franchise agreement, or other printed works or drawings are protected under the provisions of copyright law. The protection can extend to a particular design or a special type of business design. One important application of copyright law is with respect to software.

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?

Where the general pre-contractual disclosure obligations are contravened, the franchisee may terminate the agreement and demand damages if it can prove that it would not have concluded the agreement if adequate information had been disclosed. Alternatively, the franchisee can maintain the contract and require the terms to be amended.

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 principle, the corresponding contractual party is responsible for ensuring pre-contractual disclosure. If the franchisor is the direct partner of the franchisee, the franchisor is responsible for making sure the franchise system complies with the national requirements for the applicable franchise area; if not, the master franchisee, as contractual partner, bears the responsibility. Generally, the franchisor is responsible for providing the master franchisee with all necessary knowledge, and in particular the necessary know-how, in a franchise manual that is to be adjusted by the master franchisee to meet the national requirements of the franchise area.

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

As already explained in question 5.2 above, the franchisor may essentially transfer all its pre-contractual disclosure obligations to the master franchisee. However, the franchisor must provide the master franchisee with the information available to the franchisor. The adjustment for national requirements in the master franchisee's territory is the responsibility of the master franchisee, including the corresponding pre-contractual disclosure requirement.

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?

In principle, German law only allows for “class actions” – joint legal actions where decisions are binding on other parties not directly involved – in the area of capital investments. This does not cover the provisions of franchise law. Nevertheless, groups of franchisees in fact often join together to exert joint pressure on the franchisor. In legal proceedings each franchisee acts independently and, at best, may rely upon parallel judgments. In each individual legal action, each basis of claim has to be examined for each individual claimant, along with the corresponding loss and the relevant cancellation terms.

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?

The application of foreign law can also be agreed with franchisees. However, the choice of application of foreign law can throw up surprises if the jurisdiction selected is not the home jurisdiction of the franchisor or of the franchisee, and the law of a third country is applicable. In principle, a foreign legal jurisdiction may be agreed and may be implemented, where the foreign law is to be applied for a particular case (*renvoi*).

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?

Interlocutory relief can usually be secured from a court within a few days in circumstances where a franchisee is contravening agreements. This interim order must then be confirmed at a subsequent full hearing. However, such orders do not create a permanent legal solution. Therefore, it is not usually possible to secure an injunction with respect to obligations to take action. Such interlocutory orders can also cover prohibition of confusing or misleading actions by the franchisee.

7 Real Estate

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

In principle, there is no typical duration for a franchise agreement. The existence of the Block Exemption Regulation for Vertical Agreements (VABER) means that franchise agreements normally do not run for more than five years, even though this is acceptable under certain exceptional circumstances. Lease agreements are normally customised to ensure they run parallel with the duration of the franchise 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 principle, it makes sense and is practicable to agree for the franchisor to have an option to take over a franchisee's lease in case the franchise agreement fails, or to agree that a third party, to be stipulated by the franchisor, should step into the franchisee's shoes under the lease. Where the franchisee makes such an agreement with the lessor, it is recommended that the franchisor should ensure that its interests are protected in the corresponding contractual clause.

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

Generally, there are no provisions restricting foreign enterprises from leasing or buying real estate.

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)?

Terms and conditions for lease agreements vary greatly and depend on the attractiveness of the relevant location. Lease agreements for tenants of shopping centres are particularly comprehensive and complicated. Rents are usually calculated on the basis of revenues,

in addition to fixed base-rents that set a minimum rent. Additional ancillary costs for joint marketing, and levies for special events, are often agreed. Sometimes, it is also possible to have rent-free periods (of up to one year), or to agree other additional benefits (such as renovations). Before real estate is purchased, a detailed check should be made to ascertain whether there are any charges listed in the property register (building obligations, rights of way, etc.).

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?

In principle, internet trading can only be limited in the area of selective distribution. Selective distribution is a distribution system where the supplier undertakes to sell the contractual products or services only to distributors selected on the basis of specified characteristics, and where the distributors undertake not to sell those products or services to distributors who are not authorised to sell such products or services (Art. 1d VABER). If there is no selective distribution, it is extraordinarily complicated to prohibit online sales. Online distribution is regarded as a passive sale, which cannot be prohibited as a matter of principle. The details in this area are hotly disputed.

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?

When a franchise agreement is terminated, the franchisor can request the franchisee to refrain from using domains that make reference to the franchisor's trade marks and, if necessary, to enforce such action in court. In the same manner, the prohibition can be exercised to ensure that a franchisee can no longer use the franchisor's brand name in official documentation (telephone books, industry directories and other indices) after a franchise agreement has been terminated. Such prohibitions are sometimes used to ensure that franchisees give up corresponding domains or telephone numbers, or that they are deregistered by or transferred to the franchisor.

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?

Early termination of a franchise agreement is possible under the statutory provisions of Section 314 of the German Civil Code (BGB) if there is **good cause** (*wichtiger Grund*) that makes it impossible for the franchisor and franchisee to continue to work together, and provided that a **warning** has been issued and has expired without action being taken, and provided that the party had not become aware of the grounds for the termination more than two months previously. In principle, the bar for establishing the requirements for good cause is extremely high. Insolvency or illiquidity of the franchisee normally justifies termination of the franchise agreement for good cause.

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?

There are cases where the franchisee may have been classified as an employee or quasi-employee; this entailed a risk for the franchisor, in that the franchisee was protected like an employee. These cases were normally based on circumstances where the franchisee worked at fixed hours without their own equipment or employees, and was integrated into the franchisor's work organisation. There are also cases where people have been classified as pseudo-self-employed, and had to pay social security contributions, as they were similarly integrated into the work organisation of the franchisor. However, this obligation affected the franchisees and not the franchisors. Such circumstances are always throwing up difficult factual situations with grey areas.

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?

Under German law, it is very unlikely that a franchisor could be held liable for acts of the franchisee or the franchisor's employees – as long as he does not advise or tolerate illegal acts.

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 principle, there are no exchange controls that would be pertinent to franchise systems.

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?

There are no mandatory provisions for tax obligations, provided the obligations are not influenced by the shareholder relationship and correspond to arrangements that would be agreed between independent third parties.

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

There are no provisions that prescribe the currency in which payments must be made to the franchisor.

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 German law, the franchisee is not normally treated as a commercial agent (except for a commercial agent franchise) but is treated as a special sort of authorised dealer. However, under certain circumstances, authorised dealers can be treated like commercial agents. This normally applies if the authorised dealer (or franchisee) is integrated into the franchisor's sales organisation like a commercial agent and is required, in fact or in practice, to transfer its customers to the franchisor at the end of the contract. In such cases, franchisors have been held liable to pay compensation for the losses of the commercial agent. This risk can be restricted by excluding the possibility of disclosing the customers to the franchisor.

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?

Under the general provision of Section 242 of the German Civil Code (BGB), an obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration. This principle applies to all contractual relationships, but only in individual circumstances can a concrete legal consequence be derived. With the principles about pre-contractual disclosure, in particular disclosure obligations about information available only to the franchisor, and the principle of frustration of contract (*culpa in contrahendo* and *clausula rebus sic stantibus*), the most important legal principles are expressed in statutory form in Sections 311 and 313 of the Civil Code. Other than this, there are no franchise-specific provisions in this respect.

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?

The most important laws covering franchise agreements are: the rights for founders of a new business to cancel contracts within 14 days after signature; the Block Exemption Regulation for Vertical Agreements (VABER); and the analogous application of provisions of the law governing commercial agents. Beyond this, depending on the circumstances, there are numerous laws that could apply, such as the laws on standard terms and conditions (mostly applicable to franchise agreements), and intellectual property laws (trade marks, copyright, unfair competition, etc.).

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?

In principle, there is no law that must be applied to a renewal of an existing franchise agreement. The disclosure requirements would

be substantially less onerous, and there is no right of cancellation, because the franchisee has already been operating as a business, knows the system, and is no longer someone who is just setting up a business.

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?

In principle, franchisees do not have a right to automatic renewal or extension of the franchise when the franchise expires, and the legal position is unclear where there is a demand for new franchise entry fees. There have been no legal decisions on this issue.

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?

Depending on the individual circumstances of the case, when a franchise agreement ends, compensation can be payable for the loss of secured customers (see question 12.1 above). German law does not usually recognise a claim for reimbursement of high levels of investment made during the term of the contract. However, when applying the principle of good faith, a different view may be taken in individual cases. This applies when a franchisee makes a substantial investment shortly before expiry of the franchise on trust that the franchise agreement will be extended.

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?

In principle, transfer of the franchise business by the franchisee to a third party (new franchisee) requires the approval of the franchisor where contractual obligations are also to be transferred. It is recognised that the franchisee has an operational obligation and cannot simply escape the operational obligations under the franchise agreement by selling the business. Contracts often include a purchase option in favour of the franchisor, and these are usually valid.

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?

When a franchise agreement ends, the franchisor may be given a right to step into a franchisee's lease, or the franchisor can be given an option to purchase the franchisee's business. However, corresponding rights of the franchisor must be granted under adequate terms, or they will be deemed contrary to public policy (Section 138 of the Civil Code – BGB) and may be invalid (surprising and one-sided clauses pursuant to Sections 305 ff. BGB).

16.3 If the franchise agreement contains a power of attorney in favour of the franchisor under which it may complete all 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?

Provisions governing powers of attorney are not as yet common in franchise law, as in order to transfer powers the beneficiary of the performance usually requires a co-determination right. The same applies for the franchisor’s step-in rights with respect to the franchisee’s contractual rights. Such clauses may also be void pursuant to the general law of obligations (Section 138 BGB) or standard terms and conditions (Section 305 ff. BGB).



Dr. Kay Jacobsen

Jacobsen + Confurius Rechtsanwälte
Pinnasberg 47
20359 Hamburg
Germany

Tel: +49 40 302 0030

Fax: +49 40 337 820

Email: jacobsen@jacobsen-confurius.de

URL: www.jacobsen-confurius.de/en

Dr. Kay Jacobsen mainly practises in the area of civil and commercial law. His speciality for the past 25 years has been commercial law, particularly commercial agent law, authorised dealer law, and franchise law. For many years Dr. Jacobsen has been recommended in international publications as an expert on commercial law. In particular, competitors praise his approach to providing creative solutions, his commitment and expert knowledge. Dr. Jacobsen is a member of the German Franchise Association (DFV) and is recommended by the Association as an expert in the field. He is also a member of the International Franchise Lawyers Association (IFLA, www.franchiselawyers.net) and is on the Executive Board of the Alliance of Business Lawyers (www.ablglobal.net). Dr. Jacobsen is supported by a professional team of lawyers, tax advisors and consultants.



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Jacobsen + Confurius, a firm of lawyers, tax advisors and auditors, established its office in Hamburg more than 30 years ago, and has also had an office in Berlin for over 10 years. We advise German and international clients on commercial and employment law.

In the area of civil and commercial law, our practice advises in the areas of commercial law; particularly corporate law, M&A, anti-trust law, trade mark law, copyright law, competition law, contract law, insurance law and transportation law. In the field of employment law, we mainly advise companies in the area of individual and collective employment law. We are a member of the international legal network, the Alliance of Business Lawyers (www.ablglobal.net).

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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.co.uk