Franchising Global Guide: Q&A template

Franchising in France: overview

# Market

1.

What have been the main developments in the franchising market over the past 12 months?

Despite a difficult economic context, all the economic indicators in the sector of franchising in France have increased in 2015: number of points of sale (+2.1%), number of networks (+1.9%), and global turnover (+3.8%). France thus occupies the first place in the European market in the sector of franchising.

Over 1,312 franchised businesses have been created in 2015, in particular in the sectors of:

* Food industries: 763 new franchisees;
* Personal services: 311 new franchisees; and of the
* Automotive industry: 241 new franchisees;
* Household equipment: 228 new franchisees; and
* Construction: 159 new franchisees.

Various new networks have in addition appeared:

* Fast-food industry: 11 new networks;
* Automotive services: 8;
* Business services: 8;
* Construction: 7 and
* Foodstuff: 7.

With regards to global turnover, foodstuff remains in first place, representing a total of 19.52 billion euros, which shows an increase of over 1 billion euros compared to the previous year. The fast-food sector has slightly decreased, still amounting to a global turnover of over 4.17 billion euros, the major event in this sector of this year being the purchase of Quick by Burger King. The retail clothing sector represents over 4.33 billion while the housing equipment sector has largely increased to reach a global turnover of 6.09 billion euros.

As for 2016 and the following years, while the objectives of many large networks seem to focus on the purchasing of competing networks, local development and the same level of global growth should continue.

2.

What are the most commonly used methods of local and international franchising?

Depending on the nature and the importance of the franchise network, direct, multi-unit and master franchise agreements are commonly used.

## Local franchising

French franchisors often rely on direct franchising for the French territory.

## International franchising

On the international level, large networks commonly use multi-unit or master franchises to develop in the French market. Franchisors may enter the market directly, through a specific entity or with the setting-up of joint ventures.

3.

Are there any specific reasons for an overseas franchisor to use a separate entity for entering into a franchise agreement with a franchisee in your jurisdiction?

Overseas franchisors may prefer to use specific separate entities when entering the French market, for various reasons pertaining to liability and tax issues. These issues are however not specific to franchising and there are no specific legal matters relating to French franchise law with regards to such choice.

# Regulation of franchising

4.

What is the legal definition of franchising and/or a franchise?

French law does not define a franchise agreement. Instead, the definition of a franchise agreement is provided by case law as a relationship characterized by the existence of the following three elements:

* the license of a trademark,
* communication of specific know-how, and
* assistance from the franchisor to franchisees.

5.

What are the laws regulating franchising?

In France, franchising is not subject to a special statutory regime. Rather, franchise law derives mainly from case law. Courts confronted with a franchise case adapt general French contract and commercial law to the given situation.

The only special provision is Article A. 441-1 of the Commercial Code which requires “*every person that sells products or provides services, bound by a franchise agreement with a franchisor*” to inform “*the consumer that it is acting as an independent contractor, in a visible way on all information documents, especially those of promotional nature. This needs to be done on the inside and on the outside of the retail location*”.

On July, 21 of 2016, a law regarding the modernization of social dialogue has introduced the obligation for the franchisor to set up a social dialogue committee including the employee representatives, the franchisees and himself. The dialogue social committee has an advisory capacity on labour questions. The set-up of this social dialogue committee is compulsory if:

* the franchise network employs at least 300 employees in France,
* the franchise agreement contains terms impacting labour conditions,
* a representative union ask for it.

6.

What is the regulatory authority responsible for enforcing franchising laws and requirements in your jurisdiction?

No specific regulatory authority exists in France.

7.

Must the franchisor be registered with a professional or regulatory body before setting up a franchise system?

No specific registration is required in France.

8.

Is there a code of ethics or other means of promoting ethical franchising in your jurisdiction?

The “French Franchise Federation promotes the following of the European Franchise Federation Code of Conduct (the “Code of Conduct”).

However, the “Code of Conduct” is not binding.

9.

Do franchisees benefit from any laws designed to protect consumers or small businesses?

Under French law, the franchisee cannot be regarded as a consumer. Indeed, the preliminary Article of the Consumer Code defines a consumer as *"any natural person who is acting for purposes which are outside the scope of his trade, business, craft or profession"*.

All the provisions protecting consumers are therefore not applicable to the franchise agreement.

Even though the franchisee cannot be considered a consumer, the franchisee does fall under the protection of the Commercial Code, which is directly inspired by the protection of consumers.

Article L 442-6, I, 2° of the Commercial Code prohibits abusive clauses in commercial contracts. According to this text, the franchisor may be responsible if and when it subjects its franchisee to *“obligations that cause a significant imbalance in the rights and obligations of the parties*”. This formulation is quite broad, but to date judges are reasonable in the way it is construed. For instance a penalty clause does not constitute a significant imbalance.

In a wider context, Article L. 442-6 of the Commercial Code prohibits certain restrictive practices, such as the gaining of an advantage that is not related to a rendered service, for instance the participation in the financing of promotional activities that is not justified by a common interest and does not offer proportionate compensation, or the demanding of abusive fee conditions under the threat of a discontinuation of the business relationship, or the refusal to communicate terms of sales.

10.

Are there any other requirements which must be met before a business can sell a franchise?

No specific requirements must be met in France.

# Franchise agreement

## Pre-contract disclosure requirements

11.

Is the franchisor subject to any general or formal pre-contract disclosure requirements?

Over the years, French case law has developed a duty of good faith in the pre-contractual negotiation of agreements, which is based on Article 1134 paragraph 3 of the Civil Code.

In the 1980’s, the franchise industry in France was gaining momentum and the aforementioned case law was not sufficient to address the particularities of the pre-contractual negotiation of franchise agreements. On December 31, 1989, a specific law containing only one Article was approved in Parliament, named after the Minister of Commerce’s last name i.e. *“Loi Doubin”*, which imposed a mandatory prior disclosure obligation. Later it was codified in the Commercial Code under Article L. 330-3.

* Promotional Documents

When it comes to franchisor’s promotional documents, it is clear that the franchisor cannot be held liable if the information contained in these documents is aimed at showing the franchisor in its best light because that is the purpose of such documents. However, franchisors need~~s~~ to make sure promotional documents are not gravely misleading to prospective franchisees. Courts have held franchisor responsible if the promotional documents contain information that is so vague or so inaccurate that it directly misled the prospective franchisee.

Courts have established the principle that “*promotional documents can have a binding character when they have influenced the consent of the contracting party in a precise and detailed way”.* The franchisor thus takes the risk of having its promotional materials considered as part of the contract. Therefore, a franchisor must make sure that its advertising is honest, without going into detail.

* Pre-contractual Information Document

As in many countries, French law requires that a pre-contractual information document be given to the franchisee.

Article L. 330-3 of the Commercial Code provides that “*any person that provides another person with a trade name, a trademark or a sign, and requires from the latter a commitment of exclusivity or near-exclusivity for the exercise of its activity, is required prior to the signing of any contract in the common interest of both parties, to provide to the other party a document giving truthful information so it can make an informed decision*”.

The content of this information is specified in Article R. 330-1 of the Commercial Code. The information is the following:

Identification of the franchisor: The franchisor needs to be properly identified. It is thus necessary to state its legal name, commercial name, address of its headquarters, the amount of invested capital, and the business registration number.

The managers also need to be identified, with details of any criminal records.

Information regarding the trademark: Since the trademark license is an essential element of the franchise, the pre-contractual information document needs to specify the date and the registration number of the trademark. If the franchisor is a licensee of the trademark, the information also needs to include the period of validity of this license.

Information on franchisor’s banks: The franchisor needs to specify the banks with which it has accounts. If the franchisor uses multiple banks, it only needs to list the five main ones.

The business history of the franchisor: The pre-contractual information document needs to specify the creation date of the franchise business, as well as the main stages of its development. Moreover, any relevant information on the franchisor, the franchise system (such as relevant litigation, etc.), and the experience of the franchisor’s managers must be provided.

This information can be limited to the five preceding years. These elements can be of critical importance when it comes to the consent of the franchisee. For example, the Court of Appeal in Paris has judged a franchise contract void on the grounds that the disclosure document provided false information regarding the credentials of the franchise directors.

A general and local market study and the franchise system’s potential for development: The local market study is important information that a franchisee should pay close attention to. This information allows the franchisee to evaluate the investment opportunity.

While the presentation of this local market study can remain general, it should not be incomplete, misleading or unreliable. For example, the information is defective when it fails to report the presence of nearby competitors.

Articles L. 330-3 and R. 330-1 of the Commercial Code do not require the franchisor to provide a detailed market survey or an implementation study. Moreover, the franchisor is not required to provide the franchisee with a forecast balance sheet.

It is risky for the franchisor to provide additional information because the franchisor accepts responsibility for all information communicated, whether or not such information is required to be provided. Thus, if the additional information is not true, the franchisee can assert a claim for fraud and demand compensation.

For example, overly optimistic forecasts on which a franchisee relied upon to make its decision can be sufficient to demonstrate that the franchisee’s consent was vitiated.

A presentation of the franchise network:The pre-contractual information document needs to give a truthful image of the network. As such, it has to include:

* The name and the form of exploitation of each of the companies belonging to the network.
* The address of the franchisees established in France and the date of conclusion or of renewal of the franchise agreement. Article R.330-1 of the Commercial Code limits this requirement only to franchised businesses. Thus, if a franchisor has branches or other distributors (*eg* dealers, commission agents), these companies are not required to be listed. Moreover, if the network includes over fifty franchisees, only the fifty franchisees that are closest to the proposed location are to be listed.
* The number of companies that have left the network in the year preceding the issuance of the pre-contractual information document. The franchisor must specify the cause of the departure of these franchisees: nullity of the contract, contract termination, non-renewal.
* The existence of companies distributing the franchisor’s products and services in franchisee’s catchment area. Therefore, if the franchisor has already signed another distribution contract or if it has another affiliate in the same zone, this information must be provided.

The description of the network status must be particularly truthful. Judges often sanction concealment of the difficulties encountered by current franchisees in the franchise network.

The main terms of the franchise agreement: The pre-contractual information document needs to present the essential terms of the franchise contract. The following information must be included in this document: the duration of the contract, the terms of renewal, assignment and termination. Moreover, the document needs to include the exclusive rights granted to the franchisee (exclusive territory etc.), as well and the franchisee’s obligation to purchase any supply from the franchisor.

The amount of the investment, required by the franchisee: Finally, the pre-contractual information document needs to present the *"specific expenditures and investments related to the trademark that the person receiving the draft contract must pay for until the opening date”* of the franchise outlet.

As such, the franchisor is required to specify the franchise fee that will be billed to join the franchise network. The franchisor also needs to set out the possible expenses to personalize the local commercial premises.

* Rules governing the delivery of the pre-contractual information

The pre-contractual information document needs to be delivered to the prospective franchisee in order to allow the franchisee to perform a thorough study without the presence of the franchisor. It is therefore not sufficient to hand over this information at the franchisor’s headquarters, or on the company’s internet website. Such a transfer of information does not satisfy the obligations stipulated in Article L. 330-3 of the Commercial Code.

Moreover, the document needs to be delivered at least twenty days before the signing of the franchise contract (and not twenty days before the contract becomes effective).

This obligation also applies for contract renewals, including by tacit agreement. Similarly, the pre-contractual information document must be given to the assignee of the franchise agreement.

The burden of proof of delivery of the pre-contractual information document lies with the franchisor. Therefore, a copy of the document needs to be signed so it can be used as proof of receipt.

* Penalties for violation of Article L. 330-3 of the Commercial Code

The sanction is both criminal and civil.

The criminal penalty, defined by Article R. 330-2 of the Commercial Code, imposes a fine for each infringement. This fine is 1,500 euros for natural persons and 7,500 euros for legal entities. In cases of repeated offenses, the fine is doubled.

With regard to the civil sanction, the two main sanctions are the nullity of the contract and compensation of the franchisee.

The invalidity, first of all, based on Articles 1108 to 1116 of the Civil Code, is not automatic in the event of non-compliance with the pre-contractual information obligation. The franchisee must demonstrate that it was a victim of a “vice” of consent, such as error or fraud, without which the franchisee would not have agreed to sign the franchise agreement. For example, it was deemed that *"non-observance of the twenty days provided for in Article L.330-3 of the Commercial Code does not necessarily imply vitiated consent”.*

Certain information, like the bank address of the franchisor, does not, of course, play a crucial role in the consent of the franchisee. Its inaccuracy, therefore does not constitute a major risk of nullity of the contract. However, a pre-contractual informational document that is misleading, incomplete, or unrealistic, is a critical element that often leads to the nullity of the contract.

The franchisor can in addition, or even as an alternate sanction to nullity, be ordered to pay damages pursuant to Article 1149 of the Civil Code when the breach of the duty to provide truthful information has caused direct harm to the franchisee.

However, the damages and causation of damages must be proven and is treated in French law as a loss of opportunity. The Court of Cassation specifies that *"the damages resulting from the breach of pre-contractual information obligation consists of the loss of the chance of not contracting or contracting on more favorable terms and not that of obtaining gains expected".*

* The special case of error on profitability

French Courts have recently determined that the franchise agreement must be canceled when the franchisee miscalculated the profitability of its business after relying on the financial estimates provided by the franchisor.

As we have indicated, the pre-contractual information does not require the franchisor to provide the franchisee with any financial estimates. However, when such financial estimates are prepared by the franchisor and provided to the franchisee and the effective financial results are far off course, a French judge may justify a cancellation of the contract based on the franchisee’s miscalculation of its profitability. A franchisor may however present the average network’s figures made by its franchisees.

12.

Must the franchisor disclose fairly and in good faith all facts material to the prospective franchisee's decision to enter into the arrangement, or must the prospective franchisee rely on its own due diligence?

As seen in Question 11, the pre-contractual disclosure requirements set forth a precise and specific list of information to be provided by the franchisor.

## Formalities

13.

What are the formal contractual requirements to create a valid and binding franchise agreement?

There are no such requirements in France.

## Parties' rights and obligations

14.

Is there a general obligation to behave fairly, reasonably or in good faith to the other party during the term of the franchise agreement?

## Obligations of the franchisee

Just as the franchisor has to supervise its network, the franchisee needs to ensure that it does not damage the trademark’s reputation. For example, judges consider that a franchisee using misleading advertising damages the image of the network. In that case, a franchisee’s default may justify the termination of the contract.

The other obligations of the franchisee are mainly the financial obligations such as the payment of the initial fee and royalties.

* Restrictions or cost implications in relation to termination

With the exception of damages following termination for breach and costs for the removal of signage, the termination of the franchise agreement does not incur specific costs as long as certain rules are observed.

## Obligations of the franchisor

The franchisor must ensure the know-how is properly transferred and ensure that franchisees can make good use of the trademark. The franchisor is also obliged to ensure proper assistance is provided to franchisees.

The challenge is to determine how much support the franchisor needs to provide to the franchisee: the franchisee remains an independent businessman and as such, the franchisee is responsible for the management of its own business.

The role of the franchisor should therefore be limited to providing advice and technical training, which can ensure the successful implementation of the franchised concept and the franchisor may opt to extend this role to marketing aspects. The duty of support, however does not imply financial support to franchisees.

Support is due to the franchisee from the moment of execution of the franchise agreement and as long as it is valid. Also, special attention should be given to franchisees that are in difficulty.

Moreover, the French courts seem to consider the collective dimension of a franchise network. In this context, a franchisor has a particular duty to watch over its network, in the interests of all its members. A franchisor that does not exercise its control and supervision over the network is likely to incur liability. As such, franchisors have the duty to ensure that a franchisee does not violate the territorial exclusivity of another franchisee. It must also ensure that a member of the network does not tarnish the image of the trademark as a whole, for example by not complying with the concept or by violating health rules.

15.

Does local law require that particular provisions must be expressly included in a franchise agreement?

As seen in Question 4, a franchise agreement must contain (i) a trademark license, (ii) the communication of specific know-how, and (iii) an assistance from the franchisor to franchisees.

The lack of one of those provision may cause the nullity of the franchise agreement.

Regarding the existence of a trademark license, the franchisor must have rights over the trademark, which rights are then licensed pursuant to the franchise agreement. This implies that the trademark has been properly filed and registered before the French intellectual property institute (the “Institut National de la Propriété Industrielle” or “INPI”). In any event, the trademark must exist before the franchise agreement can be considered valid.

However, the franchisor is not required to own the trademark. Rather, it is perfectly valid for the Franchisor to license a trademark owned by a third party.

French courts consider that a franchisor that licenses a trademark can validly franchise and grant a sub-license even if the trademark license has not been registered before the INPI. The absence of such filing has one effect: the franchise contract will not be enforceable against third parties; it shall be considered as having no effect and third parties may ignore its existence.

The trademark must meet certain conditions. It must not be generic or harm the rights of third parties. Furthermore, it must be “notorious” in the sense of being well known, and the franchisor must ensure its promotion.

No franchise agreement exists if the trademark is generic or merely describes the product or service. In such case, Courts will declare the contract null. French law is also sensitive to the trademark’s “notoriety”. Of course, this “notoriety” requirement is not intended to apply when the trademark is new. However, in such a case, the franchisor must be diligent in promoting the new trademark to the public. In general, it is the franchisor’s duty to protect the trademark’s reputation and ensure that it is not damaged by the acts of any third party.

Regarding the communication of a specific know-how to the franchisee, it is not considered a secondary obligation, but rather as a main feature of the franchise agreement. A franchisor has the obligation to prove that it has provided to its franchisees identifiable and “one of a kind” know-how without which the franchise system cannot function. In addition, this know-how must provide an economic advantage to the franchisee in the market and must also be confidential.

Regarding the assistance to the franchisee, and according to the Guidelines on Vertical Restraints of the European Commission, "*the franchisor usually provides the franchisee during the term of the agreement with commercial or technical assistance*". The concept of assistance, however, remains unclear. French case law has defined it in several different ways.

In consideration of a franchisor providing franchisees with the aforementioned elements, franchisees pay an initial franchise fee and royalties.

16.

Are exclusion and entire agreement clauses enforceable in your jurisdiction? If so, are they effective to protect the franchisor?

Exclusion and entire agreement clauses are enforceable in France and are effective to prevent the parties to the franchise agreement from subsequently raising claims that statements or representations made during contractual negotiations, and prior to the signing of the written contract.

17.

Can the franchisor impose product tying or other purchasing restrictions and non-compete obligations on the franchisee during the term of the agreement?

## Restrictions on purchasing and product tying

The non-compete obligation may take several forms.

The first is an exclusive supply provision. Article L. 330-1 of the Commercial Code, states that the maximum duration of an exclusive or quasi-exclusive supply provision is ten years. Exclusive supply must be indispensable in order to maintain the identity of the network. Therefore, the products targeted by the exclusive

Non-compete obligations and transfer restrictions

The second form of non-compete is the clause of non-affiliation to a competing network during the performance of the franchise contract. This clause is perfectly legal and it usually applies to the franchisee as a legal entity and to its directors and shareholders.

## Fees and payments

18.

What fees are usually payable by the franchisee? Are there any restrictions on the parties' freedom to set the fees and payments, or any other payment requirements?

* Initial Fee

The amount of the initial fee is freely determined. The contract specifies the payment terms to the franchisor. It is generally expected that the initial fee is due upon signing the contract, and not from the effective date the premises, if any, are opened for business.

When a pre-contract is concluded, the parties generally provide for the payment of a percentage of the initial fee. These amounts are generally stipulated as not refundable.

* Royalties - methods of payment

The royalty fees are usually fixed and are proportionate to the turnover of the franchisee. The rate is usually in the range of 5 to 10%. The parties can also specify a variable rate to reflect a revenue range.

The clause usually specifies what services are covered by the royalty fees.

The payment terms of the royalty fees are defined with precision.

However, and even if there are no limitations on the amount of fees, the franchisee can obtain of the Court the reimbursement of any fee if he can demonstrate that:

* the franchisor failed to perform his contractual obligations, or
* the contractual fee is abusive and cause a significant imbalance in the rights and obligations of the parties.

## Term of agreement and renewal

19.

Are parties free to agree on the term of the franchise agreement? What is the typical term of a franchise agreement in your jurisdiction?

The maximum duration of a franchise agreement is ten years.

According to a study of the French Franchise Federation, the average duration of the contract is seven years.

According to general contract law, the contract that expires is tacitly renewed when the parties continue to perform their contractual obligations. In that case, the contract becomes a permanent contract and each party may terminate the contract at any time as long as reasonable notice is given. To avoid this situation, it is therefore very common to include tacit renewability clauses, which specifically stipulate that the contract shall be renewed for a period identical to the initial period.

20.

What rights of renewal are usually included in the franchise agreement? Are fees paid on renewal?

## Commercial practice

In case of renewal, the franchise agreement may provide that the franchisee shall pay an entrance fee. However, this practice is not typical of French practice.

## Local law

There is no right of renewal nor any legal restrictions on fees or charges payable on renewal in France.

## Termination

21.

Are there any limitations on the right of a franchisor to terminate the agreement?

Without a termination clause, a contract can only be terminated by a Court. Therefore, the purpose of a termination clause is to allow the franchisor to unilaterally terminate the contract if the franchisee breaches the franchise agreement. The types of breach need not be defined (although the contract usually provides a list of examples which give rise to the right to terminate).

The termination clause always specifies the prior notice duration and post-contractual consequences.

L. 442-6, I, 5° of the Commercial Code prohibits any *"abrupt termination of an established commercial relationship".* The franchise relationship is an *"established business relationship"*. The franchisor may be held liable if the termination clause is not respected, and in particular if the franchisee is not given sufficient notice.

The non-renewal of the franchise agreement that expires pursuant to its stipulated term is not wrongful. Most franchise agreements contain specific provisions dealing with renewal and the timeframe for any renegotiation, if any. However, the franchisor is not at fault as long as it exercises its right not to renew in accordance with the limitations of the renewal provision. Nevertheless, the Courts have at times judged the non-renewal as abusive if the franchisor induces the franchisee to make investments shortly before the contract expires. Similarly, the franchisor may be liable if it induces the franchisee into thinking that the contract would be renewed.

Franchisors are generally not required to support and assist its franchisees during the post-contract period and facilitate the conversion of premises or sale of the business. Indeed, the Supreme Court has stated clearly that the franchisor is under no obligation whatsoever to watch over the fate of the franchisee after the termination of the franchise contract.

22.

Are post-term restrictive covenants enforceable?

The post-terminationnon-compete obligation is valid. However, it has to meet certain conditions.

Case law provides a certain protection to the franchisee by imposing certain requirements. Case law reminds us that “*post-contractual* *clauses of non-affiliation or non-compete provisions are only legal if they are part of the franchise, namely, if they are indispensable to assure the protection of the transferred know-how, that can only benefit the members of the network, and allow the franchisor the time to re-establish a franchisee in the zone of exclusivity and provided it remains proportional to the goal that they pursue”.*

In order to be valid, the non-compete clause or the non-affiliation clause must be limited within time and space and must be proportionate to the goal and to the protection of the network. In this regard, the non-compete clause does not appear *“in proportion to the legitimate interests”* of the franchisor when it prohibits the reinstallation of the franchisee within a 50 kilometres radius for a fast food chain.

In competition law, EU (European Union) regulation nº 330/2010 of April 20, 2010 imposes certain additional restrictions. It provides that any post-contractual non-compete obligation should not exceed one year. Most franchise agreements in France abide by this EU time limitation, notwithstanding the fact that in general the EU regulation is not applicable, given that most franchise agreements do not have any effect on trade between EU countries. French competition law has however aligned with this approach, in particular following the enactment of law No 2015-990 of 6 August 2015, said “*loi Macron*”.

23.

Can the franchisor or a replacement franchisee continue to sell to the former franchisee's customers?

As long as the franchisor complies strictly with the termination clause of the franchise agreement, the franchisor is not required to provide any compensation to the franchisee.

In French law, only an agent is entitled to compensation at the end of the contract in compliance with Article L. 134-12 of the Commercial Code. No other type of distributor is entitled to payment for the loss of customers. Indeed, the franchisee is deemed as having its own clientele. This rules out any indemnification right.

Therefore, the franchisor or a replacement franchisee can sell to the former franchisee’s customers.

## Choice of law and jurisdiction

24.

Will local courts recognise a choice of foreign law in a franchise agreement for a business operating in your jurisdiction?

The franchise agreement may include a clause with the choice of applicable law If a foreign law clause is chosen in the franchise agreement and the French Court is requested by a claimant to apply such foreign law, if French private international rules so permit, the French Court will hear the case. The choice of a foreign law, however, does not prevent the enforcement of mandatory French laws, such as the pre-contractual information requirement.

25.

Will local courts recognise a choice of foreign jurisdiction in a franchise agreement for a business operating in your jurisdiction?

The choice of the competent forum is perfectly free and, if French private international rules so permit, local Court will recognize the choice of a foreign jurisdiction.

# Operations Manual

26.

How does the franchisor ensure that the franchisee complies with the business standards, systems and requirements?

Such compliance is ensured by the provisions contained in the franchise agreement.

27.

Can the franchisor change the Operations Manual unilaterally, as is usually required?

The right of the franchisor to introduce changes, both to the Manual and other aspects of the franchised business are often and should be addressed in the franchise agreement, which should take into account a maximum frequency and investment amount limit for the franchisee.

# Liability issues

28.

What are the franchisee's remedies against the franchisor for deceptive or fraudulent selling practices?

Deceptive or fraudulent practices may constitute grounds for termination or rescission of an agreement under general French contract law. Such practices may in addition give rise to criminal proceedings.

29.

How can third-party claims against the franchisee be brought successfully against the franchisor?

## Indemnity

Franchisor and franchisee’s relationship is governed by the franchise agreement, which usually addresses issues such as claims regarding the trademark or defective product issues. Third party claims may arise under tort.

## Precautions

The Pre-contractual Information Document usually mentions that it is the duty of the franchisee to inquire, and to verify, with his own counsels, if the franchise project is viable. Similarly, the franchise agreement mentions typically in its preamble that the franchisee has done its own relevant due diligence and sign the franchise agreement knowingly.

# Intellectual property

30.

What provisions are usually made in relation to intellectual property rights (IPRs), including know-how?

The trademark license is a characteristic feature of the franchise agreement and one of the components of the franchise grant, the other being the right to use the franchisor’s know-how for the duration of the contract.

The provision relating to the franchise grant and intellectual property rights including know-how describes in detail all the elements covered by the franchise and forbids the franchisee from making any changes to them.

The right to sue a counterfeiter is typically expressly reserved to the franchisor. In the meantime, if the franchisee has obtained from the franchisor the agreement to do so, he may be authorized to sue a third party in unfair competition.

31.

What are the registration requirements for licensing IPRs?

Since a franchise agreement is a hybrid trademark license and services agreement, the franchise agreement may be registered before the INPI. However, the absence of such filing has no effect on the validity of the franchise agreement.

# Real estate

32.

Are consents from landlords difficult to obtain when transferring leases or granting subleases from a franchisor to a franchisee?

Commercial lease agreements in France contain change of control clauses which may require the landlord’s prior consent or in other cases its mere notification.

33.

How can a franchisor prevent the franchisee from occupying the premises after the franchise agreement has ended?

A franchise agreement includes specific provisions pertaining to franchisee’s obligations to cease to operate its franchised business upon the expiration or the termination of the franchise agreement.

However, franchisee remaining at all times an independent merchant, the franchisor does not interfere in the relationship between the franchisee and the lessor of its premises.

34.

How can the franchisor effectively acquire the franchisee's premises at the end of the franchise relationship?

These issues are governed by the provisions of the franchise agreement which may for instance provide for right of first refusal, of first offer, or of assignability mechanisms. Again, as stated above, the intervention of the lessor is subject to the provisions contained in franchisee’s agreement with the lessor. No other legal formalities are required.

35.

If the franchisor leases or subleases its own site to its franchisee, can it pass on all related costs to the franchisee? Can the franchisor charge its franchisee tenant a rent expressed as a percentage of the franchisee's sales?

Yes. This configuration is governed in France by the regime said of lease-management (“*location-gérance*”), under which all such related costs may be passed on to franchisee.

# Competition law

36.

What is the effect of competition law rules on franchising agreements? Are there any available exemptions?

## Competition law

EU competition law forbids franchisors to impose minimum retail prices for franchisees to apply.

As stated in Question 22, French and EU law limit the time and territorial scopes of non-compete clauses.

In addition, it must be reminded that general French and EU anti-trust rules apply to franchise networks, such as rules regarding monopolies and concentrations.

## Exemptions

Exemption rules relate to general anti-trust rules and are not specific to franchising.

## Online/e-commerce restrictions

Under EU competition law, franchisors cannot forbid franchisee’s use if the internet. Such can only remain limited to franchisee’s territorial rights granted by the franchisor. Franchisors may however organize such use of the internet in order to protect its network and brand image.

# Employment issues

37.

Can a franchisee be regarded as an employee of the franchisor?

As a matter of principle, the franchisee is considered an independent trader and employer of its own employees.

It is therefore legally impossible to consider franchisee’s employees as the employees of the franchisor.

However, the qualification of independent trader implies that the franchisee indeed acts as such. If during the franchise agreement, the system induces the franchisee to lose its independence and causes the franchisee to be placed in a subordinate relationship to the franchisor, French Courts have already decided that the franchisee could be considered an employee of the franchisor such that Labour laws would apply.

The Courts are particularly attentive if a franchisor (i) strictly defines retail prices, and/or (ii) is contractually considered the owner of franchisee’s client list.

In the event of termination of the franchise agreement, the employees remain under the employment of the former franchisee.

If there is a transfer of the business to a new legal entity, the employment contracts are transferred automatically. The rule is defined in Article 1224-1 of the Labour Code which states that “*if a change occurs in the legal status of the employer, namely in case of inheritance, sale, merger, transformation of the business, or the incorporation of the company, all labour contracts, effective at the time of the change, remain valid between the new employer and the company’s personnel”.*

# Dispute resolution

38.

How are franchising disputes typically dealt with? What provisions for handling disputes are usually included in domestic franchise agreements?

Domestic franchise agreements usually provide for judicial proceedings, in particular for reasons pertaining to cost. French proceedings present the advantage not to be costly.

The French judicial presents in addition the advantage of disposing of an original judicial institution: the *juge des référés*, who may be petitioned to order urgent interim measures.

Finally, a mandatory preliminary conciliation process has been introduced by Decree of March 11, 2015. It is applicable to all commercial disputes. The claimant’s claim form must mention what steps were taken to reach an amicable solution.

Where appropriate, the judge may order a measure of conciliation or mediation when it appears that the parties have not attempted to find an amicable outcome.

This requirement does not exist, however, in emergency situations where one party, for instance, is seeking an injunction.

France is however an attractive international center for arbitration, and international agreements may often contain arbitration clauses. French law is indeed very liberal regarding the enforcement of arbitral awards.

International agreements providing for overseas forum and governing law are valid under EU and French private international law, provided that such does not violate the “French international public order”, concept which may be defined as a set of fundamental principles which a court, when rendering any decision, must at all times comply with.

39.

How are foreign judgments or foreign arbitral awards enforced locally?

Foreign judgments and foreign arbitral awards can be enforced efficiently in France.

France has signed the New York Convention on the recognition of Formal Arbitral Awards. This convention has been in force in France since September 24, 1959.

# Exchange control and withholding

40.

Are any exchange control or currency regulations applicable to payments to an overseas franchisor?

There are no such exchange control or currency regulations, subject to franchisor’s local law and administration.

41.

Is there a withholding obligation on payments made to an overseas franchisor?

France has concluded international tax treaties with most countries in the world. Such issues are dealt with in accordance with such treaties.

International franchise agreements often contain provisions pertaining to withholding taxes (gross-up clauses specifying upon whom the burden of withholding taxes shall be imposed).

# Reform

42.

Are there any proposals to reform the laws affecting franchising?

No specific proposal to reform franchise law exists in France.

However, the decrees relevant to the law regarding the modernization of social dialogue of July, 21 of 2016, are yet to be published.

In the meantime, the French Government has issued on February 10, 2016, an Ordinance enacting a new law applicable to contracts. It was published on February 11, 2016 and shall enter into effect on October 1st, 2016.

It contains in particular the right for the Courts to aggressively reinterpret contractual terms and intervene in the contractual relationship, mostly in favour of the weak party, with the goal being to balance the rights and obligations of parties.

This departs from the civil tradition, which dates back several centuries by which the law will enforce what the parties have agreed to. This principle takes its source in the roman proverb *pacta sunt servanda.* Under this tradition, the role of the Courts is limited in commercial matters to interpretation of unclear language, with the Courts otherwise refraining from “administrating” the contract.