**A. Business Overview**

* *Governmental approach to business/commercial activity.*

The French products and services sector of distribution is subject to specific regulations and controls. The Commercial Code provides special rules applicable to the distribution sector which tend to introduce a certain level of transparency and prohibit abusive behaviour of those businesses which hold a strong market position. In addition there exist several agencies responsible for enforcing said rules (the Competition, Consumption and Fraud Repression Authority – “DGCCRF”) and consultative institutions such as the Commission for Examination of Business Practices.

Therefore, business’ freedom to organize their relationships is subject to certain constraints imposed by governmental agencies.

* *View on/assistance to inward investment*.

The French Government is active in attracting investments into France. Two institutions that had a mission to promote the attractiveness of France to foreign economic operators, "Ubifrance" and "the French Agency for International Investment ", merged since 1st of January 2015. From now on, the organisation is named "Business France” and its function includes prospection and guidance into France of foreign investors. The institution is active in 70 foreign countries.

* *Banks’ support for franchising.*

All main French banks have developed a franchise department assisting franchisors and franchisees alike.

* *Brief overview of the franchise market.*

Franchise networks have an important impact on the French economy. In 2014, France had 1,796 franchise networks. These networks operate 68,171 independent franchise stores and 38,724 branches owned by franchisors. Franchised stores generate a revenue of 51.45 billion euros. The branches, in turn, have a combined turnover of 83.25 billion euros. The total turnover is 134.7 billion euros for all franchise networks. The impact on employment is also important. Franchisees employ 335,271 employees and branches employ 379,309[[1]](#footnote-1) employees.

Furthermore, the indirect contribution to the French economy is significant since the networks consume approximately $ 114.27 billion in products and services.

**B. Franchise Association**

The main trade association of the franchise sector in France is the "French Franchise Federation" which includes among its members 160 networks. Although it is an active organization it represents less than 10 percent of the total of franchise networks.

The founding principles of the French Franchise Federation (the “Federation”) are contained in the European Franchise Federation Code of Conduct (the “Code”), and joining the Federation requires that the Code must be followed.

The conditions for membership are the following:

1. the franchise network must be composed of at least two franchised outlets;
2. the franchise concept must be professional;
3. the franchisor must abide by the Code.

The application is submitted to the Board of the Federation which is composed of 19 members.

In order to become a member of the Federation, contact should be made with Mr. Alexandre GERMAIN (+33 (0) 1 53 75 30 74 – a.germain@franchise-fff.com).

**C. Definition of Franchising**

French statute law does not define a franchise agreement.

Its definition is provided by case law, as a relationship characterized by the existence of three elements:

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

The first criteria is the existence of a trademark license.

The franchisor must have rights over the trademark, which in turn are to be licensed by 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 for the franchise agreement can be considered as valid[[2]](#footnote-2).

However, the franchisor may very well not own the trademark. It is perfectly valid for the Franchisor to be holder of a license of the trademark, owned by a third party.

French courts consider that a Franchisor, holder of a license can validly franchise and grant a sub-license even if the trademark license has not been registered before the intellectual property institute. The absence of such filing has one effect: the franchise contract will not be enforceable against third parties[[3]](#footnote-3), it shall be considered as having no effect and third parties may ignore its existence.

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

The franchise contract is deprived of cause if the trademark is generic or merely describes the product or service[[4]](#footnote-4). In such case, Courts will declare the contract null.

French law is also sensitive to the trademark's “notoriety”. It must have a certain “notoriety”. Of course, this “notoriety” requirement is not intended to apply where the trademark is new. However, in such a case the franchisor must put emphasis on promoting it to the public. In general, it is for the franchisor to protect the trademark’s reputation and ensure that it is not damaged by the acts of any third party[[5]](#footnote-5).

The second criteria relates to providing a specific know-how to a franchisee. It is not considered as a secondary obligation but as a main feature of the franchise agreement[[6]](#footnote-6). It will be up to the franchisor to prove that it has provided to 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 be confidential.

The third criteria is assistance to the franchisee. 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"[[7]](#footnote-7). The concept of assistance, however, remains unclear. French case law has defined it in several different ways.

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

**D. Franchise Laws**

* *Laws that apply specifically to or are particularly relevant to franchising*

In France, franchising is not subject to a special statutory regime. 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”.

* *Registration*

No specific filing requirement exists in France.

* *Disclosure requirements whether contained in a specific disclosure law or as a part of a general obligation to prove pre-contractual information.*

French case law has developed over the years, on the basis of Article 1134 paragraph 3 of the Civil code, a duty of good faith in the pre-contractual negotiation of agreements.

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 31st 1989, a specific law containing only one Article was voted 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 the promotional documents, it is clear that the franchisor cannot be held liable if the information 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 for prospective franchisees. Courts have held the franchisor responsible if the promotional documents contain information that is so vague or inaccurate that it directly misled the prospective franchisee[[8]](#footnote-8).

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”[[9]](#footnote-9).* The franchisor thus takes the risk of having his promotional materials considered as part of the contract. Therefore, he must make sure that his advertising is honest, without going into detail.

**The 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:

1. 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 as well as the business registration number.

The managers also need to be identified, with details of any criminal records[[10]](#footnote-10).

1. 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.

3) 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.

1. 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...) as well as the franchisor’s managers’ experience, has to 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 had provided false information regarding the credentials of the franchise directors[[11]](#footnote-11).

1. A general and local market study and the franchise system’s potential for development

The local market study is information to which one needs to pay close attention to. This information allows the franchisee to evaluate the investment opportunity.

If the presentation of this local market study can remain general, it should not be incomplete, misleading or unreliable[[12]](#footnote-12). For example, the information is defective when it fails to report the presence of nearby competitors[[13]](#footnote-13).

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. The franchisor is in particular not required to provide the franchisee with a forecast balance sheet[[14]](#footnote-14).

Moreover if the franchisor provides additional information, it is taking a risk because the franchisor accepts responsibility for all information communicated, whether or not such information is required to be provided. Thus, if the additional information were not to be true, the franchisee could claim to have been victim of fraud and claim compensation[[15]](#footnote-15).

For example, overly optimistic forecasts on which franchisee relied upon to make his decision could be sufficient to demonstrate that the franchisee’s consent was vitiated[[16]](#footnote-16).

1. 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 franchisees[[17]](#footnote-17).

1. 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, those granted to the franchisee (exclusive territory etc.) and the ones that apply to the franchisee such as supply obligations.

 8) 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, one needs to specify the amount that will be billed to join the franchise network. One 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[[18]](#footnote-18). Similarly, the pre-contractual information document must be given to the assignee of the franchise agreement[[19]](#footnote-19).

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 case of repeated offenses, the fine is doubled.

With regard to the civil sanction, the two main sanctions are the nullification 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 he was the victim of a “vice” of consent, such as error or fraud[[20]](#footnote-20).

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”[[21]](#footnote-21).*

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 nullification 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 in the duty to provide truthful information has caused direct harm to the franchisee[[22]](#footnote-22). However, the damages and direct effect of default on 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"[[23]](#footnote-23).*

**The special case of error on profitability -** French Courts recently admitted that the franchise agreement must be canceled when the franchisee miscalculated on the profitability of its business after having relied on the financial estimates provided by the franchisor.

As we have indicated, the pre-contractual information does not oblige the franchisor to provide the franchisee with any financial estimates. However, when such financial estimates are prepared by the franchisor and provided to franchisee and the effective financial results are far off course, the French judge may consider the franchisee erred on profitability justifying the cancellation of the contract[[24]](#footnote-24). A franchisor may however present the average network’s figures made by its franchisees[[25]](#footnote-25).

* *Relationship laws*

After the execution of the contract, the relationship between the franchisor and its franchisees comply with a specific legal regime. Both the franchisor and the franchisee have responsibilities.

**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 obligated 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 his own business[[26]](#footnote-26).

The role of the franchisor should therefore be limited to the provision of advice and technical training which can ensure the successful implementation of the concept and it may optionally be extended to marketing aspects. The duty of support, however does not imply financial support to franchisees[[27]](#footnote-27).

Support is due to the franchisee from the moment of execution of the contract and as long as the contract is valid. Also, special attention should be given to franchisees that are in difficulty[[28]](#footnote-28).

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 not exercising its control and supervision over the network would be likely to incur liability. As such, franchisors have the duty to ensure that a franchisee does not violate the territorial exclusivity of another[[29]](#footnote-29). It must also ensure that a member of the network does not tarnish the image of the trademark as a whole[[30]](#footnote-30), for example by not complying with the concept or violating health rules.

**Obligations of the franchisee -** Just as the franchisor has to supervise its network, the franchisee needs to ensure that he does not to 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[[31]](#footnote-31).

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*

The termination of the franchise agreement does not incur specific costs as long as certain rules are observed.

**Insolvency of the franchisee** – If the difficulties of the franchisee lead it to insolvency, the franchisor is, in principle, free of responsibility. The Court of Cassation decided that in fact, *“if the trademark has not been as successful as it was expected to be, the franchisee does not have the right to request compensation from the franchisor except he can prove that the latter defaulted on its contractual obligations”[[32]](#footnote-32).* On the other hand, the franchisor may be held responsible to pay compensation for damages incurred if the franchisor breached its contractual obligations.

In the same way, if the franchisor interfered with the management of the franchisee, it could be considered as the “de facto manager”. The “de facto manager” is the person who is not the legal representative of the company, but who in reality, acts as if he is. The latter may be responsible for corporate social responsibility.

**Termination of an established business relationship -** 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 granted sufficient notice.

The non-renewal of the franchise agreement which reaches 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 term of the contract[[33]](#footnote-33). Similarly, the franchisor may be liable if it induces the franchisee in thinking that the contract would be renewed[[34]](#footnote-34).

**Absence of compensation at the end of the contract –** As long as the franchisor complies strictly with the termination clause of the franchise contract, the franchisor is not required to provide any compensation.

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[[35]](#footnote-35). Indeed, the franchisee is deemed as the as having its own clientele. This rules out any right of indemnification.

**Lack of post-contractual support –** Is the franchisor required to support and assist its franchisee during the post-contract period and facilitate the conversion of premises or sale of the business? The answer is no. 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[[36]](#footnote-36).

However, if there is no duty to assist the franchisee at such time, the franchisor must not hinder franchisee’s business during such period. For example, if the franchisor has encouraged a specific buyer of the franchisee's business, franchisor may be held accountable if it deliberately mentions the cause of termination during the negotiation stage between the franchisee and the potential buyer, the effect of which being the end of the negotiation and franchisee’s losing a chance to sell[[37]](#footnote-37).

In general, the execution, performance and termination of the franchise agreement is subject to the good faith requirement, as required in Article 1134 paragraph 3 of the Civil code.

* *Laws that seek to protect the weaker party or treat franchisees as consumers*

**Inapplicability of consumer law -** 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.

**Protective provisions of the Commercial Code -** Even though the franchisee cannot be considered as a consumer, the franchisee falls 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[[38]](#footnote-38).

In a wider context, Article L. 442-6 of the Commercial Code prohibits certain restrictive practices such as gaining an advantage that is not related to a rendered service, comprising abusive fee conditions under the threat of a discontinuation of the business relationship, or the refusal to communicate one’s terms of sales.

* *Non-compete covenants (both in-term and post term)*

**The non-compete obligation during the term of the contract –** The non-compete obligation may take several forms.

The first 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.

The second form of non-compete is an exclusive supply provision. The latter is only legal, provided it respects certain terms specified by the law. The first is stipulated in Article L. 330-1 - of the Commercial Code, and states that the maximum duration of exclusive or quasi-exclusive supply is ten years. The second is that exclusive supply must be indispensable in order to maintain the identity of the network[[39]](#footnote-39). Therefore, the products targeted by the exclusive supply provision can only be products specific to the network and the franchise system.

**The post-termination non-compete agreement –** 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”[[40]](#footnote-40).*

The non-compete clause or the non-reaffiliation clause are therefore necessarily limited within time and space[[41]](#footnote-41) and have to 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[[42]](#footnote-42) when it prohibits the reinstallation of the franchisee within a 50 kilometers radius for a fast food chain.

In competition law, UE (European Union) regulation nº 330/2010 of April 20, 2010 imposes certain additional restrictions. It provides inter alia that 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 tends to follow more and more a similar approach.



* Can franchisors protect themselves from misrepresentation claims?

It is not possible to insert a clause by which a franchisee waives in advance his right to rescind the contract or to claim damages in the event the franchisor breached prior disclosure obligations or made misrepresentations.

The ways to protect a franchisor from a misrepresentation claim is by ensuring a complete and fair information to the prospective franchisee. The information is contained in the pre-contractual information document, must be established in writing and signed by the candidate, so as to constitute evidence that the mandatory information has been provided.

The burden of proof lies with the franchisor[[43]](#footnote-43).

Regarding an action based on an error on profitability, the best option is not to provide candidate franchisees with financial estimates.

However, a clause can define in advance a limitation of liability and the level of damages, as long as the amount is not excessive since in such a situation the Court could construe this provision as an indirect way to waive any responsibility and damages and not consider such a provision as lawful.

**E. Franchise Agreements**

The franchise contract is in general drafted by the franchisor and is rarely negotiable. Such a contract usually includes the following:

1. franchise grant

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 trademark license describes in detail all the elements covered by the franchise and forbids the franchisee making any changes to them.

1. 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.

1. Grant of exclusivity

The franchise contract can have territorial exclusivity. However, in function of the sector’s activity and the density of the franchising network, exclusivity is not always desirable. In fact, when the network needs to develop quickly, territorial exclusivity may hinder the recruitment of new franchisees.

1. Duration

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

The terms of renewal also have to be set out. In fact, 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. So as to avoid this situation it is thus very common to include tacit renewability clauses which specifically stipulate that the contract shall be renewed for a period identical to the initial period.

1. Provisions concerning the identity of the contracting parties

The identity of the franchisee is an important element. In fact, in French law, the franchise contract is a contract concluded *intuitu personae* (in function of the person). Therefore, the identity of the franchisee must be determined: the full references the legal entity are stipulated as well as the information regarding the natural person the *intuitu personae* relates to.

In general, the *intuitu personae* concept is further defined in the contract. The *intuitu personae* clause is usually stipulated in an asymmetric way, which means that that the changes that affect the franchisor (change of ownership in particular) have no effect on the contract. However it applies to the franchisee and has two legal effects: the contract cannot be assigned to a third party without prior approval of the franchisor and the third party has to be approved by the franchisor.

1. Training

The training of the franchisee is one of the ways in which the franchisor provides its support and assistance. It is particularly important when the concept is technical or evolutionary. The clause may foresee mandatory training sessions for the franchisee, organized by the franchisor as well as the training of the franchisee’s personnel.

Furthermore, the clause relating to training specifies the financial terms and in particular who is responsible for the cost and expenses incurred in training (travel, lodging…).

1. Advertising

The franchisor has an obligation to promote the network. The franchise contract may set out the terms for this and specifically the financial contribution from the franchisee in the form of an advertising fee.

The contract can also distinguish between nationwide advertising – organized by the franchisor – and local advertising, which falls under the responsibility of the franchisee.

1. Royalties - modes 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 in function of the 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.

1. Assignment of Contract

The franchise agreement concluded *intuitu personae* is not transferable by the franchisee without franchisor’s prior approval. The contract usually includes a pre-emption right enabling the franchisor to buy the business at the price offered by the prospective purchaser.

1. Termination

Without a termination clause, a contract can only be terminated by having recourse to a judge. The purpose of a termination clause is thus to allow the franchisor unilaterally to terminate the contract if the franchisee is in breach. The types of breach need not be defined (although the contract usually provides for 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.

1. *electio juris* and dispute settlement clause

Like any business contract, the franchise agreement may specify the law applicable to it and the competent court or arbitration body.

Regarding applicable law, freedom of choice is however not complete. The choice of a foreign law is possible only in the presence of a foreign element (for example, if the registered office of the franchisor is located abroad). Moreover, it should be noted that certain provisions of French law are mandatory. This is the case for the pre-contractual obligation imposed by Article L. 330-3 of the Commercial Code.

The choice of the competent forum is perfectly free.

**F. Trademark/Know how**

* *How are trade names protected/registered?*

The protection of trade names is ensured through the application of unfair competition rules: one may not operate a trade name which creates a risk of confusion in the mind of consumers.

Trade names are not registered *per se* but can be indicated in franchisor’s company information (the “Extrait Kbis”). This will permit to establish a specific date as from which the trade name has been being used.

* *Procedures to obtain a trade mark.*

Trademark protection in France can be done in three ways: by filing a national trademark with the National Institute of Industrial Property*,* by obtaining a community trademark or by filing an international trademark.

In all three cases, the request will be processed or received by the INPI.

**Preliminary stage of the filing of a national trademark -** The franchisor must first determine the goods or services that are the subject of the trademark. It thus determines the number of "classes» for which the trademark registration is requested.

Once this is done, the franchisor should make sure that the trademark is available for each class of products or services. This research can be done by using the electronic database of the INPI.

The trademark may consist of any signs capable of being represented graphically, and in particular words, including personal names, designs, letters, numerals, the shape of goods or of their packaging.

**The filing of an application for a trademark** – An application form needs to be sent to the INPI. The franchisor needs to follow the proper procedure to file the trademark, in particular the way in which the application needs to be made (in writing or electronically). The payment of fees needs to be done at the same time (200 to 225 euros for a trademark falling under three classes of products or services and 40 euros per additional class of products or services).

The INPI acknowledges receipt indicating the date of receipt and the number of the trademark. A notice is then published in the Official Bulletin of Industrial Property (*Bulletin Officie de la Propriété Industrielle)* within 6 weeks of the filing.

**Application review -** INPI examines whether the mark can be registered. The INPI will verify whether the filing formalities are met and if the trademark is legally available and can be validly registered.

In addition, for a period of two months, the registration of the trademark may be subject to objections or observations by third parties.

In any case, the INPI will inform the franchisor if irregularities are found or if objections or comments have been raised. The applicant then faces the choice of either amending the application, responding to the objections and comments, or requesting a full or partial withdrawal of the application.

The INPI may reject the application fully or partially within five months. Once the trademark is registered, the INPI proceeds to its publication in the Official Bulletin of Industrial Property (*Bulletin Officiel de la Propriété Industrielle)* and provides a certificate of registration.

* *Will your jurisdiction be included in a community trade mark?*

Since France is a member of the European Union, it is possible to obtain a trademark that is valid over the entire territory of the European Union through the registration of a community trademark.

This community trademark can be obtained through the Office de l’Harmonisation dans le Marché Intérieur (OHMI) (Office for harmonization in the Internal Market, OHIM). When applicable, the application may be addressed to the INPI, who will transfer it to the OHMI.

* *What elements would be included in copyright protection and how is it obtained?*

In France, copyright protects the original creation of works as diverse as drawings, an audiovisual work, a book, a photograph or even a musical piece. The protection is obtained without registration.

This creation is protected, provided it is new and can be traced to its author. The legal issue is that of proof.

Although designs are protected by copyright, designs are also protected under the legislation regarding drawings and designs, through their registration which is before the INPI, and at the end of the filing procedure, the INPI will proceed with the publication (optionally deferred, in order to keep the creation secret) and deliver a « certificate of authenticity ».

Regarding the Operations Manual, it can be filed before an agency designated as *société d’auteurs.* There are several each concerned with a specific type of creation (videos and music, writings, etc...)*.* Their main mission is to keep a record of the creation and provide the required proof that the original creation is that of a specific author.

* *How is know-how protected?*

In French law, know-how is not protected by intellectual property rights. The protection of know-how is therefore particularly complex.

Know-how can, however, be subjected to criminal protection and may be protected by different mechanisms of civil liability.

From the point of view of penal law, Article L. 1227-1 of the Labor Code specifies that a *« manager or employee »* who reveals or attempts to reveal a «*trade secret »* may be sentenced to two years of imprisonment and to a fine of 30,000 euros*.* This offence is also established when the revealed secret does not concern the company who employs the « *manager or employee ».*

The know-how can also be protected under tort law or contract law.

The know-how can first and foremost be protected under certain conditions, by civil proceedings on the basis of unfair competition. The judge will recognize the existence of a tort if the company uses the know-how of another company, provided that the know-how is not common-place[[44]](#footnote-44).

The franchise agreement can also protect the know-how of the company, provided that the contract is sufficiently precise on the definition of know-how to be protected. French case law acknowledges the effectiveness of confidentiality clauses imposed on employees[[45]](#footnote-45), distributors and franchisees.

* *Is your country a signatory to the Madrid Agreement/Protocol?*

France was one of the first countries that signed the Madrid Agreement in July 15, 1982. France is also party to the Madrid Protocol since November 7, 1997.

This membership is valid for the entire French territory, including the overseas territories.

**G. Real Estate**

* *Overview of the real estate market.*

In general, commercial rents have followed a regular and inflationary increase during the years 2005 to 2010. Subsequently the global economic crisis has slowed the property market in France, but up to 2014 the rents have remained stable. Since 2015, rents have started to decrease due to a change in bargaining power between landlords and tenants[[46]](#footnote-46).

* *Types of real estate ownership – freehold/leasehold/licence*

The rental of commercial space usually takes the form of a « commercial lease », governed by Article L. 145-1 and following Articles in the Commercial Code.

The commercial lease is first obtained by the purchase from the existing owner of its *fonds de commerce* – or goodwill –. This is a unique French concept that does not exist in common law countries. The main condition which must be met for this to occur is that the incoming business person will operate the same type of business as the exiting business person. It is bought from the exiting business owner. The price is usually a percentage of the sales of the exiting business person.

If the acquisition of a *fonds de commerce* is not possible, the incoming lessee either buys into a new commercial lease or buys from the existing lessee the existing commercial lease at a defined price (the pricing being much lower since it is assumed that the seller is not selling an identical business), the lessor often requesting some sort of entry fee.

The commercial lease is valid for a minimum duration of nine years. The lessee, however, has the right to exit the lease at the end of every three year period (three years, six years or nine years).

The lease is freely agreed upon by the parties at the signing of the contract. The amount of the rent may, however, be modified when the lease is renewed or revised. In this case, it will be established from the market value of the commercial real estate in the catchment area.

The commercial lease specifies the type of business which can be undertaken on the premises. The lessee cannot change it, unless it requests a change of the contractual use of the space”, which will be negotiated with the lessor and authorized by the court.

French law considers that the customers of the lessee are his property. It is on this legal assumption that the law protects the lessee and its *«*commercial property*»* by giving the right to the lessee to transfer the lease with the business to a new lessee without prior approval from the lessor, or to obtain automatic renewal of his commercial lease. The lessor is discouraged from refusing a renewal by the obligation to pay compensation for eviction which *« includes in particular the market value of the goodwill, determined by the professional use, and optionally increased by the costs of moving and set-up in a new location, as well as the costs and transfer tax to be paid for a business property of the same value. »*

* *Are franchisees entitled to retain possession of the Premises on termination*?

The franchisee, who is the holder of the commercial lease, has a right to the commercial property[[47]](#footnote-47). Since the customers are supposed to be the customers of the franchisee, the previous franchisee may remain and operate in the premises after the termination or the expiry of the franchise agreement, subject to the post-termination obligations set out in the franchise agreement.

* *Do generally franchisors hold leases and grant sub leases to franchisees or do franchisees obtain their own leases from independent landlords?*

In general, the franchisee signs a commercial lease with a lessor who is not the franchisor.

Nothing prohibits the franchisor from granting leases or subleases to its franchisees. Nevertheless, the main difficulty remains the agreement of the commercial lease, which in French law is considered as “commercial property”. In the event the franchise agreement ceases, the franchisee remains holder of the right of the lease and can continue to operate from the premises.

* *What do franchisors do to obtain possession the franchise premises following termination?*

The franchise contract may include clauses allowing the franchisor to dispose of the commercial space upon termination.

First, it is possible to provide a right of pre-emption, benefitting the franchisor. This way, if the goodwill is sold, or the company holding the lease is transferred, the franchisee commits to grant the franchisor a right of priority when it comes to the sale of the business. This means that the franchisor shall benefit from a first option to acquire the business before any other third person.

On termination of a franchise agreement, whilst an automatic sale of the franchisee’s business place to the franchisor is more problematic, the transfer of the business space to the franchisor can be drafted into the franchise agreement, however it is not viewed favourably by the French Competition Authority. Such a right is not an anti-competitive practice. Nevertheless, the Competition Authority is concerned to ensure the freedom for a franchisee to continue to operate and maintain its commercial property by signing up with competing brands[[48]](#footnote-48).

**H. Tax**

* *Tax system*

**For the franchisee –** Several tax issues arise. The first is the tax treatment of the initial fee, the second is the tax treatment of royalties.

Depending on how the contract is drafted, the initial fee paid by the franchisee can either be considered as a deductible expense or an investment subject to amortization. Royalty fees are always deductible expenses.

**For the franchisor -** All the money collected, either by way of initial fee or royalties, are subject to corporation tax. The Corporate tax rate is currently 33.33% of profit.

* *Is there a double tax treaty with the US?*

The relevant tax treaty between France and the USA is dated 31 August 1994 and relates to taxes on income and on capital.

* *Are withholding taxes an issue?*

The 2009 Addendum to the tax treaty of 1994 imposes a withholding tax at the rate of 5%.

**I. Employment and Vicarious Liability**

* *Could a franchisee or its employees be treated as the franchisor’s employee?*

As a matter of principle, the franchisee is considered as 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 in the course of the life of the franchise agreement the system induces that franchisee loses its independence and is placed in a subordinate relationship to the franchisor, French Courts have already decided that the franchisee could be considered as an employee of the franchisor and as such Labour laws would apply[[49]](#footnote-49).

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

* *What happens to the employees in the event of a termination / transfer of a franchise?*

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

If the 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 labor contracts, effective at the time of the change, remain valid between the new employer and the company’s personnel”.*

1. **OTHER ISSUES**

The French Government is preparing a new law applicable to contracts, which will have a revolutionary impact on contract law in France. It is still at a consultation stage, yet it is creating controversy in the business community.

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, 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 had been limited, in commercial matters, to help in the interpretation issues of unclear language, the Courts refraining from “administrating” the contract.

1. **DISPUTES**
* *Is mediation required?*

A mandatory preliminary conciliation process has been introduced by Decree of 11 March 2015. It is applicable in 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.

* *Time scales, procedures and costs for a straightforward claim in which a franchisor seeks to enforce post termination non-compete agreements.*

The non-compete provision can be enforced before the *Juge des Référés*, a fast track commercial Court judge. This is a single judge Court, forming part of every commercial court in France.

Provided the conditions are met to present such a claim, the time between filing the claim and the hearing is usually four to six weeks, depending on the Court’s log. The decision is either taken at the hearing, or within a week of the hearing, and sent to the lawyers acting on behalf of clients, or directly to the parties since the presence of a lawyer is not mandatory.

Within this single judge Court procedure, there is a fast track process which requires that a judge from the commercial Court gives its approval for a fast track hearing which could take place from one to five days as from the moment the request for a fast track is granted.

The French Court system is free. On average a simple non-compete claim for which a lawyer is hired by either the claimant or defendant may give rise to a lawyer fee from two thousand to five thousand euros.

* *Is your country a signatory to the New York Convention?*

France has signed the New York Convention on the recognition of Formal Arbitral Awards.

This convention has been in force in France since 24th September 1959.

* *Are injunctions available and, if so, for what?*

The French Court system has a remarkable fast track Court institution called *Juge des référés.*

This Court, before which cases are heard by one judge only, has strong powers among which it can issue freezing orders, payment orders, orders to perform any required act, orders to cease acting in a particular way (in the event of unfair competition or prolonged use of a trademark despite the termination of the franchise agreement). The enforcement of all such orders is strengthened by the option for the judge, upon request from the claimant, to impose daily penalties.

* *Would your jurisdiction enforce a foreign law/courts clause?*

The franchise agreement may perfectly include a clause with the choice of applicable law and a clause relating to the jurisdiction. 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.

1. F. SAINT-CAST, L’impact économique de la Franchise en France, in *Toute la franchise 2015*, pp. 66-67. [↑](#footnote-ref-1)
2. Cass. Com., 6 Mai 2003 n°01-00.515. [↑](#footnote-ref-2)
3. Cass. Com., 4 nov. 2014, n° 13-21.393 ; CA Paris 15 Mai 2013 n°11/08620. [↑](#footnote-ref-3)
4. C.A. Paris, 4 Juill. 2008, n°07/07671. [↑](#footnote-ref-4)
5. CA Versailles 19 Juillet 2012 n°11/06147. [↑](#footnote-ref-5)
6. Cass. com. 18 déc. 2007, n° 06-15.970. [↑](#footnote-ref-6)
7. Cass. Com. 2010/C130/01, point 189. [↑](#footnote-ref-7)
8. Cass. com. 24 sept. 2003, no 01-11.595. [↑](#footnote-ref-8)
9. Cass. civ. 1re, 6 mai 2010, n° 08-14.461. [↑](#footnote-ref-9)
10. C.A. Paris, 28 Novembre 2012 n°10/09633. [↑](#footnote-ref-10)
11. C.A. Paris, 29 oct. 2014 n°13/24671. [↑](#footnote-ref-11)
12. C.A. Paris, 10 Sept. 2014, n°10/14533. [↑](#footnote-ref-12)
13. C.A. Montpellier, 21 Octobre 2014, N°13/03206. [↑](#footnote-ref-13)
14. Cass. com., 11 févr. 2003, n° 01-03.932. [↑](#footnote-ref-14)
15. Cass. com., 19 janv. 2010, n° 09-10.980. [↑](#footnote-ref-15)
16. Cass. com., 31 janv. 2012, n° 11-10.834. [↑](#footnote-ref-16)
17. C.A. Paris, 19 janv. 2011, n° 09/13977. [↑](#footnote-ref-17)
18. Cass. com. 14 janv. 2003, n° 00-11.781. [↑](#footnote-ref-18)
19. Cass. com. 21 févr. 2012, n° 11-13.653 ; Cass. com. 7 janv. 2004, n° 02-12.366. [↑](#footnote-ref-19)
20. Cass.com 25 Juin 2013 n°12-20.815. [↑](#footnote-ref-20)
21. Cass. com. 7 Oct. 2014, n°13-23.119. [↑](#footnote-ref-21)
22. C.A. Montpellier, 21 oct. 2014 n°13-03.206. [↑](#footnote-ref-22)
23. Cass. com. 25 nov. 2014, n° 13-24.658. [↑](#footnote-ref-23)
24. Cass. com. 4 oct. 2011, n° 10-20.956. [↑](#footnote-ref-24)
25. CA Aix-en-Provence, 21 fév. 2013, Juris-Data n°2013-004249. [↑](#footnote-ref-25)
26. Cass. com. 18 juin 2002, n° 99-20.788; Cass. com. 25 mars 2014, n° 12-29.675. [↑](#footnote-ref-26)
27. C.A. Paris, 31 janv. 2002, juris-data n° 2002-17815 ; C.A. Paris, 28 juin 2002, juris-data n° 2002-188814. [↑](#footnote-ref-27)
28. Cass. com. 5 déc. 2000, no 98-16.524. [↑](#footnote-ref-28)
29. Cass. com. 20 févr. 2007, Bull. civ.IV, n° 52. [↑](#footnote-ref-29)
30. Cass. com. 1er juill. 2003,n° 99-17.183. [↑](#footnote-ref-30)
31. Cass. com. 6 mai 2002, n° 99-20130. [↑](#footnote-ref-31)
32. Cass. com. 7 janv. 2014, n° 12-17.154. [↑](#footnote-ref-32)
33. Cass. com. 29 janv. 2002, n° 00-11.433 ; Cass. com. 3 nov. 2004, n° 02-17.919. [↑](#footnote-ref-33)
34. Com. 5 oct. 2004, n° 02-17.338. [↑](#footnote-ref-34)
35. Cass. com. 7 oct. 1997, *RTD. civ.* 1998, p.130, obs. P.-Y.Gautier. [↑](#footnote-ref-35)
36. Cass. com. 6 mai 2002, no 99-14.093. [↑](#footnote-ref-36)
37. Cass. com. 8 oct. 2013, n° 12-22.952. [↑](#footnote-ref-37)
38. C.A. Bordeaux, 11 mars 2014, n° 11/04944. [↑](#footnote-ref-38)
39. Com. 10 janv. 1995, no 92-17.892 [↑](#footnote-ref-39)
40. Cass. com. 16 sept. 2014, n° 13-18.710. [↑](#footnote-ref-40)
41. Cass.com. 3 avr. 2012, no 11-16.301. [↑](#footnote-ref-41)
42. Cass. com. 23 sept. 2014, n° 13-20.454. [↑](#footnote-ref-42)
43. C.A. Lyon, 31 mars 2005 n°03/04141. [↑](#footnote-ref-43)
44. Cass. com. 31 mars 2004, n° 02-14.902. [↑](#footnote-ref-44)
45. Cass. soc., 19 mars 2008, n° 06-45.322. [↑](#footnote-ref-45)
46. INSEE, *Informations rapides*, 13 mars 2015, n°60. [↑](#footnote-ref-46)
47. Cass. civ. 3e 27 mars 2002, n° 00-20.732. [↑](#footnote-ref-47)
48. Aut. Conc. 29 oct. 2013, n° 13-D-19. [↑](#footnote-ref-48)
49. Cass. com. 3 mai 1995, n° 93-12.981. [↑](#footnote-ref-49)