

Franchising in Macau (Global Retail News - Dec. 2011 - Volume XII - n°125)

Along with Hong Kong, Macau is one of the two special administrative regions of China. Officially called the "Macao Special Administrative Region of the People's Republic of China", this peninsula is composed of two islands of a total area of 29,5 km² and a population estimated to 544,600 inhabitants. The PRC governs the territory's defense and foreign affairs while Macau keeps its own legal system and currency, among others.

Portuguese traders administered the region during several centuries until the transfer of sovereignty to the PRC on 20 December 1999. Nowadays, Macau is a dynamic region whose economy is based on tourism and clothing industry. It keeps important trade relations with Europe and Portuguese-speaking countries and is a founding member of the WTO. The World Bank classifies Macau as a high income economy (GDP per capita of \$39,800 in 2009).

Franchising in Macau is regulated by Title VIII of the Macau Commercial Code (MCC) which defines a franchise agreement as "that by which one of the parties, against a direct or indirect payment, grants to the other, in a certain zone and in a stable manner, the right to produce and or to sell certain goods or services under his entrepreneurial image, according to his know-how, with his technical assistance, and subject to his control".

Article 680 provides the list of the information the franchisor has to deliver in writing to a prospective franchisee, including information about:

- the franchisor: identification, annual accounts, judicial proceedings...
- the franchise network: detailed description, composition of the network, profitability, incidence of bankruptcies;
- the franchisee: profile of the ideal franchisee, necessity and extent of the franchisee's personal and direct participation in the exercise of the franchise ;
- the monetary obligations: initial investment needed, amount of the royalties...;
- the professional experience gained, the know-how and entrepreneurial methods ;
- the services rendered by the franchisor;
- the template of the franchise contract and its appendixes.

The MCC does not provide a specific rule on how many days the disclosure must predate the signature of the contract but only requires a disclosure "with adequate advance". However, the franchisor should be careful since the franchisee will be tempted to allege that the disclosure was not adequately early. Any failure to provide the information entitles the franchisee to demand the annulment of the contract.

The franchise agreement has to be concluded in writing and any time limit agreed by the parties cannot be shorter than 3 years. As to the respective obligations of the parties, articles 686 et seq. of the MCC provide a general duty of good faith and fair dealing. This franchisor shall in particular:

- grant the franchisee the use of the Intellectual Property rights and know-how associated with the franchise and ensure peaceful enjoyment of those rights,
- ensure constant updating of his know-how,
- provide training,
- conduct advertising of the network at international and regional levels
- ensure the supply of the goods necessary to run the franchise ,
- compensate any post-term non-compete obligation,
- timely inform the franchisee of any material alterations in the running of the franchise.

In return, the franchisee is obliged to pay royalties and follow the instructions regarding equipment and premises. He also has to submit change of location or advertising campaigns to the approval of the franchisor, maintain the minimum volume of sale required and report to the franchisor any breach or misuse of the Intellectual Property right.

The MCC also contains provisions regarding the transfer of contractual position, giving to the franchisor a right of pre-emption in case of transfer of the franchisee's enterprise. Besides, when the contract is terminated for reasons not imputable to the franchisee, the franchisor has to repurchase goods not sold or allow the franchisee to keep using the Intellectual Property rights and the know-how granted.

Gilles Menguy, Avocat à la Cour, Solicitor of England & Wales,

Gast&Menguy