



the global voice of
the legal profession®

International Franchising

Vol 16 No 1 MAY 2012

Newsletter of the International Bar Association Legal Practice Division



In this issue

From the Chair	4
From the Newsletter Coordinators	5
Committee officers	7
In memoriam – André Lombart	8

IBA Annual Conference, Dublin, 30 September – 5 October 2012 International Franchising Committee sessions	9
--------------------------------------------------------------------------------------------------------------------	---

Conference report: IBA Annual Conference, Dubai, 30 October – 4 November 2011 Sessions

Hot topics for international sales, international franchising, and product law and advertising	10
------------------------------------------------------------------------------------------------------	----

How commercial agency laws impact franchise relationship	12
-------------------------------------------------------------	----

Recent trends in franchise relationship laws	13
----------------------------------------------	----

News from around the world	14
----------------------------	----

From desert to dessert: leisure development in MENA nations and beyond	15
---------------------------------------------------------------------------	----

Articles

Product liability: key considerations for Ukrainian market	16
---------------------------------------------------------------	----

New bill to bring important changes for franchising in Brazil	18
------------------------------------------------------------------	----

Franchising in Bahrain	19
------------------------	----

Private equity and franchise	23
------------------------------	----

Franchising under Regulation 330/2010 on vertical restraints – Part 1	24
--------------------------------------------------------------------------	----

Contributions to this newsletter are always welcome and should be sent to the Newsletter Coordinators at:

Rocio Belda de Mergelina
J&A Garrigues, Madrid
rocio.belda@garrigues.com

Karsten Metzloff
Noerr, Berlin
karsten.metzloff@noerr.com

International Bar Association

4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org

© International Bar Association 2012.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without the prior permission of the copyright holder. Application for permission should be made to the Director of Content at the IBA address.

Terms and Conditions for submission of articles

1. Articles for inclusion in the newsletter should be sent to the Newsletter Editor.
2. The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
3. Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) ourselves throughout the world in printed, electronic or any other medium, and to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Director of Content at editor@int-bar.org.
4. The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.

Advertising

Should you wish to advertise in the next issue of the International Franchising Committee newsletter please contact the IBA Advertising Department.
advertising@int-bar.org

This newsletter is intended for lawyers interested in the field of international franchising. Views expressed are not necessarily those of the International Bar Association.

Product liability: key considerations for Ukrainian market

Nataliya Mykolska

Sayenko Kharenko, Kiev
nmykolska@sk.ua

Anzhela Makhinova

Sayenko Kharenko, Kiev
amakhinova@sk.ua

It goes without saying that in the vast majority of cases, franchising is employed to exploit the products to the end-user consumers – individuals. As each jurisdiction, as a rule, has its specific product liability regulations, product liability issues are among the cornerstones to be considered by franchisors while capturing new foreign markets; and Ukraine is no exception. Moreover, the product liability provisions are regarded as mandatory in Ukraine and shall be complied with regardless of the governing law chosen and/or applied for specific agreements. Echoing the above, foreign companies, producing/selling the products within Ukraine, use every bit of creativity to evade the relevant requirements of the Ukrainian product liability regulations (eg, enter into ‘simple’ supply agreements, instead of a franchising agreement; stipulate that all product related risks and responsibilities are transferred to the Ukrainian party, etc.). However, the said ‘tricks’ are not serving as a safe harbour for foreign franchisors. In this article, our aim is to provide a brief overview of the Ukrainian product liability regulations as well as analyse possible options for foreign franchisors to mitigate possible risks.

Product liability under franchise agreements

The Civil Code of Ukraine (the ‘Civil Code’) and the Commercial Code of Ukraine (the ‘Commercial Code’),¹ specifically addressing franchising relations, provide that a franchisor and a franchisee shall bear subsidiary liability for consumers’ claims relating to the quality of the products manufactured by the franchisor and further resold by the franchisee (ie, the consumer is entitled to bring a claim against the franchisor only if the franchisee does not satisfy thereof).

At the same time, if the products are manufactured by the franchisee under the technology and the standards granted under the franchise agreement, the franchisor and

the franchisee shall bear joint and several liability. It is worth emphasising that as of today, there is no case law addressing the said issues.

General product liability regulations

Legislative requirements

Apart from the above provisions, the Civil Code and the Law of Ukraine on Protection of Consumers’ Rights (the ‘Consumer Protection Law’) regulate the issue of product liability claims brought by end-user consumers – individuals.

An individual consumer is entitled, on his or her discretion, to bring a product liability claim against:

- a seller of the products (ie, usually the franchisee in Ukraine);
 - a manufacturer of the products.
- Noteworthy, the definition of ‘manufacturer’ is very broad and comprises:
- the manufacturer producing the products (ie, usually the franchisor and/or its related companies);
 - a person and/or entity claiming to be the product manufacturer by placing its name, trademark or other identification element on the product, packaging or in accompanying documents (ie, usually the franchisor and/or its related companies);
 - an importer of the product (ie, usually the franchisee and/or its related companies); or
 - a designated representative office/branch of the manufacturer and/or the seller (ie, different service centres responsible for after-sales services and warranty maintenance).

It has to be emphasised that Ukrainian law prohibits contractually limiting the above list of persons to which end consumers (individuals) are in a position to bring their claims against in respect of product liability issues. Such clauses may be deemed invalid.

'Hidden reefs'

First and foremost, as of today neither Ukrainian legislation nor case law clarifies how the special provisions of the Civil Code and the Commercial Code on the franchisor's liability correlate with the general provisions of the Civil Code and the Consumers' Protection Law analysed above. Moreover, there is no direct answer whether application of the special provisions on the franchisor's liability depends on the registration of the franchise agreement² or not. At the same time, on numerous occasions the officials of the state authorities responsible for consumers' rights protection unofficially confirmed that in case of end consumers/individuals' claims, they are most likely to apply the provisions of the Consumers' Protection Law.

In addition, under the Consumer Protection Law the manufacturer is to indemnify all expenses/losses incurred by the seller/manufacturer's representative office/branch in satisfying the product liability claims of consumers. Where a product liability claim is brought against a representative office/branch of the seller, the seller is to indemnify all losses/expenses incurred and should similarly request indemnification from the manufacturer for such circumstances arising. However, if the product liability claims relate to the products produced outside the territory of Ukraine, the latter shall be satisfied at the expense of the seller (importer). At the same time, both Ukrainian law and case law are silent whether the seller and/or importer are entitled to recourse for its expenses for satisfying the product liability claims against the franchisor.

New product liability regulations

The Law of Ukraine 'On Liability for Damages Caused by Defective Products' (the 'New Product Liability Law') has recently entered into force. The New Product Liability Law stipulates new regulations in respect of defective products³ causing damages.⁴

Legislative requirements

The New Product Liability Law defines that the end-user consumers are entitled to bring the respective claims as follows:

- Against a producer being liable for damages caused by defective products, namely:
 - (i) a producer of a finished product, a

producer of any raw material or a producer of a component part; and (ii) any person and/or entity who, by putting their name, trademark or other distinguishing feature on the product presents themselves as its producer (ie, usually the franchisor and/or its related companies);

- In case of the imported products, against any person and/or entity importing into Ukraine a product for sale, hire, leasing or any form of distribution in the course of their business (the 'importer') shall be responsible as a producer (ie, usually the franchisee and/or its related companies);
- Where a producer cannot be identified, each supplier (ie, usually the franchisee and/or its related companies) shall be liable as a producer unless they inform an injured person of a producer or an importer within 30 days.

Moreover, under the New Product Liability Law if several persons are liable for damage caused by the defective products (eg, a producer and an importer, in case of the imported products), an injured person is allowed to claim for damages either to all liable persons jointly or to one of them separately.

As of today, there is neither case law nor any official interpretation of the provisions of the New Product Liability Law. Hence, it is difficult to predict how most of its provisions will apply in practice. It is especially unclear how provisions of the New Product Liability Law, the Consumer Protection Law and the Civil Code (in part of indemnification of damages caused by defective products) will correlate.

Any safe harbour for foreign franchisors?

Even though there is no clear interpretation which particular product liability regulations shall apply to franchise agreements, bearing in mind the general approach of Ukrainian law to product liability, we believe that any provisions of the franchise agreement *de jure* or *de facto* limiting the end-user consumers'/individuals' rights to bring their product related claims either jointly against the franchisor and franchisee or to each of them separately may be regarded as invalid under Ukrainian law.

At the same time, in order to minimise possible risks the franchisor may stipulate in the franchise agreement special 'cooperation' and/or 'indemnification' clauses providing for certain procedures for the Ukrainian franchisee to follow when a product liability claim is brought in Ukraine (eg, notifying



NEW BILL TO BRING IMPORTANT CHANGES FOR FRANCHISING IN BRAZIL

the franchisor, agreeing a litigation strategy, compensation of expenses, etc). The said clauses clearly shall be drafted taking into account the contractual structure chosen, supply and sales schemes, all affiliated companies involved in supply, etc. Moreover, in order to make such clauses fully enforceable and practically operative in Ukraine, the latter should also take into account, inter alia, the requirements of the Civil Code, the Ukrainian civil procedural laws and foreign currency regulations.

Notes

- 1 Instead of traditional international trade terms such as 'franchisor', 'franchisee' or 'franchise agreement', Ukrainian law operates with the terms 'titleholder', 'user' and 'commercial concession agreement' respectively. To avoid of misunderstandings, in this article we will use the internationally recognised terms
- 2 Notably, Ukrainian law stipulates mandatory state registration of (i) the franchise agreement,

- (ii) amendments thereto, as well as (iii) termination thereof. Even though failure to register the franchise agreement does not result in its invalidity, the parties are entitled to refer thereto in relations with the third parties only after due state registration.
- 3 A product shall be regarded as defective when it does not provide the safety which a consumer or user is entitled to expect, taking all circumstances into account, namely related to designing, production, circulation, transportation, storage, technical maintenance, consumption, usage, destruction (utilisation, reprocessing) of products, including:
 - (i) presentation of the product to the consumer or user, including its appearance, composition, packaging, marking and other information on the product, its consumption, usage and destruction;
 - (ii) use to which it could reasonably be expected that the product would be put; and (iii) time when the product was put into circulation.
- 4 Damage shall mean: (i) damage caused by personal injuries or by other damage to health; (ii) damage caused by death; or (iii) damage to, or destruction of, any item of property other than the defective product itself.

New bill to bring important changes for franchising in Brazil

A draft bill to revoke Brazil's current Franchise Law No 8955 of 15 December 1994 has been released by the Brazilian Government. Bill of Law No 3234 of 2012 was presented by deputy Valdir Collato on 15 February 2012 and is awaiting review by the Commission of Economic Development, Industry and Trade in the House of Representatives. The Bill of Law needs to work its way through Brazil's legislative requirements for the approval of laws, which can be time-consuming. It is not possible to determine yet whether this Bill of Law will be approved, or when.

One of the changes proposed by this Bill of Law is that the *Brazilian Franchising Offering Circular* ('FOC') will be required to be in the Portuguese language. Currently, there is no such obligation. The current law says that the FOC needs to be clear and accessible to the prospective franchisee. If, for instance, the prospective franchisee is fluent in English, the FOC can be in English.

Another change in the Bill of Law is that the FOC will be required to indicate if the franchisor will offer technological innovations to the franchisee and under what conditions. It is unclear from this whether the franchisor will be required to provide technological innovations to the franchisee.

Other additions to the FOC that are introduced by the Bill of Law is the disclosure (i) of information about the existence of minimum purchase quotas by the franchisee from the franchisor, or from any third party designated by franchisor, and the franchisor's ability to refuse to approve goods or services and the conditions for the refusal; and (ii) of any consumer pricing policy for the franchise, how it can be changed and whether the franchisor's own outlets and other franchisees need to comply with the policy. These obligations may be difficult to comply with at the time the FOC is delivered.

Importantly, the Bill of Law introduces a new obligation for the business to have at least two years of operation before being franchised.

Flavia Amaral

Trench, Rossi e
Watanabe Advogados,
São Paulo
Associated to Baker &
McKenzie International,
Swiss Verein
flavia.amaral@
bakermckenzie.com