

FRANCHISE AGREEMENT IN BELARUS: SPECIAL REQUIREMENTS





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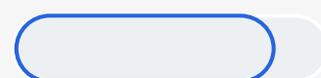
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- ▶ The franchise agreement is becoming more widely used in the activities of business entities in Belarus. Among the advantages that attract potential franchisees the use of already tested business model, consumer recognition, reduction of economic risks, lower advertising costs are pointed out. For franchisors conclusion of a franchise agreement provides an opportunity to develop business at regional level and create new sales channels with minimal financial and time costs.
 - It should be noted that the conclusion of a franchise agreement with residents of Belarus has a number of specifics, which relate to its form and content, as well as registration in the State Institution "National Center of Intellectual Property" (hereinafter - the patent authority).
 - Commercial organizations and individual entrepreneurs may act as parties to the franchise agreement. Belarusian legislation does not provide for the possibility to conclude such agreement with individuals or non-profit organizations.
 - When concluding a franchise agreement, special attention should be paid to reaching agreement on its subject matter and other essential conditions.
 - The subject matter of the franchise agreement is the transfer to the franchisee of the license complex in a certain amount, which must include the brand name of the franchisor and undisclosed information.
 - We note that other objects of intellectual property (trademarks, inventions, industrial designs, utility models and other) are not mandatory elements of the subject matter of the franchise agreement, but may be included in the franchise agreement by agreement of the parties.



The franchise agreement should

- contain information that allows to define fully and accurately the objects of intellectual property, the right to use which is granted. For example, when granting the right to use a trademark under the agreement, this agreement should include a description of the trademark, indicate its registration number, number and date of the certificate for such trademark, as well as classes of the International Classification of Goods and Services in respect of which the rights are transferred.
- provide for the use of the license complex in a certain amount, establishing the minimum and (or) the maximum amount of use.

- The franchise agreement must specify the types of business activities within which it is allowed to use the license complex.
- If any of the essential conditions are missing, for example, if the right to use the franchisor's brand name is not given to the franchisee, the franchise agreement will be considered unconcluded.
- When concluding a franchise agreement, it is important to verify that the rights to the license complex being transferred belong to the proper franchisor.

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It is also necessary to check whether the franchisor has the proper authority to transfer the license complex. Thus, the franchisor under the franchise agreement may be:



- the owner of the brand name, undisclosed information, other intellectual property objects (if any);
- the franchisee under the franchise agreement, if the right to enter into agreements of sub-franchising is granted;
- the owner of the brand name, undisclosed information, being a licensee under the license agreement, if it is permitted to grant sublicenses under this agreement.

- With regard to undisclosed information transferred under the franchise agreement, it will be necessary to make sure that such information is not easily accessible and does not constitute an object of exclusive rights to the results of intellectual activity.

- In addition to the subject matter of the agreement, an essential condition of the franchise agreement is the amount and form of remuneration payment for the provision of the license complex (par. 1 and par.4 of Art. 910 of the Civil Code). Par. 4 of Art. 910 of the Civil Code establishes the following forms of remuneration payment:
 - fixed, one-time and periodic payments;
 - deductions from the proceeds;
 - other forms of payment stipulated by the agreement.

- The parties may agree on remuneration payment in the form of lump-sum payment and (or) royalties.
- Par. 1 and par.2 of Art. 910 of the Civil Code stipulate that such conditions as the term and territory of use of the license complex may or may not be specified by the parties in the franchise agreement. In spite of that, we recommend to enshrine these conditions in the franchise agreement, because they are necessary for the purposes of registration in the patent authority.

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- The agreement on the term during which the use of the license complex is allowed enables the franchisee to plan its business activities with the use of the license complex. In the absence of a term in the agreement, either party will have the right to withdraw from the agreement by giving six months' notice to the other party, unless the notice period is extended by the agreement.
- Indication of the territory of use of the license complex is important in order to prevent competition between the franchisor and the franchisee
- In addition to the limitation by the territory of use of the license complex, Belarusian legislation allows to agree on other conditions that limit the franchisor and the franchisee. Because of such restrictions, the risk of collision of economic interests of the parties to the agreement is excluded.



The list of possible restrictions that the parties may agree on in the franchise agreement is contained in par. 1 of Art. 910-5 of the Civil Code:

- 1) the obligation of the franchisor not to provide to other persons equivalent license complexes for their use on the territory attributed to the franchisee or to refrain from their own equivalent activities on this territory;
- 2) the franchisee's obligation not to compete with the franchisor in the territory covered by the franchise agreement in respect of business activities carried out by the franchisee with the use of exclusive rights owned by the franchisor and undisclosed information;
- 3) the franchisee's refusal to obtain equivalent exclusive rights and undisclosed information from competitors (potential competitors) of the franchisor under the franchise agreement;
- 4) the franchisee 's obligation to agree with the franchisor on the location of premises used in the performance of the franchise agreement, as well as their external and internal design.

When incorporating such restrictions in the franchise agreement, parties should take into account that there is possible risk of recognition of aforesaid restrictions as invalid by the court at the request of the antimonopoly authority or another interested person (par. 2 of Art. 910-5 of the Civil Code). The condition for such recognition is the contradiction to the antimonopoly legislation of Belarus. At the same time, the state of the relevant commodity market and the economic situation of the parties should be taken into account.

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- Consequently, when including restrictions agreed by the parties in a franchise agreement, it is necessary to additionally check them from the point of view of compliance with the requirements of the current antimonopoly legislation in Belarus.
- The franchise agreement may also stipulate additional obligations of the parties to share the organization's experience, including, for example, personnel training, instructions on management, the creation of a distribution network, the operation of equipment, customer service, etc.
- The franchise agreement may provide for measures that exclude misleading the consumer. In accordance with legal requirements, the consumer of goods, works or services must be aware that the franchisee is an independent business entity and carries out business activities within the framework of the franchisor's single network. In this regard, the agreement must include the obligation of the franchisee to inform customers in the most obvious way for them that the license complex is used on the basis of a franchise agreement (par. 2 of Art. 1016 of the Civil Code, Art. 910-4 of the Civil Code).

In accordance with par. 1 of Art. 910-1 of the Civil Code the franchise agreement is concluded in simple written form. The simple written form implies the drafting of a single text document, including a document in electronic form (in particular electronic document), or the exchange of text documents, including documents in electronic form (in particular electronic documents).

Based on the fact that two original copies of the franchise agreement and one certified copy thereof must be submitted for registration, it is more preferable to draw up the agreement as a single text document signed by both parties.

The franchise agreement, as well as the amendments and termination of the agreement, are subject to registration by the patenting authority in the state register. The registration procedure is regulated by the Resolution of the Council of Ministers of the Republic of Belarus of March 21, 2009 № 346 "On registration of license agreements, agreements of assignment of rights to objects of industrial property rights, agreements on pledge of property rights, certified by a certificate for a trademark, service mark and agreements of complex entrepreneurial license (franchising)".

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The legislation does not establish the consequences of non-compliance with the requirements for registration of the franchise agreement with the patent authority. In this regard, it is debatable whether the lack of such registration may lead to the nullity of the franchise agreement on the basis of par. 1 of Art. 166 of the Civil Code.

In order to register a franchise agreement, it is necessary to submit to the patent authority:

- application for registration of the agreement;
- agreement in three copies (two copies are originals, one copy is a copy certified by the applicant),
- power of attorney (in case of acting through a representative);
- document confirming the payment of the patent fee.

The application for registration of the franchise agreement shall contain a consent to the processing of personal data by the patenting authority.



Thus, the conclusion of the franchise agreement in Belarus has its own specifics, which should be taken into account when drafting and registering it.

- It is important to comply with the requirements related to the range of entities that may be a party to the franchise agreement, the description of the subject matter of the agreement, the definition of the scope of use of the license complex, the amount and form of remuneration for such use. We note that the consequence of omitting any of the essential conditions of the franchise agreement is recognition of the agreement as uncompleted.
- Optional elements of the franchise agreement, included by the parties, also require special attention. Their detailed elaboration and clear regulation will allow not only to avoid disagreements between the parties, in particular, in matters of competition, but also to avoid such adverse consequences as the refusal to register the agreement by the patent authority.
- The essential point is to conduct a preliminary verification of the franchisor's ownership of the rights to the license complex being transferred and the franchisor's proper authority to transfer the license complex.



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