

CHINESE LEGAL ISSUES FOR BEGINNERS : Trademarks & Franchising

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中国法制问题简介：
商标及商业特许经营

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IDI – Franchising Law & Practice in Selected Countries
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简介 - Introduction

- Many franchisors believe that their intellectual property cannot be protected in China,
- and that their contracts cannot be enforced,
- consequently they are reluctant to do business in the PRC

知识产权的简介 - IP Introduction – 基本见解 Basic Advice

- China has IP laws that meet international standards
- Chinese courts do enforce IP rights, and particularly IP rights held by foreign parties
- The PRC does have a “wild west” economy
- To a large extent the threat to IP from counterfeiters can be costed and managed

合同法 - Contract Law

- PRC Contract Law (中华人民共和国合同法) adopted in 1999
- Based on the section on obligations in the Bürgerliches Gesetzbuch (German Civil Code)
- Judges tend to hold parties to their franchise contracts more than in North America

合同法 - Contract Law

Some Key Points:

- required to negotiate in good faith (诚实) – Art. 42
- Non-competition covenants with employees are enforced if payment is made
- Contract can be in English only – but for practical purposes it is better to do it in Chinese
- Free to choose governing law, including foreign jurisdictions

法院仲裁 - Dispute Resolution

Typical Trade-mark Infringement Action in China

- Time: collection of evidence in October – appeal judgment issues in July – 9 months
- Cost: about \$14,000 USD in legal fees, investigation and notarization costs extra

Chinese courts do not enforce foreign judgments (except based on reciprocity, and Hong Kong judgments)

中国法院的涉外纠纷

Foreigners in the People's Courts

浙江蓝野酒业有限公司 诉 上海百事可乐饮料有限公司
(Zhejiang Blue Wild Liquor Company v. Shanghai Pepsi Cola)
May 24, 2007



中国法院的涉外纠纷

Foreigners in the People's Courts

- December 14, 2003 Chinese co. applied for the trademark “蓝色风暴” (BLUE STORM) – registered January 24, 2006
- July – August 2005 Pepsi used the same mark in a promotional campaign
- Pepsi won in the court of first instance on grounds that use as a slogan was not used as a trademark
- On appeal Zhejiang Higher People's Court awarded 3 million yuan (\$393,576.00 USD) to the Chinese company

法院仲裁 - Dispute Resolution



法院仲裁 - Dispute Resolution



商业特许经营经营 - Franchising

Relevant Laws & Regulations:

1. 中华人民共和国民法通则 - General Principles of the Civil Law – 1986
1. 合同法 - Contract Law – 1999
1. 商业特许经营管理条例 - Commercial Franchise Administrative Regulations – 2007

商业特许经营 - Franchising

4. 商业特许经营信息披露管理办法 - Commercial Franchise Information Disclosure Administrative Measures – 2007 – being revised 2011
5. 商业特许经营备案管理办法 - Commercial Franchise Registration Administrative Measures – 2007 – being revised 2011
5. 北京市高级人民法院关于审理商业特许经营合同纠纷案件适用法律若干问题的指导意见的通知 - Beijing Higher People's Court Opinion "On Several Issues Concerning Disputes over Commercial Franchise Contracts" – 2011-02-24

商业特许经营 - Franchising

Issues:

Application of the laws & regulations:

第二条 在中华人民共和国境内从事商业特许经营活动，应当遵守本条例。

Article 2 – Commercial franchising activities conducted within the territory of the People's Republic of China shall comply with this Regulation.

商业特许经营 - Franchising

Definition of a Franchise:

第三条 本条例所称商业特许经营（以下简称特许经营），是指拥有注册商标、企业标志、专利、专有技术等经营资源的企业（以下称特许人），以合同形式将其拥有的经营资源许可其他经营者（以下称被特许人）使用，被特许人按照合同约定在统一的经营模式下开展经营，并向特许人支付特许经营费用的经营活动。

企业以外的其他单位和个人不得作为特许人从事特许经营活动。

Article 3 – In this Regulation a commercial franchise, refers to an arrangement whereby an enterprise through an agreement grants other operators the **right to use its business operating resources**, including registered trademarks, logos, patents, and proprietary technologies; whereby the franchisee conducts business under a **uniform mode of operation**; and whereby the franchisee **pay franchise fees** according to the agreement.

No entity or individual other than an enterprise may conduct business as a franchisor.

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Qualification Requirements – 2+1 Rule:

第七条 特许人从事特许经营活动应当拥有成熟的经营模式，并具备为被特许人持续提供经营指导、技术支持和业务培训等服务的能力。

特许人从事特许经营活动应当拥有至少2个直营店，并且经营时间超过1年。

Article 7 - To be engaged in franchising a franchisor shall have a **mature business model**, and shall be able to provide franchisees with continuous operational guidance, technical support, training and other services.

For a franchisor to be engaged in franchising it must have at least **2 directly-operated company-owned stores and have operated them for at least 1 year.**

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Deposits

- deposits allowed if purpose and refund terms and methods specified in writing

Franchise Agreement

- must be in writing
- have a cooling off period (length not specified)
- be for at least three years (unless otherwise agreed)
- contain consumer protection provisions and responsibility for compensation

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Disclosure – all material facts?:

第二十一条 特许人应当在订立特许经营合同之日前至少 30 日，以书面形式向被特许人提供本条例第二十二条规定的信息，并提供特许经营合同文本。

Article 21 – A franchisor shall provide a franchisee with all information required pursuant to Article 22, together with a copy of the franchise agreement, **not less than 30 days before signing the franchise agreement.**

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第二十三条 特许人向被特许人提供的信息应当真实、准确、完整，不得隐瞒有关信息，或者提供虚假信息。

特许人向被特许人提供的信息发生重大变更的，应当及时通知被特许人。

特许人隐瞒有关信息或者提供虚假信息的，被特许人可以解除特许经营合同。

Article 23 – The information provided by the franchisor to the franchisee shall be true, accurate and complete **and shall not conceal any relevant information, or provide any false information.**

If there is a significant change in the information provided by the franchisor to the franchisee, the franchisor shall promptly inform the franchisee.

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Contract Law - Article 42:

Art. 42 In the making of a contract, the party that falls under any of the following circumstances, causing loss to the other party, shall hold the liability for the loss.

- (1) engaging in consultation with malicious intention in name of making a contract;
- (2) concealing intentionally **key facts** related to the making of the contract or providing false information;
- (3) taking any other act contrary to the principle of **good faith**

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Financial Performance Representations required

(八) 在中国境内现有的被特许人的数量、分布地域以及经营状况评估；

(8) the number and location of existing franchise outlets within the territory of China, their distribution by region, and **an assessment of their business performance;**

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Commercial Franchise Information Disclosure Administrative Measures

对被特许人进行经营状况评估情况，特许人披露被特许人**实际或预计的平均销售量、成本、毛利、纯利的信息**，同时应当说明上述信息的来源、时间长度、涉及的特许经营网点等，如果是估算信息，应当说明估算依据，并明示被特许人实际经营状况与估计可能会有不同。

Information regarding an evaluation of the operations of the franchisees. The **franchisor shall disclose** information regarding the franchisees **actual or estimated average gross sales, costs, gross profits and net profits**, and describe the relevant time periods and source of the data and the outlets involved. If the information is estimated, the basis for such estimates shall be provided and explained and shall expressly state that actual business operations may be different from the estimates.

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Bei'an or Registration:

第八条 特许人应当自首次订立特许经营合同之日起 15 日内，依照本条例的规定向商务主管部门备案。

Article 8 – In accordance with the provisions of this Regulation a franchisor shall **register** at the relevant commercial department within 15 days after signing its first franchise agreement.

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