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特许经营

没有设定冷静期条款，特许人该怎么办？

WHAT CAN BE DONE IF NO COOLING-OFF PERIOD IS AGREED?

问题的提出

Question

冷静期是指在特许经营合同中，双方可约定被特许人可在合同订立后一定期限内无条件单方解除合同。冷静期的主要目的是防止被特许人的冲动盲目投资行为，给予其可以反悔的权利，维护被特许人的利益。

Cooling-off period refers to a period agreed by the franchisor and the franchisee in a Franchise Agreement where the franchisee is allowed to unilaterally terminate the Franchise Agreement with no cause. The purpose of such cooling-off period is to prevent any impulsive investment behavior by the franchisee by giving the franchisee right to go back, so that to protect the interest of the franchisee.

但是，冷静期对于已获得合同预期利益的特许人显然并非好事。如果双方已在特许经营合同中对冷静期作出了明确的约定，显然双方不会发生争议。但是，现实情况是，很多特许经营合同由于起草草率，特许人根本就没有注意到需要设置该等条款或者故意不设置此类条款。

那么，在双方没有在特许经营合同中特别约定冷静期条款的情况下，对特许人有什么影响呢？

However, for the franchisor who has gained the expected benefit from Franchise Agreement, cooling-off option is obviously not a good thing. In the event a cooling-off period has been agreed in the Franchise Agreement, for sure no dispute may arise. But in many cases, such cooling-off period is either ignored by the franchisor due to hastily preparation of the Franchise Agreement, or is omitted intentionally by the franchisor. Then the question is, if no cooling-off period is ever agreed in the Franchise Agreement, what is the impact on the franchisor?

被特许人仍然享有基于冷静期单方解除合同的权利

The right of unilaterally terminating the Franchise Agreement based on the cooling-off option is still available to the franchisee

由于被特许人所享有的冷静期单方解除合同的权利系一项法律赋予的权利，因此，即使双方未能在特许经营合同中作出明确约定，被特许人仍然有权行使该权利。

The right of terminating by the franchisee based on cooling-off option is a statutory right granted to the franchisee by the law. Therefore, even if no specific clause is agreed in terms of cooling-off period, the franchisee is still entitled to exert this right.

在双方没有约定的情况下，被特许人行使该等权利将受到实际合同履行情况及法律规定的约束。主要体现在：

Under the circumstances of no specific agreement on cooling-off period, the right to terminate the Franchise Agreement by the franchisee is subject to the extent the Franchise Agreement is performed, as well as laws and regulation. Such restriction includes:

I. 冷静期的时间长度

Time length of cooling-off period

一般情况下，如果双方约定了冷静期，鉴于大部分情况下特许经营合同由特许人事先准备，且特许人在合同签署后，并不愿意看到被特许人行使冷静期解除权导致合同利益的丧失，因此，合同约定的冷静期一般很短，可以是1个月，也可以是几日，一般该等约定均视为有效。

In most cases, if a cooling-off period is considered by the parties, due to the fact the Franchise Agreement template is usually prepared by the franchisor in advance, more importantly, the franchisor is reluctant to see the losing of contract benefit due to cooling-off option, such agreed cooling-off period is quite short, which could be 1 month or even several days. Despite of this, the agreement on short cooling-off period is legal binding.

如果双方没有约定冷静期条款，被特许人在合同订立后一定期限内主张行使冷静期解除权，该等期限是否有法定的限制？根据我们的了解，目前法律并不设定任何默示的冷静期，具体被特许人是否可以行使冷静期解除权，需要综合考虑合同履行情况进行个案界定。

In the event no cooling-off period is agreed by the parties, if the franchisee intends to terminate the Franchise Agreement within a certain period after the signing of the Franchise Agreement replying on cooling-off option, is there any limitation to such period under the law? So far we don't see any implied cooling-off period set by the law. Thus, whether the franchisee is allowed to terminate shall be decided on a case-by-case basis, in consideration of the performance of the Franchise Agreement.

II. 合同履行程度是判断被特许人是否享有冷静期解除权的关键

The extent the Franchise Agreement is performed is the key element to determine whether the franchisee enjoys the right to terminate based on cooling-off option

判断被特许人是否有权行使冷静期解除权，以下几个方面是应当考虑的因素：

The following aspects shall be considered to decide whether the franchisee is still allowed to terminate:

- 特许人是否已向被特许人提供了特许经营资源

Whether the franchise resource has been provided to the franchisee by the franchisor

一般情况下，特许人在合同签署后，应当向被特许人提供包括知识产权（例如商标）和其他特许经营资源（例如经营手册等）在内的授权。在被特许人主张冷静期解除权之前，特许人是否已向被特许人提供相关授权是应当考虑的因素。

Usually according to the Franchise Agreement, the franchisor shall provide licensing of intellectual property (such as trademark) and other franchise resource (such as operation handbook etc) to the franchisee. Before the franchise intends to terminate the Franchise Agreement, whether such licensing of IP and franchise resource has been provided to the franchisee is a factor which shall be taken into consideration.

- 被特许人是否已开始经营

Whether the franchisee has started the operation

在特许经营合同签订前后，被特许人一般情况下已就经营事项着手准备，例如选址、装修、开业等。如果在被特许人主张冷静期解除权时，被特许人已实际开业并利用了特许人所提供的特许资源，则其再主张冷静期解除权将不会受到支持。

Before and after the Franchise Agreement is signed, the franchisee usually has started to prepare the operation issues such as site selection, decoration, store opening etc. At the time the franchisee terminates the Franchise Agreement based on cooling-off option, if he has actually opened the store for operation and made use of the franchise resource, normally the termination shall not be a legal one any more.

- 特许人是否已提供相应服务

Whether the franchisor has provided relevant franchise service

一般情况下，特许人除了提供特许资源外，还会提供包括选址、市场营销、人员培训等服务。在被特许人行使解除权之时，特许人是否已履行相应服务也是考虑的因素。

Besides the provision of franchise resource, the franchisor usually needs to provide service including site selection, marketing, personnel training etc. for the franchisee. Whether these service has been provided when the franchisee terminates based on cooling-off option shall be one factor which shall be taken into consideration.

给特许人的建议

Suggestions for the franchisor

从特许人的角度出发，为避免因被特许人行使冷静期解除权而导致合同利益丧失或受损情况的发生，应当从以下几个方面进行防范：

From the perspective of the franchisor, to avoid his contract interest is seriously damaged or affected due to the franchisee's cooling-off option, we suggest the following measures to be taken:

1. 主动在特许经营合同中设置冷静期条款。在这种情况下，特许人可以选择设置时间较短的冷静期，例如 2 周，以便在合同签订后尽快渡过冷静期期限；

1. To actively include the cooling-off period into the Franchise Agreement. As discussed, the franchisor can opt to include a short cooling-off period such as 2 weeks so that this period elapses very quickly after signing of the Franchise Agreement.

2. 在合同签订后，尽快积极主动提供特许资源，并保留被特许人接收的证明；

2. After signing of the Franchise Agreement, the franchisor shall actively provide franchise resource and meanwhile, keep the receipt of the franchisee in relation to the provision of the franchise resource.

3. 在合同签订后，积极主动配合被特许人选址并尽快开业经营；

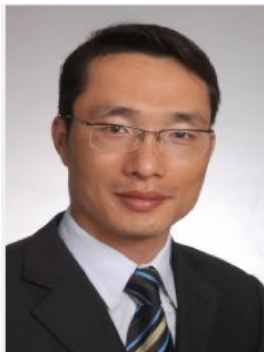
3. After signing of the Franchise Agreement, the franchisor shall actively cooperate with the franchisee to select site and start operation asap;

4. 为避免因被特许人行使冷静期单方解除权导致全部退还已收取加盟费的情况，可以进一步在特许经营合同中约定如被特许人行使冷静期解除权的情况下，如何退还被特许人已支付加盟费的条款。一般情况下，如果双方没有对此做特别约定，则法院或仲裁机构将根据合同履行情况自由裁量特许人应退还的加盟费比例。如果双方能预先在合同中对此作出约定，则可以在很大程度上避免过多退还加盟费情况的出现。

4. To avoid the full refund of paid franchise fee due to the termination of the Franchise Agreement by the franchisee, it is recommended that additional clauses can be agreed in the Franchise Agreement on how to refund the paid franchise fee in case of termination by the franchisee based on cooling-off option. In most cases, if no agreement, the court or arbitration commission will decide the proportion of franchise fee to be refunded on its discretion. However, if prior agreement can be reached in this aspect, the franchisor can be in a better position to avoid excess refund of the franchise fee.

如您对本文有任何问题，请联系：

If you have any questions about this article, please contact us via:



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