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Features of legal regulation of franchise agreement in Spain

Особливості правового регулювання договору франчайзингу в Іспанії

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Written by:

Bobyryk Volodymyr¹<https://orcid.org/0000-0002-2152-9937>**Karmaza Oleksandra²**<https://orcid.org/0000-0003-4895-5220>**Makhinchuk Vitalii³**<https://orcid.org/0000-0003-4360-0287>**Tsvytkov Andriy⁴**<https://orcid.org/0000-0002-3239-322X>**Koroied Sergii⁵**<https://orcid.org/0000-0001-7899-957X>

Abstract

The purpose of the article is to study features of legal regulation of franchise agreement in Spain. Research methodology. The research is based on the use of general scientific and special-scientific approaches such as dialectical, abstraction and generalization, logical, system analysis, historical and legal method, comparative and legal, logical analysis. Research results. Among the EU Member States, which have adopted special acts regulating franchise agreement issues, Spain is especially notable for its Royal Decree 201/2010, which regulates the procedure for concluding franchise agreement in detail. Practical implication. It is stated that there is statutory provision on pre-contractual disclosure in Spain, the main purpose of which is to protect a potential franchisee by providing him with the relevant information. Value /originality. This scientific work is the first research in Ukraine devoted to the characteristics of franchise agreement in a separate country (in Spain).

Анотація

Метою статті є дослідження особливостей правового регулювання договору франчайзингу в Іспанії. Методологія дослідження. Дослідження базується на використанні загальнонаукових та спеціально-наукових підходів, таких як діалектичний, абстракції та узагальнення, логічний, системного аналізу, історико-правовий, порівняльно-правовий, логічного аналізу. Результати досліджень. Серед країн-членів ЄС, які прийняли спеціальні акти, що регулюють питання договору франчайзингу, Іспанія особливо виділяється Королівським указом 201/2010, який детально регламентує порядок їх укладення. Практичне значення. Зазначається, що в Іспанії існує законодавче положення про переддоговірне розкриття інформації, основною метою якого є захист потенційного франчайзі шляхом надання йому відповідної інформації. Цінність/оригінальність. Ця наукова робота є першим в Україні дослідженням, присвяченим

¹ Doctor of Law Science, Senior Research Fellow, Head of the laboratory for the protection of subjective rights of the department of private law problems, The F.G. Burchak Scientific-Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine, Ukraine.

² Doctor of Law Science, Professor, Professor Institute of Continuing Education, Taras Shevchenko National University of Kyiv, Ukraine.

³ Doctor of Law Science, Professor, Deputy Director of the Institute for Research, The F.G. Burchak Scientific-Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine, Ukraine.

⁴ Candidate of Law Sciences, Senior Researcher, Laboratory for the protection of subjective rights of the department of private law problems, The F.G. Burchak Scientific-Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine, Ukraine.

⁵ Doctor of Law Science, Professor, Leading researcher, Koretsky Institute of State and Law of National Academy of Science of Ukraine, Ukraine.

Keywords: franchising, franchise agreement, franchisor, franchisee, pre-contract disclosure duty.

особливостям договору франчайзингу в окремі країні (в Іспанії).

Ключові слова: франчайзинг, договір франчайзингу, франчайзер, франчайзі, переддоговірний обов'язок розкриття інформації.

Introduction

The history of franchising dates back to the 18th century, when this term was first used in America. The widespread use of this form of cooperation began in the 60s of the last century during the period of mass sales and the spread of services in business activities. The most striking examples of the use of the franchise in this period are Holiday Inn, Burger Inn, MC Donalds, Dunkin Donats, etc. (Tsesliv 2013, p. 352)

Over time, the application of this organization of relationships between business entities only expands, as it contains a number of advantages for each of the parties. In particular, for the franchisee, such a legal structure gives the opportunity to start a new business successfully tested by the franchisor. He also gets the right to use a trademark known to consumers, the opportunity to have all the benefits of the franchisor's extensive advertising activities, business technology, as well as the access to credit resources, since it is enough often the franchisor acts as a loan guarantor.

In turn, the franchisor expands its business in new markets, gets closer to the consumer, reduces the risk of losing its own capital and receives additional income due to franchisee fees.

The subject matter of the commercial concession contract is the right to use objects of intellectual property, commercial experience and business reputation. The commercial concession contract must describe in detail the goods and services that must meet a certain standard, stipulate all elements of the use of objects of intellectual property rights. In addition, the contract defines the terms of transfer, continuation and termination of business relations between the right holder and the user, the method and forms of use of the object of intellectual property, as well as the territory of its application, which can be established according to the geographical principle or the principle of administrative division of a certain country.

Taking into account the European integration course of our country, the Covid-19 pandemic,

which caused an adverse affect on the stable function of economic and social spheres of the society (Kharytonov et al. 2021, p. 158), it is advisable to examine the experience of leading European countries related to this issue for the further implementation of positive practice into our legislation.

Thus, the purpose of the presented research is to determine the features of legal regulation of franchise agreement in Spain, since this State developed rather detailed and regulated legislation in respect of this institution.

Methodology

The methodological basis for the research is general scientific and special methods.

Among general scientific methods, dialectical method was applied when analyzing the development of the institution of franchising in the world in general and in Spain in particular.

The method of abstraction and generalization made it possible to determine the advantages of franchising activity.

Logical method helped to build the structure of the research, moving from general issues such as franchising activity to special ones (definition of the franchise agreement in the studied country, rights and obligations of the parties to the franchise agreement, termination of the contract, etc.).

As for special scientific methods, the method of system analysis was applied during the study of the concept of franchise agreement in Spain.

With the help of the historical and legal method, the evolution of franchising in Spain, as well as individual aspects and features of the franchise agreement establishment in this country were examined.

The comparative legal method was used when considering the rules of Spanish legal

instruments, governing the procedure for concluding this type of contract.

The method of logical analysis was applied in the process of determining the main concepts of the research, such as “franchising”, “franchise agreement”, “disclosure obligations”, “principle of acting in good faith”.

Literature Review

Over the last few years, the phenomenon of the franchise as a modern method of doing business has seen a marked rise in Spain, with annually increasing indicators of around 40%. As a result, Spain’s retail trade undergoes considerable transformations and becomes ever closer to the characteristics to that prevailing in other EU States (Gámir & Méndez 1999).

Rodríguez and Díez (2021) provided the definition of franchise agreement, which is a contract between companies (the franchisor and the franchisee) with the objective of creating a uniform distribution network with limited investment.

Quintana and Cazalilla (2022) proposed the following concept of franchising activity, which is defined in Spain as that which is carried out by virtue of a contract whereby a business entity (the franchisor), gives another (the franchisee), in a provided marketplace, in return for a financial remuneration, the entitlement to manage a franchise, on a business activity that the first has performed with considerable accomplishment, in order to sell particular goods or services.

Salinas (2021) stresses that franchisors can work in Spain without being enrolled as franchisors and there is no need to sign up their franchise agreements in the Franchising Registry. Prior Spanish legislation required such enrolment, but this obligation was cancelled in 2018 to address unnecessary bureaucracy and ease the distribution of franchising in the State.

Lourdes and Ballesteros (2018) investigate the abovementioned franchisors’ duty of disclosure and registration and the legality of its suspension by the Spanish Ministry of Economy.

Ester (2018) considered breach of obligations under franchise contracts in Spain. In particular the lawyer investigated the Supreme Court judgment 438/2018 of 11th September which deals with the breach of obligations contractually agreed between a franchiser and a franchisee and proposed his qualified conclusion on this issue.

Results and Discussion

Spain has rather strong economy compared to economies of other European countries. Currently, it ranked 49th out of 183 countries in the World Bank Group’s Ease of Doing Business Ranking (the countries with the most favorable conditions for doing business).

The largest sectors of franchising in Spain are: the food products sector (with an average turnover 2,151 million euros); restaurant business and fast food (with an average turnover 1,730 million euros); retail trade (with an average turnover 1.192 million euros); service sector (with an average turnover 1,233 million euros).

In 2015 there was an increase from 83% to 89% in new franchises, and a growth of 11% to 17% in international brands, totalling 138 new franchisors. Most new franchises in 2015 appeared in the such spheres: online entrepreneurship, self-care, training, restaurants and take-away, specialized foodstuffs, personal hygiene (Echarri 2016).

In 2020 a total of 1,381 franchised brands operated in Spain, and although the Covid-19 pandemic influenced the franchising sector in 2021, it was only temporary and its extension continued in 2022 (Salinas 2021).

The main franchise association in Spain is the Spanish Association of Franchising (Asociación Español de Franquicias – AEF), which belongs to the Iberian-American Federation of Franchising, the European Federation of Franchising and the World Franchising Council. Membership in the national association is not mandatory, but it is recommended as it promotes the participation of franchisors in international and national exhibitions; provides funds for specific commercial missions; helps to harmonize relationship between a franchisor and a franchisee; grants data and conducts education on franchising issues; provides information to potential investors, etc.

On May 28, 2014, AEF entered into an agreement with the World Intellectual Property Organization (WIPO) to promote arbitration in master franchise agreements. Spanish lawyers working in the field of franchising have been fully trained on WIPO’s Alternative Dispute Resolution (ADR WIPO), and the AEF is currently helping to determine if a potential candidate has sufficient experience to be appointed as an arbitrator of WIPO.

Franchisees set up franchise networks in the country, using different legal and organizational forms of legal entities, but the most common in Spain are: *sociedad limitada* (is a type of business venture, where the asset is split into shares and the liability of the associates is restricted by this fund) , *sociedad limitada nueva empresa* (this company will compromise a maximum of five members) and *sociedad anónima* (the capital of the company is divided into shares and includes the contributions of all its members who do not bear responsibility for private assets). *Empresa conjunta* (joint venture) is also a widespread form of franchise in this State. The joint enterprise is not foreseen by Spanish law, but it falls under the regulation of the civil legislation, which permits the establishing new contract-based forms in accordance with the principle of contractual freedom (Sönke 2019).

There is no special law on franchising in Spain. Relationships between the parties are regulated by the Law 7/1996 on retail trade, the Royal Decree 201/2010 of February 26, 2010 regulating franchise business and transferring data to the Register of Franchisees, the Law 14/2013 (2013) on the support of entrepreneurs, the Law 20/2013 of December 9, 2013 on the guarantee of market unity.

According to clause 62.1 of the Royal Decree 2485/1998 of November 13, 1998 to the Retail Trade Act (Real Decreto 2485/1998), commercial franchise activity is the occupation which is carried out under the contract by the company called the Franchisor, which transfers to another company – Franchisee the right to realize activities within the Franchisor's business system for the sale of goods or services.

Definition of a franchise agreement was first provided in the Law 7/1996 of January 15, 1996 on regulating the retail trade (hereinafter – the Law 7/1996) (*Ley 7/1996*). It states, in particular, that «commercial activity is carried out under the agreement, according to which the franchisor transfers the franchisee the right to use his marketing system of goods and services».

This definition has been somewhat improved by the Royal Decree 201/2010 (Real Decreto 201/2010). Thus, clause 1 of this Decree states that franchising is a business in duty-free treatment, regulated in article 62 of the Law 7/1996, which is carried out under the contract by which a company, the franchiser, gives way to another, the franchisee, in a given market, in exchange for a direct financial consideration (indirect or both), the right to the

exploitation of a franchise, about a business or commercial activity the first come previously developed with sufficient experience and success, to market certain types of products or services.

According to the Royal Decree 201/2010 (Real Decreto 201/2010), the franchise should compromise at least: a) the use of a name or common label or other rights of intellectual or industrial property and a uniform presentation of the premises or means of transport subject to the contract; b) transfer the basic, definite and distinctive proficiency to the franchisee; c) day-to-day tech and enterpreunial aid provided by the franchisor for the duration of the agreement, without considering the implementation of the general supervision that can be set in the contract.

This definition clearly demonstrates the main purpose of the contract – marketing of goods and services, with an emphasis on commercial distribution. On the other hand, the Supreme Court of Spain (Tribunal Supremo) has decided that the franchise agreement is the contract concluded between juridically and commercially autonomous parties, according to which the franchisor provides the franchisee with the right to applicate, under particular terms, within determined timeframe and in a identified territory, a procedure in a certain type of activity, in return for relevant payments by the franchisee.

There is a statutory provision on pre-contractual disclosure in Spain. Thus, section 62, paragraph 2 of Law 7/1996 provides for the obligation of the franchisor to register in a special register within three months from the beginning of its activity. The Register of Franchisees of Spain records information on those entities that transfer rights to use certain objects of intellectual property right on the basis of franchise agreements. The physical person or legal entity intending to perform franchise operation of transfer of franchise in Spain must communicate their data, within three months from the beginning of the activity, or the registration of the autonomous community where they plan to start their activities, or when the autonomous community does not establish the need for communication of data to the same, to the register of franchisors from the Ministry of industry, tourism and trade, for informational purposes. Communication to the register of franchisors does not condition the start of the activity. The lack of data communication expiry of the aforementioned period will result in the corresponding sanction, in accordance with the

penalties provided for in the Law 7/1996 and other applicable legislation.

At least of twenty business days delivery by the future franchisee to the franchisor of any payment or the signature of the contract or pre-contract of franchise, the franchisor or main franchisee must give the potential franchisee the following truthful and not misleading identification data in written: name or company name, address and registration in the register of franchisors as well as, in the case of a commercial company, social capital picked up in the last balance sheet, with expression of is fully paid up or in what proportion and registration data in the register, as appropriate.

The main purpose of this commitment is to protect a potential franchisee, which, according to the legislator, is a «vulnerable» party, by providing him with the relevant information in order it could value the terms of the future contract before it is concluded. In addition, the Royal Decree also protects the interests of the franchisor, allowing him to demand from the franchisee of non-disclosure of all pre-contractual information that has been disclosed (Article 4).

Franchisors are obliged to provide potential franchisees with the following information: 1) information about the franchisor (name, address, data on its share capital on the last balance sheet, etc.). Foreign franchisee must disclose the information on its registration in the Franchisors Registry in accordance with their national rules; 2) confirmation of ownership or license allowing the use of the trademarks and other intellectual property rights; 3) a description of the franchisor's practice that includes the day of registration and the main phases of its development and the evolution of the franchising scheme; 4) the nature and features of the franchise and the terms of its use, i.e. clarification of the entrepreneurial concept, the know-how and the content of continual economic or technical support provided by the franchisor; 5) an assessment of the required initial costs and investment.

In relation to the civil effects of the default by the franchisor in complying with its pre-contract disclosure obligations, the question is whether non-compliance with section 62.3 of the Law 7/1996 affects the validity of the franchise contract, that is, whether the contract is invalid because of a previous violation of the rules of «public order». In some cases, Spanish courts (including the decision of the Supreme Court)

recognized the franchise agreement invalid on the basis of non-observance the franchisor's pre-contract disclosure obligation or for serious misrepresentations made in the disclosure document. However, in some cases, courts decided that non-observance of the pre-contract disclosure obligation is an administrative default, since it is a violation of the Royal Decree 201/2010 and therefore does not imply the nullity of the franchise agreement. If the misrepresentations made by the franchisor in the disclosure document are insignificant, Spanish courts do not assert the complete nullity of the franchise agreement. Instead of it a franchisee obtains the right to terminate the agreement and claim damages (Echarri 2016).

Besides the pre-contract disclosure obligation, there is a requirement to act in good faith in Spanish legislation. According to it the parties to any agreement has to act faithfully. This commitment is stipulated in clauses 7 and 1258 of Código Civil (1889) and clause 57 of the Code of Commerce (1885). In addition, a franchisor and a franchisor may compose codes of good practice, in which additional provisions concerning the good faith would be foreseen. It should be noted that even during the franchise agreement negotiations, the parties must act conscientiously (*buena fe in contrahendo*).

This principle, when applied to a franchise agreement, should restrict the freedom of choice of the parties in order to protect their legitimate expectations during contract negotiations. For example, both parties may disclose confidential information about their activities, but for the protection of their interests they may conclude a non-disclose agreement. This document may be also signed when performing the agreement (for, that the franchisor possesses all intellectual property rights used by the franchisee during the execution of the contract) (Sönke 2019).

Rights and obligations of the parties to the franchise agreement are not prescribed at the level of legislation. Therefore, the franchise agreement must clearly specify only those rights and obligations which are specific to a particular type of the franchise. All common pledges or activities (non-payment, dissolution, etc.) are regulated by the Civil Code and the Commercial Code. Though, in fact, the more comprehensive the agreement is preferably.

The franchisee is entitled to: 1) the application of the franchise and its intellectual property rights; 2) receiving regular tech aid and learning; 3) obtaining know-how; 4) obtaining constant

commercial and promotional assistance; 5) holding of its particular area, if provided; 6) non-competitively by the franchisor, if provided; 7) dissolution of the contract in case of non-fulfillment of obligations by the franchisor.

The franchisee, as a rule, is obliged to: 1) afford duties and fees; 2) respect franchise specification; 3) not to violate intellectual property rights and report local infringements; 4) comply with territorial restrictions; 5) observe all instructions, know-how and learning duties; 6) respect all native rules and customs; 7) observe the requirement of confidentiality before, during and after the termination of the contract; 8) comply with accounting and reporting standards; 9) act in good faith and as a diligent business person.

The franchisor is eligible for: 1) receiving payments and royalties in due course; 2) reviewing the accounts and audits by the franchisee; 3) obtaining reports on the franchisee's activity; 4) monitoring the performance of the franchisee's duties; 5) set the franchisee's territory; 6) demanding learning and observance of the guidelines; 7) offering and setting boundary prices; 8) providing goods; 9) creating promoting schemes; 10) interfering in case of non-fulfillment of obligations; 12) applying non-competition rules; 13) dissolving the contract in case of non-execution by the franchisee.

The franchisor is obliged to: 1) provide reliable information prior to the conclusion of the contract; 2) ensure the safe use of franchise and other intellectual property rights; 3) provide ongoing technical help and education; 4) direct advertising and promotional support; 5) observe the franchisee's area; 6) adhere to all relevant rules and orders; 7) to act faithfully and honestly (Echarri 2016).

The duration of franchise agreement in Spain is not legally binding; the parties may determine it at their own discretion. Depending on the type of franchise, the franchise agreement is concluded for a period from five to ten years.

The franchise agreement, which is concluded for a limited period, is terminated only after the expiration of this term. The law, as it was already mentioned, does not provide for the fixed term of the franchise contract, however, according to the doctrine of the courts, usual contractual relations should be limited in time. This means setting a certain limit for the debtor. Therefore, in accordance with the Spanish civil legislation, any

provision imposing an indefinite period of validity of the franchise agreement will be considered as invalid.

Based on the foregoing, it can be concluded that franchise contracts, in which it is provided for a limitness period of the contract, may be one-sidedly terminated by either party. In addition, contracts limited by a certain period of time, but containing provisions for automatic prolongation may also be terminated by either party at the end of the agreed period.

It is prohibited to terminate the contract as a result of abuse of the law; during the termination the principles of equity and good faith must be observed; in case of non-execution of terms of the contract, the damages incurred must be reimbursed. The agreement may also be dissolved by shared consent of the parties.

Until the expiration of the franchise contract, the franchisor has the right to terminate the agreement in case of: 1) failure by the franchisee to fulfill his obligations under the contract or the statute, or the repeated failure to fulfill his obligation, if he was given such an opportunity in accordance with the terms of the franchise agreement; 2) death of the franchisee, if the contract is inseparably linked with his person; 3) unauthorized shift of monitoring in the franchisee; 4) dissolution of the franchisor's rent/subrent agreement during the term of the franchise contract; 5) criminal proceedings in relation to the franchisee; 6) withdrawal of the franchisee or franchisee's funds by the third party or the public authority; 7) failure to observe native franchising rules (Echarri 2016).

Unlawful termination of the agreement obliges the franchisor to renew it and to compensate any harm suffered by franchisee or to compensate for losses if it isn't possible to renew the contract.

Cancellation of the contract by expiration of its term does not oblige the franchisor to resume it or to pay compensation to the franchisee for refusal to renew it, unless it is foreseen by the franchise contract itself. Refusal to renew the contract, if it contains a provision for renewal, allows the franchisee to apply to the court for the protection of his rights and to demand the renewal of the franchise agreement and compensation for losses incurred.

In practice, the franchisee obtains the right to renew the contract under certain conditions. These conditions are as follows: 1) franchisee performs all obligations under the contract;

2) franchisee does not violate any local laws or rules of business activity; 3) franchisee agrees with the terms of the renewed franchise agreement; 4) the franchisee pays a contribution for the renewal of the contract.

Conclusion

Consequently, on the basis of the foregoing, the following conclusions can be made. In Spain, there is no special law on franchising, but this issue is sufficiently regulated, in particular by the Law 7/1996, in which the definition for the franchise agreement was first formulated. Among the EU Member States, which have adopted special acts regulating franchise agreement issues, Spain is especially notable for its Royal Decree 201/2010, which not only secured the franchisor's obligation to reveal the potential franchisee all the information in writing concerning the franchisor itself and the subject matter of the franchise agreement, which is necessary for the franchisee for objective assessment of the need to conclude the relevant franchise agreement, but also in which the procedure for the registration of franchisors, franchisors' record-keeping and computerization of the Register is regulated in detail. Another feature of Spain is that in this country the legislator has not only taken care of the interests of the potential franchisee, but also of the franchisor's, who when disclosing the information in the pre-disclose document, takes the risk of losing his trade secrets or other confidential information. The franchisee, in its turn, also obliges not to disclose information received from the franchisor.

It should be noted that the pre-contract disclose obligation is secured in internal regulatory acts. This means that there is no need for courts of this country when considering cases connected with the breach of this obligation to refer to the general principle of contract law «culpa in contrahendo» (the principle of pre-contract obligation), which is adjusted to the litigation of the countries where such an obligation is not provided for.

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