Le nouveau marché des services aux personnes et à domicile

LE NOUVEAU MARCHÉ DES SERVICES AUX PERSONNES ET À DOMICILE

Que se soit pour le soutien scolaire, l'assistance informatique, les gardes d'enfants, l'aide aux personnes dépendantes, le ménage ou encore les repas à domicile ou le jardinage,… les services à domicile sont pléthore et près de 2,5 millions de ménages y feraient déjà appel.

La première raison de l'essor des services à domicile est le vieillissement de la population française : les pouvoirs publics estiment qu'en 2020 il y aura 2 millions d'octogénaires qui auront besoin d'assistances diverses comme les courses, les repas… Si aujourd'hui le secteur est en grande partie couvert par le milieu associatif, le marché potentiel intéresse un nombre croissant de professionnels.

En parallèle, le marché des cours à domicile et de la garde d'enfants s'est développé très rapidement, avec des enseignes nationales telles que ACADOMIA, FAMILY SPHERE.

Ces services ont réellement pris leur essor grâce au mécanisme de la réduction fiscale prévue par l'article 199 sixdecies du Code Général des Impôts.

En parallèle, le code du travail a été adapté, un nouveau chapitre IX étant dorénavant consacré aux « services à la personne ». En vertu des articles L 129-1 et suivants du Code du travail, le « marché » des services aux personnes, initialement animé par des associations, a été ouvert à l'entreprise.

La nouvelle condition posée avant de commencer toute exploitation dans ce secteur est l'obtention d'un agrément délivré par l'Etat.

LES DEUX TYPES DE FRANCHISE EXISTANTS DANS CE DOMAINE

En examinant les différents réseaux de franchise dans ce domaine, nous ne pouvons que constater l'existence de flux financiers et de liens de droit très complexes, les acteurs étant multiples : le franchiseur, le franchisé, les personnes physiques exécutant les prestations, les familles, l'URSSAF, le Trésor.

Pour organiser les rapports entre ces différents intervenants, deux types de franchise coexistent : le modèle dit « prestataire » et le modèle dit « mandataire ».

L'essence du premier modèle de franchise réside dans le fait que les personnes physiques exécutant les prestations pour le client final sont des salariés du franchisé. Dans ce premier groupe, les règles de fonctionnement de la franchise sont classiques : la transmission d'un savoirfaire du franchiseur au profit du franchisé, une assistance initiale et continue, et l'usage d'une marque notoire. Sur le plan financier, le franchisé perçoit ses honoraires du client final. Le franchisé paie au franchiseur les redevances dues.

Le deuxième modèle est formé de réseaux de franchise dits « mandataires ». Le franchiseur a construit son modèle économique dans le seul but de conservation durable du pouvoir : (1) le franchiseur contrôle l'ensemble des flux économiques puisque l'intégralité des sommes versées par les clients sont déposés sur un compte géré exclusivement par le franchiseur ; (2) le franchiseur a mis en place un système informatique par lequel les ordinateurs utilisés chez le franchisé sont de simples terminaux, entièrement contrôlés à distance par le franchiseur, toutes les informations sur les familles et les professeurs étant conservées par le franchiseur ; (3) le franchiseur domine les liens de droit existants avec la famille, les professeurs, et l'URSSAF, par un système de

double mandat.

En premier lieu, les professeurs et les familles mandatent le franchisé afin de réaliser des prestations :

- les professeurs mandatent le franchisé pour les mettre en rapport avec des familles et les assister par la fourniture d'outils pédagogiques ;
- les familles mandatent le franchisé afin qu'il sélectionne le professeur, et gère la relation de travail au nom et pour le compte de la famille qui est l'employeur du professeur.

En second lieu, le franchisé dans le corps même du contrat de franchise, mandate le franchiseur afin que ce dernier, concrètement, se substitue au franchisé dans l'ensemble de ses engagements vis-à-vis des familles et des professeurs. Ainsi, seul le franchiseur gère réellement le dossier de chaque professeur en éditant les fiches de paie, en payant les salaires et les cotisations. Le franchiseur édite également les attestations fiscales remises aux familles en mai de chaque année destinées à être jointe à la déclaration de revenu pour bénéficier de la réduction d'impôt.

En conclusion, dans ce modèle, le franchisé peut se concentrer sur l'animation du point de vente, la réception physique tant des familles que des professeurs. Le franchisé s'appuie pour tout le reste sur le franchiseur qui a su développer de très puissants outils informatiques et logistiques qui seuls lui permettent de gérer les milliers de professeurs exécutant des cours à domicile à travers la France.

LE RISQUE DE REQUALIFICATION DÉCOULANT DE L'EXCÈS DE CONTRÔLE

Le modèle dit « mandataire » permet certes au franchiseur de conserver un contrôle réel sur le franchisé et la clientèle du franchisé. En pratique, il suffit que le franchiseur suspende le lien informatique pour empêcher le franchisé d'exploiter la franchise.

Sur les flux financiers, les sommes destinées au règlement des paies des professeurs, de l'URSSAF et autres organismes sociaux sont sur le compte du franchiseur. En vertu du système du mandat inclu dans le contrat de franchise, le franchisé confie en effet au franchiseur le mandat de gérer cette question en ses lieux et place. Le franchisé est donc entièrement tributaire de la coopération du franchiseur pour assurer le règlement des paies des professeurs et des cotisations dues.

Si le contrat de franchise est suspendu ou interrompu, le contrat de mandat inclu dans le contrat de franchise est ipso facto suspendu ou interrompu. Le franchiseur devrait en conséquence restituer les sommes qu'il avait conservées es qualité de mandataire du franchisé.

Or, le contrat de franchise ne prévoit pas toujours la restitution de ces sommes et le franchiseur ne prend pas l'initiative de restituer ces sommes au franchisé. Ce dernier est pourtant le gardien juridique des sommes confiées au franchiseur. En effet, le franchisé, est propriétaire de sa clientèle. Le franchisé a signé, tant avec la famille qu'avec le professeur, par acte séparé, un contrat de mandat aux termes duquel il prend la responsabilité exclusive, es qualité de mandataire des familles et des professeurs, de gérer le volet social. Il n'est pas anodin de préciser que les modèles d'acte de mandat signé entre le franchisé et les familles et professeurs sont édités par le franchiseur.

Ces précisions nous interpellent quant à la nature réelle du rapport juridique mis en place par le franchiseur :

- le franchisé, en effet, ne peut pas exercer son indépendance n'ayant pas le contrôle des flux financiers. Les règlements des familles sont faits habituellement au nom du franchiseur, les sommes étant versées directement sur le compte du franchiseur sans être remises à l'encaissement du compte du franchisé,

- le franchisé agit exclusivement comme animateur du point de vente, en prenant les commandes des parents,
- le franchisé ne peut ouvrir le point de vente que s'il est agréé par le franchiseur,
- l'économie du contrat conduit en réalité le franchiseur à gérer la facturation et les prix.

Le risque de requalification est donc sérieux, plusieurs qualifications pouvant être envisagées, en particulier celle d'agent commercial et celle de l'article L 781-1 du code du travail.

En cas de requalification es qualité d'agent commercial, la sanction est redoutable. La jurisprudence sanctionne le mandant, en cas de résiliation anticipée du contrat, à indemniser l'agent. Le seul moyen d'échapper à cette sanction est de démontrer la commission par l'agent d'une faute grave. Ce fait exonératoire de responsabilité n'est pas facile à établir.

En cas de requalification sous le visa de l'article L781-1, la voie judiciaire est ouverte pour solliciter la nullité du contrat pour vice du consentement par exemple, le franchisé se retrouvant sans clientèle alors qu'il avait signé le contrat pour, à terme, créer un fonds de commerce qui lui appartienne.

EN CONCLUSION

Un franchiseur souhaitant se développer dans ce nouveau marché doit offrir à la signature un contrat de franchise lui assurant un contrôle réel, mais mesuré, sur le franchisé. L'écueil à éviter est donc celui d'un contrat exerçant un contrôle excessif sur le franchisé. Cela laisserait le champ libre au franchisé pour agir en requalification.

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Franchising in Denmark

FRANCHISING IN DENMARK

General presentation

The Kingdom of Denmark, which covers 43 098 km², is a small market, but can be considered as an entrance to many other Nordic markets representing no less than 24 million consumers with a very high buying capacity. France is the third foreign investor in Denmark after Sweden and the United States.

The Danish economy grew by 2,4% in 2006. Inflation was extremely weak representing 1,2% on the year. The Danish government has presented a 2007 budget project in excess, which has been a recurrent phenomenon for the last ten years, of an amount of € 7.5 billion, accounting for 3,4 % of GDP. Unemployment is at its lowest level (3.8% according to the Eurostat's definition for this year), and is expected to continue decreasing for finally

reaching 3.4% in 2007 and stabilize in 2008.

Franchise had rapidly developed in Denmark. Today, there is between 140 to 150 networks. The turnover of franchising networks is estimated at € 7.3 billion in 2005, half coming from networks of a Danish origin. Franchise regarding distribution (retail) is superior to franchise dealing with service with nearly 4,000 sale points in franchise out of 5,500 in total. More than 50% of the foreign networks are from the United States of America (27 networks are actually operating in Denmark).

Danish franchising networks have been accurately present abroad since the last ten years, especially in the textile and clothing areas, with actually 40 networks among which, for example: Jysk (textile), Claire (clothing), Noa-Noa (clothing), Ecco (shoes), Bang & Olufsen (image and sound), Bo Concept (home equipment) or Kvik (kitchen).

Franchise legislation in Denmark : the Swedish inspiration

Actually there is no specific law dealing with franchise in Denmark. The legislation regarding contracts, competition, and marketing is applicable to franchise contracts and to relationships between franchisors and franchisees. These texts integrate the European legislation regarding distribution contracts and franchise.

However, it is important to underline a Swedish law of October 2006, 1st that compels franchisors to inform the future franchisees, as in French law. The Swedish law provides that franchisor shall inform franchisee as regards, among others: its activity, franchisees part of the network, financial contractual obligations, intellectual property rights, supply, non competition dispositions, modification or termination of the contract, disputes dispositions. It shall be pointed out that should franchisor fail to fulfill his information obligation he shall simply pay a fee in Sweden.

According to the Danish doctrine and practitioners, Danish courts are probably going to apply Danish law before trying to apply neighborhood legislation such as Swedish law. That is to say that they will apply the Danish Contracts Act that is very close to the spirit of article 1134 of the French civil Code referring to the law of the parties and many other approaching notions, except for the improbable (because not very used in common law countries from which it is originally from) “caveat emptor rule”. But they may well apply articles 6 and 11 of the Danish Competition Act that are quite similar to articles 81 and 82 of the European Community Treaty, which refer to cartels and abuse of a dominant position. Finally the Courts could apply the Danish Marketing Act referring once again to the spirit of article 1134 paragraph 3 of the French civil code as regards the conduct of commercial relations in good faith. More rarely but conceivable is the application of the Danish Commissions Act that, if it is not in itself applicable to franchise, could nevertheless inspire the courts as its system is similar to franchising.

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Enforcement of Judgments in Commonwealth Countries

ENFORCEMENT OF JUDGMENTS IN COMMONWEALTH COUNTRIES

The question of the clause conferring jurisdiction is an essential component of an international business strategy, in particular in the franchise business. Indeed, the Franchisor's first order of business when venturing into Asia for example is to sign a master franchise contract (or franchise contracts) with an investor located in the given Asian country whose goal is usually to sign up for the franchise rights for the whole country or even all or part of Asia.

There are a great variety of combinations relating to the choice of the clause conferring jurisdiction: the Franchisor's Court, the Master Franchisee's Court, compulsory rules, third party Courts, arbitration courts.

Difficulties often derive from the fact that both parties want the designated court to be its own, or alternatively be an arbitration court. These options create more problems than they solve: if the Court is that of one of the parties, is it not an advantage to the said party? If the arbitration court is chosen, isn't its cost much too expensive and the process lengthy in case of extreme urgency?

It occurs that the Commonwealth of Nations offers an interesting alternative to international players, offering creative solutions through the mechanism of the reciprocal Enforcement of Foreign Judgments Acts. Such acts create procedural connections between Commonwealth States which are worth being known and used.

Indeed, one has to be reminded that 53 independent States are member of the Commonwealth among which Australia, Brunei, Canada, India, Malaysia, Pakistan, Singapore, South Africa, Cyprus, Jamaica…

There is a very powerful incentive among Commonwealth States to facilitate business relations between one and another, and hence to create bilateral or multilateral rules of conflict, given that the legal tradition of Member States derives from the Common law of England & Wales.

For example, if a European Franchisor wishes to move into Malaysia, one of the questions would be: should the relevant tribunal be that of the European country or the Malaysian Judge? The European party may well prefer the Court to be its own, viewing with some fear the choice of the Malaysian Judge as being in an excessive "proximity" to the Malaysian prospective Master Franchisee. Indeed, European Franchisors going to Asia are usually in contact with powerful families, whose local "influence" is often great, and which usually sign up to buy the franchise rights for the whole country or even several countries, capable of paying entrance fees and making investments in millions of dollars.

One of the best solutions in this case is to examine the mechanisms of enforcement of foreign Judgments in Malaysia, which brings us to study the Singaporian ENFORCEMENT OF COMMONWEALTH JUDGMENTS ACT (CHAPTER 264).

Article 5 of the Act, gives the following precision: *". —(1) When the Minister is satisfied that reciprocal provisions have been made by the legislature of any part of the Commonwealth outside the United Kingdom for the enforcement within that part of the Commonwealth of judgments obtained in the High Court of Singapore the Minister may declare by notification published in the Gazette that this Act shall extend to judgments obtained in a superior court in that part of the Commonwealth in the like manner as it extends to judgments obtained in a superior court in the United Kingdom and on any such declaration being made this Act shall extend accordingly. "*

The interest for the Master franchisee of choosing in the clause conferring jurisdiction the Singaporian judge is dual: first, the Singaporian Court remains in the vicinity of the prospective Master Franchisee's cultural

environment; secondly, the law of the Land is very close to that of Malaysia since both states are members of the Commonwealth. The interest for the Franchisor is dual all the same: firstly, he avoids the Court to be that of the Master Franchisee. Secondly, the Court is that of a State known for its strict legal system and great proximity to Common Law, which is of European inspiration, and thus very close to the Franchisor's general legal culture (even if the Franchisor comes from a continental legal environment).

On a practical level, if Singapore is chosen in the clause conferring jurisdiction and a dispute arises where the Franchisor must take action to obtain from the Malaysian Master Franchisee that he refrains from using the tradesign for example, the Franchisor will file an *ex-parte* application before the Singaporian Judge so as to obtain a Court Order. It is obtained without the Master-Franchisee being heard of course. It would take two to three weeks to obtain the Court Order.

In parallel, an *in-parte* application is to be filed before the Judge, the parties hence debating and presenting their respective arguments to the Judge. During the *in-parte* Court debate the *ex-parte* injunction would remain valid. Within 14 to 21 days of issuance of the *ex-parte* Court Order, the Franchisor will have to enforce the *ex-parte* Court Order in Malaysia.

The Singaporian Reciprocal Enforcement Act would then be used to execute the *ex-parte* Court order within Malaysia. Indeed, the Singaporian Court Order will have to be registered before the Malaysian Court Registrar by filing a Certificate of Urgency which gives to the Singaporian *ex-parte* Court Order the legal power to be enforced within Malaysia, procedure which is accomplished within 2 to 3 days.

In conclusion, before signing any Master Franchise contracts, the Franchisor is recommended to analyze with precision all possible options, including those aforementioned. Only half the work will have then been accomplished: it would still be left to determine the law governing the contract.

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Franchising in South Korea

FRANCHISING IN SOUTH KOREA

Korea : essential data

South Korea, with an area of 99 601 km2, occupies the southern most half of the Korean peninsula, in the south of the demilitarized Zone (DMZ), near to the 38th parallel, which constitutes since 1953 the demarcation line with North Korea. It neighbors are China on the west and Japan on the east. The federal capital is Seoul with 9.9 million residents for a total population of 48.2 million. The population is 80% urban and concentrated on the coast and valleys. The density of 484 residents per km2 is one of the most important in the world because of the 2/3

uninhabitable territory. The last census recorded only 151,000 foreigners in Korea (0.3 % of the total population) of Chinese, Sino-Korean, Japanese, Philippine or American nationality. South Korea has largely completed its demographic transition and the accelerating ageing of its population and its impact on welfare has become a real challenge for the country. Korean is the national language. Buddhism and Protestantism are the two prevailing religions.

On the political level, South Korea initially under the Chinese influence was a Japanese colony until the Japan's capitulation in 1945. South Korea is now under a vigorous presidential regime. The constitution in force goes back to 1987. The legislative power is assumed by a single Chamber. M. Roh Moo-hyun, elected as President of the Republic in December 2002, has bound himself to follow his predecessor's engagements concerning the structural economical reforms for more transparency in management and business and the dialogue with North Korea. South Korean law is inspired by European laws, and particularly German law.

Economy in South Korea and the sector of distribution.

In 2005, South Korea's Gross Domestic Product was estimated to be US$ 810 billion (Agriculture accounted for 5 % of the GDP, the manufacturing sector for 46% and services 49 %). Growth grew by 3,9 % in 2005. The unemployment rate is low (3.8 %) and the inflation rate is about 2.7 %.

The retail sector is structured mainly through the 85 shopping centres, with two-thirds in Seoul or in its periphery. Three main actors dominate : Hyundai, Lotte (grocery, hostelry, petrochemistry…) and Shinsegae (Samsung Group), called the "Big-3". A fourth group, Galleria (HANHWA group, retail, defense industry, high technologies, financial services…), recently entered the landscape. The "Big 3+1" represents almost 60 % of the total number of the shopping centres and 80% of the market turnover. These shopping centres are characterized by structured marketing and advertising departments. That is why they pay a detailed attention to complementary services to attract customers : parking, nursery, private courses… They moreover propose cultural spaces where exhibitions, plays and fashion parades are performed. Lastly, they are more and more specialized in luxury brands, imported goods (15% of the products sold in shopping centres) and products under foreign licences (25% of the products sold by shopping centres).

In 2005, two worldwide retail giants disappeared from the Korean landscape : the French Carrefour and the American Wal-Mart. The first one sold 32 stores to a new born in this sector, which is specialized in clothing. Wal-Mart sold its outlets to the Korean leading E-mart of the Shinsegae Group.

The two important groups Lotte and Shinsegae compete on vast "resort shopping centre" projects. The Lotte's project should open close to the Gimpo airport in 2010. It should extend on 195.000 sq.m and include besides a shopping center, a hotel, a fun fair, cinemas and multitude of restaurants. Shinsegae intends to open a similar centre in 2009 in the town of Pusan where there is no centre yet.

In the wake of the "Big 3+1" one finds other chains more modest but still customer oriented : New Core and LG Department Stores. There are also smaller stores offering less imported products and their financial power is quite less important than the others and they only have a limited local influence.

Franchise in Korea is very active. There are currently more than 120,000 franchisees for 1,600 Franchisors. The Korean franchise generally groups small trades. The average number of employees is 3.7 for an annual average turnover of € 145,000. The franchise sector employs 2.6% of the working population (about 570,000 people) and had a turnover of 45 billion Won in 2002 (about € 34.6 billion) or 7.7 % of the Korean GDP.

This method of business is becoming a society phenomenon : more and more institutes and associations propose

specialized courses. The presence of foreign franchisors is still modest and their activities are concentrated in food. But prospects are encouraging in a market that is far from saturated.

The Fair Franchise Transaction Act 2002

In 2002, South Korea adopted a specific legislation for franchising, the Fair Franchise Transaction Act 2002. This strict legislation deals with the execution, obligations and termination of the franchise agreement that is to be operated within South Korea. Penalties are envisaged in case of violation of the law.

Requirements for the settlement of the agreement are the same as those provided in the French law. The Franchisor must provide an Information Disclosure Statement to the prospective franchisees.

Requirements for the execution of the franchise agreement are quite similar to the French contractual mechanisms : good faith in the performance of contractual obligations, reciprocal performance of parties' obligations, written notification of the non-renewal of franchise agreement at least ninety (90) days prior to the date of expiration of this franchise agreement.

However, a characteristic exists in the South Korean law, which establishes a Franchise Transaction Dispute Conciliation Council. This Council shall mediate –if all parties agree- over franchise Transactions as requested by the Fair Trade Commission or the Parties in dispute. The mediation by the Council is not compulsory.

Furthermore, a body named "Fair Trade Commission" can request from franchisors that they modify the contract.

The criminal sanction envisaged in case of providing of false or exaggerated information is a fine of 150 million Won and/or a prison sentence of five years maximum. Moreover, if the law has been violated, several criminal sanctions exist, from 50 million to 100 million Won with a maximum imprisonment of 3 years.

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