Franchising in Spain

FRANCHISING IN SPAIN

I. Spain: Essential data

With an area of 493,484 km^2 beside the Canaries Islands, the Baleares Islands and the autonomous cities of Ceuta and Melilla, which amount to a total of 505,992 km^2, Spain is the second biggest country in Western Europe and in the European Union after France. It is surrounded by the Mediterranean Sea in the South and East. At the North, it is separated from France, Andorra and the Bay of Biscay by the Pyrenees mountains. It is populated by more than 46 million inhabitants concentrated essentially on the maritime facades, with the exception of big cities as Madrid, Valladolid and Saragossa.

Spain has a central State administration and three levels of local administration:

- 17 autonomous communities (Comunidad autónoma),
- 50 provinces (Provincia),
- 8,112 municipalities (Municipio).

The official language of the country is Spanish, also called « Castillan ». However, every autonomous community has developed its own official language in addition to Spanish; in Mallorca for instance, inhabitants speak Mallorquin.

Spain is a hereditary constitutional Monarchy endowed with a bicameral parliament: the « Cortes ». The Spanish Constitution of 1978 was qualified as the «Constitution of the consensus ». It acknowledges the principle of judicial, executive and legislative separation of the powers.

II. Economy in Spain and retail sector

After recording one of the highest economic growth in Europe in the 2000's, Spain has been severely hit since the summer of 2008 by the global financial crisis. The Gross Domestic Product (GDP) stood in 2009 at 1.006 million euros (including 2.9% for agriculture, 30.4% for industry and 66.7% for services). The country registered a growth of 0.9% in 2008, and entered recession in 2009 (-3.7%). The forecasts for 2010 suggest a negative growth of 0.8%. The unemployment rate, which stood at 11% in 2008, rose to 17.9% in 2009. For 2010, it is estimated to a staggering 20%. Spain's Finance Minister, Elena Salgado, announced a possible return to growth with an estimated increase of the GDP (up 1.8% in 2010 and 2.7% in 2012).

Franchise law only appeared in Spain in the Fifties. Since then, franchising has considerably developed, in particular in domains such as the food industry, the hotel business, the clothing and cosmetics industry. The franchise sector proved resistant to the crisis, which is currently hitting Spain. It recorded a 20.3 billion euro turnover in 2007 and grew to € 20.8 billion in 2008. Around 80% of franchises operating in Spain are from Spanish origin. The remaining 20% are mainly French (Phildar, Franck Provost) and American franchises.

III. The regulations of franchising in Spain

Act n°7/1996 of January 15th of 1996 called « Ley de Ordenación del Comercio Minorista » governs Spanish franchising law. Chapter VI, entitled « de la actividad comercial en régimen de franquicia» pertaining to franchising includes only one article. Contrary to the French law, this article clearly defines franchising as a « commercial activity carried out by virtue of contract whereby a company, called franchisor, grants another one, called

franchisee, the right to operate a system relating to the marketing of products or services (…) ». This article also imposes two obligations on the franchisor, which are further detailed by a royal decree n°2.485/1998 of November 13th of 1998.

The first obligation consists in the obligation for every franchisor to be duly registered with several authorities. Those registers are originally created by the competent administration; therefore every franchisor must, before starting his activity, complete registration formalities. This obligation also concerns franchisors who operated a franchising business before the entry into force of the decree. The latter had a deadline of a month to complete their registration. According to the law, this obligation must be complied with « every physical person or company who wishes to operate in Spain a franchising activity (…) ». This register works at the level of the Spanish state but is held by the autonomous communities of the registered office or the place of residence of the franchisor.

The second obligation, which directly stems from French law, relates to pre-contractual information. Article 62-3 of the act of 1996 requires that every supplier hands in to any prospective franchisee, at least 20 days before the signature of the contract or before the delivery by the franchisee of any payment, a written document containing all necessary information so that the prospective franchisee can decide freely and in any knowledge whether to join the franchising network. The contents of this disclosure document are dense and mainly relate to data of identification of the franchisor. The decree of 1988 detailed the contents of this obligation. Franchisors must therefore prove that they are duly registered on the franchisor's registry, that they are registered with the commercial registry and provide information as to the amount of their share capital.

Besides, every franchisor must prove his property right on the trademark or the distinguishing features. He also has to indicate to any prospective franchisee the number of franchisees having left the network during the last two years as well as the motive behind the end of the contractual relationship with these former franchisees. Finally, the franchisor must also clearly specify the future rights and obligations of the parties to the franchising agreement, the financial terms thereof and the provisions pertaining to renewal or termination of the contract.

During the execution of the contract, breach of contractual obligations by either party to the agreement can give rise to the termination of the franchising agreement. Spanish law has been widely inspired by French law, thus imposing on the franchisor a pre-contractual obligation pertaining to the clauses of the contract.

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Franchising in Brazil

FRANCHISING IN BRAZIL

I. Brazil: essential data

Brazil is the largest and most important country of Latin America, occupying an area of over 8.5 million square kilometers. Its population includes more than 180 million inhabitants, being the majority – 81% – situated in urban areas. Its population is a real racial mix, including African, Spanish, Portuguese, Jew, Italian, Arabian, Japanese people and their descendents, among many others.

The official language is Portuguese and its political and administrative organization includes three main Branches of Power: the Judiciary, the Executive and the Legislative. It is based on the French civil system.

The country is formed by 26 States and one Federal District, comprising 5,563 towns and cities.

Although more than 70% of the population is catholic, Brazil has no official religion, and religious freedom is guaranteed by its Constitution.

The country accounts for three fifths of the South American economy's industrial production.

II. Economy in Brazil and the sector of distribution

Brazil's Gross Domestic Product is around R$ 2,900 billion dollars in 2008, or around $ 1,480 billion (services accounting for 64%, industry for 30,9% and agriculture for 5,1%).

The country trades regularly with over one hundred nations, 74% of its exports are represented by manufactured or semi manufactured goods, producing an income of € 125 billion. Its main partners are: the European Union (26% of the balance), the United States (24%), Mercosur and Latin America (21%) and Asia (12%).

The retail sector is well developed with a total revenue of $ 62 billion in 2007 and around 5 million sq.m of stocking surface. 397 shopping centers are in operation in 2009, maintaining 720,890 job positions and generating sales of $ 33,1 billion.

The franchise sector in Brazil is really developed, encompassing different fields, such as shoes, accessories, clothing, food, beauty products, vehicles, hotels and tourism, language schools, among others. It is estimated that the franchising system had revenues of more than $ 28.20 billion in 2008 rising 19.5% from 2007.

Brazil counts 1,379 franchising networks, responsible for 648,000 direct employees and 2.595,000 indirect job positions.

III. The franchise law in Brazil

Franchise in Brazil is ruled by the Franchise Law, number 8.955 from December 15th, 1994. This law was developed according to the American Franchise Act.

It states, on its article 2, the definition of franchising as "the system by which a franchisor grants to the franchisee the right of use of a trademark or a patent, along with the right of exclusive or semi exclusive distribution of products and services and, eventually, includes the right of use of implantation technology and business management or operational system developed or owned by the franchisor before direct or indirect remuneration, expressly excluding any employment relationship between them".

The procedures to the execution of a franchise agreement are the same as in France. Franchisor shall make available to the potential franchisee, 10 days prior the execution of the franchise agreement, a document (Circular de Oferta de Franquia) informing about the franchisors' company, its history, its financial situation by the presentation of the financial statements for the 2 previous years, and its legal situation by the presentation of the

pending litigations regarding the trademarks, patents, intellectual property involving the franchisor or the franchisees.

Such documents must also present all the franchise details, such as the kind of business developed, the activities to be performed, the list of the other franchisees, the ideal franchisee profile, a description of the territory (and its exclusive or non exclusive characteristics), the necessary amount for implementing the franchise including the entry fee, the conditions for the purchase of the products, the necessary equipments, the initial stock, among others, as well as the payment conditions. It must also clearly describe all periodic fees (such as royalties, leases, marketing fees, insurance) plus the method used to calculate them.

The franchisee might argue the nullity of the agreement, if such conditions were not properly observed.

Franchise is well organized in Brazil, represented by the Brazilian Association of Franchising (Associação Brasileira de Franchising-ABF).

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Franchising in Iran

DEVELOPING FRANCHISE IN IRAN

Iran: essential data

Iran is located in the Middle East, bordered to the north by Turkmenistan and the Caspian Sea, the east by Afghanistan and Pakistan, the south by the Persian Gulf and the Gulf of Oman, and the west by Iraq and Turkey. The centre and east of the country are largely barren undulating desert, punctured by irrigation canals and green oases, but there are mountainous regions in the west along the Turkish and Iraqi borders and in the north where the Elburz Mountains rise steeply from a fertile belt around the Caspian Sea.

Iran, with an area of 1,648,043 km², has a youthful, growing population of 70 million, including 7.2 million residents in the capital, Tehran.

Persian (*Farsi*) is the most widely spoken language, used by the population, but Turkish and Turkish dialects, and Kurdish are also used. Arabic is spoken by 1% in Khuzestan in the southwest, and Turkish in the northwest around Tabriz. English, French and German are spoken by many business-people and officials.

Islam is the country's official religion, but religious freedom is guaranteed by the Iranian Constitution. Of the 98% Muslim population, 89% are Shi'a and 9% are Sunni. The remaining 2% consists of Christian, Jewish, Zoroastrian and Baha'i faiths.

On the political level, Iran is an Islamic Republic since 1979. Based on the 1979 Constitution, the system comprises several connected governing bodies, at the top of which is the Supreme Leader of Iran, and below whom the

Constitution places the President of Iran.

As far as the legal system is concerned, it is based on the Napoleonic Code (in particular commercial law), but incorporates the sharia since 1979 to bring it more in line with teachings of Islam.

Economy in Iran

Iran's main sources of income are its huge oil and gas deposits, which are among the world's largest. It also has viable deposits of coal, magnesium ores and gypsum.

The agricultural sector is important, although output has been depressed by drought and migration of rural labour to the cities. Government policy has promoted the agricultural and light industry in order to reduce the economy's dependence on oil and increase the influence of the private sector – about 80% of economic activity is state controlled. Annual growth is about 4.3% (2006) with unemployment at 15% (2007). The rate of inflation in 2006 was estimated at 12%.

Economic policy is dominated by the fundamental difference of approach between the elected government and the ruling clergy. Iran has developed important new links with the newly independent states of central Asia as well as Turkey and China but, more important, existing trade with traditional partners in Europe, Japan and the Middle East have been restored.

Increasing franchise without any specific law

The links with those countries have notably led to an increase of franchises. All the more as the Iranian market is the largest consumer market in the Middle East, with a youthful and growing population passionate and fascinated by Western countries. Iranians are indeed very brand-oriented: it is the name that sells, not the taste. Therefore, many western brands have successfully settled in Iran so far, like Mango and Benetton, whose franchises across the country became very quickly profitable.

Moreover, concerning more precisely domestic law, Iran has different well structured laws and regulations applicable to both domestic and foreign companies working in Iran such as commercial law, import and export regulations, labor law, social security regulations, taxation... However, Iran does not have any special law and regulations concerning franchise.

Because there is not a specific law dealing with franchise operation, instead, commercial and civil laws of Iran are relied on.

Thereby, practically, franchise exists in Iran but in the frame of sole agency agreement. The representative of any foreign company is entitled to develop his business with the special brand and the specifications of the owner of the brand.

Implicitly, the Iranian Civil Code imposes an obligation on parties to a franchise contract to deal with each other in good faith. This includes the requirement to act in good faith during negotiations and in drawing up franchise agreements. This duty also extends to the performance of contractual obligations and to the termination of the contract.

Furthermore, there are two commercial regulations to differentiate: one is applicable to Main Land, and a different one to Free Zone, which is independent from the main land. Relying on particular economic and geographical advantages, Iran has indeed designated some areas as free trade zones. There are six Iranian free trade zones including Kish, Qeshm, Chabahar, Aras, Arvand, and Anzali. They play a very important role in Iran's economy, therefore, many legal facilities and advantages are available in these zones, including franchising.

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Franchising in Estonia

FRANCHISING IN ESTONIA

In Estonia franchising agreements are very briefly regulated in the Law of Obligations Act (in Estonian: *Võlaõigusseadus)*, in force from 07, 2002.

Following is a short overview of the regulations set forth in the Law of Obligations Act as well as other relevant issues:

Definition of franchise contract

Pursuant to the Law of Obligations Act by a franchise contract, one person (the franchisor) undertakes to grant to another person (the franchisee) a set of rights and information which belongs to the franchisor for use in the economic or professional activities of the franchisee, including the right to the trade mark, commercial identifications and know-how of the franchisor.

Form of agreement

No mandatory form is prescribed in the law for franchise agreements, thus a franchise agreement may be entered into in any form. Considering Estonian legal practice written agreements are recommendable.

Obligations of franchisor

Pursuant to law of Obligations Act the franchisor is required to provide the franchisee with instructions for the exercise of the rights franchised and to provide permanent assistance related to the franchise.

Obligations of franchisee

A franchisee is required:

- in his activities, to use the commercial identifications of the franchisor;
- to ensure that the quality of the goods manufactured or services provided by the franchisee pursuant to the contract is the same as those manufactured or provided by the franchisor;
- to follow the instructions of the franchisor which are directed at the exercise of rights on the same bases and in the same manner as the franchisor;
- to provide clients with all additional services which they could expect upon acquiring goods or contracting for services from the franchisor.

Franchisor’s right to review

A franchisor has the right to check the quality of the goods manufactured or services provided on the basis of a franchise contract by the franchisee.

Registration of franchising agreement

There are no mandatory requirements to register the franchising agreement.

Sub franchising

Sub franchise agreements are not specially regulated by the Law of Obligations Act, thus, regulation of the franchise applies.

Non competition

Not regulated by law.

Liability

With regard to claims brought to franchisee as the manufacturer of the goods no joint liability with the franchisor is set forth in the law, thus the liability is borne solely by the franchisee.

Termination of franchising agreement

Not regulated by law, thus general rules set forth in the Law of Obligations Act apply.

Renewal of franchising agreement

Not regulated by law, thus subject to the agreement by the parties of the franchise agreement.

Death of franchiser or franchisee

Not regulated by law.

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Developing Franchise in Russia

Developing Franchise in Russia

I. Russia: essential data

Russia, with an area of 17,075,400 km², is the largest country in the world. Two thirds of the territory are occupied by plains. It shares its land borders with 14 countries including Norway, Poland, Ukraine, and Kazakhstan to the south; Mongolia, China and North Korea to the southeast. The capital of Moscow includes 10,433,200 inhabitants with a total population of 141.9 million inhabitants. The Russian Federation is populated mainly by 81.5% Russians 3.8% Tatars, 3% Ukrainians, 1.2% Bashkirs and 1% Chuvashes. The territory is very unevenly inhabited: about 80% of the population lives in the European part of the Russian Federation, on a territory that is only a quarter of the country's total area. The urbanization rate reaches 73%. The top cities represent about a quarter of the urban population.

On the political front, Russia is a federal state governed by the rule of law with a republican form of government. The Constitution enshrines the separation and independence of the executive, legislative and judicial powers. The judicial system is mainly based on the German civil law.

II. Russia's economy and the sector of distribution

In 2007, Russia's Gross Domestic Product was estimated to be US$ 1.290 billion (including 4.6% for agriculture, 39.2% for industry and 56.3% for services). Growth stood at 6.4% in 2005, 7.1% in 2006 and 8.1% in 2007. Russia registered a 7.6% growth in September 2008. The growth forecast for 2009 should be revised downwards in light of the falling oil prices and the consequences of the global financial crisis. The official unemployment rate is 5.6% and the inflation rate was about 11.9% in December 2007. External trade has continued to grow since 1992 despite a sharp contraction in trade during the financial crisis of 98.

Franchising has really started in Russia in the 90's with notably the big fast-food companies ("McDonald's", "Pizza Hut" and so on.). For 10 years, the Russian market has seen the creation and development of a number of world-known foreign and Russian companies such as "Sbarro", "Subway", "Masterfibre", "Hirsh", "Grillmaster", "Ekonika", "Enton", "Kopeyka" and many others.

In 2005, Russia has experienced a very strong growth in the number of franchise offers, mostly from local businesses. The number of networks increased from 67 brands in 2003 and 85 in 2004 to 138 brands in 2005. Today, there are about 165 networks (including foreign brands and master franchisees) and approximately 3,000 stores.

Russia is very attractive for retail networks because it turned into a market in continuous growth in the consumption field. The growth rate of retail sales reached 15.6% in 2007. There are about 85 million working Russian consumers.

The type of activities involved in franchise reflects trends seen across the world. The retail sector, including different types of food stores, clothing, shoes, etc., holds the first place with 48% of franchise activities. The food industry takes the second place (23%), followed by networks of personal services (12%).

III. Chapter 54 "Commercial Concessions" of the Russian Civil Code

The law of franchise is not regulated as such. Only some aspects of the relationship between the parties are governed by the provisions of Chapter 54 ("Commercial Concession") of the Civil Code of the Russian Federation, which entered into force on 1st of March 1996. Thus, the franchise contract is in this text the equivalent of the "contract of the commercial concession", franchisors are the "right holders" and franchisees the "users".

Concerning the terms of execution of the franchise contract, two conditions must be met: (a) the contract must be

written and (b) it must be registered at the initiative of the franchisor, by the body that has proceeded to the registration of the person or legal entity, whether or not the body is located in a foreign country. Registration is important because it is only after this step that the contract will be enforceable against third parties. Failure to comply with these conditions has the effect of making the contract void. Although the chapter does not cover pre-contractual information in detail, *section 1031* provides that the franchisor has an obligation to transfer the technical and commercial documentation to the franchisee and provide other necessary information in order for the franchisee to exercise the rights granted to him under the contract.

Requirements to obligations of the franchise agreement are similar to the French contractual mechanisms: good faith in the performance of contractual obligations, reciprocal performance of parties' obligations, and payment of royalties. It should be noted that it belongs to the franchisor to control the quality of products marketed by the franchisee. In addition, the franchisor cannot set standards or limits on product prices of the franchise. *Section 1033* regulates the provisions concerning the restrictions on the rights of the parties and *section 1034* the right holder's liability for any claim regarding the quality of products sold on the basis of the contract. Regarding claims against the manufacture of franchisor's products, the latter will be jointly liable with the franchisee.

The franchisor has the right to refuse the renewal of the contract provided that during three years after the expiry of the contract he does not conclude a similar contract of commercial concession or franchise or gives his consent to the conclusion of similar contracts of sub commercial concession in the territory of the expired contract. Otherwise, the franchisor is obliged to offer the franchisee the conclusion of a new contract or compensation for losses suffered by him. If a new contract is concluded, its provisions shall not be less favourable to the franchisee as those contained in the original contract.

Each party has the right to terminate the contract at any time by notifying the other party 6 months in advance. The early termination of the contract is subject to a registration procedure. If the franchisor is not anymore the holder of rights pertaining to his name or his trade name without being replaced by similar rights, the contract will be automatically terminated. It is also the case where the franchisor and the franchisee are declared insolvent.

Aspects such as the use of the trademark, the design of the store, the pricing and advertising are not included in the provisions on the commercial concession. Furthermore, there is still no specific legislation concerning pre-contractual information, specific to franchise contracts. Regarding the Registration of trade marks, Russia, like France, is a signatory to the Madrid Convention.

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Franchising in Saudi Arabia

FRANCHISING IN SAUDI ARABIA

The World's first oil exporter opens to foreign investors

Counting more than 21 million consumers, Saudi Arabia represents the Persian Gulf's most important consumer market.

In December 2005, Saudi Arabia became the 149th member of the International Trade Organization. Saudi membership promotes foreign investment, including in the franchising sector, authorizing, at last, foreign investors to detain majority of the local companies' capital.

In 2006, foreign investment in Saudi Arabia reached 18 billion dollars. Saudi authorities consider Foreign Direct Investment as one of the most effective ways to diversify national economy and ensure employment to the young generations.

The adoption of a new investment Code in the year 2000 has created a new organism, the SAGIA (Saudi Arabian General Investment Authority) endowed with a very large jurisdiction over local or foreign investment inside the Kingdom. Every investment project is subject to the delivery of a license by the SAGIA.

Nowadays the economic expansion and development potential are still concentrated in the major cities of Riyadh, Jeddah and Al Khobar. The majority of the agreements executed in the franchising sector takes the form of a Master franchise or a license.

A favorable development potential

Every foreign franchisor willing to implant its franchise network in Saudi Arabia must have its concept operated as a franchise in its own country, during a minimum period of five years. It must be the real Franchisor and not a master franchisee of a third country.

The Saudi trade department supplies an official franchise contract model. If the parties are not legally bond by the use of this convention model, the franchise contract executed by the parties will have to be validated by the trade department's services.

No procedure equivalent to the French concept of "Information Précontractuelle" of the future franchisee or "disclosure document" is expressly mentioned by the Saudi rules.

Still, providing a disclosure document to potential franchisees is a good way of transmitting to the latter the network's essential characteristics.

More generally, a company must carefully elaborate an implantation procedure for its franchise network in Saudi Arabia. Some of the concepts will have to be adapted to the cultural and religious specificities including with regard to the strict gender separation principal or the control of images broadcasted as part of advertising campaigns.

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Franchising in Mexico

FRANCHISING IN MEXICO

General Presentation

Mexico has a population of 110 million and covers a surface of 1,923,040 sq km. It is Latin America's highest per capita income, and its GNP was 886.4 billion dollars in 2007.

Franchising in Mexico began in the middle of the Eighties, and since then it has continued to grow representing nearly 5% of GNP in 2007. Its franchise network ranks 11th worldwide and generated an estimated 12 billion dollars turnover.

There is no specific franchise law. The "Law of Industrial Property" (LIP), published on 27th of June 1991 was the first to include franchising provisions.

Many franchisees still complained of abuses from their franchisors in the early years of development of franchising in Mexico. On 25th of January 2006 amendments were made to article 142 of the "Law of Industrial Property" which greatly improved existing franchise regulations and provided additional protection for Mexican franchisees.

Article 142 et seq. contain the main provisions and provide a definition to franchising (1), the content of the disclosure document to be delivered to the franchisee (2), and the items which must be included in franchise agreements (3).

The definition of franchising

Article 142 provides a precise franchising definition. Franchising is the situation where both a trademark license is granted and technical know-how is transferred or technical assistance is provided. The person to whom the license is granted will be able to manufacture, sell goods or provide services under the licensed trademark pursuant to the operational, commercial and administrative methods established by the owner of the trademark, given that quality, prestige and reputation of said products or services is maintained at all times.

The disclosure information document

In the same way as the Doubin Law in France and the Laruelle Law in Belgium, here above article 142 requires prior to the execution of any franchise agreement that franchisor provides prospective franchisee with a disclosure information document. It is to be provided to the prospective franchisee at least thirty days prior to execution date.

However, and such differing from the French Doubin law, the Mexican legislator hasn't specifically defined the contents of information which is to be provided to the prospective franchisee.

The only clear requirement is that it is to contain information on franchisor's corporate body and on licensing rights over each and every trademark, which is to be used in the franchise.

Any inaccuracy in the content of such information is likely to cause said franchise agreement to be deemed nil and void and give rise to damages claim against franchisor. Unlike French case law, in such a case it appears that the Mexican judge could consider the agreement to be nil and void prima facie without having to determine the degree of inaccuracy and its consequences on franchisee's consent, on the condition legal action has been taken within the first year following the agreement's execution.

It should be noted that these provisions are too recent and still have to be confronted to the courts and hence the law is still in the making regarding the franchise disclosure information.

In many ways, the disclosure phase still raises many questions that have not been resolved yet. Hence it is advisable for franchisors to take utmost precautions to avoid franchise agreements to be in jeopardy.

The franchise agreement's content

Section 142 bis contains a list of items to be imperatively included in franchise agreement.

The franchise agreement should contain the usual standard information (geographical area of operations, training of franchisee, franchisor's assistance, network's marketing and advertising policy), and information that would better fit in a disclosure document such as investment details, or the profit or commission margins that franchisee can expect with franchise operation.

In order to protect prospective franchisee, the new provisions of Article 142 bis 1 et seq. of 27th of June 1991 Law insist on defining franchisee as independent and remind franchisor that it has no right over the organization and daily management of franchisee.

Finally, Article 142 bis 3 organizes franchise agreement's expiration. To avoid abusive unilateral early termination of contract by some franchisors, the Mexican legislator has formalized in the Law the following principle: franchisee and franchisor cannot unilaterally terminate the contract unless there is good cause or unless contract has been executed for an indefinite period (which is very rare).

Non-compliance with these provisions may give rise against the defaulting party to a damages claim.

In conclusion, recent changes in Mexican law do clarify some aspects of the franchise business but several key issues shall remain unclear until Mexican case law resolves them.

Although the law has increased franchisees legal protection and has put an end to franchisors prior total freedom of action as observed in the previous fifteen years, franchising in Mexico has great potential of development.

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Franchising in Vietnam

FRANCHISING IN VIETNAM

Vietnam, a country which is going through big changes

Vietnam has begun a process of economic liberalisation and integration in world trade.

This country remains the third most populous country in Southeast Asia after Indochina and Philippines with an estimated population of over 85,262,000 people. It is bordered by the South China Sea, shares borders with China to the north and Cambodia and Laos to the west. The Khin (Viêt) ethnic represents 85% of the population. The Chinese ethnic is the largest minority. The literacy rate is 90.4% with an urbanisation rate of about 25.8%.

With a GDP estimated at 71 billion U.S dollars, the growth rate reached 8.4% in 2007, after a period of uninterrupted growth of around 7% per year during the past six years. Foreign investment continues to be very high and is increasing : $ 10.2 billion in 2006 to an estimate of 29.7 billion in 2007.

If the Communist Party, the single party, still dominates the national political life, Vietnam has passed through two key stages of its opening to a market economy : the adoption of the New Commercial Law and its admission in January 2007 as a member of the World Organisation Trade (WTO) in 2005.

The main interest on the new legislation lies in creating a common system for foreign and Vietnamese companies.

Extensive efforts have been made by the Vietnamese regime to fill the uncertainties of the Vietnamese legal framework and give a decisive impetus to economic development.

The economy of Vietnam and the distribution sector

The distribution industry remained an area closed to foreign investment.
Today, Vietnam has committed to allow foreign commercial implantation in the area of brokerage services, wholesaling and retailing.

As from January 1st, 2008, there is no longer limitation to the parts of foreign partners in joint ventures between foreign and Vietnamese companies. In 2009, companies 100% owned by foreign investors may be created.

Some important retailers are already present in Vietnam such as the Big C Group bought in 1999 by the Casino French Group. Since its setting-up in Vietnam, Casino has already invested over 150 million dollars in 3 joint ventures with the Vietnamese part.

Other brands have begun a gradual implantation in the country such as the German bulk-buying Tradesign “Metro Cash and Carry” currently operating 8 points of sale in Vietnam and Kentucky Fried Chicken since 1994.

The entry into force of New Commercial Law on January 1st, 2006 and many changes in the Vietnamese law on intellectual property has radically changed the situation to carry out the establishment of foreign brands in Vietnam.

New Commercial Law offers new perspectives for the Franchise

If the franchise is still a new concept in Vietnam, franchise networking has multiplied during the past two years. Today, there are nearly 65 different franchises. Estimates suggest that the franchise industry will be fully

developed by 2012.

The new law makes provision of prior information of the coming franchisee such as the French Disclosure Information Document. The franchisor must communicate this document 15 days before signing the contract. The contract must be translated into Vietnamese and must be registered in the administration agency in charge, prior to the signature of the agreement.

Except for the latter conditions, the rule is freedom of contract. The parties are allowed to freely set the terms of the contract relating to the royalties, fees or termination clauses. The partners are free to choose the law of contract.

By introducing these new legal rules, Vietnam, while favouring the foreign investment influx in the coming years, is meeting the necessary and suitable conditions to the development of future franchise networks on its territory.

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L’offre de négociation dans le cadre de la procédure civile anglaise

L’OFFRE DE NEGOCIATION DANS LE CADRE DE LA PROCEDURE CIVILE ANGLAISE

Introduction

En droit anglais (et gallois), l’offre de négociation ne relève pas que du choix des parties, ou du moins ce choix est éclairé par le Civil Procedure Rules (CPR) en sa Section 36 intitulée *Offers to settle*.[1]

Aux trois questions qui structurent l’offre de négociation : à qui faire l’offre ? quand ? comment ? le CPR apporte plus que des réponses. Il incite fortement les parties en conflit, désireuses peut-être encore d’en découdre plutôt que de négocier, de réfléchir sur les conséquences financières de leur acceptation ou refus d’une offre de négociation.

1. ## L’offre de négociation

Moins de 2% des conflits civils font l’objet d’un jugement en Angleterre. Diverses raisons expliquent cet extraordinaire faible pourcentage. L’une d’elles – et non la moindre – est le fait que la majorité des procès donnent lieu à négociation avant le début ou la fin du procès.

Negotiated settlements et *CPR Part 36*.

Dans la procédure civile anglaise actuelle, il existe deux voies de règlement amiable des conflits :

- la voie traditionnelle, dite *negotiated settlements*, qui ne se réfère nullement à la Section 36 du CPR. Un règlement par ce biais est censé être *without prejudice*. Aucune partie ne peut évoquer son contenu devant un tribunal si le conflit rebondit , à moins que les deux parties y consentent. Cette règle vise à encourager les parties en conflit à négocier autant que possible.
- la voie formelle, renvoyant à la Section 36 du CPR.

Le choix entre ces deux approches relève de considérations pratiques et tactiques.

CPR Part 36

L'intérêt de cette Section est d'instituer un régime pénalisant les parties en conflit à ne pas rejeter inconsidérément une offre raisonnable de négociation. Un refus injustifié emporte la prise en charge de tous les risques du procès.

En principe,

1. Le demandeur (*claimant*) est à même de faire une offre de règlement amiable au défendeur en lui signifiant ce qu'il est prêt à accepter à titre de dédommagement. Comme dans l'approche traditionnelle du *negotiated settlement*, cette offre de négociation peut se faire *prior to the issue of proceedings* ou *once proceedings have been issued* , mais, à la différence de l'approche traditionnelle, qui peut être conduite oralement ou par écrit, la Section 36 du CPR oblige à recourir à l'écrit.
2. Le défendeur (*defendant*) est en droit également de formuler le même type d'offre. Depuis le 6 avril 2007, il n'y a plus d'obligation d'assortir cette offre d'un paiement *into court* pour que celle-ci ait un effet juridique (*to make a binfing offer under CPR Part 36*).[2]

Dans les deux cas, le délai d'expiration de l'offre est de 21 jours. En conséquence, *after the commencement of proceedings*, l'offre doit être faite au moins 21 jours avant le début du procès.

2. CPR Part 36 strategy

Ce genre d'expression est communément utilisée par les praticiens du droit outre-manche, car l'offre de négociation d'une partie et son acceptation ou refus par l'autre partie est bel et bien ressentie comme une question de tactique et de contre-tactique tant les conséquences financières peuvent être lourdes pour la partie qui a mal calculé son coup.

Claimant's offer to settle

Les *costs consequences* d'une offre du demandeur ne sont en rien mécaniques. Elles dépendent de l'anticipation par le demandeur de la réaction du défendeur, du réalisme de l'offre et de la réaction effective de celui-ci. Elles dépendent aussi de la décision du tribunal. C'est dire si un jeu est possible et qu'il convient de savoir joueur.

Deux situations se présentent selon que l'offre du demandeur est acceptée ou non.

- Si l'offre du demandeur est acceptée, l'instance est suspendue (*the action is stayed*) et le défendeur se verra ordonner de payer le montant de l'offre, augmenté des coûts du procès (*legal costs*) du demandeur *on the standard basis*.[3] Le défendeur devra prendre en charge également ses propres coûts.

- Si l'offre du demandeur est rejetée, les conséquences varient suivant la décision du tribunal :

1. si le tribunal fait droit à la demande et si le dédommagement accordé par le tribunal est supérieur à celui de l'offre du demandeur, le tribunal ordonnera au défendeur d'acquitter les dommages-intérêts arrêtés (*damages*) ainsi que les coûts du procès du demandeur en sus des siens.

En outre, si le tribunal le juge bon (*if it is considers just to do so*), le défendeur se verra infligé une *penalty* pour n'avoir pas accepté l'offre de négociation du demandeur.

Une telle sanction prendra la forme

- du paiement d'un intérêt sur le montant des dommages-intérêts pouvant aller jusqu'à 10% au-dessus du taux de base en vigueur ;
- et/ou du paiement d'un intérêt sur les coûts du procès allant également jusqu'à 10% au-dessus du taux de base en vigueur ;
- et/ou du paiement des coûts du procès *on the indemnity basis*. [4]

Tous ces éléments, pouvant composer la *penalty*, seront calculés à partir de la date limite jusqu'à laquelle le défendeur aurait pu accepter l'offre (soit 21 jours après la formulation de l'offre du demandeur).

2. si le montant accordé par le tribunal est égal ou inférieur à l'offre du demandeur, il n'y aura, à l'encontre du défendeur, aucune des *adverse costs consequences* listées en a). Le défendeur devra payer les dommages-intérêts arrêtés ainsi que les coûts du procès du demandeur *on the standard basis*.

Prenons un exemple simple pour illustrer toutes ces conséquences alternatives.

Soit un contrat conclu entre un grand producteur de boissons et un de ses fournisseurs. Le producteur se plaint auprès du fournisseur en question de la défectuosité d'un ingrédient entrant dans la composition de ses boissons. Dans le cadre d'une tentative de règlement amiable placé sous les auspices du *CPR Part 36*, le producteur présente une offre de négociation au fournisseur en lui demandant un dédommagement de 500.000 £.

Ce faisant, le producteur, en tant que demandeur, exerce une pression sur le fournisseur pour négocier car ce dernier pourrait faire face à de redoutables conséquences financières s'il refusait et s'il perdait. La pression sera d'autant forte que l'offre de négociation sera faite tôt attendu que, dans ce cas, plus longue sera la période sur laquelle pourront être calculés les *bonus interests* et *indeminity costs*.

Le fournisseur a 21 jours pour relever l'offre du fournisseur. Le choix est clair, à défaut de prédire exactement ce qu'il entraîne :

- s'il accepte l'offre du producteur, aucune assignation ne lui sera délivrée et le producteur sera dédommagée de la somme réclamée ;
- s'il rejette l'offre, le dénouement dépend de la décision du tribunal :
- si le juge reconnaît le bien-fondé de la demande du producteur et condamne en conséquence le fournisseur au paiement d'une somme de 750.000 £, soit une somme supérieure à l'offre de négociation de 500.000 £, le fournisseur se verra condamné à 750.000 £, augmentée de la *penalty* redoutée (soient les deux types d'intérêts punitifs, ainsi que les coûts du procès calculés sur une base indemnitaire et sur une période de référence plus ou moins longue selon que l'offre a été présentée très en amont ou non) ;
- si le tribunal condamne le fournisseur à la somme de 350.000 £, c'est-à-dire à une somme inférieure à l'offre de négociation, celui-ci n'aura à acquitter que la somme indiquée dans le dispositif du jugement

et ses propres coûts du procès.

Defendant's offer to settle

Pour tenter d'échapper à la pression du demandeur dans le cadre même *CPR Part 36*, le défendeur peut prendre les devants et s'engager à dédommager le demandeur. L'intérêt de cette démarche est de pouvoir estimer soi-même le montant à verser et d'exercer à l'envers une pression sur le demandeur.

Deux cas se présentent à nouveau :

- si l'offre du défendeur est acceptée par le demandeur dans les 21 jours, le défendeur honorera son engagement de payer et assumera les coûts du procès du demander o*n the standard basis*. ;
- si l'offre du fournisseur est rejetée par le demandeur dans les 21 jours, les conséquences financières dépendent, là encore, du montant des dommages-intérêts octroyés par le tribunal :
- si le demandeur obtient mieux que l'offre du défendeur, le demandeur ne fera face à aucune des *specific costs consequences*. Le défendeur sera condamné à payer les dommages-intérêts ordonnés par le juge ainsi que les coûts du procès du demandeur *on the standard basis*. On retrouve ici en symétrique la solution correspondant à la situation : offre de négociation émanant du demandeur, rejet du défendeur, et montant alloué par le tribunal supérieur à l'offre initiale.
- si le demandeur n'obtient pas mieux que l'offre du défendeur (*does not beat the payment in the court*), le tribunal sera enclin à partager les coûts du procès en deux (*may make a split costs order unless it considers unjust to do so*). Outre le fait qu'il sera condamné à payer les dommages-intérêts arrêtés, le défendeur devra payer les coûts du procès du demandeur jusqu'à la dernière date d'acceptation où l'offre aurait pu être acceptée. Quant au demandeur, en sus de recevoir les dommages-intérêts alloués, il se verra ordonner par le juge de prendre en charge les coûts du procès du défendeur à partir du jour suivant la date d'expiration de l'offre jusqu'au procès. Comme cette dernière phase est celle qui engage le plus de dépenses, la partie du jugement relative aux coûts pénalise en réalité le demandeur même si celui-ci a gagné finalement au fond. Le tribunal le sanctionne pour n'avoir pas accepté une offre de négociation raisonnable qui émanait du défendeur.

Claimant's counter offer to settle

Un demandeur qui doit faire face à l'engagement d'un défendeur de le dédommager à l'amiable peut ne pas apprécier d'être mis au pied du mur par celui par qui, à ses yeux, le mal est arrivé ! Outre le dommage qu'il a subi, il peut avoir le sentiment d'être manipulé par le défendeur qui, en prenant l'initiative de négocier, l'amène à assumer les conséquences financières de ne pas donner suite dans les 21 jours. C'est sans doute trop supporter pour le demandeur, mais le *CPR Part 36* n'a pas exclu la possibilité pour ce dernier *to make a counter offer*, renvoyant ainsi sur le défendeur la pression exercée par l'offre de négociation *(thereby putting cost pressure back onto the defendnt*). A son tour, le défendeur a 21 jours pour accepter ou rejeter la contre-offre du demandeur.

Supposons, par exemple, que le défendeur en premier offre en réparation d'un dommage cause dont il se sent responsable la somme de 75,000 £. Supposons également que le demandeur fasse une contre-offre de 115,000 £. Plusieurs cas de figure sont envisageables :

1. Le tribunal fixe à 100,000 £ (intérêts compris) le montant des dommages-intérêts. Cette somme est supérieure au montant de l'offre du défendeur (75,000 £) mais inférieure à celui de la contre-offre du demandeur (115,000£). Dans ce cas, la tactique du défendeur, contrée par celle du demandeur, a échoué. Aucune *penalty* ne frappe le demandeur mais le défendeur n'est pas non plus sévèrement sanctionné. *Neither tactic has worked*. Le demandeur obtient la somme arrêtée par le tribunal (100,000

£). Le défendeur acquittera ladite somme et prendra en charge les coûts du procès du demandeur *on the standard basis (i.e. costs reasonably and proportionaly incurred)*.

2. Cette somme est inférieure, non seulement au montant de la contre-offre du demandeur, mais aussi à celui de l'offre du défendeur. Le demandeur *is awarded* 50,000£, mais *a split costs order* partagera les coûts du procès Le demandeur payera les coûts encourus *on the standard basis* à compter du jour suivant le 21e jour à partir de la réception de l'offre du défendeur jusqu'au procès. Comme le montant de ces coûts seront probablement supérieurs à ceux encourus sur la même base par le défendeur jusqu'au 21e jour inclus, la différence viendra en déduction des dommages-intérêts de 50,000£ accordés au demandeur (*the claimant will have to pay the balance out of £ 50,000 damages*).
3. Le tribunal fixe à 135,000 £ (intérêts compris) le montant des dommages-intérêts. La tactique de contre-offre du demandeur est ici payante. Non seulement il obtiendra la somme arrêtée, mais cette fois la *tactical step to counter the defendant's offer* a pleinement pour effet de retourner la pression sur le défendeur redevenu *the offeree* après avoir tenté d'être le premier *the offeror*. Calculée sur une période allant de l'expiration de la contre-offre de 21 jours jusqu'au procès, le défendeur aura à assumer, en sus des coûts du procès du demandeur *on the indemnity basis*, les *bonus interests* (*interest on the damages received, i.e. £135,000, at not more than 10% above base rate, and interest on the claimant's costs of up to 10% above base rate).* Ces intérêts punitifs ne doivent pas être confondus avec l'intérêt usuel qui vient s'ajouter au montant des dommages-intérêts *from the cause of action* si le tribunal le juge bon.

Tels sont les résultats étonnants, et réellement dissuasifs, *du CPR Part 36* qui encouragent les parties à prendre au sérieux toute offre de négociation au plus en amont du procès. Il y a lieu de réfléchir à deux fois si on n'entend nullement négocier.

Une fois l'offre de négociation éventuellement formulée, les nouvelles règles du *CPR Part 36* empêchent que l'offre soit retirée avant le délai d'expiration sans que le tribunal donne son accord. Celui qui est familier de la *common law* anglaise y verra une exception au droit des contrats dans le cadre duquel il est possible de retirer son offre avant qu'elle soit acceptée.

Une fois que l'offre est éventuellement acceptée, le règlement doit être effectué dans les 14 jours d'acceptation de l'offre, ou de l'ordonnance du tribunal, à moins que les parties conviennent d'une plus longue durée d'un commun accord.

Conclusion

Au terme de cette brève étude, le praticien français pourrait avoir l'impression que le CPR Part 36 constitue un ensemble fortement contraignant pour des parties qui entendent négocier comme elles l'entendent. Qu'on ne se trompe pas : les parties demeurent libres d'aller au procès, mais elles ne doivent pas abuser de cette possibilité pour décliner toute offre de négociation qui serait raisonnable.

Le *CPR Part 36* s'inscrit dans la ligne de la réforme Woolf de la procédure civile anglaise mise en œuvre à partir des années 1990. L'objectif majeur de cette réforme, tel que rappelé dans le *CPR Part 1*(*Overriding objective*), était de permettre aux tribunaux de mieux contrôler le cours de la justice qui passait pour trop *expensive, protacted and controlled by lawyers*. Il suffit de voir comment aujourd'hui s'enchaînent rigoureusement, dans des formulaires et des délais précis, les différentes étapes du procès (*letter of claim*, *claim form*, *particulars of claim*, *defence and/or counterclaim*, *reply and/or defence to counterclaim*, sans parler des *pre-action protocols* selon la matière en cause, etc.) Même la communication des pièces (*disclosure*) fait l'objet d'une réglementation précise qui évite les dérives de la *discovery* américaine, d'autant que devant les tribunaux anglais pèsent sur les avocats l'obligation de

produire, parmi les pièces, celles qui s'avèrent aller jusqu'à l'encontre de leurs clients (*adversely affect their own case*) …

En avant de la conduite du procès, le *CPR* a entendu également régler de façon efficace la conduite de la négociation. Le *CPR Part 36* offre un cadre contraignant et protecteur pour la partie de bonne composition qui n'a pas à souffrir à l'excès de la mauvaise foi ou de manœuvres dilatoires. Si la stratégie de négociation (*settlement strategy*) demeure l'apanage des parties, le *CPR Part 36* est là pour leur rappeler les risques et les coûts d'un refus injustifié ou tardif pour régler à l'amiable leur conflit.

Une telle approche peut assurément servir de guide pour aider et mieux développer l'offre de négociation en France. Des procédures contraignantes équivalentes auraient un effet non moins heureux pour les parties civiles trop victimes des chicaneurs ainsi que le décrivait non sans humour Racine au XVIIe siècle. Une réforme en ce sens pourrait être aussi l'occasion d'élargir l'offre de négociation à toute forme de demande, d'autant que nombre de dossiers comportent un aspect multidimensionnel qui ne saurait se réduire au simple paiement de dommages-intérêts. Si le besoin d'une tierce personne se fait sentir, une telle offre pourrait être celle d'une médiation, tant cette procédure se révèle aussi rapide et moins coûteuse.

[1] Le CPR comporte 76 *Parts*. Chaque *Part* est décomposée en *Rules*.

[2] The Civil Procedure Rules (Ammendment N°3) 2006.

[3] *On the standard basis* signifie que les coûts pris en compte doivent être *reasonable* quant à leur nature et à leur montant. Cependant, ils peuvent être proportionnels à la matière en cause et au montant de la demande. Un recours est possible. Les *legal costs* sont les coûts générés par la communication des pièces (*disclosure*), la sollicitation des témoins et des experts et les *trial costs* (honoraires des *solicitors* et/ou *barristers*, etc.)

[4] *On the indemnity basis*. Cette expression recoupe celle de *standard basis* si on en ôte l'aspect proportionnel.

Principles of Japanese Franchising Law

PRINCIPLES OF JAPANESE FRANCHISING LAW

Franchising has developed extensively in **Japan,** the two main sectors being food stores and service franchises and has been regulated first in 1973 and more precisely in 2002.

A general duty of disclosure is provided for in the 1973 Medium-Small Retail Business Promotion Act and is administered by the Ministry of International Trade and Industry (MITI). They were modified in April 2002.

On 24 April 2002, the *Japan Fair Trade Commission (JFTC)*, the competition authority of Japan, published guidelines on franchising which revised and replaced the guidelines originally issued in 1983. The new guidelines consist of three parts: a general description of franchising, provisions for the disclosure of necessary information at the time of the offer of a franchise and a part on vertical restraints between a franchisor and its franchisees.

According to the second part of the guidelines, the failure to provide necessary information shall constitute deceptive customer inducement, which is one of sixteen types of "unfair trade practices" listed by the ordinance under the Antimonopoly Act, and shall be subject to a cease and desist order by the JFTC. The aggrieved party is

also entitled to raise a suit for injunction against such an act. The guidelines list the following as examples of the items to be disclosed:

1. the conditions regarding the supply of goods to the franchisee (e.g. recommendation of the supplier),
2. the details of the assistance to be offered the franchisee, such as a description of the assistance to be offered, its manner, frequency and costs,
3. the nature, amount and conditions of repayment, if any, of the fee to be paid at the time of entering into a franchise agreement,
4. the amount, method of calculation, as well as the timing and manner of payment of royalties,
5. the description of any settlement arrangement between the franchisor and the franchisee, as well as the interest rate of any loan to a franchisee offered by the franchisor,
6. whether or not the franchisor is prepared to indemnify the franchisee for its deficit or to render assistance to the operation of a franchised unit that is not doing well,
7. the terms of the franchise agreement and the conditions of its renewal, resolution as well as termination; and,
8. whether or not the franchisor in the franchise agreement reserves a right to operate a unit on its own or to grant another franchise close to the franchisee and whether or not the franchisor plans to do so.

The guidelines also require that if the franchisor provides the franchisee with the projected sales or profits, such projection shall be made in a reasonable manner, on the basis of reliable data. The underlying data as well as the way in which the projected sales or profits are worked out must be disclosed to the franchisee.

As regards the vertical restraints imposed by a franchisor upon its franchisees, the third part of the guidelines observes that, if these restraints go further than is needed to duly operate the franchised business, they can be condemned as an abuse of a dominant position (i), as dealing on restrictive terms (ii) or as retail price control (iii).

In the first of these cases (i), when the franchisor holds a dominant position as against its franchisee, requirements in the franchise agreement or acts of the franchisor under it, such as:

- Restraints on the sources of supply,
- Quotas on the amount to be purchased by a franchisee,
- Requirements to offer services that are not prescribed in the franchise agreement; or
- A prohibition to engage in a competing business after the termination of the franchise agreement to a greater extent than is necessary for the protection of the know-how provided by the franchisor, can fall under the category “abuse of a dominant position”, which is listed as an unfair trade practice. The franchise agreement as a whole, rather than each of its clauses or each act of the franchisor, can also constitute an “abuse of a dominant position.” The points to be examined in this regard are, to name but a few, restraints on the goods to be offered or on the manner of sale, the sales quotas, restrictions on the right of the franchisee to terminate the franchise agreement, and the term of the agreement.

Secondly (ii), if a franchisor requires its franchisee to purchase goods or materials from either itself or a designated supplier, such a requirement may, if there are anti-competitive effects, be found to constitute a “dealing on restrictive terms”, which is listed as an unfair trade practice.

Thirdly (iii), the fixing of a retail price by a franchisor, as opposed to its indicating a suggested price, shall be illegal per se if the franchisor supplies goods to the franchisee. If the franchisor is not itself supplying the goods, it may fall under the category of “dealing on restrictive terms”.

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