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Franchise Contract in International Trade Law

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Abstract: The international contract is of interest to all states because of its value. It represents a way in which international exchanges can be realized, its role in international economic relations giving the parties the opportunity to use the advantages of arbitration and autonomy of will. The main legal instrument used to promote international relations is the contract. Compared to other fields, the legal relationships resulting from contracts are numerous and frequent. International trade contracts are distinguished by certain particularities, because according to their nature, they constitute a form of contracts regarding commercial activity. However, international trade contracts, compared to domestic contracts, do not remain subject to national law and differ from them by the existence of specific elements of internationality. An important moment in the existence of a contract is that of formation. All aspects related to the formation of contractual relations are influenced by the exact knowledge and correct application of the practice of concluding the contract. International trade contracts differ from commercial contracts concluded between participants in domestic trade by means of the extraneous element it contains, an element that, together with the commerciality element, delimits the international trade contract from the other contracts that are regulated by the rules of general law. From the category of contracts that are part of the field of international trade law, the franchise contract has had a rapid evolution, having the ability to adapt and introduce new services, products and techniques to the market, the extent of which has taken over time having practically no tendency to decrease nowadays, more and more merchants end up concluding such contracts. Thus, the franchise contract is both a relatively safe and cheap method of obtaining profit, as well as the most agreeable tool of globalization, attributed to the current consumer society.

Keywords: *franchise; international law; trade law; international contract.*

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1. Introduction

Franchising is an economic-legal operation through which a merchant, called franchisor, natural or legal person, who owns tangible or intangible goods offers the right to manufacture or market his product or service to another merchant, called franchisee, this one from then using the franchisor's know-how, technical and commercial assistance. This operation is based on a contract that was concluded for this purpose, where both parties have both rights and certain particular obligations. A large part of the authors localize the franchise as originating in the United States of America, the Americans being the first to take part in the formation of this economic phenomenon. Traders to adapt to the requirements of the new economy, understood that the most important thing is not production, but distribution for economic development. Thus, the phenomenon of franchising enjoys a formidable development, an eloquent example we have in the USA when at the beginning of the 20th century the antitrust legislation forbade a merchant to sell his goods on the market alone, forcing him to turn to an intermediary or a company to be able to sell his goods. At the same time, the rapid evolution of this phenomenon also led to excesses on the part of traders, especially franchisors, so the Americans tried to counter these abuses by issuing a federal law in 1979 that required the franchisor to provide the franchisees with a series of information regarding know -how, legal background, methods used and experience gained. In Europe, the phenomenon of franchising only appeared after the Second World War, France being the first country to take it over and diversify it. However, the scale that France managed to take in Europe eventually led to litigation that was submitted to the Court of Justice of European Communications. Those disputes arose from the franchise contracts concluded in relation to the community treaties, thus giving rise to new regulations, which particularly targeted the services market, due to the fact that the franchise enjoyed a good adaptation (Sitaru, 2017, p. 286).

The franchise contract consists of the operation by which a person, called the franchisor, grants to another person, called the franchisee, the concession of a service or a large factory, as well as the means of marketing and the set of methods, which can ensure the management and exploitation in profitability conditions (Florea, 2017, p. 59.).

2. Legal characteristics of the franchise contract

Under the franchise agreement, both parties benefit. The franchisor, the owner of the brand, creates his own distribution network of services or goods, without having to make investments, and the franchisee can use a brand that does not belong to him, and which is appreciated, known and renowned, thus benefiting from the franchisor's commercial and technical experience, which helps him to independently run a business. During the execution of the contract, the franchisee must receive assistance from the franchisor regarding the organization of the activity it carries out. The franchisor will be able to impose on the franchisee the characteristics related to the brand, such as the presentation of the products, logo, colors, or the characteristics of the services that can accompany the product (Cibotariu, 2017-2018).

As an economic phenomenon, in principle, franchising is a very effective means of distributing products, services, a brand from one market to another, especially in international exchanges. The speed and simplicity of this network, the facilities it creates for both parties, but also the way the activities are carried out give the importance of the franchise phenomenon. Consumers are the ones who enjoy this network the most because they enjoy a wide range of services or products, at a reasonable price, commercial additions, taxes or others that are imposed on an important commodity, without justifying themselves. At the same time, it should be mentioned that within a large network, which has managed to develop in several markets within a single country, but also at the international level, any crisis or harmful element that can affect one or more franchisees, the network will remain intact, since the risks are shared evenly, even if there is independence between franchisor and franchisee. It is precisely this and the existence of this very small risk that has led to the success of the franchise worldwide. The franchise contract is a bilateral, consensual contract, aimed at individuals, with successive execution, but also of adhesion (Cârpenaru, 2016, p. 616).

a. The franchise contract has a bilateral character because both the franchisor and the franchisee oblige and wish to obtain mutual advantages. The purpose of the franchisor is to expand the franchise network, to be able to enter, without investment efforts, foreign markets, as well as to receive periodic royalties. Also, the franchisee aims to carry out his activity with the means made available to him by the franchisor, thus succeeding in developing his business and obtaining profit. Thus, both the franchisor and the franchisee benefit from the conclusion of a franchise contract.

b. The consensual character of the franchise contract is explained by the fact that the parties can conclude the franchise contract by simple agreement of will, without the need for a certain form for their conclusion. If at the moment the two parties want to make such a contract, they are free to determine what form they want the contract to take, only the simple agreement of will being sufficient for it to be concluded validly.

c. The franchise agreement is an agreement with successive execution, as both the franchisor and the franchisee will execute their obligations over time. At the time of concluding the contract, they commit themselves to honor the obligations assumed under the contract for a certain period of time. The duration of the contract will be fixed in such a way that the beneficiary can amortize his investments. As a rule, a franchise contract is concluded for a long period of time, a period that can reach up to 20 years.

d. The *person-oriented* character of the franchise contract consists in the choice of the franchisee, through the solvency and managerial capabilities he has, and in the case of the franchisor through the object of the franchise, the image he has on the market, the clientele, the success the business reaches respectively, and at the same time, the field in which it operates. In the framework of the franchise contract, the individual character is of considerable importance for both parties and not only for one.

e. The adhesion character of the franchise contract consists in the fact that at the time when the contract was concluded, the franchisee agrees to access the rules imposed on him by the involved party, and certain ones, by the franchisor. In this situation, the franchisor predetermines the terms of the contract, in full, the other party not having the opportunity to negotiate or discuss them, but only the option to accept them or not (Nemeş, 2012, p. 356).

3. Issues regarding the commercial or civil nature of the franchise agreement

The commercial or civil character of the franchise contract must be discussed from two different points of view. In a first point of view, it is necessary to determine the commercial or non-commercial nature of the service or product that the franchisee offers to consumers, more precisely, the object of the activity exercised by the franchisee. The other point of view is constituted by the use of know-how, technical or commercial assistance, signs used to attract customers. The activities carried out within a franchise contract are in most cases commercial, but there are activities that tend to

expand the franchised concept in non-commercial areas, more precisely, such as legal and consulting activities. So, even if the object of the franchisee's activity is commercial or non-commercial, in the case of the franchise contract, the object is one and the same, more precisely the operation of the franchise.

The franchisor will be considered a trader if he himself exercises a commercial activity through his object, alongside the operation of the franchise, so that the presence of a commercial act is possible. However, if the operation of the franchise is carried out on the basis of a distribution contract, then it is about the presence of a commercial contract, but not a franchise contract, but a distribution contract, because its role is an accessory one.

In the case of franchising, its essence consists in cloning a business or a product, the transfer made by the franchisor to the franchisee being an informational one. Thus, in order to make the exploitation of the franchise a commercial activity, the existence of a legal regulation derogating from the non-commercial character of the operation is necessary. According to the legislation in force, the franchise is introduced in the commercial area, as the franchisor is considered to be a merchant (Mutulescu et al., 2009, pp. 33-35).

4. Franchising methods

Regarding international franchising methods in international practice four ways have been created by which a franchisor can increase and develop his business.

The four international franchising methods are the following: direct franchising; opening a branch; main franchise; franchising through joint ventures;

1. Direct Franchise: Over time, international relations have determined the formation of a branch of law that can regulate relations between individuals and legal entities, most of the time, being commercial relations. By means of a direct franchise contract, the franchisor has the opportunity to expand his business in other geographical areas, more precisely, it is about concluding a franchise contract itself, but which has a special feature compared to classic contracts. Thus, when concluding a direct franchise contract, the franchisor chooses to collaborate with a beneficiary of another nationality, in this case it is possible to conclude a contract under a private international law relationship, which also has an element of foreignness. This method is quite advantageous, especially since in terms of economic costs, they are quite low, but with regard to both parties to the contract, a number of difficulties arise. More precisely, it is about the lack of

permanent communication between the two parties, the difficulty of ensuring the assistance that involves a franchise contract on the part of the franchisor, and above all, the lack of knowledge of the geographical area. The franchisor can expand his business in another area, but this comes with some rather difficult situations compared to a classic franchise contract, especially since it would be advisable for him to be as present as possible to be able to by himself an overview of the situation created following the conclusion of such a contract. At the same time, there are a number of factors that can disrupt the smooth running of the concluded contract, such as the territory, local legislation in the respective area, traditions and customs.

2. Opening a branch: The conclusion of an international franchise contract can also be achieved by opening a branch or another headquarters, which lacks legal personality and from where the network can be managed. Thus, some of the shortcomings of the direct franchise are eliminated, but the concluded contract is still subject to private international law. Opening a branch is the easiest method and, thanks to the element of internationality, can eliminate most problems that may arise. The opened branch is subject to the national law of the beneficiary state, and not of the franchisor state, due to the fact that once opened it has its own legal personality. This is an advantage because being under the leadership of a local partner and local law, the transmission of technical assistance is much easier, the training of personnel is also much easier, and the standards, forms and qualities that have been required by franchisor can be insured.

3. Main franchise: The main franchise contract is based on the sub-franchise contract, more precisely it is a contract where the franchisor assigns a master-franchisor the right to establish a franchise network deriving from the initial franchise, or the possibility to contracts a series of benefits, in a network controlled by the master franchisor. Beneficiaries vis-à-vis the franchisor are sub-beneficiaries, whose management of the unit falls to one of them in turn. Thus, the franchisor chooses a master-franchisor, concluding a franchise contract, granting him the right to open and manage a franchise network in his geographical area, having in turn the possibility of concluding local franchise contracts, governed by local law and under the management of a sub-beneficiary.

Within this contract, the franchisor has control over the activity, transmits the know-how, information, assistance and any other necessary goods to the master franchisor. At the same time, he is trained by the franchisor in terms of operating the brand in exact and optimal conditions.

The master franchisor enjoys an independence specific to the franchise agreement, but is also accountable to the franchisor and to the local beneficiaries. As far as the local beneficiaries are concerned, they only have contractual relations with the master-franchisor, there are no contractual relations between them and the primary franchisor. The advantage of this franchising method is that the subfranchisor is a local person, who knows the situation in the geographical area best, thus being able to interact and develop the franchise network much more easily.

All the necessary assistance, along with the transfer of know-how and training will be provided by the sub-franchisor and not by the primary franchisor, which means that very often the beneficiary does not know who the real franchisor is.

The reason why the main franchise contract is not very widespread in practice is the main failure, namely the situation in which a contractual break appears between the franchisor and the master-beneficiary, most of the time it is a resolution. The question that causes problems in this situation is whether the termination of the contract between these two parties also results in the termination of the subsequent contracts, with the other beneficiaries who contracted with the master franchisor. Common law answers affirmatively in this case, the contracts will be terminated as long as the object is missing, the subfranchisor will lose the rights to the franchisable concept, and in terms of the legal cause the same will happen because there is no separate agreement of will between the primary franchisor and the beneficiaries .

4. Franchising through mixed companies: This form of franchising requires the franchisor and a local partner to create a commercial company in a form provided for by local law in the respective geographical area, where each has an input, a contribution, their purpose being to conclude of franchise contracts with different beneficiaries and at the same time, managing a franchise network. In this situation, two possibilities arise: The first possibility consists in the fact that the right to exploit the franchisable concept is offered by the franchisor together with all the rights and obligations that this implies within a franchise contract. A problem that arises is that of the obligations of information and permanent assistance, of technical and commercial support, their regime having to be carefully established, according to the will of the parties and within the person's constituent state. The second possibility consists in the role of the master franchisor within a main franchise, a role that the commercial company occupies as a legal person. In this situation, the franchisor must act according to an international contract, and the local franchise contracts will

be concluded by the company in its own name. The great advantage in these types of contracts is that the franchisor directly controls the subfranchisor, thus all economic, decision-making and contractual plans are met, as the management and management body of the company is composed by the franchisor (Sitaru, 2017, p. 287).

5. Brief details on the content of the franchise agreement

Regarding the content of the franchise contract, it is important to find, among other aspects, the pre-contractual relations, as well as the franchisable intellectual property rights and the particularities of their exploration in this system.

The pre-contractual information obligation in franchising is presented under two aspects, being a stage prior to the conclusion of a franchise contract, having a binding character.

- from a commercial point of view, before concluding the franchise contract, the franchisor is required to carry out a thorough and careful analysis of the aspects that may influence the extension of the franchise relationship. The franchisor must analyze as complex as possible the impact of this contract on potential franchisees, as well as the implications necessary for the business to develop as a franchise.
- from a legal point of view, the importance lies in the fulfillment or non-fulfillment of the pre-contractual information obligation, this having consequences such as the interruption of the pre-contractual relationship or the franchisor undertakes to be patrimonially liable.

As far as the conclusion of a franchise contract is desired, knowledge of the aspects aimed at fulfilling the obligation of pre-contractual information must be known both by the franchisor and the franchisee.

The franchisor is the person obliged to carry out the pre-contractual information, even if in case a franchise contract is to be concluded, the franchisor must obtain some information about the potential franchisee, such as information about his financial situation, professional competences.

Even if no fixed term is established anywhere when the pre-contractual information must take place, the information must be communicated to the franchisee:

- before the franchise contract is concluded;
- the franchisee must have sufficient time to make the decision to join the franchise network.

The content of the contractual information must include the acquired and transferable experience, the financial conditions of the contract, the elements that allow the beneficiary to calculate the expected

result and draw up his financial plan, as well as the duration of the contract, the conditions of renewal, termination and assignment.

The acquired and transferable experience refers to the know-how itself, since the franchisor cannot assess the possibility of implementing the franchise without knowing it. It should be mentioned that the initial information must admit the existence of a compromise between the interest of the franchisor to protect the know-how and the possibility of implementing the know-how by the franchisee. More precisely, if the franchisor considers it necessary to disclose some essential data that must be known by the franchisee, it is recommended to disclose them, however, the total disclosure of the know-how is not necessary, but only certain elements of it.

The financial conditions of the contract include any entry fees, royalties or advertising or exclusivity fees. However, it is advisable to consider the possibility of increasing tariffs for the services or goods that the franchisor provides to the franchisee.

The elements that allow the beneficiary to calculate the forecasted result and to compile his financial plan constitute the most difficult category of data because it suggests the franchisor's obligation to identify and bring to the attention of the franchisee the elements that can influence the calculation of the financial result. Thus, the franchisor will have to indicate to the franchisee any market factors that must reasonably be identified and indicated as being of such a nature as to influence the financial performance of the franchisee. The franchisee will have to carry out his own analysis of the data provided by the franchisor. In this situation, it is recommended that the franchisee ensure the correctness of the figures provided by the franchisor. At the same time, the franchisor does not have a legal obligation to guarantee the achievement of the financial result that was foreseen, but must indicate the respective data as correctly as possible.

The category of data concerning the duration of the contract, the terms of renewal, termination and assignment is closely related to the terms of the franchise contract. The franchisor will have to take into account the special provisions of Ordinance no. 52/1997 and the competition law regulations, at the time of their establishment.

We draw the conclusion that, regarding franchisable intellectual property rights and their particularities in this system, the following can be deduced:

- the franchisor grants the franchisee the right to exploit a product, a service, a business;

- the franchisor is the owner of the rights of a fully registered brand, rights that should be exercised for a period at least equal to the period in which the franchise contract will last;
- the franchisor undertakes to provide the franchisee with initial training in order for him to succeed in capitalizing on the registered trademark;
- to promote his brand, the franchisor personally uses financial means;
- the know-how made available to the franchisee constitutes all the technical formulas, drawings, documents, formulas, procedures, which serve to manufacture a product and sell it;
- supported by the technical and commercial assistance of the franchisor, the transferred right allows the franchisee to use the brand of products, services and technologies, as well as other industrial or intellectual property rights (Sitaru, 2017, p. 286).

6. Conclusions

The advantages of this economic phenomenon, which has experienced a significantly high development, are not superior to any advantages, which gives traders the necessary confidence to use this phenomenon. The franchise contract is characterized by a series of essential features: throughout the duration of the contract, the two parties have continuous collaboration; there are no subordination relationships between the partners; the franchisee operates independently, for him and of course, on his account; for the services provided or the goods produced and marketed, the trade name is used, as well as the franchisor's brand. Franchise businesses originated in the United States of America, but franchising was not subject to special regulation until 1979, when a federal law was passed restricting the freedom of the franchisor, who had the obligation to provide pre-contractual information to the franchisee, as well explained by Professor Hogoş (2021, p. 32).

The International Chamber of Commerce in Paris, synthesized the practice in the matter, on an international level, by drawing up a model contract for the international franchise.In our legal system, the legal regime of the franchise was regulated through O.G. no. 52/1997, which was approved with amendments and additions by Law no. 179/2019. According to the community regulation, the franchise contract is an agreement through which a person, called the franchisor, offers another person, called the franchisor, the right to be able to exploit a franchise in order to sell some

services or products, all this in exchange for a financial rewards, which can be direct or indirect.

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