

МЕЖДУНАРОДНОЕ ПРАВО

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LEGAL REGULATION OF A FRANCHISING IN THE REPUBLIC OF KAZAKHSTAN AND IN THE WORLD

In economically developed countries the wide circulation was received by the organization of enterprise activity on the basis of a franchising. Often such contracts conclude in sphere of sale of the goods and services.

The foreign legislation has no terminological unity about franchising. The term "Franchise" means the rights, or relations of the right and the obligation under the contract, arrangements.

Regulation of a franchise in the world refers to various spheres of the right, for example: the contract right; laws on representation and the laws regulating contracts of distribution; laws on fair trade; the corporate right; the competitive legislation; the laws regulating intellectual property, etc. In some states the franchise has independent legal regulation, without using norms of other laws and instructions thus isn't excluded. Besides, norms of the international conventions, for example the Parisian convention, the Bern convention and etc. are applicable also.

The USA - the world's largest franchising empire. There the highest level of development special franchising legislations, rich judiciary practice on a franchise, extensive the legal theory of franchising. Much older experience of a franchise in the USA has allowed the public of the country and to all branches of the power at all its levels better, than in other countries, to reveal advantages of a franchise and its weak places.

Regulation of the franchising in the USA is carried out by two norms: federal regulation and state regulation at level of states. Between federal instructions and instructions of states there are distinctions, and requirements of states, as a rule, are harder than the federal. [1]

The special legislation exists in France, Italy, Spain, Canada, Brazil, Romania, Indonesia, Malaysia, China, Japan, Korea and in some other states.

In [Australia](#), franchising is regulated by the "[Franchising Code of Conduct](#)", a mandatory [code of conduct](#) made under the [Trade Practices Act 1974](#). The Code requires franchisors to produce a disclosure document which must be given to a prospective franchisee at least 14 days before the franchise agreement is entered into. The Code also regulates the content of franchise agreements, for example in relation to marketing funds, a [cooling-off period](#), termination and the [resolution of disputes](#) by [mediation](#). The federal government is currently considering recommended changes to the Code of Conduct contained in the report, "Opportunity not Opportunism: Improving conduct in Australian Franchising" tabled by a Parliamentary inquiry into franchising on 4 December 2008.

The Brazilian Franchise Law defines the franchise as a system in which the franchisor licenses the franchisee, for a payment, the right to use a trademark/ patent along with the right to distribute products or services on an exclusive or semi-exclusive basis. The "Franchise Offer Circular" or disclosure document is mandatory before execution of agreement and is valid for all of Brazilian territory. Failure to disclose voids the agreement with refunds and serious damages. The Franchise Law does not distinguish between Brazilian and foreign franchisors. The National Institute of Industrial Property is the registering authority. Indispensable documents are the Statement of Delivery (of disclosure documentation) and Certification of Recording.

China has the most franchises in the world but the scale of their operations is relatively small. Each system in China has an average of 43 outlets, compared to more than 540 in the United States. Together, there are 2600 brands in some 200,000 retail markets. The year 2005 saw the birth of an updated franchise law, "Measures for the Administration of Commercial Franchise". Previous legislation (1997) made no specific inclusion of foreign investors. Today the Franchise Law is much clearer by virtue of the 2007 law, a revision of the 2005 Law. The laws are applicable if there are transactions involving a trademark combined with payments with many obligations on the franchiser. The Law comprises 42 Articles and 8 chapters.

Franchising of goods and services, foreign to India, is in its infancy. The first International Exhibition was only held in 2009. India is, however, one of the biggest franchising markets because of its large middle-class of 300 million who are not reticent on spending and because the population is entrepreneurial in character. So far, franchise agreements are covered under two standard commercial laws: the Contract Act 1872 and the Specific Relief Act 1963, which provide for both specific enforcement of covenants in a contract and remedies in the form of damages for breach of contract.

In Kazakhstan franchise turnover for 2010 is 1 billion US\$ dollars per year. Kazakhstan is the leader in Central Asia in the franchising market. There is a special law on the franchising of 2002, there are about 300 franchise systems and franchises near the 2000 outlets [2]. Kazakhstan franchise began with the emergence of a factory "Coca-Cola", opened to sublicense Turkish licensor of the same brand. The plant was built in 1994. Other brands that are also present in Kazakhstan through the franchise system include Pepsi, Hilton, Marriott, Intercontinental, Pizza Hut etc. On 24 June 2002 the Republic of Kazakhstan adopted a law on franchising (Law No. 330 of 24 June 2002 concerning the Integrated Business License (Franchise)). It is not a disclosure law, it deals with the franchise agreement and with the duties of all those identified as involved in franchise relationships. The Law has 24 articles. A general header states that it regulates relations that are connected with the exercise of the integrated business license or franchise, that it defines the contents of the contract and is directed to the development and promotion of franchise activities in the Republic of Kazakhstan on the part of the State.

Franchising has grown rapidly in Europe in recent years, but the industry is largely unregulated. Unlike the United States, the European Union has not adopted a uniform franchise disclosure policy. Only five countries in Europe have adopted pre-sale disclosure obligations. They are France (1989), Spain (1996), Romania (1997), Italy (2004) and Belgium (2005). The Code of Ethics of the European Franchising Federation is self-enforced in seventeen European states where their national franchise associations are members of EFF members, and UNIDROIT.

France is one of Europe's largest market. Similar to the United States, it has a long history of franchising, dating back to 1930s. Growth came in the 70s. The market is considered tough for outside franchisors because of its cultural angularities; yet, McDonald's and Century 21 are found everywhere. There are some 30 US Firms involved in franchising. There are no government agencies regulating franchises. The Loi Doubin of 1989 was the first European Franchise Disclosure law.

Under the Italian law franchise is defined as an arrangement between two financially independent parties where a franchisee is granted, in exchange for consideration, the right to market goods and services under trademarks. In addition, articles which dictate the form and content of the franchise agreement and define the documents that must be made available 30 days prior to execution.

Legal definition of Franchising in Spain is the activity in which an undertaking, the franchisor, grants to another party, the franchisee, for a specific market and in exchange of an economic financial compensation (either direct, indirect or both) the right to exploit an own system to commercialize products or services already exploited by the franchisor with enough success and experience. The Spanish Retail Trading Act regulates franchising.

In the United Kingdom, there are no franchise-specific laws; franchises are subject to the same laws that govern other businesses. For example, franchise agreements are produced under regular contract law and do not have to conform to any further legislation or guidelines. There is some self-regulation through the British Franchise Association (BFA). [3]

It is possible to formulate the general principles for the majority of the states: as a rule, a regulation definite purpose, namely franchise relations, its development and protection of legitimate interests of participants of relations; the regulation subject, the basic concepts are accordingly formalized; in some laws are registered necessary conditions for franchisors which should be executed to the offer of the first franchise; the written form of the contract; obligatory disclosing of the information to the conclusion of agreements; the basic conditions of the agreement and payments; conditions of cancellation, the termination and agreement renewal, and also a cancellation consequence; penal sanctions.

The special attention is necessary for turning on those positions which concern precontractual disclosing of the information. For example, in the USA at federal level the certificate "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" - the "FTC Rule". According to this document to demanded to disclosing the following information is carried: the information about franchisor and its experience, experience of directors and the main employees, judicial proceedings and history of bankruptcies, initial payments and funds, obligations of purchases, the incomes received by franchisor, and restrictions, the information on quantity of franchises, support, the financial information and some other positions. Time established for disclosing of the information, - 10 working days before signing potential franchisor any agreement imposing on it legal obligations and payments of money resources,

connected with franchise purchase. In the named document, applicable the basic terms and formulations are resulted in a franchise, and also conditions at which this rule isn't applied.

In Europe along with national norms the legislation of EU extending on the states-participants operates also. In EU the franchise isn't regulated directly by special laws. Regulation concerns norms of the competitive right. Two articles of the Roman contract establishing the European economic community, define the key rules of a competition forbidding certain actions, incompatible with the Common market. Positions of specified articles concern horizontal and vertical agreements. To horizontal agreements refers agreements between actual or potential competitors, that is between the organizations which are at one stage of manufacture or chains of distribution. At the same time, within the limits of EU the Regulations establishing some privileges with reference to distribution of action of item 81 of the Roman contract. According to Regulations of Council of European Economic Community 1965, the European Economic Community Commission has been authorized to accept privileges for some vertical agreements. [4] In 1983 the regulations giving privileges to categories of exclusive agreements of distribution and exclusive consumer agreements, in 1988 - to franchising agreements have been accepted. Active development of the mixed systems, for example, including within the limits of one network branches and independent franchisor, a status combination franchisor with the status of the agent, has led to franchise reference under the general regulation of vertical agreements by Regulations of 1999.

The new economic approach of the Commission of EU to vertical agreements has concentrated on an estimation of their efficiency in the market for the purpose of increase in well-being of the consumer and creation of effective distribution of resources. At the same time, he recognizes that the reasonable balance between benefits and competition restriction in EU market should be reached.

Development and expansion of commercial communications leads to change and occurrence of new forms of interaction between participants of the market. Participation of the states in integration processes leads to acceptance of new forms of legal relationship. For example, such contracts as agency, the contract of commercial representation, commercial concession, etc. the Franchise and commercial concession have a number of the general signs are integrated into the Kazakhstan and Russian right from international law, but disputes concerning till now don't cease, whether is "the commercial concession" analog of "franchise", and the term "franchise" at its wide distribution to practice remains not legalized.

The contract about the complex enterprise license in Civil Code of the Republic of Kazakhstan and the contract of commercial concession in the Civil Code of the Russian Federation have appeared how became the nature of economic relations that has led subsequently to high level of a dissatisfaction with the maintenance of norms of regulation in their set in Kazakhstan and Russia is clear.[5] Similar problems exist and in the countries of the former socialist camp that is the factor of restraint of development of a franchise in national territories, and also interferes with development of processes of free legal interaction of representatives of business of the various states.

Presence of problems of the legal character connected with absence of uniform and unified norms of regulation, and importance of the decision of these problems, and also necessity of development and perfection of methods of business cooperation between representatives of business of the various states have led to creation of the International advisory council which structure will include practicing advisers and the lawyers specializing in sector of a franchise. In February, 2010 the memorandum of creation of the International advisory council has been signed and now work on working out of regulations and the business documentation is carried out. Under the aegis of the International advisory council on a franchise, with the assistance of Fund "DAMU" and assistance of Embassy of the USA in Kazakhstan on June, 9-10th III International Exhibition and the Forum has been spent to Almaty "the Franchise in Kazakhstan - 2010".[6]

1. Franchising in the US economy prospects and problems. Washington Committee on small business House of representatives. 1990. p.56

2. Бекнур Кисиков. Франчайзинг в Казахстане.- Алматы: BookinEast, 2007.- с.15

3. Мендельсон М. Руководство по франчайзингу. – Москва: "Sibli International Inc.", 1995.- с. 20-21.

4. Сосна.С.А., Васильева Е.Н. Франчайзинг. Коммерческая концессия. – Москва: ИКЦ «Академкнига», 2005.-С.176.

5. Savinova O.N. Legal regulation of franchising in Russian Federation.- Kazan: Taglinat, 2006. p.75.

6. Central-Asian Association of Franchising and Licensing-Association. www.cafla.com

Мақалада Қазақстанда және әлемде франчайзингтің құқықтық реттеуі туралы айтылады. Кейбір мемлекеттерде франчайзинг дербес құқықтық реттеледі, сонымен бірге басқа заңдар және нұсқауларды қолдану нормалары шығарылмайды.

В статье говорится о правовом регулировании франчайзинга в Казахстане и в мире. В некоторых государствах франчайзинг имеет самостоятельное правовое регулирование, при этом не исключается использование норм других законов и инструкций.