

GETTING THE
DEAL THROUGH 

Franchise 2016

Contributing editor
Philip F Zeidman
DLA Piper LLP (US)

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@lbresearch.com

Adam Sargent
adam.sargent@lbresearch.com

Dan White
dan.white@lbresearch.com

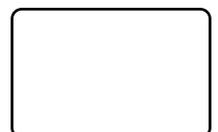


Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2015
No photocopying without a CLA licence.
First published 2007
Tenth edition
ISSN 1752-3338

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of July 2015, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

The president of the company just left a message for you...	5	Italy	82
Philip F Zeidman DLA Piper LLP (US)		Roberto Pera and Irene Morgillo Rödl & Partner	
Argentina	7	Japan	89
Diego César Bunge Estudio Bunge – Bunge, Smith & Luchía Puig Abogados		Etsuko Hara Anderson Mōri & Tomotsune	
Australia	12	Malaysia	94
Philip Colman and John Sier MST Lawyers		Jin Nee Wong Wong Jin Nee & Teo	
Belgium	19	Mexico	101
Pierre Demolin, Véronique Demolin, Benoit Simpelaere and Leonard Hawkes DBB		Jorge Mondragón González Calvillo SC	
Brazil	25	New Zealand	107
Paulo Shigueru Yamaguchi, Marco Mello Cunha and Theo Santos Cabral da Hora Tess Advogados		Stewart Germann Stewart Germann Law Office	
Canada	30	Russia	112
Bruno Floriani, Marvin Liebman and Marissa Carnevale Lapointe Rosenstein Marchand Melançon LLP		Vladimir Biriulin and Sergey Medvedev Gorodissky & Partners	
China	38	South Africa	117
Claudio d'Agostino and Paula Cao DLA Piper UK LLP (Shanghai and Beijing)		Eugene Honey Adams & Adams	
Colombia	46	Spain	123
Juan Carlos Uribe Triana, Uribe & Michelsen		Ignacio Alonso Even Abogados	
Finland	52	Switzerland	129
Patrick Lindgren Advocare Law Office		Martin Ammann and Christophe Rapin Meyerlustenberger Lachenal	
France	58	Thailand	135
Emmanuel Schulte Bersay & Associés		Chanvitaya Suvarnapunya and Pattama Jarupunphol DLA Piper (Thailand) Limited	
Germany	64	Turkey	140
Karsten Metzloff and Tom Billing Noerr LLP		Hikmet Koyuncuoğlu and Seza Ceren Aktaş Koyuncuoğlu & Köksal Law Firm	
Guatemala	70	United Kingdom	146
Marco Antonio Palacios Palacios & Asociados		David Bond, Chris Wormald and Vicky Reinhardt Fieldfisher	
Indonesia	75	United States	151
Galinar R Kartakusuma and Reagan Roy Teguh Makarim & Taira S		Michael G Brennan and Philip F Zeidman DLA Piper LLP (US)	

Turkey

Hikmet Koyuncuoğlu and Seza Ceren Aktaş
Koyuncuoğlu & Köksal Law Firm

Overview

1 What forms of business entities are relevant to the typical franchisor?

The main distinction regarding business entities is establishment as a real person company (unlimited company or general partnership) or an equity company (capital stock company). A typical franchisor would establish an equity company, especially in view of the favourable consequences regarding liability. At the same time, there are different types of equity companies that can be established by a franchisor. The two main alternatives are limited liability companies and joint-stock companies. They differ from each other in many ways, but in principle limited liability companies are easier and less costly to establish and easier to operate after establishment. On the other hand, joint-stock companies are more suitable for comprehensive shareholding structures and have the advantage of placing no liability on its shareholders with regards to (public or private) company debt. The franchisor, in consideration of these facts, may establish the type of business entity that serves its needs most.

2 What laws and agencies govern the formation of business entities?

The Turkish Commercial Code is the main regulation governing the formation and regulating the characteristics of business entities. There are also a number of communiqués dealing with the steps and phases for the establishment of business entities.

It should be noted that the new Commercial Code (which came into force as of 1 July 2012) brings improvements and amendments on issues like transparency in regard to companies, obligation of independent auditing for certain capital companies determined with the decision of the Council of Ministers, regulations regarding company groups, increasing power of minority shareholders and accounting standards in line with International Financial Reporting Standards.

3 Provide an overview of the requirements for forming and maintaining a business entity.

The formalities mainly depend on the type of the business entity that will be formed. In general terms, however, with regard to the formation of an equity company, the phases are:

- the composition of the articles of association of the company, which includes information on the shareholders, the representation, addresses, etc;
- the notarisation of the articles of association, which must be signed by all the shareholders; and
- application to the relevant trade registry accompanied by the notarised articles of association and other necessary documents (which are listed in the Trade Registry Regulation) for the establishment of the entity to be registered and announced. In legal terms the date of registration is the date of establishment.

4 What restrictions apply to foreign business entities and foreign investment?

It must be noted that any company registered in the Turkish trade registry is accepted as a Turkish company. The shareholding structure is not relevant to such determination. Consequently, there is no concept of 'foreign business entity' if the company is established in Turkey and is registered in the relevant trade registry (see question 8). Nevertheless, article 5 of the

Regulation for Implementation of Foreign Direct Investment Law indicates that companies and branch offices subject to the provisions of the Foreign Direct Investment Law (referring to companies involving foreign real or legal entities as their shareholders, no matter what the percentage) shall submit a form titled 'FDI Operations Data Form'. This form must be submitted to the Ministry of Economy, the General Directorate of Incentives Implementation and Foreign Investment before the end of May every year. The aim and scope of the regulation is monitoring foreign investment activities.

5 Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

If the franchise fee is paid to a related party, it will be subject to Turkish transfer pricing regulations, under the Corporate Tax Law, article 13. According to the said legislation, all types of royalties should be paid at arm's-length prices.

Turkish tax legislation usually recognises two kinds of licence (royalty) payments:

- the cross-charging of the intellectual property (IP) generation costs to the Turkish subsidiaries; and
- arm's-length royalties, which are fixed as a percentage multiplied by net sales of the Turkish subsidiary.

The current Corporate Tax Law recognises the deduction of IP generation costs if the expenses concerned are related to the generation and maintenance of income in Turkey and if the portion of the costs to be allocated to the Turkish entity is in line with the arm's-length cost allocation keys. On the other hand; as royalties, entry fees and other franchising payments are considered to be 'intangible property income', they are subject to 20 per cent withholding tax, which might be reduced to 10 per cent with double tax treaties.

Under Turkish transfer pricing legislation there are no specific provisions for royalty fee setting mechanisms. The conditions below are sought when the Turkish subsidiaries are questioned on the deductibility of royalty payments to the group companies abroad:

- the royalty rates and the method of calculation should be in line with the arm's-length principle under Turkish transfer pricing regulations;
- the royalty rates are defensible based on available comparable royalty payments; and
- the IP owner's interest in the proper production, quality and branding of goods in the Turkish market shall be presented very clearly (by way of documentation). This should be linked to the Turkish subsidiary's developing business in Turkey with the use of the IP generated by the IP owner.

Especially with the adoption of the 2007 transfer pricing legislation in Turkey, the burden of proof to support any royalty payment lies with the Turkish company, especially with the adoption of the 2007 transfer pricing legislation in Turkey. It should be noted here that there is an important annual Transfer Pricing Documentation requirement for Turkish companies that must include every inter-company transaction of the Turkish entity with foreign related parties.

It should also be noted that there is a certain risk of questioning the profitability of the franchise company in Turkey if the royalty fee reduces the corporate tax base of the company.

6 Are there any relevant labour and employment considerations for typical franchisors? What is the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor? What can be done to reduce this risk?

The Turkish Labour Law identifies the employee as 'a natural person working under an employment contract'. The main elements of an employment contract under Turkish law are:

- the commitment of the employee to perform and provide services according to the employer's wishes;
- the service of the employee being rendered in return for remuneration; and
- an agreement between the employer and the employee including the above-mentioned conditions.

Considering that the franchisor and the franchisee are two 'business persons' (which is a concept defined in the Turkish Commercial Code) aiming to maximise profit instead of a natural person serving an employer under an employment contract, there is only a slim possibility that the franchisee could be considered as an employee of the franchisor.

7 How are trademarks and know-how protected?

Other than contractual safeguards for such purposes, the trademark or the know-how shall be registered before the Turkish Patent Institute for absolute protection. It should also be noted that Turkey is a member of the World Intellectual Property Organization.

8 What are the relevant aspects of the real estate market and real estate law?

Article 35 (which was amended on 3 May 2012) of Law No. 2644 deals with the conditions for foreign nationals acquiring real property within Turkey. Accordingly, the Council of Ministers has been authorised to determine which countries' nationals are permitted to acquire real property in Turkey. The Council of Ministers shall consider the public interest in such a determination. As per article 36 of Law No. 2644, the companies registered in the Turkish trade registry that are majority-owned by foreign real persons or legal entities or companies registered in the Turkish trade registry in which foreign real persons or legal entities have the right to appoint or dismiss more than half of the members of the board of directors must obtain permission from the relevant governor for acquiring real property, in case that real property is located in a military security zone or a special security zone.

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

The only specific regulation dealing with franchise agreements was the Block Exemption Communiqué regarding Franchise Agreements of the Competition Authority, which came into force on 16 December 1998. The Communiqué has since been abolished and replaced by the Block Exemption Communiqué on Vertical Agreements of 14 July 2002 (the Communiqué is also applicable to franchise agreements).

The abolished Communiqué regarding Franchise Agreements identified the Franchise Agreement as follows.

[A]n agreement whereby the franchisor grants to the franchisee the right to employ the franchise in order to market specific goods and/or services, in return for a direct or indirect contribution, and at least covers the obligations:

- to use a common brand or enterprise name, and make the facilities and/or transportation vehicles look uniform;
- to transfer know-how to the franchisee by the franchisor; and
- to support the franchisee by the franchisor commercially and technically on a continuous basis during the agreement.

10 Which laws and government agencies regulate the offer and sale of franchises?

As mentioned above, there is no specific legislation or any regulation governing franchise agreements in Turkish law. The concept of franchise and the content of franchise agreements are considered mainly in case law, which includes the decisions of the Competition Board and the Supreme Court.

11 Describe the relevant requirements of these laws and agencies.

The Supreme Court, in its decision dated 25 June 2001 No. 2001/4917, has defined franchise agreements as follows:

Franchising is a long-term and continuous contractual relation where one party which is holding a concession in terms of a product or a service, grants the other party such concession for enabling the other party carry out the commercial business in relation with the said concession subject to conditions, time frame and limitations and also bearing the responsibility of providing support and information with regards to the organisation and administration of the business.

With regards to the form of the contract the Supreme Court, in its decision No. 2010/6178 dated 20 January 2011, stated that a franchise agreement may also be concluded orally (without any requirement to form a written contract) and such a franchise agreement would be valid and binding.

12 What are the exemptions and exclusions from any franchise laws and regulations?

There is no such law or regulation; however, any practice that is not in line with the above-mentioned definition of the Supreme Court would result in not being considered as a franchise agreement or a relation.

13 Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

There are no such requirements in any law or regulation.

14 Are there any laws, regulations or government policies that restrict the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers?

There is no such law or regulation or government policy on franchising that restricts the manner of recruiting franchisees or selecting suppliers. These kinds of restrictions or requirements may be freely determined under the franchising contract in accordance with the principle of contractual freedom, unless the goods or services which are subject to the franchising require the implementation of a specific regulation.

15 What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?

There is no pre-contractual disclosure requirement for any type of contract regulated in Turkish law but article 1 of the Turkish Code of Obligations (the amended version came into force as of 1 July 2012 as the Turkish Commercial Code) indicates that in order for a contractual relation to be complete, the will of the parties shall be coherent and compatible. The pre-contractual disclosure requirement shall be evaluated accordingly. Specifically, article 36 of the Turkish Code of Obligations provides that if a party has entered into a contractual relationship as a result of the fraudulent acts of the other party, he or she shall not be bound by such a contract.

It must also be noted that there are types of agreements that are required to be registered to a private registry, which is quite different from a pre-contractual disclosure requirement. For example, financial lease (equipment leasing) agreements shall be registered with the land registry (for immovable property) or the special registry that is kept by the Union of Financial Leasing, Factoring and Financing Companies, primarily to enable third parties to monitor such agreements. Such agreements are not put into effect unless the registration procedure is completed.

16 In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

There is no pre-contractual disclosure requirement for franchising agreements under Turkish law. In that sense, the disclosure obligation of the franchisor and the sub-franchisor shall be determined in accordance with the franchising contract and the contractual requirements.

17 What information must the disclosure document contain?

As there is no specific law dealing with the content of such documents, the obligation of disclosing information shall be evaluated within the scope of the general principles of the Turkish Code of Obligations. In that sense, the main elements (namely, the factors that would affect the decision of the counterpart to be involved in the contract or not) shall be disclosed and shared.

18 Is there any obligation for continuing disclosure?

Again, in line with the principles mentioned in the Turkish Code of Obligations, one party shall keep the other party informed regarding any information that would have an effect on the performance of the other party. This principle would play an even more important role taking into consideration an ongoing and continuous relationship such as a franchise contract.

19 How do the relevant government agencies enforce the disclosure requirements?

As mentioned in question 4, Turkish companies that have foreigners as shareholders must continue submitting the FDI Operations Data Form to the General Directorate of Incentives Implementation and Foreign Investment at the Ministry of Economy. This form includes a subsection where details of the 'licences, know-how, technical assistance, franchise agreements and transfers' of the company are requested. This form shall be submitted to the General Directorate of Incentives Implementation and Foreign Investment at the Ministry of Economy before the end of May every year. As stated above, the aim and scope of the regulation is monitoring foreign investment activities, rather than an intention to govern the disclosure requirement of franchise agreements.

20 What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?

In line with the provisions of the Turkish Code of Obligations, any information revealed between the parties during the pre-contractual phase that is later understood to be not in compliance with the initial wills of the parties would disrupt the validity of the contractual relation between the parties.

In such a case the compensation for the damages shall be requested from the court by the party who faced damage thereof. The damages include actual and prospective damages (loss of profit, loss of business opportunity, etc).

21 In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

As there is no law regulating such a scenario, the party that is liable for disclosure shall be determined in accordance with the terms of the contract. As a general principle, the liable party in the case of sub-franchising would be the sub-franchisor as a result of it being the party to the sub-franchising contract (if there is no term in the master franchising contract dealing with such an issue).

22 In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

The above-mentioned rules are the general principles of law that affect the offer and sale of franchises. These principles, which would affect the offer and sale of franchises, derive mainly from the Turkish Code of Obligations, the Turkish Commercial Code and the laws regarding intellectual property rights. See question 40 regarding the competition law aspect of the subject.

23 Other than franchise-specific rules on what disclosures a franchisor should make to a potential franchisee or a franchisee should make to a sub-franchisee regarding predecessors, litigation, trademarks, fees etc, are there any general rules on pre-sale disclosure that might apply to such transactions?

The pre-sale disclosure requirements regarding franchise contracts are based on general obligations that exist in the above-mentioned laws and regulations.

24 What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under franchise sales disclosure laws?

In accordance with the general principle of 'confidence and trust' that must be established between the parties during the formation of the contract, the parties shall not engage in misleading acts or appearances. Otherwise the contract might be deemed null and void in accordance with the above-mentioned first and other relevant articles of the Turkish Code of Obligations. As there is no law regarding franchise sale disclosure, this is the only remedy if a franchisor engages in fraudulent or deceptive practices.

Legal restrictions on the terms of franchise contracts and the relationship between parties in a franchise relationship**25 Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?**

There are no specific rules for such purpose. The contractual terms (unless they violate the general principles of Turkish law) shall define the ongoing relation between the parties.

26 Do other laws affect the franchise relationship?

The content of the Block Exemption Communiqué on Vertical Agreements affects the franchise relationship. Contractual impositions on the franchisee that are not in compliance with the Communiqué, the consequences of non-compliance, exceptions and the duration of non-compete obligations during and after the term of the contract have all been regulated within the Communiqué.

Depending on the case, the rules contained in the Turkish Commercial Code regarding business agents might be applicable to franchising contracts. Franchisees are not mentioned as one of the prototype business agents in the Code. Nevertheless, depending on the nature of the franchising relation and the clauses in the franchise contract, the rules regarding agency, commissioners (or other matters regulated by law) might be applicable to the franchising relationship.

Furthermore, the general provisions regarding representation regulated in the Turkish Code of Obligations might be applicable to a franchising relationship and would be taken into consideration. The notion of 'abuse of economic dependence' has been invoked by the Supreme Court several times in disputes involving supplier-agency, employee-employer and lessor-lessee relations. In this regard, it might be likely that the said notion would be invoked by the court in a dispute concerning a franchising contract. All the same, there is at present no case law involving such an assessment.

27 Do other government or trade association policies affect the franchise relationship?

No such policies directly affect the franchise relationship. Nevertheless, the government or other authorities may interfere (within the limits of the law) if the relationship has an undesired impact on governmental policies (such as, possibly, foreign trade policy).

28 In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

Parties are free to choose between a contract for a fixed term and a contract for an indefinite period, in line with the general principle of contractual freedom, which includes the terms of the contract. The main differences would be regarding the termination of the contract. A contract signed for a

fixed term shall only be terminated through a justifiable cause or in return for compensation during its term. Otherwise, the contract shall continue to be in effect until the expiry of its term. In contrast, a contract signed for an indefinite period shall be terminated through a regular termination notice any time (unless no notice period has been introduced in the contract).

It shall also be noted that the above information depends on the content of the agreement and, particularly, on the termination clauses and on the definitions of justifiable causes (if any) for termination.

Turkish law does not require a minimum period of notice for the termination of a franchise contract made for an indefinite period. Actions that constitute a material breach of the contract and of the notion of franchising shall justify earlier termination. The Supreme Court in its decision dated 3 July 2006, No. 2006/7900, stated that:

[A] franchise agreement is a type of agreement that builds a continuous relation between the parties and the contract shall not come to an end unless the parties terminate the contractual relation at their own discretion. Principally, contracts made for indefinite periods shall be terminated either by ordinary or extraordinary terminations. In this regard when the contract is being terminated without any cause this would be an ordinary termination, however, if the contract is being terminated by a party on the grounds of justifiable and material cause this would be an extraordinary termination.

29 In what circumstances may a franchisee terminate a franchise relationship?

As there is no distinction by law, the same reasoning indicated in question 28 shall also to apply to termination by the franchisee.

30 May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

Again, in line with the general principle of contractual freedom, a franchisor may refuse to renew an agreement with a franchisee. At the same time, the amount of investment by the franchisee would be decisive in determining the amount of compensation, if any, granted to the franchisee if the decision not to renew the agreement could not be justified by the franchisor.

Furthermore, such preference of the franchisor (not renewing the agreement) might be challenged if the service or the product subject to the franchise agreement constitutes an 'essential factor' for the franchisee to carry out its activity.

31 May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

The franchise agreement might contain clauses that oblige the franchisee to obtain the franchisor's consent before transferring its franchise or again transferring ownership interests in the entity. Nevertheless, such a restriction shall only be binding upon the franchisee, not before third parties who are not aware of such a clause. Consequently, the transfer of the franchise (even with the existence of a restrictive clause in the franchise agreement) would be valid and the franchisor may only seek compensation as a result of the violation of the agreement.

32 Are there laws or regulations affecting the nature, amount or payment of fees?

The parties are free to determine the amount and the currency of the fees. At the same time, the taxation of the fee transfer is a separate matter that is regulated through the relevant articles of the tax codes.

33 Are there restrictions on the amount of interest that can be charged on overdue payments?

The amount of interest on overdue payments determined by the parties in the agreement shall be valid on the condition that such a rate shall not lead to ruination of the other party. On the other hand, if the parties have not decided on an interest rate in the agreement, there is a specific amount of interest designated by law for commercial disputes (including franchise matters) that is renewed each year.

34 Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

There is no such restriction by law unless the franchisor's domestic currency is one of the currencies that are in circulation within the Turkish Republic.

35 Are confidentiality covenants in franchise agreements enforceable?

The confidentiality covenants in franchise agreements are enforceable but the penalty amount determined in the agreement may be reduced by the court if it exceeds the damage caused by a breach thereof.

36 Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

Yes, article 2 of the Turkish Civil Law regulates the obligation of acting in good faith (bona fides) by the parties. For this reason, the acts of the parties would be assessed by the court in line with this general principle at the signing of the agreement and also throughout the term of the agreement.

37 Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

The definition of a consumer in the new Act on the Protection of Consumers which is in force as of 28 May 2014 is 'a real person or a legal entity who acts without any commercial or occupational aim'. Based on this definition a franchisee shall not be treated as a consumer.

It must also be noted that article 11 of the Act on the Protection of Consumers provides that the manufacturer, seller and importer of defective goods, as applicable, are jointly responsible before consumers.

38 Must disclosure documents and franchise agreements be in the language of your country?

As a general principle, the document shall be in Turkish if the parties to the agreement are both Turkish. If, however, one party is a foreigner the document might also be presented in another language besides its Turkish version. The Turkish version would, however, prevail in such a case.

39 What restrictions are there on provisions in franchise contracts?

According to the Block Exemption Communiqué on Vertical Agreements, a non-compete obligation shall not be introduced for an indefinite period or more than five years and shall not forbid the members of the selective distribution system from selling the branded products of designated competing providers. A non-compete obligation that is not in compliance with the said conditions would result in the agreement violating the Act on the Protection of Competition.

Additionally, article 5 of the Block Exemption Communiqué on Vertical Agreements indicates that:

[A] non-compete obligation may be imposed on the purchaser provided that it does not exceed one year as of the expiry of the agreement, with the conditions that the prohibition relates to goods and services in competition with the goods or services which are the subject of the agreement, it is limited to the facility or land where the purchaser operates during the agreement, and it is necessary for protecting the know-how transferred by the provider to the purchaser.

Nevertheless, the 11th Chamber of the Court of Appeals formed a controversial opinion in its two successive decisions (file No. 2011/13747, Decision No. 2012/356, date 19 January 2012; File No. 2012/17736, Decision No. 2013/9814, date 13 May 2013) regarding the enforceability of the post-contractual non-compete obligation in a franchising contract. In its decisions, the court ruled that the parties' post-contractual non-compete clause of the franchising contract was void based on article 48 of the Constitution and articles 19 and 20 of the former Turkish Code of Obligations. More precisely, the Court stated that such a post-contractual non-compete obligation is against the freedom to work protected by article 48 of the Constitution, and the parties cannot agree otherwise in a contract due to the limits on the principle of contractual freedom regulated under articles 19 and 20 of the former Turkish Code of Obligations. It should be noted that the Court considered neither the Block Exemption Communiqué for

Vertical Agreements nor the Act on the Protection of Competition in this decision.

A recent decision of the 11th Chamber of the Court of Appeals (File No. 2012/10309, Decision No. 2014/1890, date 4 February 2014) indicates a different and legitimate approach of the Court on the post-contractual non-compete clause of a franchising contract. Despite the claims of the franchisee on the unconstitutionality of post-contractual non-compete obligation, the court of first instance ruled that such obligation is not related to the freedom of work, but rather is in line with the provisions of the Act on the Protection of Competition and the Block Exemption Communiqué for Vertical Agreements. The award of damages given by the court of first instance owing to the breach of such obligation by the franchisee was reversed by the 11th Chamber of the Court of Appeals only from the point of VAT application on the damages. However, the objections of the franchisee on the unconstitutionality of post non-compete obligation were dismissed by the Court, unlike its former decisions explained above.

Furthermore, possible limitations as to the customers or geographical regions to which the franchisee may sell would principally result in the franchise contract being excluded from the scope of the Block Exemption Communiqué for Vertical Agreements and thus it would be in violation of the Act on the Protection of Competition (unless the agreement qualifies for individual exemption). But, again as mentioned above, the Communiqué regulates some exceptions and in this way validates the use of such restrictions.

The exceptional cases in which such restrictions may lawfully be imposed are:

- provided that it does not cover the sales to be made to customers of the purchaser, the restriction by the provider of active sales to an exclusive region or exclusive group of customers assigned to it or to a purchaser;
- restriction of sales of purchasers operating at the wholesale level in relation to end-users;
- restriction on the performance of sales by the members of a selective distribution system to unauthorised distributors; and
- in the case of parts supplied with a view to combining them, restriction of the purchaser's selling them to competitors of the provider who holds the position of a producer.

Finally, as per the Block Exemption Communiqué for Vertical Agreements, preventing the purchaser from determining its own selling price would again result in the agreement being excluded from the scope of the block exemption (thus violating the Act on the Protection of Competition).

Nevertheless, the principles of case law indicate that the franchisor shall be entitled to impose a maximum resale price or suggest a recommendation price to the seller, although the seller is contractually not obliged to comply with such recommendation.

40 Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

A franchise agreement is regarded as a vertical agreement, thus it is within the scope of the Block Exemption Communiqué on Vertical Agreements.

Update and trends

The franchising market in Turkey has continued to improve rapidly in recent years, and it has reached an indisputable size particularly together with the growing shopping mall business. Turkey seems to have the highest number of franchising chains in Europe, and despite the general economic distress in various sectors, the franchising market has managed to remain unaffected and even gained momentum over the past couple of years.

The relevant articles of the regulation (for franchise agreements) are provided in question 39.

The competent authority for the enforcement of competition law is the Competition Authority, which may initiate an investigation on its own initiative as well as according to complaints raised by third parties.

41 Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

There are four types of jurisdiction in Turkish law. These are constitutional jurisdiction, administrative jurisdiction, military penal jurisdiction and civil jurisdiction. The Law Concerning Civil Procedure regulates the jurisdiction mechanism with regards to civil law disputes arising within the boundaries of Turkey. There are mandatory and non-mandatory rules concerning jurisdiction in the law as some rules concerning jurisdiction are considered to correlate with public policy.

The notion of jurisdiction in Turkish law is composed of two concepts. First is determining the type of court (for example, the court of peace, the court of first instance, the commercial court) that will deal with the dispute (the assigned court) and the second is determining the geographical location of the court that will deal with the dispute (the competent court). The rules on the assigned court are supposed to be mandatory and may not be altered. Nevertheless, some of the rules regarding the competent court are mandatory (for example, disputes in relation to real estate shall be dealt with in the courts of the region where the real estate is located) and some are not. The mandatory rules regarding the competent court may not be modified through an agreement, whereas the others may.

The available dispute resolution procedures indicated in the Law Concerning Civil Procedure are litigation and arbitration.

It should also be noted that article 47 of the Code Concerning Private International Law and Civil Procedure indicates that parties are able to choose a different (foreign) jurisdiction in the agreement, provided that there is a foreign element in the case and the court assigned by law is not exclusively competent (namely, the jurisdiction clause in the law that is replaced by the agreement is not a mandatory one).



Hikmet Koyuncuoğlu
Seza Ceren Aktaş

h.koyuncuoglu@kkhukuk.com
c.aktas@kkhukuk.com

Halide Edip Adıvar Mah
Darülaceze Cad Akin Plaza No. 3 Kat 5
Şişli, İstanbul
Turkey

Tel: +90 212 320 68 70 / 71
Fax: +90 212 320 68 30
www.kkhukuk.com

42 Describe the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction.

The answer to this question mainly depends on the type of arbitration and the location chosen. Nevertheless, in general terms, considering the lengthy trials before the Turkish courts, parties would benefit from a faster procedure of arbitration. Even so, recognition in Turkey of an arbitral award that has been obtained from an arbitral tribunal abroad would, again, take substantial time.

43 In what respects, if at all, are foreign franchisors treated differently from domestic franchisors?

In legal terms there is no different treatment for a foreign franchisor compared to a domestic franchisor (as mentioned above, except for the submission of the FDI Operations Data Form to the General Directorate of Incentives Implementation and Foreign Investment at the Ministry of Economy for companies containing foreigners as shareholders).

In practical terms, a domestic franchisor's access to the market and local knowledge are likely advantages over a foreign franchisor.

Getting the Deal Through

Acquisition Finance	Distribution & Agency	Labour & Employment	Public Procurement
Advertising & Marketing	Domains & Domain Names	Licensing	Real Estate
Air Transport	Dominance	Life Sciences	Restructuring & Insolvency
Anti-Corruption Regulation	e-Commerce	Mediation	Right of Publicity
Anti-Money Laundering	Electricity Regulation	Merger Control	Securities Finance
Arbitration	Enforcement of Foreign Judgments	Mergers & Acquisitions	Securities Litigation
Asset Recovery	Environment	Mining	Ship Finance
Aviation Finance & Leasing	Executive Compensation & Employee Benefits	Oil Regulation	Shipbuilding
Banking Regulation	Foreign Investment Review	Outsourcing	Shipping
Cartel Regulation	Franchise	Patents	State Aid
Climate Regulation	Fund Management	Pensions & Retirement Plans	Structured Finance & Securitisation
Construction	Gas Regulation	Pharmaceutical Antitrust	Tax Controversy
Copyright	Government Investigations	Private Antitrust Litigation	Tax on Inbound Investment
Corporate Governance	Insurance & Reinsurance	Private Client	Telecoms & Media
Corporate Immigration	Insurance Litigation	Private Equity	Trade & Customs
Cybersecurity	Intellectual Property & Antitrust	Product Liability	Trademarks
Data Protection & Privacy	Investment Treaty Arbitration	Product Recall	Transfer Pricing
Debt Capital Markets	Islamic Finance & Markets	Project Finance	Vertical Agreements
Dispute Resolution		Public-Private Partnerships	

Also available digitally



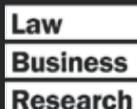
Online

www.gettingthedealthrough.com



iPad app

Available on iTunes



Franchise
ISSN 1752-3338



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law