

Franchise

In 25 jurisdictions worldwide

Contributing editor
Philip F Zeidman



2016

GETTING THE
DEAL THROUGH

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Franchise 2016

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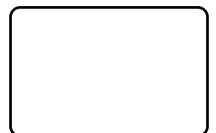


Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

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No photocopying without a CLA licence.
First published 2007
Tenth edition
ISSN 1752-3338

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



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Spain

Ignacio Alonso

Even Abogados

Overview

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

A franchisor can perform its activity through the following types of capital companies:

- joint-stock company (SA);
- European joint-stock company;
- limited liability company (SRL);
- new limited liability company; and
- limited partnership by shares.

Less frequently, a subsidiary of a foreign entity or partnership can be used as a form of business entity.

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

Royal Legislative Decree 1/2010 of 2 July (in force as of 1 September 2010 and last amended by the Entrepreneurial Funding Promotion Act 5/2015 of 27 April 2015) lays down the standards governing capital companies. The Commercial Register Regulation is also applicable to such companies' incorporation and functioning.

The formation of a business entity is governed by the Central Commercial Register and the provincial commercial registers where the company has its corporate domicile.

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

The incorporation of a company requires the signature of a public deed (including the by-laws) by the founding partners before a notary public. The deed must be registered at the Commercial Register.

The following documents must be obtained, prepared and presented in order to execute the public deed of incorporation:

- a certificate (issued by the Central Commercial Register) stating the availability of the company name;
- identification documents, which must be presented to the notary by the shareholders. If the shareholders are represented, their representative must also show a notarised power of attorney;
- the by-laws have to contain certain minimum information such as the company's name, purpose, address, share capital and its distribution in shares or parts; and
- the company must have a minimum share capital (in money, goods or rights). For an SA, the amount is €60,000 (although it could be only 25 per cent disbursed at incorporation); for an SRL, it is €3,000. An SRL with less than the mentioned minimum capital is possible, but in such case some rules on reserves, distribution of dividends and payments to shareholders and administrators will apply. These funds must be deposited in a bank account (if the capital is paid up in money) directly by the shareholders or (less frequently) by the notary. In the first case, the bank issues a certificate of deposit that must also be shown to the notary public. In the case of capital paid in goods or rights, it will be necessary to identify them and their economic value and, in case of a SA, to provide an expert's report on their value.

The company must apply to the Spanish Tax Administration for a tax identification number (as well as the company's shareholders and directors if

they do not already have one). No tax has to be paid for the incorporation itself.

This procedure can be eased under certain circumstances, but only for SRLs (and not if the shareholder is a foreign entity) by adopting standardised by-laws and following the Electronic Single Document or through the use of entrepreneurial assistance points, which provide advice and support to entrepreneurs.

The company is able to start operating upon its registration with the Commercial Register, although some preliminary transactions can be carried out beforehand. Companies also need to legalise their books, to issue a tax declaration for the beginning of their activity and to be duly registered before the Social Security Administration.

The maintenance of a company mainly requires the directors' annual preparation of the annual accounts, and the annual shareholders' meeting (by which the annual accounts and the directors' activity are approved). If the company reaches some specific requisites, auditors are appointed. Annual accounts must be filed with the Commercial Register.

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

Generally, foreign business investments are not subject to particular restrictions. Nevertheless, in some cases investors are obliged to make official disclosures of their investments, such as a prior declaration of investments when the investor is domiciled in a country that is considered a tax haven, regardless of the size of investment in the Spanish firm. Prior administrative authorisation is also required for investment in certain protected sectors (television and radio, weapons, gambling, national defence or air transport). Certain investments have to be communicated ex post to the authorities for statistical, administrative or economic purposes. This is especially true for investments in real estate that exceed €3 million, and if, regardless of the amount, the money comes from a tax haven. For anti-money laundering purposes, companies must also make a report when a physical person or persons directly or indirectly own 25 per cent or more of their capital.

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

There is no specific tax on franchising activities; the general tax system applies.

By and large, companies with their tax residence in Spain are taxed on all their income, regardless of where the income was generated or where the payer is domiciled. Companies not residing for tax purposes in Spain are generally subject to a corporate tax on income derived in Spain, although double-tax conventions (if applicable and depending on the tax residence) provide for special rules.

VAT is imposed on the delivery of goods and services. The general governing principles of this tax are standardised within the EU.

VAT is valid in the Spanish peninsula and the Balearic Islands. A special indirect tax is applied in the Canary Islands: the Canary General Indirect Tax. The cities of Ceuta and Melilla have a tax on production, services and imports.

No taxes are due for incorporation, capital increases and mergers.

When the franchisor purchases real estate, either VAT (together with the tax on documented legal acts) or tax on the transfer of assets has to be paid. Tax on urban land value increase is also incurred, but this has to

be paid by the seller (although it is normally passed on by contract to the purchaser).

Ownership of real estate is subject to annual local property tax. In cases of leases of real estate, the agreement is subject to the tax on the transfer of assets and the income is subject to income tax and VAT.

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?

Franchise agreements are understood to be contracts between independent entrepreneurs and do not entail the existence of an employer–employee relationship. Nevertheless, some risks can arise, such as being considered an employee of the franchisor if the franchisee does not act as a real independent entrepreneur.

The franchisee can also be seen as a mere supplier of manpower rather than an employer and the franchisor and franchisee can be seen as a group of companies for labour purposes, with the consequence of joint liability of both in light of obligations to employees. In general, such joint liability is triggered when the real employing entity within the group cannot be distinguished and the use of different legal personalities is considered fraudulent.

Some measures can be taken to avoid these risks. The franchisee must itself be a real company with its own assets and liabilities and must retain power over its own materials and personnel to carry out its organisational responsibilities. Thus, the franchisee must not merely be the supplier of a workforce for the franchisor and the franchisee must manage its own employees, being responsible for, inter alia, their salaries, attendance and social security contributions.

7 How are trademarks and know-how protected?

Trademarks are protected mainly by the Trademarks Act. The main means for protection is registration: the first to register is given priority. Trademark registration entitles the owner of the trademark to the exclusive right to use the trademark commercially and the right to prohibit its use by third parties. The owner of the trademark can claim, among other things:

- the adoption of measures to stop violations;
- damages caused by the violation;
- the destruction of products illegally using the trademark; and
- the publication of the decision granting the owner these rights.

The Unfair Competition Act protects know-how. The violation of secrets (defined as the disclosure or exploitation of industrial or other business secrets accessed illegitimately or legitimately with a non-disclosure obligation, without the consent of the owner) is considered unfair competition.

Some aspects of know-how (for example, documents and software) can also be protected by the Intellectual Property Act.

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

Spain's real estate market was subject to speculation until the market bubble burst in 2008. The market recently shows some activity, according to some studies, but prices have not yet recovered their pre-crash values. Currently, as a consequence of the critical economic situation, particularly in the financial sector, some banks still need to become more active in the real estate market in order to clean up their balance sheets and this has provoked a fall in prices.

Real estate purchases have to be formalised in a public deed before a public notary and registered at the Land Register (for which all taxes related to the purchase must be paid).

When a franchisor leases premises to a franchisee, the agreement is mainly subject to the freedom of the parties, except for some general obligations set out in the Urban Lease Act (for example, warranty and procedural questions in the case of litigation). In the absence of agreement, the Act will be applicable and, secondarily, the Civil Code.

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

The legal definition of a franchise is an activity in which an undertaking (the franchisor) grants to another party (the franchisee), for a specific market and in exchange for financial compensation (either direct, indirect or

both), the right to exploit its own system to commercialise products or services already successfully exploited by the franchisor. The contents of this system must include, at least:

- the use of a common name or brand or any other intellectual property right and uniform presentation of the premises or transport means included in the agreement;
- communication by the franchisor to the franchisee of certain technical knowledge or substantial and singular know-how that has to be owned by the franchisor; and
- technical or commercial assistance, or both, provided by the franchisor to the franchisee during the agreement, without prejudice to any supervision faculty to which the parties might freely agree in the contract.

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

The offer and sale of franchises is governed by the Retail Commerce Act 7/1996 of 15 January (last amendment by Act 18/2014 of October 15). Article 62 is particularly applicable to franchise agreements. The Act is completed by Royal Decree 201/2010 of 26 February on Franchise Agreements and Franchisors' Register.

The administrative agency in charge of franchise matters is the Franchisors' Register, which is administered by the State Secretary of Commerce (General Directorate of Internal Commerce sub-directorate of Internal Commerce) of the Ministry for Economy and Competitiveness.

Regional franchisors' registers can be created if the regions' respective legislation foresees it.

11 Describe the relevant requirements of these laws and agencies.

According to the rules applicable to franchising, a franchisor (and also a foreign franchisor, with some exceptions) should be registered in the Franchisors' Register and must provide certain information (see question 17). These obligations should be dealt with no later than three months after the franchisor's activities in Spain begin.

Registration is not a prerequisite of starting the activity; nevertheless, if registration does not take place within three months of the start of the franchisor's activities in Spain then penalties of €6,000 to €30,000 may be incurred.

Franchisors are also obliged to communicate to the Franchisors' Register any modification of the information already provided. This communication has to be made within three months of any change taking place.

Each January, franchisors are also obliged to communicate to the Franchisors' Register any closing or opening of premises (whether owned or franchised) during the previous year. If this information is not disclosed, a severe infringement procedure can be followed against the franchisor and a fine of €6,000 to €30,000 could be imposed.

As an exception, franchisors established in an EU member state and without a permanent establishment in Spain but acting in freedom to provide services will only be obliged to communicate to the Register the commencement of their activities.

Franchisors have an obligation to provide certain information to potential franchisees before the signature of the franchise agreement or pre-agreement and before any payment made by the franchisee (see question 15).

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

Franchising rules are applicable to commercial franchise agreements regardless of the sector in which they operate.

Nevertheless, a contract granting the exclusive commercial right of distribution is not necessarily a franchise contract if it is simply a contract through which a vendor promises to buy – under some circumstances – merchandise (that is normally trademarked) from a seller who grants the vendor (under certain conditions) exclusivity within a certain area and granting assistance to purchasers once the purchase has taken place.

The following are not considered franchises:

- the granting of a manufacturing licence;
- the cession of a trademark to be used within a determined zone;
- the transfer of technology; and
- the granting of a logo or commercial trademark name.

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

After the modification of the Retail Commerce Act that has been in force since 3 March 2010 it is not necessary to have previously registered on the Franchisors' Register.

Royal Decree 201/2010 of 26 February contains a number of elements regarding information that must be disclosed to potential franchisees before any agreement is signed or any payment is made. See question 15.

According to the definition of franchise agreement, franchise needs that the activity had been carried out by franchisor previously and with success enough.

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 are neither special regulations nor government policies that restrict the manner in which a franchisor recruits franchisees or selects franchisees' suppliers. These are usually elements that are agreed between the parties in the franchise agreement.

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

Pre-contractual information (see question 17) has to be communicated to the franchisees by the franchisor at least 20 working days before the signature of the franchise agreement or pre-agreement, or before any payment is made to the franchisor by the future franchisee.

On the other hand, information to be disclosed to the Franchisors' Register has to be given to the regional register or, if the regional legislation does not provide for such obligation, to the central one.

No specific legal provision obliges the franchisor to update to franchisees the information already disclosed but it could be considered that the information disclosed should be updated if anything relevant is modified. Franchisors are obliged to update this information directly to the Register (see question 11 for updating obligations and annual information).

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?

In a master franchise agreement, the franchisor grants to the master franchisee the right to exploit a franchise in a particular market in exchange for financial compensation (either direct or indirect or both) with the intention of signing franchise agreements with third parties. The master franchisee assumes the position of the franchisor in this particular market or area.

In case of a sub-franchising structure, therefore, pre-sale disclosure to sub-franchisees must be made by the master franchisee (sub-franchisor).

The information required concerning the franchisor and the contractual relationship between the franchisor and the sub-franchisor is the following:

- identification of the franchisor:
- name;
- registered address;
- information about the entry in the Franchisors' Register,
- if it is a company, its capital stock in the last balance sheet, indicating what proportion is paid, and the Commercial Register information, if appropriate;
- if the franchisor was a foreign franchisor, information about its entry in the Franchisors' Register according to its legal obligation; and
- evidence of having obtained a licence for the Spanish use of the trademark and other devices of the franchisor (indicating their duration), as well as any judicial procedures that could affect the use of the trademark.

Moreover, the sub-franchisor must give the Franchisors' Register the following information about its own franchisor: name, registered address, type of business entity, duration of the master franchise agreement and a declaration that it has signed the agreement granting the franchise by the main franchisor.

17 What information must the disclosure document contain?

Franchisors must disclose the following specific information in an accurate and not misleading manner and in writing to the potential franchisee:

- identification of the franchisor (name, registered address, information of the commercial registry and stock capital, indicating if it is fully paid up or in what proportion), including details of the entry in the Franchisors' Register. Foreign franchisors must disclose information about their registry to the Franchisors' Register according to their national regulations;
- justification of ownership or licence for the use of any trademark or similar device and any judicial claim affecting it, as well as the duration of the licence;
- a general description of the sector in which the franchise operates, including details of its most relevant elements;
- the franchisor's experience, including the date of incorporation and the main steps in its evolution and the development of the franchise network;
- the contents and characteristics of the franchise and its exploitation, including a general explanation of the business, special characteristics of the know-how and the permanent commercial or technical assistance the franchisor will provide to franchisees, and an estimation of the necessary investments and expenses to start a business. If the franchisor is offering figures on the volume of sales or results of the placement of the business to the potential franchisee, these should be based on experience or information that can be fully justified;
- the structure and extent of the network in Spain, including the way it is organised and the number of establishments opened in Spain (either directly owned or through franchises), indicating the cities, as well as the number of franchisees having left the network in the preceding two years, indicating the reasons; and
- essential elements of the franchise agreement, including the rights and obligations of the parties, conditions for its termination or renewal, economic obligations, exclusivity clauses and limitations imposed on the franchisee in order to run the business.

Moreover, a franchisor should disclose to the Franchisors' Register information about the franchisor (name, address and Commercial Register information); property and intellectual rights (information about ownership or licensing rights and their duration); a description of the business, namely, the network (number of premises), seniority of the franchise activity and the number of franchisees having left the network in Spain in the preceding two years; information about the contract with the franchisor (in cases where there is a sub-franchisor) and the documents attesting the power of attorney (in cases where the franchisors are registered through a representative).

18 Is there any obligation for continuing disclosure?

There is no specific obligation for continuing to disclose information to current franchisees once the agreement has been signed although it could be necessary if some relevant modifications have taken place. As mentioned in question 11, there is an obligation to update the information provided to the Franchisors' Register.

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

The enforcement of disclosure requirements is usually entrusted to the competent bodies at the regional governments (autonomous communities) – usually the region's commercial or economic authority.

Lack of compliance with the disclosure requirements to franchisees can be considered a minor infringement, possibly leading to an administrative penalty of up to €6,000. Under some circumstances lack of disclosure can affect the validity of the franchise agreement, could be considered as an unfair competition activity and could provoke the claim for indemnities. Lack of compliance with the obligation to annually update information is considered a severe infringement and could lead to an administrative penalty of €6,000 to €30,000.

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?

If the disclosure requirements are violated by the franchisor and, if in the absence of this violation, the franchisee would have not signed the agreement, the franchisee may sue the franchisor in a civil action. If the violation was consciously done by the franchisor then the franchisee can ask for the contract to be nullified. If the violation was not deliberate, then indemnity for damages can be demanded. This could also apply in the case of an incomplete disclosure document with essential omissions.

There are no specific rules or criteria by which to calculate franchisees' damages for violation of disclosure obligations. In general terms, damages must be justified by the party asking for them.

Generally, if the franchisee cancels the franchise contract, it will not be entitled to reimbursement or damages unless the termination is due to a previous breach by the franchisor.

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?

In the event of disclosure violations where there is a sub-franchise, liability is assumed by the party who committed the violations. It will be necessary to review each of the contracts (franchise and master franchise agreement) and to refer to the level of liability, negligence and behaviour of all parties. In general, the franchisee can claim against the sub-franchisor in as far as it is responsible for the information disclosed, and the sub-franchisor can claim against the franchisor if the disclosure violation is imputable to it.

In general, from a commercial standpoint, the individual officers, directors and employees of a franchisor or sub-franchisor (in cases of entities whose liability is limited) will not be held liable for acts realised by these entities. In specific situations prescribed by the application of commercial legislation, directors can be held responsible for the actions undertaken by the company. This said, the directors of a moral entity (either legally appointed or acting as such) or legal representatives will respond personally of the criminal acts by this entity to which they represent.

Finally, every individual will respond personally for criminal violations committed by that individual and also for the civil consequences of such criminal violations.

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?

General civil and commercial legislation principles are also applied to the offer and sale of franchises and, particularly, the principle of good faith in commercial relations. Civil code also foresees the extra-contractual liability that includes the culpa in contrahendo principle. According to this, the person who causes damages to another person, with fault or negligence, is obliged to repair such damages. This principle could be used to find remedies for damages caused in the previous negotiations or in connection to the information disclosed that should be done in an accurate and not misleading manner and in writing (see in question 17 the specific contents).

Other general principles such as the principle of freedom of contract are also applied.

The European Code of Ethics for Franchising is applied in Spain but it does not replace national or European rights.

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?

No.

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?

If a deceit regarding the disclosure of information has produced a material harm to a franchisee's interests (and normally also to the benefit of the franchisor who perpetrates this for financial gain), criminal charges can be brought. Such a deceit will be regarded as fraud or corporate crime if the falsification refers to the corporate annual accounts or to another document that should reflect the franchisor's legal and economic situation.

The franchisor could also be accused of falsification of documents but, according to the particular case, this could be understood as the means through which the fraud was committed. Criminal actions are also publicly prosecuted. As mentioned in question 21, directors and legal representatives of a moral entity will be considered as responsible for criminal acts of this entity.

From another perspective and on certain occasions, a civil action for unfair competition might be commenced, particularly for a violation of good faith and, among other things, for acts of deceit, confusion, denigration, exploitation of another's reputation, discrimination and economic dependence.

The norms of unfair competition permit actions to declare disloyalty, to enjoin conduct, to rectify its effects, to rectify deceitful or misleading information, to remedy damages and to recognise unfair financial benefit.

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 laws regulating the franchise agreement once the contract comes into effect.

26 Do other laws affect the franchise relationship?

Other laws affecting franchise agreements include:

- the Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices;
- the Commercial Code (22 August 1885);
- Act 3/1991 on Unfair Competition of 10 January (last modified by Act 3/2014 of March 27);
- Act 17/2001 on Trademarks of 7 December (last modified by Act 2/2011 of 4 March);
- Act 11/1986 on Patents, Inventions and Utility Models of 20 March (last modified by Act 22/2013 of 23 December);
- Royal Legislative Decree 1/1996 Intellectual Property Law of 12 April (last modified by Act 21/2014 of 4 November);
- Royal Legislative Decree 1/2007 of 16 November, General Act for Consumer Protection (last modified by Act 3/2014 of 27 March and modified by the Judgment of the Constitutional Court 10/2015 of 2 February);
- Act 15/2007 on the Defence of Competition of 3 July, last modified by Act 22/2013 of 23 December; and
- Act 1/2004 of Commercial Hours (last amendment by Act 18/2014 of 15 October), as well as other regional regulations on retail.

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

The principal association of franchisors is the Spanish Association for Franchises, which belongs to the Iberian and American Franchise Federation, the European Franchise Federation and the World Franchise Council.

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?

A franchising contract can be of a predetermined or an indeterminate length.

If the contract has a predetermined length, the contract will end upon the agreed term. It can also be terminated upon a breach of contract, death (in the case of individuals) or the liquidation of any of the parties (in the case of companies).

If the contract is of an indeterminate duration, any of the parties can terminate the contract by advance notice. Since there is no legal norm regulating the advance notice, this should be sent with a reasonable length of warning, as dictated by the particular circumstances of each agreement.

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

The circumstances in which a franchisee can terminate the franchise contract are the same as those in which a franchisor can terminate the contract (see question 28).

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

Yes, the franchisor can refuse to renew the agreement for any of the reasons listed in the agreement, or simply because the franchisor does not wish to renew it once the agreement expires.

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

Yes.

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

There are restrictions relating to the nature, amount or payment of fees as regards related-party transactions and transfer prices. The relationship between franchisor and franchisee should be established under market conditions and as a relationship between independent entities.

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

Generally, the amount of interest is freely agreed to by the parties.

In the absence of an agreement, Act 3/2004 of 29 December (last modified by Act 17/2014 of 30 September) that establishes the means for collection in the case of default in commercial operations will apply. This Act establishes the general obligation to pay within a period of 30 days from the receipt of the goods or services if no other term was foreseen in the agreement. In case of default and provided that the creditor has fulfilled his or her contractual and legal obligations and that he or she has not received on time the amount due – except if the debtor can prove he or she is not responsible for the delay – then the debtor must pay the interest agreed to or (in the absence of such agreement) the interest decided upon by the European Central Bank, as prescribed by law, with an addition of 8 percentage points and (without it being necessary to expressly claim for it) a fixed amount of €40.

The Act for the Repression of Usury (23 July 1908 last modification by Act 1/2000 of 7 January) is applied when a transaction is considered similar to a loan agreement. This Act nullifies any stipulation of interest that is notably higher than the usual and which is manifestly disproportionate to the circumstances of the specific case.

In cases where there are connected operations, interest should also be calculated according to the norm for transfer prices.

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 are no restrictions on making payments to a foreign franchisor in the franchisor's own currency.

35 Are confidentiality covenants in franchise agreements enforceable?

A franchisor can impose confidentiality agreements before, during and after the expiration of the agreement.

Before the contract is signed, this possibility is expressly foreseen in Royal Decree 201/2010 and will affect all the information the franchisor is obliged to disclose.

During and after the franchise agreement, parties are free to stipulate these kinds of clauses.

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, the general norms of common law demand that contracts be made in good faith. This rule is applied to franchise contracts through preliminary negotiations, the signing of the contract and the relationship during the carrying out of the contract. Moreover, case law considers that franchise contracts, even though they are not specifically regulated, are subject to good faith and mutual confidence (Supreme Court, judgment No. 754/2005 of 21 October confirmed by judgment No. 145/2009 of 9 March).

Acts contrary to good faith can be addressed legally as acts of unfair competition, among other options.

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

Not insofar as franchisees are entrepreneurs in a trade activity. Consumers' Act (last amended by Act 3/2014 of 27 March) provides that a consumer is a physical person acting for purposes outside their trade or professional activity. They are also consumers, legal persons and entities without legal personality acting non-profit and in a field different to a commercial or trade activity.

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

No specific rule foresees this.

39 What restrictions are there on provisions in franchise contracts?

In general terms, franchise contracts contain the typical restrictions that are usual in other jurisdictions for the same kind of contracts. These restrictions must usually be examined in light of the parties' freedom to regulate their relationship and, in some cases, under European law, particularly regulations on competition. Some of these restrictions are that:

- territorial exclusivity has to be expressly mentioned and agreed in the contract; and
- resale price maintenance clauses have been considered null and void by the Supreme Court (judgment 567/2009 of 30 July) when the franchisor has not only recommended prices to the franchisee but has sent a list of resale prices. These clauses have been considered restrictive even in cases where:
 - for some products only a minimum price or a minimum and a maximum price was fixed; and
 - the price was fixed not for all products, but only for some of them.

Minimum purchase clauses may be admitted but have to be considered together with the franchisor's obligation to supply to the franchisee, the franchisee's freedom to purchase goods from different authorised providers and the reasonableness of the minimum purchase that is agreed.

Restrictions on sources of supply clauses have been admitted by Spanish courts. Article 3 of Royal Decree 201/2010 expressly mentions, as an essential element of the disclosure document, exclusivity clauses and limitations to the franchisee's freedom to run its business.

Clauses on dispute resolution, including mediation (Mediation Act on civil and commercial matters 5/2012), are admitted in franchise agreements.

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

Competition rules regarding both national and European law are applicable to franchise contracts.

Franchise contracts that actively or potentially restrict or limit competition are considered prohibited by article 101/1 of the Treaty on the Franchising of the European Union and article 1.1 of Act 15/2007 on the Defence of Competition.

That said, neither article is applied to vertical agreements under the circumstances and conditions foreseen in Commission Regulation (EU) 330/2010 (20 April). The terms of article 1.1 of Act 15/2007 will not be applied to franchise agreements that do not impose on the companies involved restrictions that are not essential for a better commercialisation

Update and trends

On 20 June 2013 the General Codification Commission presented a new proposal for a new Mercantile Code. The proposal contained regulations on a wide range of different commercial matters such as commercial undertakings, commercial agreements, competition or industrial property.

However, although this first proposal also regulated collaborative contracts with a completely new regulation on distribution agreements, including franchise agreements, the Draft on the Mercantile Code presented by the Spanish Ministry for Justice in 30 May 2014 does not include this chapter. The government, then, seems to have decided against proposing a new regulation on distribution and franchise agreements.

Nevertheless, the more relevant dispositions in the draft which could affect franchise agreements (if it is finally approved as proposed)

are: capital companies, unfair competition, defence of competition and restrictive practices, some dispositions on trademarks and patents and general principles for commercial contracts (some dispositions on payments default in commercial relationships, new technologies in commercial transactions, general conditions, vending machines and confidentiality and no competition clauses, among others).

Taking into account that the State Council has argued (File 837/2014 published in 29 January 2015) that the draft still needs some important considerations, particularly to reconsider the opportunity of re-including the distribution agreements, the legislative procedure and the end of this legislative period foreseen for November 2015, the approval of this draft is uncertain.

or distribution of goods and that do not allow the possibility of eliminating competition with respect to a substantial part of the products or services concerned.

The National Commission for Markets and Competition or the regional authorities for the defence of competition can prosecute and sanction prohibited conduct when such conduct is not considered to be exempted from the application of the cited norms according to the affected market (national or regional).

On the other hand, commercial courts are also authorised to apply the prohibitions and consequences of restrictions of competition to the private relationship between franchisors and franchisees.

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

There are two main types of proceedings within the civil jurisdiction: verbal and ordinary proceedings. Generally, verbal proceedings are conducted for claims up to €6,000, while ordinary proceedings are conducted for claims above €6,000 or claims whose amount is not determined beforehand.

The competent courts are generally the courts of first instance (for conflicts related to franchise agreements) or the Commercial Court (for special matters such as bankruptcy, unfair competition, intellectual property, general conditions, transport or commercial undertakings) where the defendant is domiciled, except where parties have agreed otherwise, and without prejudice to the application of the EU norms.

The sentence issued by the judge at first instance can be appealed (a de novo review of the full case) before the provincial court.

After this judgment, there are two subsequent ways to appeal. The first is an extraordinary appeal on the basis of procedural error; the court competent to resolve such problems is the superior court of justice of the relevant autonomous region (according to the Final Disposition 16 of the Civil Procedural Act or by the Supreme Court while the necessary amendments are not adopted). Only infractions of the norms regarding

jurisdiction or competence (except territorial competence), infractions of regulatory norms of the sentence or infractions of procedural guaranties that determine the nullity or produce the inability of one of the parties to defend themselves legally can be alleged. The other appeal available is for the annulment of the proceedings (extraordinary procedure). The Supreme Court resolves such matters based on the infraction of the applicable law (as long as the amount in dispute exceeds €600,000), or in cases in which contradictory jurisprudence on the matter may exist.

From the lodging of the initial complaint, the plaintiff can solicit from the court 'preventive measures' to secure the effective judicial protection that is solicited.

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

Arbitral submission to a Spanish arbitrator is valid, provided some essential elements are respected (including written form and an express provision in the contract).

Arbitration is recommended if parties trust the equanimity and fairness of the arbitrator and in some circumstances because of the arbitrator's special expertise. All the same, the disadvantages of this system in the case of a foreign arbitral decision should also be considered: a special exequatur procedure (with its inherent costs) is required in order for the decision to be enforced in Spain (article 46 of the Spanish Arbitration Act - last amended by Act 11/2011 of 20 May as well as the New York Convention of 1958).

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

Foreign franchisors are treated no differently from national franchisors, other than the exceptions mentioned in question 11 regarding franchisors established in the European Union.

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Franchise
ISSN 1752-3338



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