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Namsrai Battulga, PhD student

Állam - és jogtudományi doktori képzési szakasz, University of Pécs, Hungary
namsrai.nas@gmail.com

THE HYPOTHESIS OF BALANCING FRANCHISE DISPUTE RESOLUTION: COURT AND ARBITRATION MATTERS

ABSTRACT

The paper examines franchise dispute resolution scenarios based on drawing comparative research findings and places the author's assumption of the further approach of legal proceedings. Therefore, it found the research gap by applying study results from the literature and analyzing alternative dispute resolution. Thus, the research cited not only distinguished legal coordination but also the briefing of notable franchise litigations in the US and some EU countries. Namely, the importance of the study was act comparisons between law texts, while considering civil procedure matters linked to jurisdiction and tribunal field. Consequently, it covers pursuing legal globalism, and best practices in the Western world. As a result of the research, except in the occasion of class action, I suggest that franchise disputes be resolved through arbitration or other flexible ways rather than litigation. However, it does not mean a downgrade value of the court. To elaborate and strengthen the credibility of research, pre-contractual and post-contractual, arbitral, and judicial dual jurisdiction were taken into account. Comparing franchising practices across different industries, or periods was expected to identify commonalities and differences to gain a nuanced comprehension of how contextual factors influence franchise dynamics which was necessary to inquire or re-think about appropriate franchise lawsuit resolutions.

Keywords: Franchise, Arbitration, Jurisdiction, Forum Selection, B2B

1. INTRODUCTION

Examining how to resolve franchise disputes compares the complexities of the civil procedure, then leads to an analysis of which option is best to use in what kind of circumstances. Hence it is necessary for more comparative studies to fill the research gap or to support a win-win game. My study is directed at this purpose and I considered franchise theoretical and practical questions as follows.

The main reasons for the research question emerge from considering the fundamental principles of legal philosophy. Namely, the rule by law means that legal subjects shall abide by the requirements of certain regulations enacted through legislative powers. Whereas the rule of law teaches all are equal before the law, and have free will to exercise.¹ Hence, the balance is essential for upholding the rule of law and ensuring that legal disputes are resolved equitably and alternatively. The balance requires an adjustment of competing interests to maintain negotiation liberty. A contract procedure rule is a plain example of it. In particular, a commercial contract is considered the priority regulation regarding businesses with combining company law.

The traditional civil procedure aims usually to regulate general issues related to material and non-material wealth, but it is still not good enough for business activities in various jurisdictions. There is a need to enrich and clarify the norms that comprehensively coordinate business relations between traders, i.e. B2B communication. In other words, the Civil Code and its procedure mainly regulate C2C or C2B relationships between consumers and entrepreneurs. However, the principles of protecting business interests between for-profit entrepreneurs, freedom of contract parties, quick, and cost-effective negotiation, and accountability are not sufficiently implemented.

While most participants in everyday private law communications are persons, the parties in franchise agreements are typically licensors and intellectual property owners.² That being so, contract law should provide an interactive framework for social, and economic compounds and encompass market goals.

According to common concepts, contract law has one language with its own set of principles, rules, and doctrines aimed at regulating the relationships and associations between entities.³ Nevertheless, distinction in the continental system has separate pieces of legislation known as codification, whereas Common law consists of judge-made rules. For instance, Inquisitorial and Adversarial forms are practical models of them. While the inquisitive form is a way, too focused on a court proceeding that refers to litigation, the accusatorial form tends to engage in alternative dispute resolution. From this point, the philosophical root of dispute resolution manner starts, I would say.

¹ Stein, A., *What Exactly Is the Rule of Law?* University of Minnesota Law School, 2019, Volume 185, p.187.

² Florea, D., Gales, N., *Franchise contract in international trade law*. European Journal of Law and Public Administration, 2022, Volume 9, pp.12-22.

³ Emerson, W., *Franchising and the Collective Rights of Franchisees*, Vanderbilt Law Review, 1990, Volume 43, p.1507.

Today countries with civil law systems, arbitral power is less than the court and in case of enforcing an arbitral award, it needs to file again to the court. The reason is judicial bodies have more power than defense lawyers and arbiters. Besides, the court handles all evidence in advance and aims to make a decision directly. It shows that, in some law fields, we still need to resolve conflicted questions to prevent unbalance.

As mentioned before, legal subjects enter into some type of negotiation daily, thereby taking part in a relationship in which obligations and rights are granted to others. If the controversy that arose between them cannot be resolved by consensus, it goes to a third party for deciding, and that role has been performed by the courts for hundreds of years. Even though, countries have found that the option of alternative dispute resolution improves the local business enabling environment and helps increase investors' confidence. Franchise agreements often involve ongoing business relationships and disputes are a bright example of settling contract or commercial lawsuits. Because franchise partnerships have the type of B2B. Arbitration and mediation allow B2B parties to work together to find mutually acceptable solutions, potentially preserving the franchisor-franchisee bond and avoiding further damage.⁴

Regardless of the branch, arbitration can provide a sound alternative to resolve contract and commercial disputes. First of all, tribunals can provide a level playing field and ensure that disputes are adjudicated by professionals who understand the complexities of the industry. Moreover, arbitration institutions have rules and procedures specifically designed for international disputes, providing a neutral forum for parties from different jurisdictions to resolve their conflicts.⁵ Therefore, the enhancement of the non-judicial sector can help the court ease its burden and focus on commercial priorities and the reform is an ongoing process. As previously quoted, there are no absolute winners in contract disputes unless one party has been misled or deceived the another. Hence the question arises of where and how to resolve the disagreement between disputers with flexibility. Therefore, dispute resolution form is an important issue for fields of International franchises concerning investment or intellectual property infringements, and market competition.

When selecting a dispute resolution forum, parties should consider jurisdictional issues, including the enforceability of judgments or awards in the relevant frame. Understanding the legal landscape and potential challenges associated with

⁴ Kerkovic, M., *The main Directions in Comparative Franchising regulations*, European Research Studies, 2010, Volume XIII, p.109.

⁵ Zeidman, P., *With the Best of Intentions: Observations on the International Regulation of Franchising*, Stanford Journal of Law, Business & Finance, 2014. Volume 19, p.264.

enforcement is essential in choosing the most appropriate forum. Ultimately, the choice of dispute resolution forum will depend on various factors, concerning the nature of the dispute, the preferences of the parties involved, and the specific circumstances of the franchise agreement. By carefully considering these factors, when necessary, parties can select a dispute resolution method that offers effectiveness in resolving international franchise quarrels.

Given the complexities of franchises and the multitude of potential disputes that can arise, selecting the appropriate dispute resolution forum is indeed crucial. The balancing of dispute resolution means that, while avoiding bias, business-to-business contractual relationships should be distinguished from typical contract dispute resolution forums due to the specialty of franchise and other similar law issues.

2. THE QUESTION OF LEGALLY BINDING

Each form of dispute resolution has advantages and disadvantages; however, the best form of franchise dispute resolution should be in a soft way. In most cases, a combination of approaches, concerning negotiation followed by mediation or arbitration, if necessary, could be the most effective way to resolve franchise disputes.

Namely, negotiation is the best approach when the dispute is relatively minor or when the parties have a good working relationship. It allows for flexibility in finding a mutually agreeable solution for B2B. Nevertheless, it does not belong official resolution structure, and conflict may arise again. Arbitration is advantageous more than negotiation because it typically offers a faster resolution compared to litigation and can be less formal. However, the decision made by the arbiter is binding, which means there is limited recourse if one party is disappointed with the outcome.⁶

Some disputes would benefit from a scenario of different dispute resolution methods. For example, parties may engage in negotiation first, with arbitration as a fallback option if negotiation is unsuccessful. This hybrid approach can provide credibility while still ensuring a binding resolution if needed.

Litigation can be necessary for certain situations, such as when there are significant legal complex issues at stake or when other forms of dispute

⁶ Guide to International Master Franchise Arrangements, UNIDROIT, 1998, Chapter 17, p.8.

resolution have failed. However, it should generally be considered a last resort. For instance, franchise disputes can involve complex legal issues, including serious breach of contract, intellectual property rights, and violations of franchise regulations.⁷ Navigating these complex issues requires a thorough understanding of franchise, contract, and intellectual property laws, and other relevant regulatory frameworks. Moreover, franchise agreements typically outline the rights and obligations of both the franchisor and the franchisee. Disputes may arise when one party alleges that the other has failed to fulfill its contractual obligations. This could include issues such as missing to pay royalties, breach of territorial rights, or non-compliance with operational standards.

On the other hand, disputes would be complicated if either party alleges non-compliance with obligatory franchise regulations, such as not fulfilling required disclosures, or violation of statutory duties or standards. Disputes can arise whether the franchisee uses the intellectual property in a manner not authorized by the agreement or there are allegations of trademark infringement, copyright violation, or misappropriation of trade secrets as well. If the dispute involves significant financial losses or other serious issues that cannot be resolved through negotiation, court litigation may be necessary to protect the interests of both parties.

Furthermore, court proceedings are a matter of public record, which means that the details of the dispute, including evidence and legal arguments presented by both parties, become part of the public domain. This transparency can be advantageous in cases where one party seeks to hold the other accountable for wrongdoing or breaches of contract. On the contrary, arbitration awards do not create the same type of formal legal precedent as court decisions do. For the reason that disputes are awarded behind closed doors at the request of the parties. Frankly, arbitration proceedings are often conducted behind closed doors and are confidential by nature. This means that the details of the dispute, the evidence presented, and the arbitrator's reasoning are not typically made public. Without public access to this information, arbitration awards do not have the same impact on shaping the law or influencing future cases as court decisions, which are part of the public record and can be cited as legal precedents. Because arbitration awards are based on the specific facts and circumstances of each case, they are generally seen as applying only to the parties involved in that particular arbitration and do not have broader legal implications for other parties or future disputes.

⁷ IP disputes and resolution strategy in franchising industry: a case study, WIPO. 2007, p.7. https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=85963

Arbitration awards are subject to limited review by the courts. While courts may review awards to ensure that they are not in violation of public policy or that the arbitrator did not exceed their authority, they generally do not scrutinize the merits of the decision itself. However, arbitration awards can still be persuasive in future disputes, particularly if they are well-reasoned and based on legal principles, even though they may not carry the same formal weight as court precedents.

Quarrel resolvers must base their judgments solely on the facts and applicable law, without being influenced by personal biases or external pressures. It does include various principles and rules aimed at ensuring that all parties to a civil lawsuit are treated fairly and that their rights are protected throughout the legal process. Regarding due process, it requires that parties to a lawsuit are given notice of the proceedings against them and an opportunity to be heard. It ensures that individuals have a fair chance to present their case and defend themselves before a neutral decision-maker.⁸ While court litigation can provide a final and binding resolution to franchise disputes, parties should consider available options to determine the most appropriate course of action based on the specific circumstances of the case.

In the past period, a court was a form of power that implemented the functions of the state, so it is considered the most reliable way to balance disputes. Courts were being indeed played a central role in administering justice and resolving disputes, serving as an essential institution for upholding the rule of law. Nonetheless, dispute resolution manners gradually have changed in progressive ways. While courts have been traditionally relied upon to balance disputes, it's important to recognize that alternative dispute resolution methods, such as mediation and arbitration, have gained prominence in recent years.

Nowadays, two types of suit resolution have dominated around the world. As mentioned before, the adversary process supports options for solving disputes such as conciliator, mediator, and arbitrator as parallel to the court. Therefore, I consider that this is not just a matter of the legal system, but an effective way to diversify the dispute resolution ways. The issue of ensuring legal balance is not a matter of worshipping one way or the other, so every option, such as court, arbitration, or mediation, should be given an equal footing.

⁸ Model Franchise Disclosure Law, UNIDROIT, 2002, Article 85(G)

3. WHY DO FRANCHISE QUARRELS FIT ALTERNATIVE DISPUTE RESOLUTIONS?

As regards the case of transnational businesses such as franchises, prefer to choose mediators or arbitrators instead of filing a lawsuit in the territorial jurisdiction. That's why, mediation and arbitration offer transnational businesses an effective alternative to traditional litigation for resolving disputes across borders. By choosing mediators or arbitrators with expertise in international law and cross-border transactions, parties can achieve efficient resolutions that preserve their business relationships.

Take an example, only in Europe has the number of intellectual property or patent infringements increased by 8 percent in the last 5 years as well.⁹ Major disputes belong to in fields of competition and intellectual property.

Because, a franchise requires transparency, fair competition, vertical restraints, and a well-negotiated payment schedule since it is a legally binding agreement and business model for transmitting intellectual property to the economy. Franchise agreements should provide clear and comprehensive information regarding the rights, obligations, and expectations of both the franchisor and the franchisee. This includes details about fees, royalties, territorial rights, operational standards, and any restrictions or limitations imposed by the franchisor.

Transparency fosters trust and helps mitigate misunderstandings or disputes down the line. Besides, franchising operates within a competitive marketplace, and it's crucial to ensure that franchise agreements do not unfairly restrict competition or stifle innovation. Even so, franchisors should avoid engaging in anti-competitive practices, such as price-fixing, immoral market allocation, or imposing unreasonable restrictions on franchisees that hinder their ability to compete effectively.

The goal of resolving a franchise contract dispute is to find the cause of the conflict between the parties and offer a practical solution to them. Hence, depending on the situation, franchise or other patent disputes are more likely to be settled in alternative dispute resolution. In the field of investment and

⁹ Total annual number of cases of international arbitrations, mediations, and adjudications, 2022 in the United Kingdom, see: <https://www.statista.com/statistics/611403/international-legal-services-activity-in-the-united-kingdom-uk/>

intellectual property negotiations, arbitration is the appropriate form of dispute resolution.¹⁰

Namely, as for the franchise agreement, arbitration¹¹ is a distinctive dispute resolution forum requiring rational decisions of the parties before submission to arbitration. Moreover, for franchisees who wish to remain in their respective systems, arbitration is less adversarial.¹² The reason, it is troublesome with the countries have a variety of legal arrangements for civil procedure. Consequently, arbitration offers the parties dispute settlement outside of the framework of national courts. However, unlike an arbitrator, other soft versions of dispute settlement such as a mediator do not make a mandatory decision for the parties. Therefore, patent and license disputes are rarely brought to the mediator. Nevertheless, the coercive power of the arbitrators is less than the court in most countries, so this is common where a lawsuit is filed again to the court to enforce the awards.

However, questions about jurisdiction have already been decided in some countries. As common law jurisdiction, does strongly supports the principle of party autonomy in international arbitration. This means that if parties have a valid arbitration agreement that is reasonable ground to finalize a dispute, the courts in these jurisdictions are generally inclined to stay in court proceedings and enforce the arbitration agreement. For example, England and Australian courts support the autonomy of international arbitration and will stay court proceedings in the presence of a valid arbitration agreement broad enough to cover the dispute.¹³ In this way, the contract law of the countries has been reformed from time to time. Due to such renewed law coordination, international arbitration cases may doubled in the UK over the last decade.¹⁴

As in many jurisdictions around the world, EU countries typically uphold the principle of party autonomy in arbitration. This means that parties are generally free to choose arbitration as the method for resolving their disputes and to determine the procedures and rules that will govern the arbitration process. Arbitration remains a popular and effective means of resolving disputes in the EU, particularly in international commercial matters. The EU has adopted

¹⁰ Stavros, B., Julian, L., & Loukas, M., *The evolution and future of international arbitration*, Kluwer Law, 2016, p.5.

¹¹ Andrews, N., *Arbitration & Mediation*, Intersentia, 2013, p.89.

¹² Pressman, A., Peabody, N., & Klein, J., *The strategy of Arbitration*, ABA, 2012, p.14.

¹³ General Ed: J William Rowley QC., *Arbitration world. Jurisdictional comparison*, Reference, 2004, p.119.

¹⁴ Total annual number of cases of international arbitrations, mediations, and adjudications in UK 2009-2019, see: <https://www.statista.com/statistics/611403/international-legal-services-activity-in-the-united-kingdom-uk/>

several directives and regulations that promote and support arbitration within the member states. Moreover, Directive 2008/52/EC on mediation in civil and commercial matters encourages the use of mediation as an alternative dispute resolution, including in cross-border disputes within the EU.

If take an example, in Germany, the franchisor and franchisee may agree to seek arbitration, in case of a dispute. The German Civil Procedure Act¹⁵ (Schiedsgerichtsgesetz) governs arbitration proceedings. The act provides a legal framework for parties to submit their disputes to arbitration and ensures the enforceability of arbitration agreements and awards. The parties are free to determine the essential framework of such a procedure themselves. Further advantages of arbitration are that these proceedings can be held confidential and arbitration awards are easily enforceable, especially with decisions of foreign courts outside the European Economic Area and Switzerland.¹⁶

For instance, the US fast-food chain “Subway” a Franchisor, and a German Franchisee entered into a contract for the operation of a branch in Germany. The contract was based on the Franchisor’s multi-purpose standard form contract which was governed by the law of Liechtenstein and under the Arbitration Rules of the UN Commission on International Trade Law.¹⁷ A dispute arose and the Franchisor initiated arbitration proceedings before the American Dispute Resolution Center in Glastonbury, New York, and obtained a favorable arbitral award which it sought to enforce in Germany before the Higher Regional Court in Dresden. It concluded that since all three arbitration clauses were valid, the franchisee’s counterclaims were inadmissible based on the application by analogy of Section 1032(1) of the German Civil Procedure Code.¹⁸

The main legislation governing arbitration in Italy is Law No. 353/1990, also known as the Italian Arbitration Act (*Legge sull'Arbitrato*). The law is based on the UNCITRAL Model Law on International Commercial Arbitration and provides comprehensive provisions for domestic and international arbitration proceedings. Arbitration law upholds the principle of party autonomy in arbitration, allowing parties to agree to resolve their disputes through arbitration and to determine the procedures and rules that will govern the arbitration process. Italian courts have a pro-arbitration approach and are generally

¹⁵ Section 1029-1033, German Arbitration law, Section 1025.

¹⁶ Rohrßen., B., Carandente., G., & Co-Editor Zeidman, P., *Germany Franchise and Licensing*, Lexology, 2021, p.7.

¹⁷ Certainly, the monist form regards international and national private law as two parts of a single system.

¹⁸ Oberlandesgericht Dresden/11 Sch 08/07 2007, Germany, see: https://newyorkconvention1958.org/index.php?lvl=concept_see&id=66&page=57&nbr_li_gnes=2124&l_typedoc=

supportive of arbitration agreements and awards. The country has a well-developed legal framework for arbitration and is generally supportive of arbitration as a viable method for resolving franchise disputes. The country is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which facilitates the enforcement of arbitration awards as well.

Arbitration in France is governed primarily by the French Code of Civil Procedure (*Code de procédure civile*), as well as the French Arbitration Code (*Code de l'arbitrage*). These laws provide a comprehensive framework for all arbitration proceedings. According to the Code of Civil Procedure, an arbitration clause is an agreement by which parties to a contract undertake to submit to arbitration any disputes that may arise in relation thereto.¹⁹ Arbitration awards rendered in France are enforceable and have the same legal effect as court judgments. Many franchise agreements in France include arbitration clauses as a way to provide a streamlined and confidential dispute resolution process that is tailored to the specific needs of the franchising industry. Parties may choose to arbitrate their disputes through private arbitration institutions or ad hoc arbitration proceedings, depending on their preferences and the terms of their franchise agreement. While arbitration is not mandatory for franchise disputes in France, it is a commonly used and accepted method of franchise dispute resolution, offering parties an effective alternative to traditional court litigation.

The process of increasing the value of arbitration in the states of the European Union is being implemented in the form of supporting the legal framework and expanding the scope of arbitration, as well as the validity of arbitration decisions. In this regard, the recognition of arbitration alongside domestic courts is considered a policy measure to reduce transnational business and legal conflicts. As a result of this process, there is no question that the judicial power can be over-reduced or that the business dispute resolution process will become unregulated or excessively arbitrary. Instead of it, as markets, contracts, and commercial law are reformed, court involvement will indeed decrease.

4. DISPUTE AFFILIATION IN THE PRE-CONTRACTUAL STAGE

The next questions are a specific affiliation of arbitration and transparency. Courts and Arbitrators have jurisdiction to hear disputes arising from pre-contractual negotiations and agreements, including those related to franchises.

¹⁹ Code of civil procedure - Arbitration in force 1981, Chapter 1. Article 1442.

Parties may bring claims in court alleging breaches of pre-contractual duties, misrepresentation, fraud, or other legal violations. In pre-contractual franchise cases, courts and arbitrators may consider various legal principles, such as the duty of good faith and fair dealing, negligent misrepresentation, and statutory consumer protection laws.

The court has the authority to award remedies such as damages, specific performance, rescission of contracts, or restitution to compensate parties for losses suffered as a result of pre-contractual disputes. Whereas arbitral awards issued in pre-contractual franchise cases are generally enforceable and have the same legal effect as court judgments. The parties are bound by the arbitration agreement and are required to abide by the arbitrators' decisions. Take an example, according to UN Arbitration Rules where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the Arbitration Rules, then such disputes have to be settled in accordance.²⁰ The franchise contract is often made before the dispute arises. Also, an agreement to arbitrate can be made anytime-even after the dispute arises.²¹ Virtually any business matter such as franchise and transnational commerce disputes can be submitted to arbitration or court at any stage of the contract.

Franchise disputes can potentially be resolved before the contract is concluded, although the specific circumstances may vary depending on the nature of the dispute and the willingness of the parties to engage in pre-contractual negotiations or alternative dispute resolution ways. While it's preferable to resolve franchise disputes before the contract is finalized, parties should be mindful of the potential legal and practical implications of entering into binding agreements or making concessions during pre-contractual negotiations.

For instance, in the case of Hoffman v. Red Owl Stores: During preliminary negotiation, Hoffman and Red Owl Stores delivered a promise to give a franchise contract with a conditional precedent. In reliance on Red Owl stores' commitment to invest 18000 USD, Hoffman bought a premise for his prospective store. However, Red Owl stores breached their promises and asked for more investment. Hoffman cannot afford it and the Franchise Contract was not concluded between them. Under the classical legal doctrine, there is no liability during preliminary negotiation and therefore Red Owl Stores was not liable for such expenses paid by Hoffman. Anyway, the court held that Hoffman deserved compensation and awarded him reliance damages for his loss. The

²⁰ UNCITRAL Arbitration Rules, 2013, Article 1.1.

²¹ Fisher, D., Philips, J., *The legal Environment of Business*, West Pub.co, 1986, p.86.

court was only awarding reliance damages for the expenses and not awarding expectation damages since the franchise contract has not been concluded yet.²²

The North American and German courts' practice of dealing with pre-franchise agreements is more sophisticated. Take an example from the case of German, OLG Düsseldorf: The claimant was seeking to reverse the franchise agreement that was concluded between the parties. The franchisee justified this by stating that the defendant had incorrectly informed him in advance that he would maintain business relationships with several customers, from which the claimant, as a potential franchisee, could also profit economically on a large scale. In particular, the franchisor promised a turnover of 33,000 euros for the first four months according to gross planning, but the franchisee was only able to achieve an income of 1500 euros after the conclusion of the franchise agreement in the same period. The court considered the scope of pre-contractual information obligations in franchise contracts in this case. The franchisor's obligation to inform is a basic requirement of any contract. Therefore, courts do consider pre-contractual disputes regardless of their damages.²³ However, there is no specific franchise law in Germany and pre-contractual disclosure is not regulated by special statutes or monitored by a specific agency.²⁴

5. WHAT ABOUT FORUM SELECTION PROVISIONS?

From the perspective of the Franchise Model Law, the parties to the contract have to agree on which laws, courts, or arbitration shall be selected in the event of a dispute. As a result, the door shall have opened to avoid bias, to overcome possible risks, and to simplify difficulties through joint principles.

The Model law requires the disclosure of forum selection or choice of law provisions. In international situations, franchisors often impose the provisions relating to these items.²⁵ The consequence is a forum that the franchisor finds convenient, often in its own country, and that the law that applies to the contract is the law of the State of origin of the franchisor. This might give rise to problems for the franchisee, who will be less familiar with the law of the

²² Hoffman v. Red Owl Stores Inc.-26 USA. Wis. 2 d 683, 133 N.W.2d 267.1965; see: Donald, H., Dennis, T., *Contract law today: Anglo-French comparison*, Oxford: Clarendon Press. 1989, p.27.

²³ OLG Düsseldorf GER, Urteil vom 25.10.2013 – Az. 1-22 U 62/13., see: <https://www.evers-vertriebsrecht.de/mandanten/franchisenehmer/>

²⁴ Waldzus, D., *Germany – pre-contractual disclosure requirements and relevant case law*, International Journal of Franchising Law, 2014, Vol. 12.p.3.

²⁵ Model Franchise Disclosure Law 2002, UNIDROIT.

franchisor's state. Hence, the prospective franchisee needs to know which arbitration rules will apply and which court will be seized of any dispute, in particular considering that the expenses faced by the parties may differ.

Therefore, most franchise agreements contain a forum selection clause that governs the location of where disputes between the parties should or must be resolved. Parties to a franchise agreement should understand the legal distinction between permissive and mandatory forum selection clauses. When parties agree to refer their disputes to arbitration under specific arbitration rules, they are bound to settle their disputes by those rules. This agreement typically forms part of the arbitration clause within their contract or agreement. For instance, in the case of litigation, the parties cannot choose their courts, as they will be decided by territorial jurisdiction. Considering it from this point, arbitration procedures, which are more in line with international law, sometimes conflict with the national judicial system.

In particular, it is necessary to mention the extreme of agreements containing provisions to the effect that investment disputes will be subject to the law of the host state.²⁶ In the majority of cases applicable law includes both international law as well as the law of the host state and in the case of a transnational franchise agreement, the parties usually provide for the choice of arbitration or an international specialized court.²⁷

For every arbitration proceeding there is an underlying agreement to arbitrate, by which the parties agree to submit their dispute to an arbitral tribunal. The agreement to arbitrate is also where the parties determine some aspects of the procedure to be followed by the tribunal. One essential element that the parties should specify is whether their arbitration will be ad hoc or institutional and what arbitration rules will be applied.

The jurisdiction of disputes varies from country to country and is largely governed by arbitration law. For example, in the EU zone, legal disputes must be resolved, first through mediation and, if it fails, through arbitration "organized or approved by a European Franchise Federation National Association Member" or through litigation.²⁸ Franchise law cases are often handled at the national level

²⁶ Alexander, J., *Arbitration, order public and criminal law*, Taxon, 2009, p.361.

²⁷ The New York Convention on foreign arbitration, by Article V (1) (e) lays down a procedural norm that an arbitral award, duly rendered, attains finality if, and only if, a domestic court endorses it. See: Covindaraj, C., *Private International Law*, Oxford University Press, 2018, p.127.

²⁸ Code of ethics, European Franchise Federation 2016, Article 2.4. & "See", Gordon, B., Philip, L., *EU and US antitrust Arbitration*, Kluwer Law, 2011, pp.11-45.

rather than by a specific European court dedicated to franchise issues. However, there have been instances where EU directives or regulations have influenced franchise-related matters within member states.

Although countries are taking decisive steps to accept broad dispute resolution powers and adopt flexible commercial law policies, contracting parties retain the right to choose their jurisdiction. The formal protection of the forum selection right is mandatory in the written contract itself and prevents interfering with the choices of the parties to the contract.

6. THE COERCIVE POWER OF THE ARBITRATION

Recently common law countries started to adopt statute laws, while civil law countries are studying case law in their court affair. The mixed system is becoming more ideal in countries and both systems have the same purpose of adherence to due process of law.

Some countries have anti-suit policies for the parties' satisfaction. It is a matter of "*Res Judicata*" and so good practice to restrict double jurisdiction. By implementing anti-suit policies, countries aim to promote the effectiveness and enforceability of arbitration agreements and other chosen dispute resolution methods in franchise agreements. These policies help ensure that parties' rights and obligations are determined following the agreed-upon procedures and forums, thereby enhancing legal certainty and facilitating the resolution of franchise disputes fairly and efficiently. The laws may restrict or prohibit parties from pursuing litigation in foreign jurisdictions or forums outside of the agreed dispute resolution manner, such as arbitration. By preventing parties from initiating legal proceedings in jurisdictions other than those agreed upon in the franchise contract, anti-suit policies seek to uphold the integrity of the chosen dispute resolution process and prevent forum shopping or tactical litigation.

Andrews cited, that English law has employed anti-suit injunctions for many years to the satisfaction of aggrieved parties to arbitration agreements. An anti-suit injunction is a court order that prohibits a party from pursuing legal proceedings in another jurisdiction or forum, typically when there is a valid and binding agreement to resolve disputes through arbitration or in a specific court. In the context of franchise disputes, English courts do grant anti-suit injunctions to prevent a party from initiating or continuing litigation in a foreign jurisdiction in breach of an arbitration agreement or forum selection clause.

The English court would consider factors such as the validity and scope of the arbitration agreement, the parties' intentions, and the principles of international comity in deciding whether to grant the injunction. In deciding whether to grant an anti-suit injunction in franchise disputes, English courts could also consider the public interest, fairness, and the interests of justice. Courts shall balance the parties' contractual rights and obligations with broader policy considerations, such as the promotion of arbitration as an efficient and effective means of dispute resolution, and the principle of party autonomy in contract law.

Canadian courts also grant anti-suit relief as well.²⁹ If the franchise agreement contains a forum selection clause designating Canadian courts as the exclusive forum for resolving disputes, and one party commences legal proceedings in a foreign jurisdiction in violation of this clause, the other party may seek an anti-suit injunction. In deciding whether to grant an anti-suit injunction in franchise disputes, Canadian courts will balance the interests of the parties and consider the public interest. Ultimately, the decision to grant an anti-suit injunction rests within the discretion of the Canadian court, which will assess the merits of the case and exercise its equitable jurisdiction to provide appropriate relief.

Regarding Europe, the OLG Dresden, Decision of 2007, 11 Sch 8/07 is an example of how if any contract is governed by Arbitration Rules, the domestic court would not accept counterclaims. This norm is applicable as the contract is governed by the private law of Lichtenstein, where the Austrian ABGB is the applicable law for such cases. The sole objective of this arbitration clause was to further increase the imbalance in power between the commercially less adept franchisee and the franchisor, with the help of the US American parent company.³⁰

7. FRANCHISE CLASS LAWSUIT

Technically, an agreement takes either the form of an arbitration clause or a submission agreement.³¹ Such provisions can include permission for mass or complex mediation, and multi-party arbitration.³² Furthermore, franchisees

²⁹ Andrews, N., *Arbitration & Mediation*, Intersentia, 2013, Vol. II. p.233.

³⁰ Wiewirowska, A., *Franchising Study*, EU, Policy Department A: Economic and Scientific Policy, 2016, p.125.

³¹ General Ed: Rowley, J., *Arbitration world. Jurisdictional comparison, Reference*, 2004, p.8.

³² Garner, M., Hagedorn, S., & MacPhee, L., *Mass litigation by Franchisees*, IFA, 2012, p.8.

accept the need, for practical, economic, and other reasons, to unite as a group to challenge franchisor actions in the same proceeding.³³

To the court, mass franchise actions are joint of more than one petitioner who participates in a class of franchisees against the respondent. For instance, owners of “Meineke Discount Muffler” franchises sued franchisor corporates. The plaintiffs claimed that the franchisor’s handling of advertising breached the Franchise and Trademark Agreements. The plaintiffs also advanced a raft of tort and statutory unfair trade practices claims arising out of the same conduct. Finally, they won a 390 million USD judgment against the franchisor and its affiliated parties. To conclude, the first obstacle to class treatment of this suit was a conflict of interest between groups of franchisees concerning the appropriate relief.³⁴

The above sort of claim exists in both arbitral and court proceedings which belong to common law and statutory, or international law. In comparison, participant in class action whether to apply for arbitration or join a lawsuit is a matter of will for the franchisee. Also, contract disputes cannot be forced to submit arbitration only excepting agreed-upon by all parties.

The arbitral award should be overturned if the arbitrator exceeds its power. Namely, *Bazzle v. Green Tree Financial Corp*, and *Stolt-Nielsen v. Animal Feeds International Corp* cases from the US Courts exhibit courts and arbiters how should approach any class action.

In an attempt to solve a contract dispute, Lynn and Burt Bazzle filed suit against Green Tree Corporation. After they filed the suit, Plaintiff learned that other respondent’s customers were dealing with the same sort of dispute. As a result, they asked for and received permission to file a class action suit. However, Green Tree contracts had a clause requiring that any contract disputes be settled by an arbitrator. Green Tree asked the court to revoke the class certification because the Federal Arbitration Act, it argued, did not permit class-wide arbitration. Instead, the arbitration would have to be conducted on a case-by-case basis.³⁵ The South Carolina Supreme Court disagreed, ruling that, unless specifically banned in the contract, class-wide³⁶ arbitration could be permitted by the courts.³⁷

³³ Heller, M., Zarco, R., *The most significant franchise cases of all time*, ABA, 2014, p.16.

³⁴ *Broussard v. Meineke Discount Muffler Shops* 1998, US, No.87-1808., see: <https://casetext.com/case/broussard-v-meineke-discount-muffler-shops-inc>

³⁵ “*Green Tree Financial Corp. v. Bazzle*, 539 US 444. 2003, “See”, in www.oyez.org/cases/2002/02-634

³⁶ A legal case organized by a group of people. “See”, Susan. W., *Law Dictionary*, Merriam-Webster, 2006, p.11.

Another example of class action, in 2015 chain franchise Jimmy John's faced controversy over its fulfillment of non-compete agreements with its franchise employees. The case involved arbitration proceedings initiated by franchisees. The dispute highlighted the challenges and legal considerations related to non-compete clauses in franchise agreements. Consequently, a United States District Court in Illinois issued an opinion and order which held that two employee plaintiffs did not have standing to pursue their claims for declaratory relief to determine the legal interests, validity, and enforceability of the Confidentiality and Non-Competition Agreements.³⁸

8. TRANSPARENCY REQUIREMENTS AND PECUNIARY DAMAGES

Many countries have specific laws or regulations that mandate franchisors to provide disclosure documents to prospective franchisees. These documents typically include details about the franchise system, the franchisor's financial performance, the obligations and responsibilities of the parties, any fees or payments required, and other relevant information.³⁹

Franchisors are often required to provide these disclosure documents a certain number of days before the franchise agreement is signed to give prospective franchisees ample time to review the information. Even in jurisdictions without specific franchise disclosure laws, franchisors may still have common law duties to provide accurate and complete information to prospective franchisees. Courts may impose a duty of good faith, fair dealing, or full disclosure on franchisors, requiring them to act honestly and transparently in their dealings with franchisees.

Franchise transparency requirements aim to protect the interests of franchisees by ensuring they have access to the information they need to make informed decisions about entering into a franchise agreement. Courts can provide relief for pecuniary damages resulting from a lack of transparency through various legal remedies, including monetary damages and other forms of relief to compensate franchisees for their losses.

³⁷ David, G., *Class action alert*, Nixon Peabody LLP 2003, p.1.

³⁸ *Brunner v. Liautaud*, US 14-C-5509. 2015, see: <https://casetext.com/case/brunner-v-james-john-liautaud-jimmy-johns-llc>

³⁹ Levitt, N., Tyre, H., & Ward, P. *Controlling Your International Franchise System*, ABA, 2010.

In cases where a franchisor's lack of transparency or misrepresentation has caused pecuniary damages to a franchisee, courts may order various forms of relief to compensate the franchisee for their losses. This could include monetary damages to cover the franchisee's financial losses, as well as other forms of relief such as rescission of the franchise agreement, restitution, or specific performance. Franchisees must mitigate their damages by taking reasonable steps to minimize their losses once they become aware of a breach of contract or misrepresentation by the franchisor. Failure to mitigate damages may affect the amount of compensation awarded by the court.

Along with the general principle of contract law, where a party breaches the obligations imposed on it by the contract, this usually results in a claim for damages. For example, German law goes even further than this and partially grants claims for damages if a breach of duty occurs even when no contract has yet been concluded. Therefore, there is an obligation on the franchisor to clarify the profitability of the franchise system on an accurate factual basis in other words, truthfully as a whole. The duty of disclosure includes making accurate statements regarding the turnover to be achieved and, in particular, not presenting the franchise system as more successful than it is.⁴⁰

German courts have stressed that, as a rule, a franchisee should obtain information on its initiative about the general market conditions and their impact on the prospective franchised business. It reflects the expectation that franchisees should conduct due diligence and assess the viability of the franchise opportunity before entering into a franchise agreement. German courts expect franchisees to exercise reasonable care and diligence in evaluating the franchise opportunity. It includes researching and understanding the relevant market conditions, such as consumer demand, competition, economic trends, and regulatory requirements. While franchisors are typically responsible for providing certain information about the franchise system, German courts recognize that franchisees also have a responsibility to gather information independently. This helps mitigate information asymmetry and ensures that franchisees make informed decisions about the franchise investment. However, if there are particular circumstances about which only the franchisor is aware, and which would be important to the potential franchisee's decision as to whether to enter into the franchise contract, the franchisor must disclose that information. German case law has ruled that a franchisor must refrain from providing misleading information about the

⁴⁰ Greifeneder, S., Schwind, E., *The scope of pre-contractual information obligations in franchise contracts* 2019.

franchise system and must disclose all relevant information about it to avoid subsequent damage claims.⁴¹

9. DISPUTES RELATED TO BUSINESS FORMAT FRANCHISING

Franchisees raise concerns about the quality or consistency of products or services supplied by the franchisor. Disputes can arise over the allocation of advertising and marketing funds, as well as the effectiveness of marketing campaigns question the adequacy of marketing support provided by the franchisor, or dispute the use of advertising funds. Financial disputes probably arise over issues such as royalty fees, accounting practices, or financial reporting by the franchisor. Franchisees might challenge the franchisor's enforcement of operational standards or compliance requirements. This could involve disputes over training programs, operational procedures, or health and safety standards. Also, it is necessary not to miss regulatory compliance issues, such as violations of franchise disclosure laws, consumer protection regulations, or antitrust laws.

Today, most franchise disputes related to licensing, supervision and support, system implication, material, product prices, payments, or accounting, post-termination arise among the franchisor and franchisee, license owner, manufacturer, and distributor. Accordingly, in the proceedings, precedent is used to resolve franchise-related litigation. For instance, The Australian Courts generally look to both American cases and relevant Codes of Australia for guidance on how to define a 'system or marketing plan.'

The court considers the meaning of "franchise agreement" under the Code and sets out several indicators that are to be used when determining the existence of a system or marketing plan. Which includes: a) the provision by the franchisor of a detailed compensation and structure for distributors b) centralized bookkeeping and record-keeping computer operation provided by the franchisor for distributors; c) a scheme prescribed by the franchisor under which a person could become a distributor and director; d) the reservation by the alleged franchisor of the right to screen and approve all promotional materials used by distributors; e) a prohibition on re-packaging of products by distributors; f) the provision of assistance by the alleged franchisor to its distributors in conducting opportunity meetings; g) suggestion by the franchisor of the retail prices to be charged for

⁴¹ Smith, R., Billing, M. 2019. *Franchising in Germany*. Franchise law insider, see: <https://franchiseinsider.quarles.com/2019/09/franchising-in-germany/>

products; h) a comprehensive advertising and promotional program developed by the alleged franchisor.⁴²

For systemizing these helpful indicators were relied upon in the case of ACCC v. Kyloe Pty Ltd. The main issue was whether or not a franchise agreement had been entered into inadvertently between two distribution companies. The Federal Court followed its previous decision in Capital Networks Pty Ltd and clarified the criteria set out in the Code, which determines when an agreement is considered to be a 'franchise agreement'. While the Court found that there was no franchise agreement, in this case, the decision provided a full discussion on the definition of a 'system or marketing plan' as previously explored and solidified the Court's willingness to follow American jurisprudence.⁴³

10. HOW DOES REGULATE CONTRACT TERMINATION DISPUTES?

The main provisions that the parties must agree on when concluding a franchise agreement are market restrictions and termination fees. The agreement sets out how the parties will resolve these issues, which are common in practice, through the courts and arbitration. For example: In the United Kingdom, formal termination that would invoke arbitration or litigation is unusual. Because the franchisor faces disruption costs whenever a franchisee leaves the system, comprising lost royalties, costs of finding premises and a replacement franchisee, and training and promotional costs. So, the same arbitration, renewal, and asset-valuation clauses discussed in connection with lease control are invoked whenever a franchisor wishes to terminate a franchise agreement. Consequently, Franchisors use professional limitation (no competition) restrictive covenants in their contracts.

Franchisees must agree that, on leaving the system, for periods of between six months and two years, they will not compete within the same line of work within their old franchise territories. British and European courts will enforce such covenants as long as they are specific to the business and not too long-lived, as shown by *Connors v. Connors*, *Commercial Plastics v. Vincent*, and the '*Pronuptia*' case in the European Court. An example is given by Avis: "The Licensee undertakes that it will not for 12 months after termination be involved

⁴² FCA 808 (2004) *Capital Networks Pty Ltd v. au Domain Administration Ltd.*, see: Sriporn, C., *Franchising legal frameworks: a comparative study of the DCFR, US law and Australian law regarding franchise contracts*, Universiteit Leiden, 2023, p.49.

⁴³ Jones, L., Ned, E., & Schulz, A., *The inadvertent Franchise*. IBA, IFA joint Conference book, 2010, p.12.

directly or indirectly in any vehicle rental business within the licensed territory.” Thus, much of the investment the franchisee has made in building up his business may become worthless to him upon exit from the franchise network.⁴⁴

The vast majority of civil lawsuits filed in the courts of countries claiming termination of a franchise agreement are due to non-payment of contract fees or royalties. For example, according to the agreement, it set out that the licensee would pay Kangol (appellant) a running royalty of 7.5 percent of the wholesale price of the products bearing the mark. If the licensee fails to pay the appellant the minimum royalty level specified agreement, the appellant may terminate this agreement forthwith. That being so the Court of Appeal held in *Robertson v Kangol* that a trademark license agreement could be terminated with immediate effect due to failure to pay agreed charges.⁴⁵

The judgment of 2020 issued by the Supreme Court of Spain refers to a franchise agreement entered into by two companies. The price clause of the contract established two pecuniary obligations for the franchisee: 1) an initial franchise fee; and 2) monthly royalty payments to be paid during the term of the agreement. About a year and a half after the beginning of the contractual relationship, the franchisee sent the franchisor a termination notice as a consequence of disputes between the parties. In summary, the franchisee claimed that the franchisor had breached its contractual technical assistance and support obligations, while the franchisor claimed the non-payment of several monthly royalty payments.

The Supreme Court concluded that, although in a franchise contract, it is possible to distinguish between benefits of continual performance and others of unique performance, all of these together make up the benefits framework that the franchisor undertakes to provide to the franchisee. In this sense, other than the grant of the contract itself, there is no ‘interest’ of the franchisee that could be deemed fully satisfied by the training and know-how received at the beginning of the contract, since the training and know-how alone are useless once the contract has been terminated. Hence, the partial refund of the initial single-payment franchise fee in a proportion that reflected both the actual duration of the agreement and the term of the contract that was not fulfilled was appropriate and, therefore, the franchisor’s appeal was dismissed.⁴⁶

⁴⁴ Dnes, W., *A Case-Study Analysis of Franchise Contracts* 1993, The University of Chicago press Journals. Vol. 22, pp.371, 387.

⁴⁵ England and Wales Court of Appeal. *Robertson plc v Kangol Ltd* BLD 2301040197. 2004, see: <https://www.bailii.org/ew/cases/EWCA/Civ/2004/63.html>

⁴⁶ *Ed. Abell M., Berenguer, P., Fuentes, M., The franchise law review*, the law reviews, 2021, p.253.

In terms of franchisors need to reject the regulations of the state that violate constitutional principles and interfere with the contractual relationship between franchisors and franchisees. On the other hand, the court must restrain the bias of either party, regardless of whether the government has a legitimate interest in protecting franchisees. Thus, a delicate balance between protecting franchisees from unfair practices and preserving the contractual freedom of franchisors and franchisees.

11. CONCLUSION

An important area of comparative research concerns the dispute resolution procedure and I have made due diligence through the study on reforms of arbitration and considered judicial precedents in selected countries. In order, to respect jurisdiction boundaries between the countries there exists a gap to overwhelm legal disputes, and which stipulates, that franchise parties have barriers referring to forum selection clauses. Hence, the study pointed out the distinguished patterns of inquisitorial and adversarial systems in litigation or award on franchise breaches.

The main advantages of arbitration would be defined as confidentiality, cost-effectiveness, and applicable rules. Therefore, building a legal basis such that arbitration awards are as binding as court decisions is crucial in the long run. I would emphasize that if there is no administering power to enforce its decision metaphorically it is like a toothless lion.

Nowadays, the legal experience of countries suggests that alternative dispute resolutions are supported by their courts for resolving franchise and other commercial disputes. The reason is that the court has narrow deadlines and is also expensive.

Frankly, we are standing in front of reactive and proactive legal policies that exist around the world. Dissimilar legal systems expand the gap in which contract parties avoid going to court. The traditional way of preferring the territorial jurisdiction is gradually changing, and there is a tendency to resolve contractual disputes, through arbitration instead of courts. Franchise is a global phenomenon with issues of legal and economic aspects. Hence, non-judicial and international institutions are more specialized in franchise disputes.

Furthermore, balancing dispute resolution in a manner is a matter of modern sense. It has the advantage of reducing the workload on the courts while decreasing the government intervention in contract dispute resolution. Hence, advanced steps have been taken to enhance the legal competence of arbitral tribunals and the validity of their decisions in recent years throughout European countries. There is no wonder that such good practice will give value to the

prompt resolution of legal problems of transnational business by updating the laws of nations.

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