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Australia's New Requirement for "Fair" Franchise Agreement Terms

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New Unfair Contract Term Law

- Consumer law → small businesses
- Contracts entered into, renewed from **12 November 2016**
- Variations made from **12 November 2016**

“Small business” Contracts

- A misnomer!
- Applies to:
  1. a “standard form” contract
  2. one party has fewer than 20 employees at time of signing
  3. known consideration less than AUD 1m (AUD 300,000 if 12 months or less)

Impact of Unfair Term

- Is void
- No court order required
- May take into account circumstances
- Must take into account:
  - contract as a whole
  - “transparency”
- Balance of contract can remain

What is unfair?

- 3 elements required:
  1. would cause significant imbalance
  2. not reasonably necessary to protect legitimate interests (NOTE: onus of proof)
  3. would cause detriment if relied on (NOTE: potential enough)

Examples of possible Unfair Terms

- Unilateral variation, termination or renewal rights
- Power to vary goods/services supplied
- Subjective assessment of breach
- Uneven assumption of liability
- Termination of franchise agreement without cause
- Power to vary minimum performance requirements

Action Required

- All contracts, manuals, policies etc operating in Australia require review
- Risk = provisions unenforceable
- At a minimum: do an 80:20 review

Thank you for your kind attention!

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FRANCE

WHAT IS THE IMPACT OF THE NEW CONTRACT LAW AND THE MACRON ACT ON FRANCHISE AGREEMENTS?

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I. The impact of the Macron Act on franchise agreements :

1.1. A mandatory uniform term applicable to all contracts between the affiliate/franchisee operating as a retailer and a commercial-distribution network to which he belongs

1.2 Post-term non-competition clauses contained in franchise agreements will be on principle deemed null and void: to be valid, they require fulfillment of 4 cumulative conditions

II. The Order dated February 10, 2016 reforming contract law: the expected consequences for franchise agreements:

2.1. An extended opportunity for the Courts to interfere in order to rebalance a franchise agreement

2.2. Codification of the plea of breach under the Courts' supervision

I)

THE MACRON ACT'S IMPACT ON FRANCHISE AGREEMENTS (DATED AUGUST 6, 2015)

1.1. A mandatory uniform term applicable to all contracts between the affiliate/franchisee operating as a retailer and a commercial-distribution network to which he belongs

- **Article L.341-1 of the French Commercial Code:** « *all contracts* ***(i)*** *concluded between a person making available to an operator of a retail business* a trade name, a trademark or a store brand in consideration of an exclusive/quasi-exclusive commitment: Article L.330-3 of the French Commercial Code) ***and*** **(ii)** "*the shared purpose of which is the operation of one or several retail outlets which include clauses which are liable to limit the freedom of the outlet's operator to carry on his business*" **shall all have the same expiry date**.

- **Aim pursued:** to enable the retail-business operator to join another distribution network if he so wishes

- **Consequence of this "legal indivisibility"** = if one of the agreements is terminated, all of the other agreements binding this operator, are automatically terminated at the same date.

- **However**, this "termination contagion effect" does not apply to **(i)** commercial leases and to **(ii)** participative franchise agreements (i.e. agreements in which the franchisor owns a stake in the franchisee's or master franchisee's holding company)

1.2. Post-term non-competition clauses

Article L.341-2 of the French Commercial Code:

IN PRINCIPLE : post-term non-competition clauses (including non-affiliation clauses) contained in franchise agreements, will be deemed null and void,

EXCEPT IF the 4 cumulative following conditions are fulfilled

These conditions are identical to those set out in Article 5.3 of the EU Exemption Regulation on Vertical Agreements (330/2010/EC) and to the EU case-law (ECJ January 28, 1986, *Pronuptia*).

- it relates to goods or services competing with those to which the agreement relates;

- it is limited to the premises where the franchisee conducted its business during the franchise agreement;

- it is essential for the protection of substantial, secret and specific know-how belonging to the franchisor; and

- its duration does not exceed one year from the expiry or termination of the agreement.

It should have a significantly restrictive effect on the French case-law which were generally allowed post-term non-competition clauses:

(i) for a duration of more than one year in franchise agreements if proportionate to the interests to be protected and deemed necessary for the protection of the franchisor's know-how

(ii) for the franchisee's **exclusive territory or a radius of several kilometers** around the franchisee's premises.

These new provisions shall enter in force after on **August 6, 2016**

II)

THE ORDER DATED FEBRUARY 10, 2016 REFORMING CONTRACT LAW: THE EXPECTED CONSEQUENCES FOR FRANCHISE AGREEMENTS

INTRODUCTION

Certain new provisions, to apply henceforth to all business contracts, are well known to franchisors already, such as the **duty to negotiate** and **enter into agreement in good faith** (Article 1104), or **the general duty of pre-contractual disclosure** created by the new Article 1112-1 of the Civil Code.

≠ other novel provisions are likely to have an impact on franchise agreements and their parties:

- the Courts will not only have a right to void or terminate an agreement, as previously, but also henceforth to amend it (**through the principle of "hardship**"), including its economic features: **amendment or deletion of the clause**
- In any event, this reform is a blow against **legal security,** in the French legal system**.**
- the reform codifies the **plea of breach**, subject to implied review by the Court

2.1 An extended opportunity for the courts to interfere in order to rebalance a franchise agreement?

(i) Acceptance of Court-ordered amendment on the grounds of hardship

The wording of **Article 1195 of the Civil Code** provides for two stages.

First, it imposes on the parties a **duty to renegotiate the agreement**, performance of which has become "*unduly onerous*" for one of them, owing to an "*unforeseeable change in circumstances*", the "*risk*" of which had not been accepted by the victim.

Then, if the renegotiation is denied or fails, the parties may choose, jointly, either contractual termination or a joint application to the Court for "*adaptation*" of the agreement. Absent agreement "*within a reasonable time*", they may unilaterally apply to the Court, which may "*amend the agreement or terminate it*".

- **An essential feature of the reform:** as the provisions of Article 1195 are not mandatory in nature, it seems possible for the franchise agreement (i) to restrict or exclude the duty to renegotiate borne by the parties, and (ii) to bar the option for the Court to amend the agreement.

- The drafting of such a clause can be expected to be intricate, having regard in particular to the risk of its being held null and void as creating a significant imbalance between the parties' rights and duties.

2.1 An extended opportunity for the courts to interfere in order to rebalance a franchise agreement?

(ii) Extension of the censure of unfair terms: deletion of clauses creating a significant imbalance

- **Article 1171 of the Civil Code** provides that:

"*In an adhesion contract, any clause creating a significant imbalance between the rights and duties of the parties to the agreement shall be null and void.*

The evaluation of significant imbalance shall relate neither to the principal purpose of the agreement nor to the adequacy of the price to the service".

This article is inspired by special areas of the law, i.e. **consumer law** and **the law of restrictive trade practices**. The concern in that legislation is **to protect the parties in a weak bargaining position.**

The criteria usually selected by the case-law are:

- a partner's dependency,
- the lack of reciprocity or consideration, and
- the disproportion between the parties' obligations.

➢ **The scope of review of significant imbalance: restriction to adhesion contract**

The scope of unfair terms is restricted under **Article 1171** to "*adhesion contracts*", where such clauses are most common.

Article 1110 of the Civil Code : « *An adhesion contract is one in which the terms and conditions,* ***not subject to negotiation, are pre-determined by one of the parties*** »

In order to avoid franchise agreements being treated as adhesion contracts, or at least in order to secure evidence in the event of future litigation, the franchisor must be able to prove that the agreement was negotiated with the franchisee, or at the very least that certain terms are the outcome of negotiation.

➢ The manner of the Courts' evaluation of significant imbalance

Under consumer law, the legislator favors a comprehensive approach of the contract having regard to the circumstances in which it is made. The list of terms presumed to be unfair contained in Articles R. 132-1 and R. 132-2, however, requires the Court to evaluate the significant imbalance **clause by clause**.

In anti-trust law most cases, the Courts perform a **concrete evaluation** and accordingly a **comprehensive analysis** of the agreement in order to determine by reference to the background whether or not the parties negotiated.

The sanction of significant imbalance = the unfair term shall be "***null and void"*** . It is a **public policy provision**

2.2 Codification of the plea of breach under the Courts' supervision

A plea of breach, by provisionally freezing a contract's effects, may be used as an alternative form of amicable resolution of contract disputes.

The plea of breach is a newcomer to the Civil Code, whereas it was previously based solely on precedent.

A plea of breach creates a holding position, **by freezing provisionally the liability for an obligation** to be provided by the party raising it, until a new event or new behavior by the other contracting party breaks the deadlock.

It is a **response -coercive but provisional-** intended to put pressure on the partner to perform its obligations.

The Order provides for it in two forms, in two separate Articles.

First, a **plea of ordinary breach** permits one party to withhold performance, even though it is due, if the other party fails to perform.

Second, a **plea of anticipatory breach** permits one party to withhold performance when it is clear that the other will not perform when due. The requirement is that the prospect of failure must be clear, i.e., definite. A potential risk is not sufficient, therefore

CONCLUSION

- The reform of contract law and the provisions of the Macron Act relating to retail trade result in reinforcing the protection enjoyed by franchisees, regarded as the weaker parties, and improving mobility between chains.

- Although these factors appear as a revolution causing legal uncertainty for all the players in franchise agreements, who will need to adapt, the actual impact of these reforms on franchise agreements should not be overstated.

Thank you for your kind attention!

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Recent Developments in Russian Franchise Law

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General

- The Civil Code of the Russian Federation („Civil Code“) contains special provisions on franchise agreements (named as commercial concession agreements).
- The provisions of the Civil Code form a reliable basis for franchise agreements between Non-Russian franchisors and Russian franchisees.
- The Russian legislator is endeavoring to develop the laws on franchise agreements in order to
  - Adapt the laws to international standards, and
  - Facilitate the use of the law by franchisor and franchisee.

Applicable National Law

- Russian law permits that the parties of a franchise agreements choose the law of the non-Russian franchisor or another national law as the governing law.
- If no national law is chosen, the national law of the following country applies:
  - Country in which the franchisee conducts its business,
  - Country of the franchisor's main place of business if the franchisee conducts business in more than one country .

Registration According to Singapore Treaty

- Franchise agreements with Russian franchisees are subject to mandatory registration with the Russian patent office Rospatent.
- The registration is mandatorily governed by Russian law.
- Singapore Treaty on the Law of Trademarks
  - Signed by the Russian Federation in 2009
  - Russian laws adapted in October 2014
- As a result not the franchise agreement, but only the exclusive IP right being granted under the franchise agreement is subject to registration. Therefore, only limited information must be presented to Rospatent, including the below:
  - Form and subject of franchise agreement,
  - Names of the parties,
  - Registration numbers of IP rights

Pre-Contractual (Including Disclosure) Obligations

- Since March 2015 there is a legal framework for pre-contractual negotiations.
- Parties are obliged to act in good faith. Breach of obligation is basis for obligation to compensation for damages.
- A party is not acting in good faith if it:
  - Starts or continues negotiations without the intention to enter into an agreement,
  - Terminates the negotiations unexpectedly and unjustifiedly in circumstances in which the other party may not have expected termination,
  - Provides incomplete or untrue information or fails to disclose information which, according to the character of the planned agreement, should be known by the other party.
- Are the new provisions a basis for substantial **disclosure obligations of the franchisor**? Currently, no clear answer possible.
- **Recommendation:** Prior to discussions of a franchise agreement, the parties should enter into an agreement on the negotiations in which the requirement to act in good faith will be set down in more detail (such agreements being expressly permitted by the new laws).

Options under Russian Laws

- Options are often used in franchise agreements:
  - Option of the franchisor, upon termination of the franchise agreement, to re-purchase goods supplied to the franchisee,
  - Option of the franchisee, upon reaching certain success factors,
    - To open further shops, or
    - To extend the territory of the agreement.
- The option of entering into an agreement is introduced into the Civil Code:
  - Specific type of agreement under which one party makes to the other party the irrevocable offer to conclude an agreement by way of accepting the offer,
  - Must contain the essential terms and conditions of the agreement to be concluded,
  - May provide that the offer may be accepted only if circumstances determined in the option occur. If the option does not provide for a specific term, the offer may be accepted within a period of one year.

Enforcement of Obligation to Enter into Agreement

- New provision on the enforcement of the obligation to enter into agreements which is relevant to options.
- Previous law:
  - If the party for which the conclusion of the agreement is obligatory, avoids its conclusion, the other party has the right to sue the avoiding party
  - Not very helpful as it is unclear how the obligation may be enforced
- New law:
  - If the lawsuit is successful the agreement is deemed to be concluded under the terms cited in the court decision as from the time of entry into legal force of such court decision,
  - A modern and very efficient solution!

Representations and Warranties

- Liability
  - By a party which, in connection with an agreement, gave incorrect confirmation of circumstances which are important for the conclusion, performance or termination of the agreement,
  - For compensation for damages or payment of the agreed penalty.
- Astonishingly, the condition for liability is that the confirming party:
  - Assumed or had reasonable cause to assume that the other party would rely on the confirmation,
  - Knew that the confirmation was incorrect.
- Further interesting aspect:
  - An incorrect confirmation triggers liability even if the agreement which contains the confirmation is recognized as not concluded or invalid
  - Comprehensible, if at all, only for confirmations which concern the validity of the agreement (e.g. the power of attorney of the signatory, or the existence of all required corporate approvals or approvals by third parties)

Indemnity

- Under the new law agreement permitted that a party is obliged to pay compensation for economic losses which it suffers due to certain circumstances unconnected with a breach of the agreement.
- The law mentions the following examples:
  - Impossibility of performance of an obligation,
  - Claims by third parties (e.g. governmental authorities) against the indemnifying party or third parties.
- Indemnity clause:
  - Must provide a basis for calculating the economic loss
  - In deviation from previous draft laws, there is no reference to the general provisions on calculating damages if mechanism for calculating losses is lacking
- Indemnity clause triggers liability also if agreement which contains indemnity clause deems not concluded or is invalid (cf. representations and warranties).

Thank you for your kind attention!

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ITALY

Draft Law on
Independent Commercial Networks

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Purpose

To widen the franchisees' protection currently provided for in the Italian Law on Franchising (Law 129/2004) and extend it to any type of independent commercial network, for the distribution of products or services under a common name, brand, logo, trademark or sign.

Definition of *"grantor of the commercial network"*

Any person or legal entity which carries out a business activity (..) and negotiates and concludes with third parties any type of contract admitted by law, for granting in common use, either for free or against payment, a name, brand, trademark, sign, or, anyway, the identifying logo of the activity, in order to involve the members in a network composed by members being economically and legally independent and autonomous, within the national territory, at the aim of marketing specific goods or services and proposing to the members an exclusivity or semi-exclusivity agreement for the performance of their activities

Contents of the Draft Law (1)

- Pre-contractual disclosure
- Information to be published in a public registry (“REA”)
- Information to be provided in the contract
- Information to be provided by the member

Contents of the Draft Law (2)

- Pre-contractual agreements
- Compulsory mediation
- Consequence of violation of the rules

Conclusions

- Positive attempt to improve the rules currently applicable to franchise agreements
- Dangerous to excessively widen the relevant scope of application

Thank you for your kind attention!

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Germany / Europe

The „Facebook“-Decision by the Court of Justice of the European Union

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Facebook - Decision

On 6th of October 2015, the Court of Justice of the European Union ("CJEU" or "Court") ruled in the matter *Maximilian Schrems vs. data protection Commissioner* ("Schrems Case").

Facebook - Decision

The Court basically ruled that Safe Harbor is not a sufficient mechanism for the transfer of personal data to the US. According to the court, because personal data transfered from the European Union to the USA, without any limitation or differenciation are beeing stored and used by US authorities, the fundamental right of privacy of European citizens is violated.

Facebook - Decision

The Judgement containes some general statements on data-transfer to the US. These are considered relevant to all mechanisms for data-transfer to the US, not limited to Safe Harbor.

Data protection=fundamental law

The Judgment repeatedly affirms data protection to be a fundamental right under EU law. In particular, the Court found that generalized access to data by public authorities is a violation of this fundamental right (because it compromises the right to private life under Article 7 of the EU Charter of Fundamental Rights (“ Charter“).

EU law applicable to data transfers to third countries

The Court pointed out in its Judgment that EU law is applicable to data transfers to third countries.

This aspect of the Judgement is significant as it makes clear that such transfer of data from a Member State of the European Union requires "*essentially equivalent data protection*" in the third county the data is transfered to. In conclusion, the third country has to provide for the same level of data protection as defined by the Charter

Adequate level of data protection

The Court defines the adequate level of protection for international data transfers as „essentially equivalent“ but not necessarily „identical“ to the level provided by EU law.

No adequate level of data protection in the USA

The Judgement mainly focusses on a condemnation of US intelligence gathering practices and their effect on fundamental rights under EU data protection law.

Effect on other mechanisms

- Standard Contractual clauses
- Binding Corporate Rules
- Consent

They all bear risks, as the all rely on an adequate level of data-protection

Risks for franchisees/franchisors

In case data-transfer is found illegitimate, the authorities can claim fines up to EUR 300.000,00 (in Germany, laws in other European countries vary, but are similar).

Risks for franchisors

Franchisees can attempt to terminate their franchise-agreements in regard to the Judgement, as the Judgement and its main statements might make fulfillment of certain contractual obligation impossible.

Privacy Shield

Since the Schrems Case was resolved by the Court, there have been negotiations between EU and US regarding a new agreement, the "*EU-US Privacy Shield*".

Privacy Shield

As of May 2016, it remains uncertain if and how the Privacy Shield might adress the main statements of the Court. It is expected that the Privacy Shield in its current draft will – in case it is brought to Court – not convince the Judges.

Thank you for your kind attention!

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