GIAMBRONE LAW

Franchise Agreements under Italian Law

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Introduction - Historical Overview

The English word "franchising" derives from the French word "franchise" which, in turn, derives from the Franco-German term "franck". All these terms indicate a situation of freedom and autonomy. The origin of the word goes back to the Middle Ages when, in fact, it was used to describe the granting of specific benefits, in terms of autonomy, to both states and citizens.

At the beginning of the 19th century, in the United States and in northern Europe, there was a proliferation of a type of contract called "contract of the beer", which indicated a contract for provision of exclusive supply through a network of local distributors that used both the signs and the name of the producer. However, franchising, in its modern meaning, started again in the United States, but only in the second half of the 19th century. The historical reason behind the development of this commercial practice was the economic situation in the aftermath of the Civil War.

In that scenario, all the Confederated states represented a new market for industries and commercial operators to conquer. However, due to the lack of founds to invest for the direct opening of other points of sale, these operators preferred to spread their products through the decentralization of their sale vehicles, carried out through the decentralization of all those distinctive signs that represented their commercial identity. In the United States, the real apex of the diffusion of this practice took place only after the Second Word War, also due to an increasing level of technology and to a completely new concept of "service" that started to be perceived by the general public. This incredible penetration of franchising inside the social and commercial reality of the country invited the unavoidable interest of the legislator and the courts, which tried to set up a wide and exhaustive legislative framework to discipline the subject.

In Europe, on the other hand, a direct permeation of franchising did not begin until the 1970s, when the phenomenon made its first appearance, at very different times and degrees in the various countries. The process of implementation of the United States franchising model in Europe took place in two separate steps: the first step was characterized by the exploitation of the European market by the United States franchisors, and the second was characterized by an enfranchising of the European market, which reached a significant level of diffusion of the franchise model among European contractors only.

Definition of Franchise Agreement in European Community Law

European Community Law, as legislation, gave its first definition of a franchise within the context of competition law. In particular, EEC Regulation Number 4087/88 offered one of the most successful notions of a franchise agreement, which emerged as a result of all the definitions given over the years by scholars and case law in the major European countries. This definition is:

"… ' franchise agreement' means an agreement whereby one undertaking, the franchisor, grants the other, the franchisee, in exchange for direct or indirect financial consideration, the right to exploit a franchise for the purposes of marketing specified types of goods and/or services; it includes at least obligations relating to:

- The use of a common name or shop sign a uniform presentation of contract premises and/or of transport,
- The communication by the franchisor to the franchisee of 'know-how'
- The continuing provision by the franchisor to the franchisee of commercial or technical assistance during the life of the agreement."

Before the issuance of EEC Regulation Number 4087/88, the European Court of Justice, in the judgment concerning the *Pronuptia* case on 28 January 1986, offered the first general (but incisive) description of franchising, by stating that it is a commercial horizontal relationship between two relailers.

EEC Regulation Number 4087/88 represented the natural follow-up to this description. Subsequently, the European Franchise Federation (EFF) adopted, in its Code of Ethics, a definition of franchising, which is in substantial agreement with the definition given in the Regulation (it was, in fact, prepared in consultation with the European Commission).

This definition is:

"…franchising is a system of marketing good and/or services and/or technology, which is based on a close and ongoing collaboration between legally and financially separate and independent undertakings, the Franchisor and its Individual Franchisees, whereby the Franchisor grants its Individual Franchisee the right, and imposes the obligation, to conduct a business in accordance with the Franchisor's concept. Tha right entitles and compels the financial consideration, to use the Franchisor's trade name, and/or trade mark and/or intellectual property rights, supported by continuing provision of commercial and technical assistance, within the framework and for the term of a written franchise agreement, concluded between the parties for this purpose."

A footnote also offered an effective definition of "know-how", stating that this can be defined as a "body of non-patented practical information, resulting from experience and testing by the franchisor, which is secret, substantial , and identified" is discussed, in depth, later in this chapter.

This chapter demonstrates how this wide scope of the term "franchising", accepted by the European Court of Justice, strongly influenced the Italian legislator in the process of drafting the Italian law on franchises.

Another significant contribution made by European Community law is the distinction in different types of franchises. The case law of the European Court of Justice acknowledged three primary types of franchises:

(1) Service franchise, when the franchisee is allowed to be part of a chain belonging to the franchisor and availing of the features of the latter;
(2) Manufacturing franchise, when the franchisee is allowed to manufacture the products following the specifications of the franchisor, and the following sale of such products using the trade mark of the franchisor; and
(3) Distribution franchise, when the commercial relationship is limited to the assignment of a point of sale, availing of the sign of the franchisor.

To a certain extent, scholars raised doubts that the binding commercial relationship that exists between franchisor and franchisee could negatively affect competition by imposing limitations on the general principle of free economic initiative. As a matter of fact, the European Court of Justice clarified that all those clauses that, somehow, imposed territorial restrictions on one operator(in this case , the franchisee) were liable to affect competition.

Nevertheless, the same European Court of Justice, in the *Pronuptia* case, concluded the debate on this issue by stating that it is possible to tolerate some restrictions to competition, namely, possible restrictions imposed by the franchisor on the franchisee, even if the are in partial breach of Article 85 (now Article 81) of the EC Treaty, provided that the ultimate interest of the consumers is protected..

One scholar noted how European Community law did not take a position about the termination of a franchise agreement while, in most countries, this specific moment of the relationship between franchisor and franchisee received maximum attention; in the United States, for instance, there are specific rules in the statutes on franchise. More precisely, the general United States approach to this issue is the necessity of the existence of a good cause (or just cause) to terminate the agreement, even if it reached its natural term-time.

Origin and development of Franchising in Italy

In Italy, before Law Number 129 of 2004 (the Franchising Law), the word "franchise" represented a contractual scheme that had the purpose of encouraging the decentralization of industrial and commercial entities in their distribution processes.

In Italy, as well as in the rest of Europe, the development of franchising went through the same initial difficulties, and it took place in two phases: the first phase is characterized by the presence of a united States franchisor and a Italian franchisee, while the second one is characterized by the presence of an Italian franchisor and an Italian franchisee.

The recent gradual liberalization of the retail market let to an increase in competition and innovation. In this context, new and more flexible forms of organization emerged, and franchising, in particular, underwent a strong expansion.

A bright example of the diffusion of franchises in Italy is the commercial history of Luigi Buffetti S.p.A., a company established in 1852 and active in the supply of office supplies and equipment. In the 1930s, this company decided to transfer its "know-how" to a number of distributors under the brand name of Buffetti and, "*de facto*", transformed them into affiliates. Today, Buffetti S.p.A. features more than 1,000 points of sale, through franchise agreements.

In Italy, before the Franchise Law, a franchise agreement was considered an atypical contractual instrument. In this kind of contractual structure, either the associative feature or, the distribution purpose could be the stronger feature of the agreement. The primary difficulties and the major problems that arose over the years, in relation to franchise agreement, stemmed from the lack of a commonly used definition and lack of defined characteristics of a franchise operation. Jurisprudence attempted to give uniform discipline to the subject. Some crucial ruling before 2004, the year of the issue of the first Italian Franchise Law, are:

(1) The franchisee retain its autonomy and, therefore, the franchisee's personnel cannot be considered as employees of the franchisor;
(2) A franchise agreement is to be considered as such when there is a partial integration between the franchisor and the franchisee and, therefore, there is the creation of a structure which is decentralized, but somehow integrated;
(3) A franchise agreement is an atypical agreement based on correspondent performances; and
(4) The basis of a franchise agreement is the transmission, from the franchisor, of an asset of active position (trade mark, "know-how", commercial strategy, and the like) versus the payment, by the franchisee, of a sum of money called "royalties". The outcome of the activity undertaken by the franchisee is extraneous to the agreement.

All the judgments, and many others, gave significant support to the attempt to identify the subject and to ease the juridical approach to it but, obviously, they were not sufficient.

Additionally, the traditional structure of franchise agreement, as explained in the judgment, has, over the years, been replaced by a hybrid version of an agreement in which the distributor does not limit itself to selling the products, but also is involved in the production process. Consequently, this involvement often occurs in return for the benefit to distribute in certain selected areas. The increasing proliferation of this ambiguous commercial practice further emphasized all the limits existing in the traditional contractual schemes utilized so far and pushed the legislator to seriously think about the necessity to draw up a legislative framework for the whole subject.

Issue Affecting a Uniform Definition in Italy

Among European countries, only France and Spain could feature a legislative discipline of franchises. Until very recently, all the other countries seemed to ignore this commercial practice, at least from a legislative point of view.

However, according to most scholars, this lack of discipline was one of the main reasons for the huge proliferation of franchises in Europe in the last few decades. In this context, the fact that the commercial relationship was completely left to the autonomy of the parties strongly encouraged operators to avail of this formula, which appeared flexible and could be adapted to any situation. The reverse side was that this complete lack of discipline made it impossible to determine a consistent definition of a franchise and, as a consequence, generated a lot of controversies.

In 2002, for instance, an important textile factory located in the Northeast of Italy executed an agreement with a large garment retailer in Sicily. The content of the agreement provided for the sale of clothes from the factory to the shop, which undertook to sell them according to the conditions set forth in the agreement.

In 2004, the textile factory was called before the Court of Treviso upon summons initialed by the shop in Sicily, which claimed that this agreement was a franchise agreement and therefore presupposed a number of fulfillments that the termination of the agreement and claimed for damages. The plaintiff stated that the assumed franchisor was in default in

respect of a number of contractual obligations. In particular, the plaintiff complained of having suffered heavy losses because of the investments that were made in the shop, which did not produce the foreseen results in terms of proceeds.

The plaintiff also claimed that the improvements made at the point of sale, as well as the prices applied, were a consequence of precise clauses of the agreement executed and since the defendant did not carry out (as a franchisor, it was supposed to) any market evaluation before initiating the assumed franchising relationship, those princes were too high and, therefore, the clothes could not be sold and the investments made could not be recouped.

Moreover, the plaintiff claimed that the assumed franchisor did not take any care with the selection of the collections supplied for sale, not followed any other marketing strategy that could provide an incentive to the sale of the products in Sicily. Further, the plaintiff stressed that the defendant was under the contractual obligation to provide, at its own costs, software for the management of the point of sale; the failed functionality of this software made it impossible to draft an inventory and to follow the trend of the sales. Finally, the plaintiff furnished a list of the main fulfillments that the Franchise Law provided for a franchise agreement and which the presumed franchisor did not fulfill.

What the plaintiff failed to explain and prove was the reason that the agreement should be considered as a franchise agreement, nor did it explain why the Franchise Law was to be applied to the case under investigation.

In fact, the legal defense strategy was based on the simple challenge of the assumption that there was a franchise agreement at all and of the assumption that the Franchise Law should be applied.

Moreover, since the buyer did not pay for the goods, the defendant had already sent a letter terminating the agreement, as expressly allowed by the Italian Civil Code and as specifically allowed by an express termination clause contained in the agreement executed.

The entire case revolved around the precise definition of a franchise agreement, its limits, and its minimum standard contents. The agreement executed by the parties was proffered by the defense and was deeply analyzed by the Court, who concluded that it could not be deemed to be a franchise agreement under the definition of "franchise" provided by EC Regulation 4087/88, because a number of typical franchise contract clauses indicated in this Regulation were missing. In particular, in the agreement executed by the parties, there was no reference to any "entrance fee", nor to any "royalties" to be paid by the plaintiff, and the use of the trade mark was completely gratuitous.

Moreover, there was no mention of a minimum amount of garments to be bought or sold; the assortment of garments to be sold was completely remitted to the discretion of the plaintiff; no obligation existed on the defendant, under the agreement, to carry out market analysis, nor to contribute actively in the marketing of the garments supplied to the plaintiff. Last, but not least, the Court clearly established that Law Number 129/2004 could not apply, since the execution of the agreement dated back to 2002.

The court decided that there was no franchise agreement because of the lack of those substantial elements that were necessary to configure a franchise agreement under European Community law and an agreement stipulated in 2002.

This is only one example of how market operators found it difficult to agree on a uniform definition of a franchise and how this lack of a clear definition under the Italian law generated a lot of confusion in commercial practice, largely resulting in early termination of agreements.

Franchise Law

Enactment of the Franchise Law

The Franchise Law (Law Number 129/2004) entered into force on 25 May 2004. This was an extraordinary result that came after a long and arduous legislative path, which went through two change of government. The issuance of the Franchise Law occurred more than thirty years after the first appearance of a franchise agreement on the commercial landscape in Italy. This means that, for more than thirty years, franchise agreements had been executed and implemented without a legislative framework in place.

The reason for this substantial delay in the issuance of a law ruling this sector of business is that most of the market players deemed a legislative discipline to be completely useless – and maybe even counterproductive – first, because the data available showed that the expansion of this contractual instrument was remarkable and, second, because there was

a relatively limited body of case law on such agreements, that is, there were a relatively tolerable number of abuses related to these instances of commercial cooperation.

On the other hand, market players were afraid that a strict legislative discipline could limit a business tool that, so far, had proved to be flexible and therefore able to be adjusted to different commercial situations. The same fear existed in other countries like Germany, where the Association of Franchising succeeded in fighting to avoid the issuance of a franchise law, through the adoption of a rigid Code of Conduct.

The long itinerary of the Franchise Law started in 1997. Between 1997 and 1998, five legislative projects on franchise agreements were submitted by some members of the Italian Parliament. This generated a sort of concern in the class associations that, until that moment, had preferred to remain extraneous to the debate. Such concern was, once again, the fear that a franchise law could impose excessively strict limits on free commercial cooperation between the parties.

Subsequently, the *Associazione Italiana del Franchising* (Italian Franchising Association, or AIF) passed from a passive attitude to an active one, starting to push for the issuance of a franchise law, provided it was a disclosure law only.

Restricted Committee was appointed and started to work on the five different projects submitted between 1997 and 1998, also received the main proposals from the AIF. All these sources had a common denominator: to impose the obligation, on the franchisor, to perform strict disclosure in favor of the future franchisee. Indeed, this principle was incorporated in the draft to be submitted to Parliament for discussion and approval.

In 2000, the draft discussed and approval by one branch of Parliament was transmitted to the other branch under title of "Disposition for the discipline of franchising". The second branch of Parliament could neither discuss nor approve it, because of a change of government and the resultant change in the composition of the Parliament that took place at that time.

The interest in the subject remained high under the new government as well, and the project to issue a law ruling franchise agreements stayed on the agenda. The starting point was the draft approved by the first branch of the Parliament in 2000.

Another Restricted Committee was appointed and another analysis of the draft began. There were hearings with experts, scholars, and class associations. The Government itself submitted a number of amendments. This led a new version of the draft in 2002, not very different from the original version dated in 2000.

In 2003, after the submission of some more amendments, the first branch of the Parliament again approved the final text of the Franchise Law. This text was transmitted to the other branch of the Parliament, where it was finally approved in 2004.

During these years, a lively debate took place about the kind of intervention the legislation should apply. The majority was convinced of the necessity to improve the disclosure mechanism between the parties. However, while one faction thought that this was a perfect occasion to also discipline the content of the franchise agreement, the other faction was of the opinion that the principle of contractual freedom between parties should prevail.

In the end, this second tendency triumphed, strongly supported by both the AIF and b y market players: therefore, the Franchise Law limited itself to providing for a higher level of transparency to be implemented in the very early stage of the negotiations between the parties, without intervention in the very content of the agreement, which was left to the autonomy of the parties. This tendency safeguarded the flexibility (to be interpreted as flexibility in the balance of contractual obligations between the parties) of this contractual instrument, and allowed for the widespread use of franchise agreements in the commercial context.

However, to rule properly regarding the information phase in the context of a franchise agreement, it was necessary to identify the weak party, that is, the party that needed to be informed more accurately about the content of the contractual relationship. Obviously, the weak party was identified as the franchisee.

The recourse to the general principles set forth by the Italian Civil Code seemed insufficient to grant a real equality between franchisor and franchisee, especially considering that the franchisee is often someone who does not have any specific experience in trade. Finally, therefore, the legislator decided to apply to the franchise agreement the same principles of protection conceived for investors within the scope of securities, which provides for the widest disclosure to

be implemented by the strong party of the agreement in favor of the weak party (in that context, the investor in securities).

Principal Features

According to Italian law, a franchise agreement is classified as a bilateral agreement based on a valuable consideration. For the very first time in Italy, Article 1 of the Franchise Law offers a generally applicable definition of a franchise. This encompasses every business relationship between two legally and financially independent undertakings, whereby a franchisor grants a franchisee the license of a bundle of intellectual or industrial property rights, together with the necessary technical and commercial support. The similarity with the European Community definition of a franchise is fairly evident.

Regarding the scope of application of the law, it is important to remember that, on one hand, the legislator decided that the definition contained in Article 1 of the Franchise Law had to cover only franchises concerning the marketing of goods and services, leaving out industrial franchises as well as wholesale franchises, while, on the other hand, the legislator decided to cover both “master franchises” – that is, the agreement by which a company grants to another (independent from the former), against the payment of a consideration (direct or indirect), the right to use franchise with the purpose of executing franchise agreements with one or more third parties – and “corner franchises” – that is, the agreement by which the franchisee, using one of its available distribution spaces, creates a “corner” , exclusively dedicated to the dealership of products inherent to the franchise agreement.

The first explanation stated by the legislator refers to the absolute independence between franchisor and franchisee, under both the economical and juridical point of view. The independence that has been underlined between a franchisor and its franchisee takes its origin from the need to make a very clear distinction between a franchise agreement and any sort of employment relationship.

In terms of obligations, the franchisor must transmit to the franchisee a number of faculties and rights, while the latter must pay the consideration, which may be structured as follows:

(1) A fixed amount (entrance fee), which is determined on the basis of the territory covered by the agreement and, therefore, on the basis of the expected turnover; and
(2) A variable amount (royalties), which generally consist of a fixed amount, irrespective of the proceeds, plus another amount that is calculated on a yearly basis, to be determined on the basis of the volume of business effectively carried out.

The consideration to be paid by the franchisee to the franchisor within the context of a franchise agreement must have a pecuniary nature.

Another provision set forth by the Franchise Law is that the juridical entity involved in the franchise relationship, according to the definition in the Franchise Law, must be an entrepreneur.

The content of a franchise agreement is the transfer of industrial and intellectual property on a number of assets (trade marks, signs, copyrights, “Know-how”, patents, and the like). In the respect, a strict similarity with the European Community definition emerges in the better known as the “Know-how” of a company.

The definition of “know-how” is very close to that provided by European Community law. Indeed, the only difference with the definition provided by Article 1 of EC Regulation Number 2709/99 (which recalls the one provided by EEC Regulation Number 4087/88) is that of “franchisor”. This difference is due to the fact that the Community Regulation regulates a number of different commercial relationship and not only franchise agreements.

According to the Italian Franchise Law, the primary subject of a franchise agreement must be considered the “know-how”, which must have three main characteristics:

(1) It must be secret, but this does not mean that it must be a worldwide secret, simply that it must not be well known or easily accessible;
(2) It must be substantial, but, in this respect, the law uses terms which relate much more to the commercial aspects than to production; and

(3) It must be identified, that is, it must be described in a way that will allow a check on compliance with the requirements of secrecy and substantiality.

Franchise Agreement

Form

A franchise agreement must be in writing. If it is not in writing, the agreement is null and void. This rule aims at protecting the franchisee, who must be allowed to submit the agreement to its advisors before the execution.

Duration

One of the must significant innovation of the Franchise Law is the obligation pending on the franchisor to guarantee a minimum duration for the franchise agreement. This minimum duration is three years. This obligation aims at allowing the franchisee to write off the initial investment for undertaking the franchising adventure.

Before the Franchise Law entered into force, franchisors would execute short-term agreements with their franchisees, with termination clauses that provided for the immediate termination of the agreement, could not continue using the trade mark and other features of the franchisor, irrespective of the commercial cooperation. No case law succeeded in changing this unfair practice.
In this respect, the Franchise Law represents a big step for the rights of the franchisee, even if there is no trace of any effective sanction in case of violation of this time limit (e.g., a franchise agreement having a duration of less than three years), nor is it possible to apply Article 1339 of the Italian Civil Code, which provides for the automatic insertion of the clauses imposed by law.

The most authoritative doctrine suggested that the more efficient sanction would be the automatic prorogation of the agreement up to three years any longer period, as is deemed necessary for the writing off of the investments made by the franchisee. However, the only remedy currently existing for the franchisee is to start a legal action after the termination of the agreement, and claim for damages.

A claim for damages also may be initiated in case of an agreement that has a duration of three years. In fact, the law indicates that the duration should be sufficient to allow the franchisee to write off the investments sustained, and three years may not be a sufficient enough term. To calculate the damages suffered by the franchisee, the parameter of amortization will be used by the judge or the arbitrator. Obviously, the default of the franchisee exempts the franchisor from any liability related to the advanced termination of the franchise agreement.

Minimum Content

The Franchise Law expressly provides for the minimum standard content of the franchise agreement. A checklist of significant elements is contained in the Law. This list may be divided into essential elements, and ancillary elements. The lack of one of the essential elements makes the agreement null and void, while the lack of the optional elements does not affect its validity:

The essential elements are:

(1) The indication of the exact amount of money the franchisee should invest (including the entrance fee) to enter into the franchise agreement;
(2) The procedures for the calculation and for the payment of the royalties and, when applicable, the indication of the minimum proceeds to be achieved by the franchisee;
(3) The indication of a possible (but not mandatory) territorial exclusivity in relation to other franchisees
(4) The specification of the “know-how” provided the franchisor to the franchisee;
(5) The recognition of possible improvements in terms of “ know-how” brought about by the franchisee;
(6) The indication of services offered by the franchisor in terms of technical assistance, setting up, personnel training, commercial assistance , and the like;
(7) The clear indication of the renewal of the agreement; and
(8) The clear indication of the termination of the agreement.

During the negations preceding the execution of the franchise agreement, if the franchisor mentions certain ancillary elements to encourage the counterpart to stipulate the agreement, the Franchise Law provides for the mandatory insertion, expressly and in detail, of those ancillary elements into the written agreement.

Reciprocal Obligations

In General

By analyzing Articles 4 and 5 of the Franchise Law, which provide for the obligations pending on the parties, it is evident how the legislator considered the franchisee as the weak party in the franchise agreement.

Indeed, there are a number of additional obligations pending on the franchisor only, especially in terms of disclosure, pre-contractual correctness, and good faith compliances.

Obligations for the franchisor

First, the legislator requires a franchisor that intends to undertake one or more franchising relationship to possess a well-tested commercial pattern (what is called a market plan). This should be created by the franchisor itself and should include details such as the furnishing of the point (or points) of sale. The market strategy used by the franchisor must be tested, to avoid fraudulent setting up of distribution networks with no market base. In case of lack of this prerequisite, the relative agreement is not void. However, this issue would be a ground for a franchisee to claim for damages.

Second, a franchisor is under the obligation to give to its franchisee a copy of the franchise agreement to be executed, in addition to the attachments providing information about the franchisor and its distribution network, at least thirty days before the assumed date of well-grounded reasons of confidentiality.

Further information obligations for the franchisor have been set forth by Ministerial Decree number 204 of 2 September 2005. Within thirty days before the execution of the franchise agreement, the franchisor must deliver to the franchisee a list containing all the other points of sale of the franchise (both direct or through franchisees) operating in the world. On the request of the franchisee, the franchisor must deliver a list with the location and availability of at least twenty other franchisees.

In case of a total number of franchisees lower than twenty, the franchisor must deliver the complete list of all the franchisees. Moreover, the franchisor must indicate any variation in the list as well as any legal process or arbitration (even if concluded) in which it has been involved.

The franchisor also must fulfill other obligations that, however, are not expressly set forth by the Franchise Law, namely:

(1) The obligation to provide the franchisee with the goods to be distributed;
(2) The obligation to provide the franchisee with the license to use the trade mark; and
(3) The obligation to provide the franchisee with adequate "know-how".

Obligations for the Franchisee

The franchisee is under the obligation not to transfer the main office, if indicated in the franchise agreement (the "location clause"), unless expressly authorized by the franchisor or unless it is compelled by reasons of *force majeure.*
His is also obliged to comply with the confidentiality rules set forth in the agreement in relation to the activity carried out as implementation of the franchise agreement, even after the termination of the franchise agreement.

The franchisee must fulfill other obligations that, however, are not expressly set forth by the Franchise Law, namely, to pay the entrance fee and the royalties.

Conciliation

In case of controversy, the Franchise Law specifies that parties may seek conciliation before resort to a court or to a board of arbitrators. This is not a mandatory step, but a mere facility provided for the parties, which becomes mandatory only

if they insert it in the agreement. In the case, the judicial process may not be started and any recourse to the judicial authority will be suspended until the attempt for conciliation has been carried out.

The attempt for conciliation is a very common practice in Italy. Indeed, it is used in different sectors of law (employment agreements, corporate law, financial intermediation, banking law, and the like).

The legislator identifies the natural site for the performance of a conciliation attempt as the Chamber of Commerce of the territory where the franchisee maintains its main office. Any documents related to the conciliation procedure are exempted from any costs or taxes or duties of any kind.

The agencies appointed to perform this attempt at conciliation between the parties may be public or private entities, but must be registered in a special register with the Ministry of Justice. Any of these agencies are under the obligation to file their regulation of procedure with Ministry. The regulation of procedure of any agency must have a minimum standard content ruling the following aspects: confidentiality of the procedure and criteria to appoint the entity in charge of carrying out the conciliation.

Compensation for Damages

In a franchise agreement, the law foresees that in case of disclosure of false or incorrect information by one party, the other party may apply for the nullification of the agreement and may claim for damages. The question is: what kind of damages may be blamed in the pathological phase of a franchising relationship?

Commonly, under Italian law, the damage to be compensated consists of two parts: the emerging damage and the loss of profits.

Obviously, all the investment expenses that have already been written off should not be compensated, nor those expenses that may be related to any other activity (for instance, the rental fee for the shop or the purchase of generic goods). While the loss of profits may surely be compensated, it is not easy to calculate such loss. In fact, it must be calculated taking into account both the past relationship and the future residual relationship. The result is not straightforward, particularly as the criterion to be utilized is based on the estimate of the possible amount of the proceeds that could have been gained, if true information has been provided.

The rationale of this rule is to discourage the franchisor from releasing false or incorrect information about its business. Indeed, in case of a judgment of nullification of a franchise agreement, the higher detriment will be borne by the franchisor, who will be obliged to keep this event in all its future records.

Practice of Franchising in Italy

On June 2010, at the Chamber of Commerce of Milan, the Italian Franchising Association (*Assofranchising*), introduced the final data about the franchising trend in 2008.

The first evident data is that franchising is an increasing practice in all sectors under analysis. The business volume is higher than EUR 21 billion, an incresse of 1.4 per cent, compared to 2007.

In Italy, there are currently 852 franchisors. Also the number of employees increased by 2.2 per cent, with a total of 182,215 people working in the franchise sector.

Conclusion

The reason for the increasing development of the franchises worldwide is the fact that this practice allows the producer (“franchisor”) to enhance the capillary distribution of its products and allows the entrepreneur (“franchisee”) to maintain its juridical and economic independence, while availing of the reputation and the “know-how” of the producer.

According to experts, the reason for the increasing proliferation of franchises in Italy over the years has been, among others, the great autonomy left to the parties to start and to terminate their commercial cooperation without any

legislative reference to limit their autonomy. These circumstances justified the main fear of market operators that a franchise law could somehow negatively affect the widespread use of franchises in commercial practice.

However, the data demonstrate that, until the present time, this degeneration has not taken place. Also, this would mean that the Italian Franchise Law has been a good law. Those who were afraid to face radical restrictions in the contractual flexibility of franchising through the instrument of the law have apparently given a favorable judgment of the law issued, as is evidenced in an even wider diffusion of franchises.

It is evident that the legislator attempted to conciliate the need to protect the parties'rights within the context of the commercial affiliation, while also remaining at a distance from any inappropriate invasion within the context of the contractual freedom of the parties. Besides, the long prelude to the Italian Franchise Law led to a rather satisfactory result in this respect.

In particular, the Franchise Law seems to combine the two different ambitions with a rare balance. Indeed, the little entrepreneur, aiming at starting a commercial relationship with a big multinational company through the means of a franchise agreement, is finally protected in its rights by a number of pre-contractual behavior obligations pending on its counterpart. In spite of this, the temptation to over-discipline the content of the agreement has been successfully avoided.

Finally, over the next few years, Europe will face an even greater challenge from Far East competition over consumption goods than it does today.

The instrument of franchise agreements could represent a significant tool in the hands of European trade marks, either for consolidation in the internal market, or in an attempt to establish a presence in other markets to compete with foreign competitors in their own countries.

In Italy, especially, there are a number of small sectors of business whose importance is totally related to their trade marks and whose survival really depends on their capacity to globalize their offer. Franchises could well be the answer.

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