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Cross-Border Provision of Rights Included in the Comprehensive Business License Agreement

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Abstract:

In today's global economy, emerging companies often enter into agreements with vendors, suppliers, partners, distributors, and other individuals or entities in different countries that require licenses or transfers of intellectual property (IP agreements). Engaging in cross-border transactions can provide opportunities to expand into new markets establish a cost-effective supply chain and obtain access to new and advanced technologies.

However, each country – and jurisdictions within a country – may have different approaches to contract terms (such as warranties and enforceability), as well as different rules relating to the licensing, transfer and ownership of intellectual property. While courts in most countries will respect the parties' agreement to apply a specific governing law to a contract, it is still important to understand the laws of the applicable jurisdictions of the counterparty when negotiating cross-border IP agreements, as those laws may still apply to certain aspects of the agreement.

This article is intended to identify some – but not all – considerations to keep in mind when negotiating cross-border transactions, focusing specifically on IP agreements.

Keywords: Cross-border, franchising, UNIDRUA, Lex mercatoria, Uzbekistan.

Despite the great interest in franchising, its legal nature is relatively new for domestic legislation and requires the development of a special draft law. Differences in the legal regulation of franchising agreements, the absence of a single set of rules for its conclusion, ambiguity in the legal terminology of different countries cause problems in the regulation of cross-border transactions and require their resolution.

Franchising is one of the complex civil-legal contracts in practice, according to its theoretical concept and structure. In science, there is still no unified view on the subject of the contract, its place in the system of civil-legal agreements, what constitutes a serious breach of the contract. The current issue is complicated by factors such as the complexity of contractual relations, the risks of both parties, and the imperfection of contract regulation in most countries. The presence of such an element in relation to the content of the contract creates even more difficulties inherent in cross-border transactions. An example of this is the mandatory norms of the country where the current law is applied[1].

International (cross-border) franchising has firmly entered the reality of modern commercial practice. This way of doing business allowed entrepreneurs to create a business under internationally famous brands and production technology based on the franchisor's many years of experience. And for the licensor, it opens the prospects of entering new markets, expanding its network, as well as earning. However, cross-border franchising is not without its controversial aspects. A potential licensee must make a significant financial investment in order to obtain a franchise and fulfill the terms and conditions of the licensor. On the other hand, the franchisor bears significant financial and reputational risks if its counterparty is not sufficiently careful or turns out to be dishonest. For these reasons, in international practice, cross-border franchise relations include a number of agreements, in particular, in addition to the main agreement, a confidentiality agreement, a non-disclosure agreement and an agreement on disputes. In addition, such relations are accompanied by all the difficulties inherent in operations complicated by a foreign element. Taking this into account, issues of legal regulation of cross-border franchising are widely discussed in legal literature.

Cross-border franchising is a complicated legal relationship with a foreign element. Its essence, on the one hand, is provided by the licensor to another party - the licensee, for a fee, to the results of intellectual activity and means of personalization (franchising), as well as business methods and other commercially significant information, and at the same time, the rights to such objects are manifested in the cross-border transfer.

If the licensee is a foreigner, will the additional franchise agreement concluded between legal entities of the same country have a cross-border nature? According to some researchers, the interaction of the parties to a contract complicated by a foreign element with the legal systems of two or more countries, as well as the international character of the object of legal relations, can be.

According to the doctrine of private international law, a foreign element is expressed as a subject, object or legal fact. However, the cross-border licensee relationship is implemented through two agreements between the licensor and the sublicensee and between the sublicensee and the ultimate licensor. In our opinion, it would not be correct to classify additional franchising relations as cross-border based on subjective criteria. The legal fact, that is, the actions of the sublicensee and the licensee aimed at concluding a contract, is also related only to the legal system of the country where the parties have citizenship. As for the object, in this case the object of both contracts forming the main franchising relationship is the same - a set of exclusive rights (franchising). Thus, if the object of legal relations is of foreign origin, as a result, the subfranchising agreement on the transfer of a foreign franchise will also have a cross-border nature[2].

The question arises: why is it important to regulate the cross-border nature of the contract? It is known that the legislation of Uzbekistan, like in other legal systems, allows the parties to a cross-

[1] Shakhnazarov B.A. Transgranichnaya peredacha prav na obekti promyshlennoy sobstvennosti: monogr. - M.: Prospect. - 2012. - S. 6.

[2] Kanashevsky V.A. Dogovor mejdunarodnogo franchisinga: soderjanie i kollizionnoe regulirovanie // Zakonodatelstvo. - M.: Garant. – 2013. – No. 9. Sorokin I.S. Pravovoe regulirovanie dogovora kommercheskoy kensessii (franchise). Kaliningrad: M-vo vnutrennix del Rossiyskoy Federatsii, Kaliningradsky yuridichesky institute - 2010. - S. 62. Titova M.N. O meste franchisinga v sisteme pravovogo regulirovaniya investmentnoy deyatelnosti. Law and economics. – 2014. – No. 9 (319). - S. 25-29.

border transaction to choose the law. In particular, the parties can choose the law of a particular country; ensure the application of international conventions, as well as the rules of customs accepted in a particular business field.

It should be noted that currently there is no single model franchise agreement at the international level. The basis of the regulation is the "lex mercatoria" documents of international organizations. In the framework of these international organizations, large-scale work on the unification of franchising rules was carried out, and the regulatory system was adapted to international requirements. For example, the World Intellectual Property Organization developed a guide to franchising in 1994. After a comprehensive analysis of franchising regulation in different countries of the world, UNIDRUA developed the International Master Franchise Agreement Manual in 1998 and the Model Law on Franchise Agreement Disclosure in 2002. Finally, in 2000, the International Chamber of Commerce published a model International Franchise Agreement. However, these model contracts on franchising do not fully satisfy the interests of the parties. First of all, the interests of the parties are different, secondly, there is no unified normative framework at the international level, and thirdly, it is necessary to refer to the legislation of several countries when applying the provisions of the model contract. The most optimal solution for the parties is a system of guarantees for setting and implementing the terms of the contract.

The problem with using the above-mentioned "Lex mercatoria" sources is that they are rarely used in the courts of Uzbekistan. Principles such as UNIDRUA and INCOTERMS are often used to interpret subsidiary or legal concepts. Therefore, it is not recommended for the parties to franchise agreements to choose the transnational norms applicable to legal relations, if one of these parties is a subject of Uzbekistan. This means that the legislation on the regulation of cross-border franchising relations in Uzbekistan has not yet been adapted to international requirements, and its provisions have not been improved.

As for the regulation of franchising relations at the national level, countries such as Moldova, Kazakhstan and China have adopted special laws on franchising. In some countries, franchising is very widely developed, but there is no separate legal document related to its regulation. However, there are a number of these documents that contain very specific franchising rules.

Thus, in the field of franchising in the USA, federal laws such as the "Automobile Brokerage Franchise Act" of 1956, the "Oil Sales Market Practices Act" of 1978, and the "Rules of Mandatory Pre-Sale Information" apply. In France, franchising is regulated by the 1989 law "On the development of commercial enterprises and the improvement of their economic, legal and social environment". In Germany and Spain, franchising is regulated by national contract law.

It is known that franchising relations in Uzbekistan are regulated by the norms of the FC regarding the comprehensive business license agreement. According to Article 1190 of this Code, in the absence of an agreement between the parties on the choice of the applicable law, the law of the executing party, which is decisive for the content of the contract, shall be applied. However, in the case of a franchise agreement, special conflicts of laws are established - as a general rule, the law of the country in which the user is allowed to use the set of exclusive rights and rights belonging to the right holder applies. There are conflicting opinions among industry experts about the validity of this legal regulation. In order to answer this question, it is necessary to determine which of the parties to the franchise agreement performs the decisive work. There is no clear opinion on this issue either. For example, A.V. According to Asoskov, "the main focus of the franchise agreement is on the obligations of the user to produce products or provide services using trademarks and other intellectual property objects provided by the right holder".

According to other sources, decisive performance is carried out by the right holder, because the object of the contract is the transfer of a complex of absolute rights. On the other hand, there are often situations where the licensor enters into agreements with persons in several countries. In this case, Article 1190 of the FC of Uzbekistan, in the absence of the will of the parties, the law of the licensor's country shall apply[3].

In recent years, from the point of view of financial regulation, in the practice of science and law enforcement, the issue of the need to adopt a special law on franchising has been emphasized several times. There are several reasons for this:

First, in some countries, the concepts of "franchising" and "commercial concession" are not the same. S.V. According to Klimov, in France, Belgium and some other European countries, the commercial privilege means the absolute transfer of the right to distribute goods. Thus, if such an agreement is concluded, the right holder cannot enter into similar agreements with other persons in this territory. However, there are no such restrictions in the legislation of Uzbekistan and Russia, so the commercial preference differs significantly in the national and European sense. Therefore, if the legislation of the country of the foreign licensor interprets the commercial privilege differently from the legislation of Uzbekistan, hidden conflicts may arise[4].

Second, in some countries, a franchise agreement is preceded by a confidentiality agreement similar to M&A transactions. In addition, many jurisdictions require disclosure of franchise information prior to signing an agreement. Chapter 50 of the FC of Uzbekistan does not allow to regulate the relationship before the franchise agreement.

Typically, a non-disclosure agreement is designed to limit the release of commercially sensitive information. For the licensor, this tool serves to ensure the use of counterparty information only for the purpose of concluding a contract. It also defines the obligations of the counterparty in case of failure of the transaction. In the FC of Uzbekistan, it is established that it is possible to conduct negotiations before concluding a contract (Part 2 of Article 363), but the content and conditions of conducting it are not specified.

In the FC of Russia, if during the negotiations on the conclusion of a contract, one party has received confidential information given to the other party, he must not disclose this information and use it dishonestly for his own purposes, regardless of whether the contract was concluded or not. In addition, the parties may establish a confidentiality regime for information that does not have commercial significance from the point of view of the legislation of the Russian Federation (Article 434.1).

Disclosure of information is one of the most important stages of the franchising agreement. At the international level, the UNIDRUA institute adopted the model law "On Disclosure of Franchise Information". In the United States, the Franchise Disclosure Document (FDD) applies. The document contains a wide range of information, from the number of open outlets to the number of bankruptcy proceedings. This information will be provided to the licensee at least 14 days before the signing of the contract.

Disclosure of information in the Russian Federation Amendments to the Civil Code of Russia in 2015 from the point of view of pre-contractual relations (introduction of Article 434.1 on the legal regulation of negotiations on the conclusion of a contract) significantly reduce this risk. In addition to the confidentiality agreement or the agreement on the procedure for conducting negotiations, the legislator provided for a number of circumstances indicating the dishonesty of the counterparty. Thus, entering into negotiations without the intention of concluding a contract, and terminating

[3] Klimova S.V. Legal regime for franchising and national and international turnover: Dis. ... candy. walk date: 12.00.03. - M., 2011. - S. 189.

[4] Vilkova N.G. Contract law and international trade. - M., "Statute". - 2004. - S. 510. Boguslavsky M.M. Mejdunarodnoe chastnoe pravo: Uchebnik. - M.: Lawyer. - 2005. - S. 604.

negotiations without grounds are considered as dishonest actions of the party. In addition, the Civil Code of Russia clearly defines the obligation of the parties not to disclose confidential information provided during negotiations. Therefore, the attempt of dishonest persons to obtain information about the licensor will lead to compensation of damages and expenses caused by the licensor during the negotiations[5].

Another feature of franchising regulation in the Russian Federation is the increased level of responsibility of the right holder. The FC of Russia determines the additional liability of the owner of the exclusive right for the requirements to the user regarding the inconsistency between the quality of the goods, works and services provided by the user under the contract (Article 1031). In addition, the joint responsibility of the right holder and the licensee for the requirements imposed on the right holder as a product manufacturer is determined.

The validity of these provisions has been repeatedly questioned in the civil sciences as they apply to franchise agreements by analogy. The question arises, why should the licensee be responsible for the licensor's actions if he does not follow the licensor's instructions? It is known that the franchise agreement puts the parties in an unequal situation. The licensor will always have more leverage at the pre-contractual stage than at the contractual relationship stage, so the licensee needs robust safeguards. However, the transfer of civil liability is not a defense[6].

According to the doctrine of civil law, responsibility arises only in the presence of its conditions - illegality of the act, damage or loss, cause and (except in cases of innocent liability) guilt. On the other hand, this measure may be related to the need for additional consumer protection to ensure full compensation for damages caused by defective goods, works or services. In our view, apportioning responsibility based on fault would be a more reasonable choice. If it is found that the licensee violated the instructions in the production of the product, and the licensor failed to carry out appropriate control, if the technical documentation or the instructions of the licensor were found to be incomplete or incorrect, or if he was able to carry out the control, then civil liability should be imposed on the licensor.

In conclusion, we can say that despite the need to adopt a special law on franchising, FC Uzbekistan and special laws currently meet the main needs of Russian franchising. However, the rules on trade preferences are not sufficiently developed to regulate cross-border franchising agreements. Inadequate definition of rules at the pre-contractual stage for foreign partners raises some issues regarding the choice of applicable law. In addition, the difference in the content of the concepts of "commercial privilege" in Uzbekistan and foreign legislation can also cause difficulties. We believe that the licensor's obligation to disclose certain information before entering into an agreement should be enforced by law. Pre-contract disclosure of franchising information has long existed in foreign law and significantly reduces the number of difficulties and disputes between the parties.

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