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Leiden
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Franchising legal frameworks: a comparative study of the DCFR, US law and Australian law regarding franchise contracts

Sriporm, C.

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Summary

Chapter 1: Introduction

Chapter one sets the framework of this PhD dissertation. This chapter first identifies that a franchise is a contractual relationship created by a franchise contract between a franchisor and a franchisee to distribute the franchisor's goods or services to the market through the franchised business operation. Although a franchisor and a franchisee are business persons, a franchise relationship is ordinarily asymmetrical because the franchisor holds greater informational and bargaining power than the franchisee. This asymmetrical relationship increases the likelihood of franchisor opportunism. A franchisor may unfairly treat a franchisee in the three stages of a franchise life cycle, from a pre-contractual stage of a franchise relationship to the end of the relationship. The franchisor's unfair or opportunistic conduct would cause the franchisee economic loss or damage.

Based on that assumption, chapter one develops an overarching research question:

Which franchise-specific law rules should be formulated to regulate the franchisor's opportunistic conduct?

In answering the research question, the first chapter indicates that this dissertation utilizes legal-dogmatic research with a comparative law method as a research methodology. This dissertation examines and juxtaposes the franchise legal framework of the European Draft Common Frame of Reference (DCFR), the United States of America (USA), and Australia to extract legal approaches to the problem. This dissertation discusses the extracted solutions to propose guidelines for formulating private law rules under comprehensive franchise legislation regulating franchisor opportunism in the three stages of a franchise relationship to protect franchisees.

Chapter 2: Definition and essential elements of a franchise

Chapter two explores the definition of a franchise. Defining a franchise will demarcate a franchise relationship from other legal relationships for the purpose of regulation. The second chapter proposes that the conclusion of a franchise contract by the franchisor and the franchisee establishes a franchise

relationship under comprehensive franchise law. Comprehensive franchise law should understand a franchise contract as a marketing contract with the following three fundamental elements: (1) the franchisor's grant of the right to conduct a franchise business, (2) the franchisor's license to use the franchisor's marks, and (3) the franchisee's payment of franchise fees. Chapter two also suggests that comprehensive franchise law regulates the formality of making a franchise contract. A franchise contract should be made in writing; otherwise, the contract is unenforceable.

Chapter 3: Regulation of pre-contractual information obligations of the franchisor

Chapter three examines the regulation of the franchisor's pre-contractual information duties. In the pre-contractual stage, a franchisor may opportunistically withhold or distort essential information about a franchisor and a franchise system; hence, a franchisee needs legal protection in this phase. The third chapter proposes that comprehensive franchise law establishes the franchisor's disclosure obligation. Comprehensive franchise law should require the franchisor to provide the prospective franchisee with a disclosure document, which is reasonably accessible by the franchisee, at least one month before (1) the conclusion of a franchise contract or (2) the franchisee's payment of monetary considerations. Comprehensive franchise law should prescribe that a disclosure document contains essential information about the franchisor, the franchise system, the franchise business, and the fundamental rights and obligations under a franchise contract.

Chapter three also proposes that comprehensive franchise law imposes the duty to provide complete, current and accurate information on the franchisor. The law should require the franchisor to ensure that the information included in a disclosure document is current, complete, and accurate at the date of the disclosure. In the end, the third chapter suggests that comprehensive franchise law constitutes a remedial regime. Under the remedial system, the franchisor's failure to perform these pre-contractual duties provides the franchisee with a legal ground for enforcing the franchisor's performance, claiming monetary compensation for loss or damage, and canceling a franchise contract.

Chapter 4: Regulation of the franchisor's ongoing obligations

Chapter four examines the regulation of franchisor encroachment and the franchisor's provision of assistance. During an ongoing relationship, a franchisor may cannibalize franchisees' franchised business by engaging in territorial encroachment in traditional or non-traditional forms. A franchisor may open a new company-own franchised outlet or license other new franchisees to operate a franchised store in close proximity to an existing franchisee's business. A franchisor may also distribute its goods or services through alternative

distribution channels, such as online sales, which compete with the franchisee's business. The fourth chapter proposes that comprehensive franchise law regulates the franchisor's encroaching conduct to protect franchisees. The franchisor may engage in those encroaching practices provided that the franchisor has offered the franchisee the right of first offer or reasonable compensation or other remedial forms to offset the franchisee's potential lost profits caused by the franchisor's encroachment.

A franchisor may not appropriately assist and support franchisees in opening and operating franchised businesses. In this case, chapter four proposes that comprehensive franchise law establishes the franchisor's duty to assist. The law should require the franchisor to provide the franchisee with initial and ongoing assistance, which is vital for launching and running a franchised business. The franchisor should be obliged to respond to the franchisee's reasonable request for support during the operation of a franchised business. Comprehensive franchise law should also designate a person who bears the costs of rendering the assistance. The franchisor should bear the costs of providing the franchisee with initial and ongoing assistance. The franchisee should reimburse the franchisor for expenses spent in providing tailor-made support. In the end, chapter four advises that the remedial system provides an aggrieved franchisee with mechanisms to compel the franchisor's performance of the duties, claim damages for the franchisor's non-performance, and cancel a franchise agreement.

Chapter 5: Regulation of transfer, non-renewal, and termination of a franchise contract

Chapter five explores the regulation of franchisor opportunism related to a franchise transfer by a franchisee and a franchisor's non-renewal and termination of a franchise contract.

First, a franchisor may abuse a franchisee by withholding consent to the proposed transfer of a franchise. To protect a franchisee, chapter five proposes that comprehensive franchise law regulates the procedure for transferring a franchise by a franchisee. Furthermore, the law should constrain the franchisor's consent to a transfer. The law should require the franchisor to have reasonable grounds for withholding consent to a transfer and to withhold its consent in accordance with good faith.

Second, a franchisor may not renew an expiring franchise contract to the detriment of a franchisee's legitimate interests. The fifth chapter proposes that comprehensive franchise law sets the notice procedure that permits a franchisee to request the renewal of the term of a franchise agreement. The law should also require the franchisor to act in good faith when refusing to renew the agreement.

Third, a franchisor may terminate a franchise contract, inflicting a financial loss on a franchisee's business. Chapter five proposes that comprehensive franchise law regulates termination of a franchise contract through termination

rules. These rules apply to termination of the contract by both parties. The rules should require a party to a franchise contract with an indefinite term to terminate the contract by giving the other party written notice of termination for a reasonable period before the termination is effectuated. The rules should require a party to a franchise contract with a definite term to prematurely terminate the contract only for legitimate grounds, including the other party's material non-performance of an obligation and other compelling commercial reasons.

The fifth chapter also advises that the remedial system of comprehensive franchise law establishes the franchisee's right to repurchase and the right to compensation for goodwill as the remedial rights distinct from other private law remedies suggested in this dissertation. Upon the cessation of a franchise relationship, the franchisee should be entitled to ask the franchisor to repurchase the remaining stock, spare parts, inventory, supplies, equipment, and furnishings bought from the franchisor or the franchisor's approved supplier. The franchisee should also be entitled to compensation for the value of the franchisee's goodwill, provided that the franchisee is restricted by a non-compete agreement.

Chapter 6: Conclusion

Chapter six concludes the PhD dissertation by recapitulating research findings in each chapter, summarizing recommendations for formulating private law rules under comprehensive franchise law, and pointing out caveats with regard to the findings and recommendations in this research study. The sixth chapter also offers a list of the model provisions of comprehensive franchise law to exemplify the dissertation's proposals for the benefit of utilization by legal systems. Chapter six ends the dissertation with issues for future research.