
International Franchising





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Franchising in TURKEY

- Franchise agreements are vertical agreements. If franchisor's market share does not exceed 40%, franchise agreement will be able to benefit from the block exemption. In order to benefit from such block exemption, the non-compete clauses must not exceed five years.
- Franchise agreements contain similar provisions with agency agreements and portfolio compensation

granted to agencies is also applicable to franchisees. Portfolio compensation cannot exceed the average of franchise fees received from the franchisor for the last five years of commercial activities.

- If franchisor has a standard form agreement, it should ensure that important commercial/penalty provisions of these agreements are specifically acknowledged by franchisee.

General Information on Franchise Agreements

There is no specific legislation directly governing franchise agreements. They are considered as sui generis type of agreements, containing aspects of various agreements specifically defined under the Turkish Code of Obligations (“**TCO**”). The Court of Appeals defines franchise agreements as “long-term and continuous contractual relations whereby franchisee has the right to market a product or service on its own behalf by using franchisors’ trademark or trade name and operation methods and franchisor undertakes to provide support and information to organization and administration of the relevant business”.

There is no restriction in the applicable legislation differentiating foreign franchisors from local ones. Accordingly, foreign franchisors can carry out their activities within the country through local franchisees, like any other Turkish entity. In Turkey, most preferred corporate entity types are joint stock corporations and limited liability partnerships. In order to establish a corporate entity, there are two stages; registration with the relevant trade registry and conducting tax opening of the company before the relevant tax office. There is no restriction regarding nationality of shareholders or partners of corporate entities.

Consumer Protection Law

Consumer is defined as an individual or a legal entity that benefits from a product and/or a service without any commercial purpose. As both franchisor and franchisee are merchants and carry out commercial activities, they will not be deemed consumers and cannot benefit from the rights granted to consumers under the applicable legislation. However, franchisees are bound by the obligations under the relevant legislation, if consumers benefit from products provided by franchisees.

Competition Law

As franchise relations are based on marketing and distribution of a product or service, franchise agreements are deemed vertical agreements. The prohibitions set out under the Law on Protection of Competition (“**Competition Law**”) will apply to franchise relations. Accordingly, franchise agreements will be assessed as to whether they cause prevention, distortion or restriction of competition directly or indirectly in a particular market. Franchise agreements or their provisions violating the Competition Law will be deemed invalid and a monetary fine up to 10% of the infringing entity’s turnover generated in the previous year may be imposed. If franchisor’s market share does not exceed 40%, the relevant agreement will be entitled to benefit from the block exemption. Another condition to benefit from such block exemption is that the non-compete clauses under franchise agreements must not exceed five years. If franchisee conducts its operation within franchisor’s facility, such restriction will not be applicable. If a franchise agreement cannot benefit from the block exemption, parties may still apply to the Competition Authority for individual exemption, to avoid invalidity of non-compete provisions and monetary fines.

Labor Law

Both franchisor and franchisee conduct commercial activities to gain profits. In this regard, the relationship between these parties is purely commercial and does not contain any employment related items. Accordingly, labor legislation is not applicable to franchise agreements.

Agency Law

As franchise agreements contain very similar provisions to agency agreements, the Court of Appeals opines that portfolio compensation granted to agencies as per Turkish Commercial Code (“**TCC**”) is also applicable to franchisees. Portfolio compensation cannot exceed the arithmetic average of franchise fees and/or other

payments received from the franchisor for the last five years of commercial activities (or for the complete term of the agreement if executed for a shorter term).

Tax Law

Income generated through franchise operations of a foreign (non-resident) company is deemed commercial income and will be collected through withholding. The relevant withholding rate is 20%. Such amount is paid by franchisee to the relevant authority on behalf of franchisor. If there is a double taxation treaty between the investors' country of origin and Turkey, applicable tax regime (e.g., tax rates, exemptions and refunds) will be determined accordingly. If foreign entity has established a capital company in Turkey, income gained by such company will be subject to 20% corporate tax, regardless of the shareholding percentage of the foreign entity.

Intellectual Property Law

Franchisors should register their intellectual property rights with the Turkish Patent Institute (the "TPI") for protection. The trademarks can be registered for a period of ten years, which may be renewed consecutively. As Turkey is a party to Madrid Protocol and the Patent Cooperation Treaty, foreign franchisors may register their intellectual property rights with the TPI in a more expedited way.

Disclosure Requirements/ Confidentiality Clauses

Under Turkish law there is no pre-contractual disclosure requirement regulating franchise agreements. The parties are entitled to freely determine the term of the confidentiality clause, the breach of which is commonly tied up to a penalty payment.

Important Remarks on Franchise Agreements

General restrictions set forth under the TCO are applicable to franchise agreements. For instance, the parties to a franchise agreement will not be able to

limit the other party's liability arising from gross fault or gross negligence.

Majority of scholars opine that restrictions under the TCO on agreements in standard form will be applicable to franchise agreements. Accordingly, if franchisor has a standard form agreement, it should ensure that important commercial/penalty provisions are specifically acknowledged by franchisee. Otherwise, such provisions would not be deemed included. However, certain scholars argue that this restriction should not be applicable to franchise agreements, as both parties are merchants.

Parties are free to determine the amount and the currency of the franchise fees. Under the TCC, parties can determine the interest rate applicable to the commercial transactions freely.

Under Turkish law, there is no renewal obligation imposed on parties with respect to franchise agreements. Franchise agreements may be either terminated in line with contractual provisions or through termination notice. Legal ground of the notice will vary depending on the term of the agreement. For instance, an agreement signed for a definite term can only be terminated based on a just cause or in return for compensation. However, an agreement signed for an indefinite period will be terminated at any time through a regular termination notice, unless otherwise agreed under the agreement. If there is no notice period under the contract, regular notice period will be three months, by way of reference to provisions for agency agreements.

Franchise agreements are principally transferrable, unless otherwise agreed by parties. Parties are free to agree on limitation clauses regarding transferability of the agreement.

If parties to a franchise agreement are Turkish entities, all contractual documents must be executed in Turkish. Otherwise,

parties will not be able to raise any claims based on such documents. Such rule will not be applicable to agreements, if one of parties is a foreign entity. Parties generally execute such agreements in dual column format and state that the Turkish version will prevail in the event of a discrepancy.

Dispute Resolution/Applicable Law

All disputes arising from franchise agreements are held by civil courts. Civil litigation is governed under the Civil Procedure Law and the International Private and Procedure Law, depending on whether or not the nature of the claim has a foreign element. The Turkish legislation allows disputes to be brought before a litigation or arbitration proceeding. If parties did not agree on the jurisdiction of an arbitration tribunal regarding the

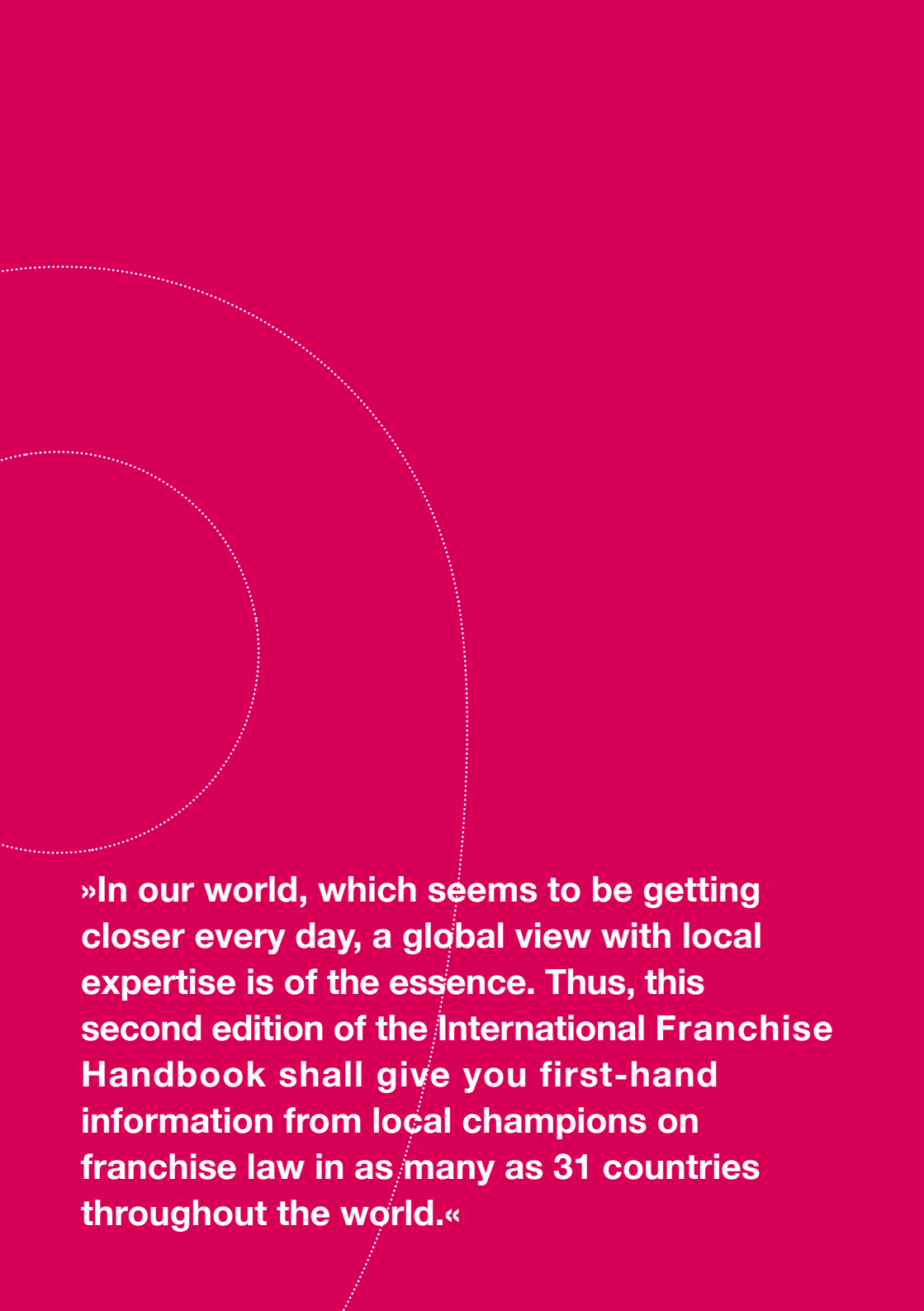
dispute, as a general rule, such dispute would be subject to a litigation procedure to be carried out before the competent court. As litigation procedures carried out before the Turkish courts may be time consuming, determination of jurisdiction of an arbitration tribunal may be more time efficient for the parties.

In principle, the parties are free to choose the governing law in franchise agreements, if one of parties is a foreign entity. Turkish law will be applicable to franchise agreements, if both franchising parties are Turkish entities. However, certain scholars argue that parties to a franchise agreement can still choose foreign law, even if both parties are Turkish entities, provided that there is a foreign element in the franchise relationship.

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»In our world, which seems to be getting closer every day, a global view with local expertise is of the essence. Thus, this second edition of the International Franchise Handbook shall give you first-hand information from local champions on franchise law in as many as 31 countries throughout the world.«