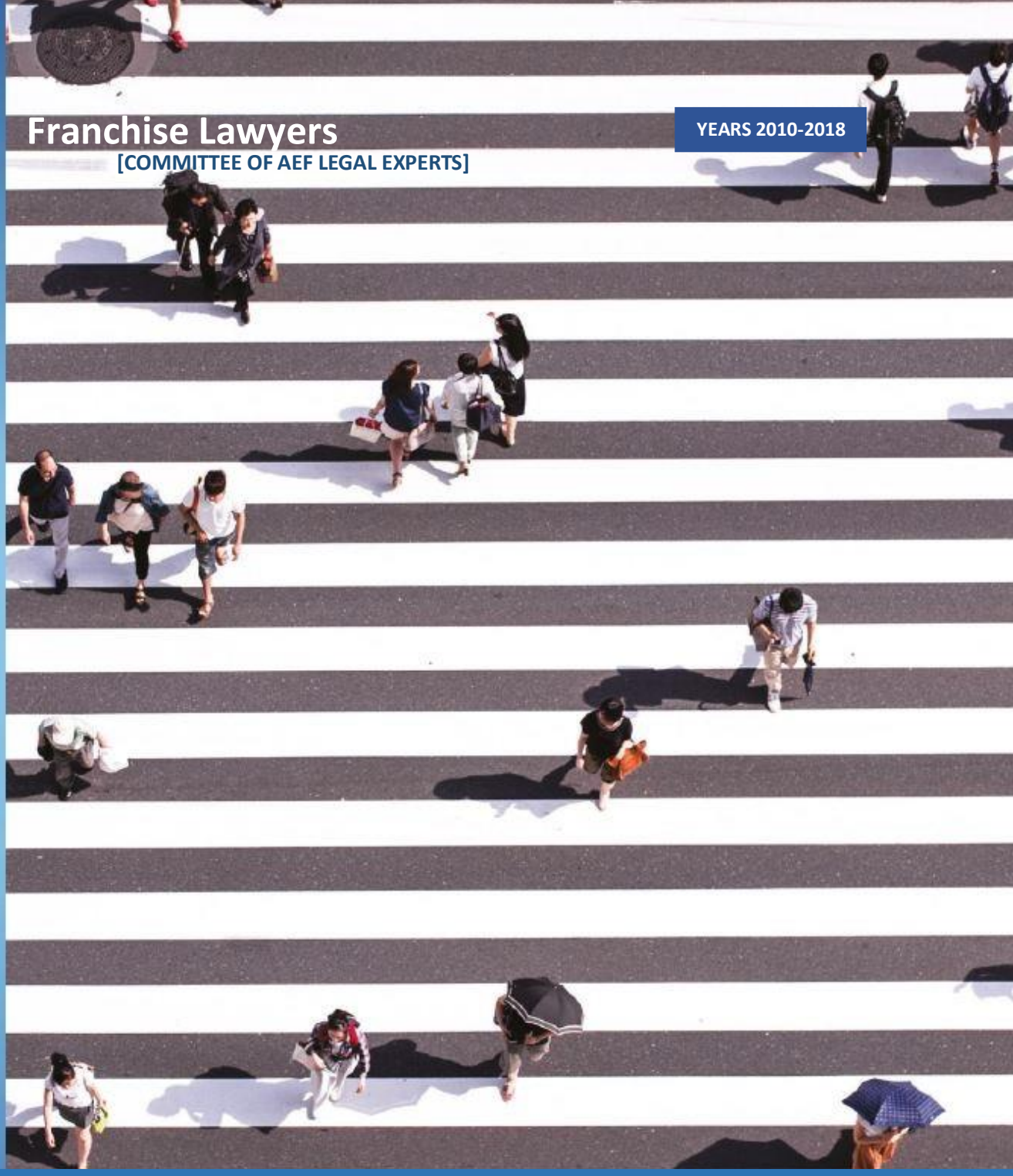


Franchise Lawyers

[COMMITTEE OF AEF LEGAL EXPERTS]

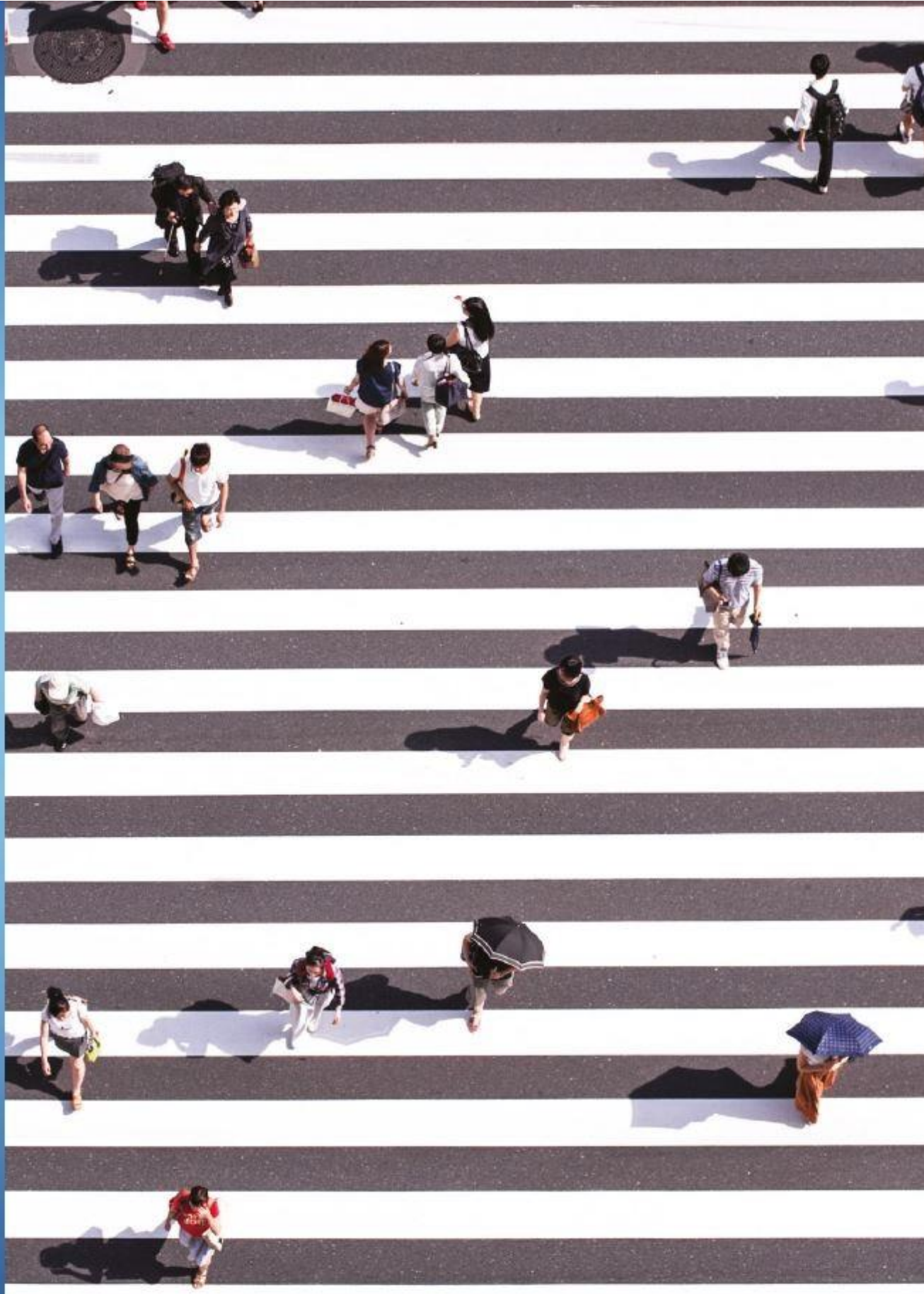
YEARS 2010-2018

FRANCHISE CASE LAW OBSERVATORY

AEF
ASOCIACION ESPAÑOLA DE FRANQUICIADORES

Sabadell

FRANCHISE IN SPAIN
CASE LAW
OBSERVATORY



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LETTER OF PRESENTATION

The Committee of Legal Experts of the Spanish Franchise Association (AEF) has spent 3 consecutive years preparing this "**Franchise in Spain Case Law Observatory**", a pioneering report at the world level in the field of franchise, which presents the state of affairs of this business system in terms of the degree of litigiousness that is recorded between Franchisors and franchisees in Spain.

The data indicated by the Observatory are very significant in terms of the scarcity of conflicts that are recorded each year between both business parties; on this occasion, the period between 2010 and 2018 has been analysed, with an average litigiousness of only 0.09%. This is another sample which evidences that the franchise business model is not, by any means, conflictive.

In addition, and although the usually held belief is that franchisees are the ones predominantly taking matters to court to solve their problems with Franchisors, this study reveals exactly the opposite. Thus, it is noted that the highest number of procedures are initiated by the Franchisor with an average of 62.26%. In fact, the Observatory goes even further by pointing out that the resolutions issued by different High Courts or Tribunals are also favourable to the Franchisor, with an average percentage of 66.75%.

The figures of this study, drawn up with seriousness and rigour, provide a realistic and objective view of the litigiousness in the world of franchising today and clear up all doubts and questions about the conflicts between the parties which end up in court.

Providing specific data from the AEF, we have taken a step further and decisive in this case, evidencing the maturity of the franchise system and its self-regulation, which aims to reduce contentious issues and settle possible disputes out of court.

Luisa Masuet
President of the
Spanish Franchise Association

LETTER OF PRESENTATION

The Committee of Experts of the Spanish Franchise Association (AEF) was created in 2004. Its members are lawyers appointed by the Board of AEF and are chosen based on criteria of excellence or due to their knowledge and experience in the franchise system.

Throughout its history, the Committee of Experts has carried out numerous activities, including the preparation of reports on legislative projects that affect franchising and the carrying out of lobbying activities with the authorities that processed the said regulations, the adaptation of the European Code of Ethics for Franchising to Spain, the mediation in conflicts affecting members of the AEF, as well as the participation in numerous events that contribute to franchising outreach. The members of the Committee are, moreover, specialised franchise arbiters recognised by the World Intellectual Property Organisation, among other national Courts of Arbitration.

Among the outreach tasks of the Committee are the drawing up of a newsletter which is available online at www.abogadosdefranquicia.com/es

On this occasion, I am pleased to present the third edition of the "**Franchise Case Law Observatory**", which was created in 2017 as a tool at the service of the franchise system. The Observatory consists of a statistical study that offers a quantitative and qualitative x-ray of litigiousness in the field of franchise in Spain. In this way, it not only analyses statistically the number of judicial resolutions related to franchises and their impact in relation to the size of the sector, but also makes a qualitative analysis to determine the state of opinion of Case Law on the most important issues.

This study was set up to be ongoing, as shown by the fact that this is the third edition.

Jordi Ruiz de Villa
Chairperson of the Committee of Experts of the AEF
Partner of the Franchise Department of Fieldfisher JAUSAS

LETTER OF PRESENTATION

It is difficult to diagnose why **Banco Sabadell** was the first entity to back franchising. At that time, in the mid-90s, the Bank decided to endorse franchising brands as a vital complement that would provide the necessary resources to those interested in being part of a brand, thus offering them the opportunity of being at the same time part of a brand and business entities.

At present, this is a very widespread model, which makes it difficult to understand the importance of what **Banco Sabadell** developed at the time in the financial world linked to franchising, but it was an opportunity that the Bank decided to take advantage of in order to be on the side of the leading brands that wanted to grow, of entrepreneurs and, ultimately, to back this business segment.

The professionals at **Banco Sabadell** were pioneers and we are proud to feel that we are also leaders in this business model, in this part of Spain's economy that is becoming more and more meaningful and significant. Together with other organisations, associations and participants, we make up a whole array of means that promote the development and growth of this necessary and deep-rooted business marketing system. This compels us remain creative, to seek and launch products and services linked to franchising, to be very close to brands, as well as to maintain constant contact with and to ascertain the needs and objectives of brands, and at the same time to be close to the entire expansion structure of brands, that is the franchisee. It obliges us to know more about each of the sectors that grow in this way and to ascertain their characteristics in order to be able to adjust to a greater and better extent thereto, and thus offer better financing or service.

In **Banco Sabadell** we do not only feel leaders in this business, we feel leaders in terms of experience, know-how and expertise; in taking responsibility, in being more and more present in this active and growing market, in segmenting better, in helping new brands, in getting even more involved with existing ones, in advising our entire organisation so as not to forget that being leaders in something in which we pride, which gives us strength and passion to continue growing, whilst the same time obliging us to continue being agile, active, effective and with extremely high quality standards with all the stakeholders.

We decided to be part of all this, and here we are, where the client is.

Jaume Rubió
Director of Franchising of Banco Sabadell

METHODOLOGY

Several databases were consulted in preparing this report, mainly Westlaw (publisher Aranzadi), LALEYDIGITAL (publisher Wolters Kluwer) and CENDOJ, related to judgments of Provincial High Courts ("*Audiencias Provinciales*")and of the Supreme Court (First Chamber of Civil Matters) ("Tribunal Supremo- Sala de lo Civil").

With respect to the previous edition, the rulings of 2018 have been included, as well as those of 2010 and 2011, so this report covers the period from 2010 to 2018. Since the analysis comprises almost 10 years, we believe that this is a sample with sufficient statistical value and that, therefore, even if we took more years into consideration, the results would not be significantly different.

Rulings issued by the Courts of First Instance have not been taken into account given that there is no reliable database that publishes all rulings given in Spain. In this degree of jurisdiction, both Westlaw (publisher Aranzadi) and other databases consulted, make a subjective selection of those judgments they consider most significant, so statistical data cannot be obtained. Arbitral awards have not been taken into account either, given the difficulty in obtaining information from the Arbitral Courts due to the confidential nature of the awards. Consequently, rulings of the High Courts of Justice related to appeals against arbitral awards have not been taken into account.

The rulings are classified according to the bodies that issued them as well as to the years (2010 to 2018). There is also a classification depending on whether the party that initiated the process was the Franchisor or the franchisee.

Finally, the activity sector has been analysed in order to bring it in line with the main economic figures of the franchise.

This analysis gives us greater knowledge of the degree of litigiousness of an activity that in 2018 grouped 56,753 establishments with a turnover of €17,112,095 million, and the main conflicts that arise between Franchisor and franchisees.

INTRODUCTION

Between **2010** and **2018**, a total of **388 judgments*** were passed in the field of franchising. The following table shows the list of resolutions handed down each year.

TOTAL RULINGS	388
2010	46
2011	44
2012	41
2013	45
2014	45
2015	33
2016	39
2017	39
2018	57

As one can see, the number of resolutions issued during the period under review is relatively stable, with between 39 and 46 resolutions per year, with two exceptions. On the one hand, in 2015 there was a decrease to 33 resolutions. On the other hand, in 2018 there has been an increase of the total number of 57 resolutions.

However, despite the resurgence in 2018, the total number of judgments shows that **the franchise is a system in expansion that has little litigiousness.**

There are probably more controversies than the judicial ones, but the fact that judicial assistance is not resorted to resolve differences evidences that mediation, negotiation and/or conciliation systems are successful and allow the differences between stakeholders to be resolved in a reasonable manner.

Below, we shall break down these figures pursuant to the body that issued the resolution.

*Including rulings handed down by the Supreme Court and High Courts.

PROVINCIAL HIGH COURT RULINGS

The number of judgments reflects a lack of litigiousness regardless of the prism with which they are analysed. If we analyse the global number of rulings, from **2010** to **2018**, the High Courts (AAPP) ruled **379 times** on aspects related to franchise agreements.

TOTAL RULINGS	379
2010	45
2011	44
2012	36
2013	44
2014	44
2015	33
2016	39
2017	38
2018	56

The analysis by years shows that the number of judgments issued by the High Courts remains stable during the years 2010 to 2017, with a slight decrease in the years 2015 to 2017 and a resurgence in 2018, which was the year in which more controversies reached the High Courts.

Judgments depending on whether the franchisor or the franchisee initiated the procedure - are analysed below:

TOTAL		INITIATED BY THE FRANCHISEE	INITIATED BY THE FRANCHISOR	IN FAVOUR OF THE FRANCHISEE	IN FAVOUR OF THE FRANCHISOR
RULINGS	379	143 (37.73%)	236 (62.26%)	126 (33.24%)	253 (66.75%)
2010	45	19(42.22%)	26 (57.77%)	15 (33.33%)	30 (66.66%)
2011	44	16(36.36%)	28 (63.63%)	14(31.81%)	30 (68.18%)
2012	36	9 (25%)	27 (75%)	12 (33.33%)	24 (66.67%)
2013	44	14(31.82%)	30 (68.18%)	15 (34.10%)	29 (65.90%)
2014	44	17(36.36%)	27 (61.36%)	13 (29.55%)	31 (70.45%)
2015	33	10(30.30%)	23 (69.69%)	7(21.21%)	26 (78.79%)
2016	39	17(43.58%)	22 (56.41%)	17 (43.59%)	22 (56.41 %)
2017	38	16(42.10%)	22 (57.89%)	11 (28.95%)	27 (71.05%)
2018	56	25 (44.64%)	31 (55.35%)	22 (39.28%)	34 (60.71 %)

As it can be seen, the Franchisors have initiated 62.26% of the procedures and this percentage hardly changes during the years 2010 to 2015. However, from 2016 there is a slight decrease in the percentage of procedures initiated by the Franchisor. The percentage remains stable at around 55%, although in 2018 there is an increase in the number of judgements.

Regarding the result of the rulings issued, **66.75% are favourable to the Franchisor.**

Likewise, in 2012 and 2013 the number of rulings in favour of the Franchisor is inferior to the number of procedures initiated by Franchisors, and in 2016 both figures coincide. This means that Franchisors, in the remaining six years, have obtained more favourable judgments than the procedures initiated by them.

Now a comparison shall be made between the number of resolutions issued in the years under analysis and the number of franchisees and an analysis of the sectors with the highest degree of litigiousness.

TOTAL		NUMBER OF FRANCHISEES	PERCENTAGE DEGREE OF LITIGIOUSNESS	FAVORABLE TO FRANCHISEE	% IN FAVOUR OF FRANCHISEE
RULINGS	379	419,150	0.09%	126	0.03%
2010	45	42,433	0.10%	15	0.04%
2011	44	42,849	0.10%	14	0.03%
2012	36	41,179	0.08%	12	0.03%
2013	44	41,420	0.10%	15	0.04%
2014	44	44,619	0.09%	13	0.03%
2015	33	46,125	0.07%	7	0.02%
2016	39	50,994	0.07%	17	0.03%
2017	38	53,778	0.07%	11	0.02%
2018	56	56,753	0.09%	22	0.04%

The number of franchised premises between 2010 and 2018 has increased by 14,320 (33.74%), as reflected in the official statistics of the AEF.

Despite this, the degree of litigiousness during the years 2010 to 2018 remains stable and is certainly low, with the average percentage being 0.09% in relation to the number of establishments open to the public on a franchise basis in Spain. Additionally, if the number of judgments in favour of the franchisee is analysed in relation to the number of franchises open to the public, the percentage decreases to 0.03%.

The three sectors of activity with the highest litigiousness in the 9 years analysed are Restaurants, with 50 procedures; Fashion, with a total of 42 procedures; and Financial Services, with 30 procedures.

While the Restaurants and Fashion sectors constitute sectors with a high number of brands and franchisees, the Financial Services sector presents an anomalous degree of litigiousness.

In this sense, and according to the report of the AEF “Franchising in Spain 2019” ("La Franquicia en España 2019"), of the 1.376 brands existing in Spain in 2018, 196 belonged to the Restaurants sector, and had 7.117 franchisees.

For its part, the Fashion sector had a total of 247 chains and 5.915 franchisees, while the Financial Services sector had only 15 franchise brands and 397 franchisees.

If we compare the specific weight of these sectors as a whole, we see that in the first two sectors the litigiousness rate is equivalent to the number of franchised premises, while in the Financial Services sector it is much higher.

Thus, the percentage of premises in Restaurants with respect to the total number of franchised premises is 12,54%, and the percentage of litigation is 13,19%.

On the other hand, in the Fashion sector the percentage of franchised premises with respect to the total is 10,42%, while the number of rulings is 11,08%.

However, in the Financial Services sector, while the percentage of franchised premises is 0,69%, the number of disputes in relation to the total is 7,91%.

The conclusion to be drawn is that although Restaurants and Fashion sectors are the most litigious in accumulated terms, this is due to the fact that they have a large number of franchised premises, while the Financial Services sector has an anomalous degree of litigation.

SUPREME COURT RULINGS

We have eliminated all reference to the appeals dismissed by the Supreme Court, in order to focus on the analysis of rulings passed.

As it can be seen in the graph, the 9 rulings of the Supreme Court (Civil Chamber) between 2010 and 2018 show that the franchise institution, in spite of being firmly established legally, presented in the aforesaid period an unquestionable interest in terms of appeals in cassation:

TOTAL RULINGS

QUALITATIVE ASSESSMENT OF CASE LAW

The analysis of the Case Law related to conflicts arising from the Franchisor-franchisee relationship provides six main issues liable to judicial review.

Whether the procedure is initiated by the Franchisor or the Franchisee, the Franchisor must justify the correct and proper compliance with its three main obligations: (1) assignment of peaceful use of the brand; (2) transfer of knowledge; and (3)initial and continued assistance adequate to the concept of a franchise business. We now turn to the main areas that are liable to judicial review in the most recent resolutions.

1. NULLITY OF THE FRANCHISE AGREEMENT DUE TO DEFECTS IN THE FRANCHISEE`S CONSENT

In some of the resolutions analysed, the franchisees filed legal actions based on the alleged nullity of the franchise agreement due to defects in the consent given, taking into account the rationale summarised below:

- Nullity of the agreement was requested alleging defects in the consent given by the franchisee;

- Absence or insufficiency of the pre-contractual information provided by the franchisor was alleged as the cause of error in the consent granted by the franchisee who, if he/she had received such information or received it completely, would not have given his/her consent to the agreement.

- The difference between the economic results obtained by the franchisee in the operation of its business and the corporate accounts provided by the Franchisor prior to granting the agreement has also been alleged in different procedures.

Case Law is unanimous in the sense that the franchise agreement does not grant a promise of results to the franchisee since he assumes the risk of the business activity.

2. NULLITY OF THE AGREEMENT DUE TO LACK OF OBJECT

The non-existence of know-how is alleged both as a cause of nullity of agreement and sometimes as a cause of termination of agreement, by alleging breach by the Franchisor of the obligation to provide the franchisee with the aforesaid know-how by means not only of the delivery of the Franchise Manuals to the franchisee but also through the existence of training programmes, operational or functional elements and assistance and/or supervision tasks deployed by the Franchisor.

3. NON-COMPLIANCE OF FRANCHISEE DUE TO NON-PAYMENT OF ROYALTIES

This is possibly the most common cause of litigiousness between Franchisor and franchisee. It is a breach that is usually counteracted by the franchisee alleging the existence of previous breaches attributable to the Franchisor, such as the lack of transfer of know-how and the absence of training and commercial and/or technical assistance. With this, the procedure, as we have said before, becomes an examination of the degree of compliance by the Franchisor of its own contractual obligations. Only the existence of a previous breach attributable to the Franchisor allows the franchisee to evade its obligation to pay royalties. The rulings analysed mostly resolve as to the non-existence of previous breaches by the Franchisor and consequently declare the existence of the breach of the franchisee, for non-payment of **royalties**

4. NON-COMPLIANCE OF FRANCHISEE DUE TO BREACH OF POST-CONTRACTUAL NON-COMPETITION CLAUSE

The reported breach occurs in two different circumstances:

- The first is that the franchisee, after the end of the term of agreement, continues to carry out this activity in competition with the Franchisor (this being prohibited in the franchise agreement);

- The second is when there is an early termination of the franchise agreement as a result of a breach of the Franchisee and his activity in competition with Franchisor continues to be carried out(this also being prohibited in the agreement)

Rulings require that there should not be prior breach by the Franchisor so that he can ask the fulfilment of obligations of post-contractual non-competition to the Franchisee. Rulings admit the application of the prohibition on post-contractual competition, as well as the possibility of establishing penalty clauses for the case of breach of this obligation by the franchisee. However, the judge can moderate the figures of such clause if he considers them disproportionate. There are no rulings that oblige the franchisee to cease his activity for breach of its obligation of post contractual non-competition.

5. NON-COMPLIANCE OF FRANCHISEE DUE TO MARKETING OF UNAUTHORISED PRODUCTS OR PRODUCTS FROM UNAUTHORISED SUPPLIERS

The enforcement by the Franchisor of the suppliers from which the franchisee can (and must) acquire the materials that shall be used in the operation of the franchise is sometimes questioned by the franchisee. The rulings consider that such an enforcement, and the consequent prohibition on purchasing products from other suppliers, is a logical consequence of the nature of the franchise agreement and of the power of control by the Franchisor of the know-how that is transferred to the franchisee.

The power of control over products that the franchisee has to acquire either from the Franchisor or from third parties with the prior authorisation and verification of the Franchisor, is a consequence of the transfer of the know-how to the franchisee, that is to say, technical knowledge that is not in the public domain and that is necessary for the manufacture or commercialisation of a product or provision of service, and knowledge that therefore gives an advantage to those who master it over competitors, which is preserved by avoiding its disclosure.

The obligations of the franchisee to be supplied the raw materials and any other merchandise related to the operation through the Franchisor and to acquire them from third parties with the prior authorisation of the Franchisor, must be understood as being pursuant to the nature of the agreement and essential for the maintenance of the good name and the image of the franchised network.

6. NON-COMPLIANCE OF FRANCHISOR BY FAILING TO PROVIDE TECHNICAL ASSISTANCE

The provision by the Franchisor to the franchisee of commercial and/or technical assistance during the term of agreement is an essential obligation of the Franchisor within the framework of a franchise relationship. This obligation is included in the legal provisions and has been accepted without controversy by Case Law. Therefore, the absence or deficiency is considered a breach of sufficient entity to justify the termination of the agreement for causes attributable to the Franchisor.

Judicial decisions consider a variety of instruments as valid means for the provision of assistance, such as commercial training, technical training, marketing and/or advertising advice and supervisory work deployed in the franchisee's establishment.

SOME IMPORTANT RULINGS

Valencia High Court Ruling of 8th March 2010:

The franchisor claimed to the Franchisee the total amount for the sales made to final clients. The Franchisor founded the claim on a document exclusively produced by him, which also showed a very complex relationship with the Franchisee. Since the Franchisor had not provided any expert´s report, the court dismissed the claim because the debt was not sufficiently proven.

Supreme Court Ruling, Civil Chamber, of 5th November 2010:

The Franchisor requested: (i) the termination of the franchise agreement; (ii) the payment of the amounts for the breach of the agreement by the Franchisee; and (iii) the compensation for damages set for in the penalty clause. The Supreme Court partially upheld the High Court judgement, declared the termination of the franchise agreement and ordered the Franchisee to pay the advertising and liquidation campaign fees that he had made without the Franchisor's authorisation. However, the Supreme Court rejected to apply the penalty clause.

Seville High Court Ruling of 13th December 2010:

The Franchisees asked for the nullity or annulment of the franchise agreements due to defect of consent or, alternatively, the termination of the agreement and a compensation for the damages and losses due to the breach of the agreement by the Franchisor. The judgement rejected the action for nullity or annulment because it considered that Franchisees had not proven the defect of consent; however, the High Court declared the existence of a serious breach of obligations by the Franchisor. The Manual handed over as a Manual was too simple and did not include proper specifications so that in no way could it be understood as expressing a will to comply with the obligation of advice inherent to the activity of franchising. The Court stated that one of the essential obligations of the agreement was the transfer of knowhow of the business from the Franchisor to the franchisees. Therefore, the judgement ordered the Franchisor to compensate the franchisees for the damages caused by the breach of the Franchisor´s obligations.

Madrid High Court Ruling of 29th April 2011:

The Franchisor terminated the franchise agreement on the grounds of breach of the agreement by the Franchisee. The Franchisee claimed a compensation for the goodwill since he considered that the early termination was unfair and unilateral. The court dismissed the claim and its appeal because the termination of the agreement had been according to law. However, had the Franchisee proven that the early termination was unfair; the Franchisor would have been entitled to a compensation according to article 28 of Insurance Contract Law.

Barcelona High Court Ruling of 16th May 2011:

The franchisee filed an appeal asking for (i) the nullity of several clauses of the franchise agreement, specifically, the articles of the agreement relating to the payment of royalties, retail prices, the obligations of the Franchisor before the franchisee's commencement of activity, etc.; and (ii) to order the Franchisor to comply with the clauses related with the respect of territorial exclusivity, advertising rules and amendments to the agreement. The High Court judgement declared the nullity of the following clauses for breach of Article 1,256 of the Spanish Civil Code(i) the clause of the agreement by virtue of which the Franchisor, by means of a simple communication, "reserved the right to change the amounts of [the] royalties", and (ii) the clause by which the franchisee was obliged to provide in the establishments identified with the brand "the (services) that shall be provided by the Franchisor in the future". Consequently, the Court made it clear that the parties should sign a new agreement of intentions on both issues.

Supreme Court Ruling, Civil Chamber, of 27th February 2012:

The franchisee claimed before the Court that there was a defect of consent at the time of contracting. The court stated that such defect did not exist, since the franchisee knew that the franchise was new and that the viability plans were not verified yet. The franchisee should have contacted the managers of the other three pilot establishments that had been operating for a year, and finally, the franchisee had experience in the sector.

Supreme Court Ruling, Civil Chamber of 18th July 2012:

The judgement stated that in order to be able to unilaterally terminate the franchise agreement on the grounds of breach of agreement, such breach must be of a principal and reciprocal obligation, the breach whereof hinders the legitimate expectations of the parties or their economic interests. Therefore, it must be a serious breach.

Supreme Court Ruling, Civil Chamber of 30th July 2012:

The Franchisor granted exclusive zones to the franchisee. However, the Franchisor reached an agreement with "El Corte Inglés" to carry out within its establishment, and consequently within the franchisee's exclusive area, activities related to the marketing of the franchise's own products. This fact ended up having the same or even worse impact, since the relationship between the Franchisor and "El Corte Inglés" was a hidden agreement and unknown to for the rest of the franchisees. The Supreme Court stated that the Franchisor violated the exclusivity agreement and committed a fundamental breach of agreement, as it destroyed the significant trust required in collaboration agreements. Likewise, the Court ruled that reasonable expectations of profits, indicated in a pre-contractual manner, should not be confused with a hypothetical loss of profit duly quantified and accredited.

Supreme Court Ruling, Civil Chamber of 22nd October 2012:

The franchisee did not dispute or contest invoices during the term of agreement. When the agreement terminated, the franchisee claimed the invoices and the court rejected the lawsuit because it considered that the action was contrary to the doctrine of respect for one own's acts. The invoices should have been challenged at its proper time, otherwise the franchisee gave the appearance that it was satisfied with them.

Burgos High Court Ruling of 5th April 2013:

The Franchisor filed a claim asking the Franchisee to pay the outstanding royalties due until the end of the agreement and 90.151,82 € as a penalty clause for the breach of non-compete clause in the years following the termination of the agreement. The High Court partially admits the claim and says that the non-compete clause is valid and the Franchisor to a compensation worth 9.000 €. The reduction of the compensation is because the former Franchisee has not shown interest to continue his activity in the territory and the damage is very little.

Seville High Court Ruling of 18th July 2013:

Although the Franchisee ran the franchise suitably, the business did not meet the expectations provided by the Franchisor. After several novation of the agreement, the Franchisee unilaterally terminated the franchise agreement. Even if the termination did not meet the terms of the agreement, the High Court Judgement stated that nobody could oblige the Franchisee to run a ruinous business when the losses are not attributable to the performance of the Franchisee.

Barcelona High Court Ruling of 24th July 2013:

The High Court judgement declared the nullity of 3 clauses of the franchise agreement for breach of the General Conditions of Contract Law and Bankruptcy Act: a) the clause that allowed the termination of the agreement in the case of insolvency b) the clause that allowed the Franchisor to terminate the agreement in the case of a change of ownership of the company, change of administrative body or transfer "causa mortis"; c) the clause that established a daily sanction of €1,600 in case of any violation of agreement on the part of the franchisee, if it were not amended within a term of 30 days.

Barcelona High Court Ruling of 10th October 2013:

The franchisee quits the franchise agreement without terminating it. He also changed the name of the business but continued providing the same services. The Franchisor noted a significant drop of sales and the franchisee was providing identical services under another name. The Court declared that there was unfair competition, since the agreement was not terminated, and even if it was, the non-competition covenant was perfectly valid and applicable after the termination of the agreement.

Balearic Islands High Court Ruling of 17th October 2014:

As a consequence of the collapse of the real estate system, the judgement stated that it was legal to apply the **rebus sic stantibus** clause and reduce the fees of the franchise agreement.

Valencia High Court Ruling of 19th January 2015:

Since this was a dispute between trading companies rather than consumers, these companies should be the ones to submit to the European Court the provisions that were allegedly infringed. However, the Defendant counterclaim only alleged the non-application of the non-competition clause, and therefore, the High Court was unable to declare anything in this regard.

Castellon High Court Ruling of 22nd July 2015:

The franchisee's claim was dismissed the Court stating that certain behaviours, although declared encroachment in the United States, were valid and fair pursuant to Spanish legislation. The High Court accepted that the White Book allowed franchisees to ascertain the requirements that they must have met in order to be eligible to sign a new franchise agreement, but the judgement also recognised that even if a franchisee met all the requirements, the Franchisor was not obliged to grant the franchisee a new franchise agreement, because this was part of the Franchisor's freedom to contract. This ruling was the first and most comprehensive precedent in Spain and probably in Europe in relation to encroachment and the non-binding nature of the Franchisor's internal policies [Defended by Jordi Ruiz de Villa].

Madrid High Court Ruling of 12th February 2016:

Within the framework of a unilateral termination of agreement the franchisee could not prove that the franchisor had imposed a damaging pricing policy on him. If the prices that were imposed were abnormal in all the establishments that competed offering low prices, which was not proven, only then could the business intent have been considered breached.

Las Palmas High Court Ruling of 14th May 2016:

Professional negligence occurred on the part of a doctor who did not provide a patient with due information about the consequences of the treatment the patient received. The civil liability of the Franchisor against the franchisee was declared in this case, given that it acted under the Franchisor's instructions in using their material and techniques.

Madrid High Court Ruling of 19th October 2016:

The Franchisee claimed the nullity of the franchise agreement due to the inexistence of know-how, but the High Court dismissed if since the fact that the business did not have long-term experience was not equivalent to a lack of know-how or the existence of error or misleading. In addition, there was no claim of defect due to lack of accounting data available showing some success in the business when this was also unknown to the Franchisor at the start of the activity. The franchisee had access to this information before the signing of the agreement, so it was not possible to assess these reasons as valid for the termination of the agreement.

Supreme Court Ruling, Civil Chamber of 16th January 2017:

The franchisee claimed for the termination of the franchise agreement and a compensation for damages, since the Franchisor had granted a franchise to a competitor, which sold similar products from other brands in the area of exclusivity of the plaintiff. In short, there was a discussion about whether the franchise agreement granted an exclusive area for all similar products or specifically, for those detailed in the franchise agreement. Finally, the Court ruled that there was not breach of exclusivity because bearing in mind the agreement, the circumstances and the background of the case, the exclusivity only affected the products and brands detailed in the agreement, but not others that had not been included.

Valencia High Court Ruling of 17th February 2017:

Within the framework of a cosmetic surgery operation carried out in a franchised clinic, the patient suffered damages and he made a claim against the Franchisor for medical liability. The Franchisor answered claiming lack of passive legitimation, since the Franchisor and the franchised clinic were independent companies. The Court confirmed the first instance ruling and understood that the Franchisor was also responsible for the damage caused, even though the Franchisor was not part of the agreement between the patient and the franchisee. The franchise agreement imposed on the franchisee a certain way of acting vis-à-vis third parties. In addition, in this case the Franchisor appeared at all times as the entity that provided the services, which caused the patient to rely on the prestige and commercial name thereof as a guarantee of the success of the operation. It is also noticeable that in the agreement between the franchisee and the patient it was agreed that, in order to cancel the operation, the patient had to contact the Franchisor directly.

Barcelona High Court Ruling of 30th June 2017:

The franchisee unilaterally terminated the franchise agreement alleging several contractual breaches such as lack of transfer of know-how, delay in the supply of inventory and increase in the specified investment. The Court ruled that the termination of the agreement was not correct because the Franchisee could not prove the alleged breach of contract. Furthermore, the franchisee was aware of the details of the franchise with which he was going to sign: among other things, the franchisee knew that it was a novel franchise. It cannot be required that every business system object of a franchise must have such a proven experience so as, practically, to eliminate any risk for the franchisee.

Valencia High Court Ruling of 10th July 2017:

A few months after the end of the franchise agreement, the franchisee started a business in which it provided the same services as those previously performed. The agreement specified a 10-year contractual and post-contractual non-competition covenant. Likewise, in the event of non-compliance, a penalty clause of €600 per day was specified. The Court understood that the performance of the former franchisee was contrary to competition law, although it determined that the duration of the contractual non-competition covenant was excessive, as was the penalty clause. The Court ruled that the period of non-competition would be 2 years and that the penalty clause would be €600 per month.

Burgos High Court Ruling of 10th April 2018:

The Provincial High Court declared the unilateral termination of the franchise agreements entered into to be pursuant to the law. The franchise was fictitious or merely nominal, since the two essential elements of it did not concur, namely, the existence of an original or novel business model or business activity created or carried out by the Franchisor and the existence of a know how or expertise arising from the business experience derived from the creation and development.

Cordoba High Court Ruling of 15th May 2018:

The Provincial High Court declared that the failure of the franchisee to pay royalties and supplies justified the termination of the franchise agreement and the claim for the amount when there was no previous failure of the Franchisor. With regard to the different prices of the other franchise in the city of Cordoba, which created a disadvantage to the claimant, the case was that the agreement envisaged some recommended prices, but these were not mandatory, without any possible sanction or direct or indirect obligation to maintain those prices by the franchisee. Hence there was no breach of the franchise in doing nothing in light of the lower prices of the other franchisee established in this location.

Badajoz High Court Ruling of 17th May 2018:

The Provincial High Court concluded that the franchise agreement was invalid when the Franchisor imposed fixed sales prices under the conditions stipulated in the agreement, as law prohibits this conduct. A defective legal transaction did not produce any effects at any time. The contracts were born with an innate defect; hence, the sanction should and could be applied from the very moment the agreement had been concluded.

Balearic Islands High Court Ruling of 21st June 2018:

The Franchisor is liable for the acts of the franchisee. There is a contractual confusion in the position occupied by the Franchisor and the franchisee, probably due to the franchise policy that Dorsia imposed on the franchisees, which ended up occupying a position in the contracts with clients. This determines the direct obligation of Dorsia with a position of guarantor (Dorsia assumed the commitment to carry out diligently the aforesaid activity, providing the patient with the means necessary and pursuant to the information provided to the patient), both with respect to the successful outcome of the agreement and the responsibilities derived from it.

Supreme Court Ruling, Civil Chamber of 11th July 2018:

The franchisor (Foster's) filed a lawsuit to terminate the agreement. He also asks: a) for a sum of €61,585.71 for the unpaid royalties, b) €90,000 for advertising fees and unpaid return expenses c) and €90,000 compensation for the non-return of the Franchise Manuals that included the know-how and d) the amount of €12,000 for not withdrawing the brands and symbols of the franchise. Both the Court of First Instance and the Ávila High Court dismissed the Franchisor's claims for not having complied with the contractual information obligations regarding sales forecasts. Finally, the Supreme Court dismissed the cassation appeal because the appeal did not expressly refer to the consequences of the breaches of the Franchisor's pre-contractual information obligation. This fact suggests that the Supreme Court is willing to establish Case Law on this matter.

Madrid High Court Ruling of 4th October 2018:

The first instance ruling partially recognized the claim of the Franchisor and declared the termination of the franchise agreement and the obligation of the Franchisee to pay €18,966. The franchisee then filed an appeal alleging error in the evaluation of the evidence, as the evidence for the plaintiff's breaches was not sufficient. The High Court observed negligence on the part of the Franchisor, since he did not attend the electrical installation of the premises, generating difficulties in the progress of the business and forcing the franchisee to deploy a series of costly efforts. Therefore, the Court applied the exception of "*non rite adimpleti contractus*", since the Franchisor committed negligence in the matter relating to the electrical installation. Finally, the Court reflected on the Case Law of the Supreme Court regarding the principle of preservation of contracts, which gives an adequate response to the vicissitudes presented by the contractual dynamics; therefore, it upheld the appeal of the franchisee, declaring the termination of the franchise agreement inappropriate.

Badajoz High Court Ruling of 24th October 2018:

The First Instance Court ruled in favour of the Franchisor, declared the franchise agreement terminated, and ordered the franchisee to pay €120,000 as a penalty clause for non-compliance with the post-contractual non-competition covenant. The franchisee then filed an appeal, alleging that the penal clause filed was alien to contractual good faith, and asked to have it reduced. Finally, the Court dismissed the appeal because the franchisee's non-compliance is proven, and since the franchisee was a professional, he could not excuse himself in its own lack of diligence to avoid the contracted liabilities.

Barcelona High Court Ruling of 19th November 2018:

The franchisee filed an appeal against the first instance ruling, which declared the franchise agreement terminated and ordered the franchisee to pay €63,794.63. The franchisee based the appeal on failure to receive adequate information (defect in consent) of the franchise agreement at the time of signing, which would determine the nullity of the agreement and an abuse of right by the Franchisor. The High Court upheld the judgement stating that: (i) the franchisee could not be considered a consumer, ergo, the abuse of right alleged by the claimant could not be appreciable; (ii) the alleged nullity of the agreement could not be considered, as this would require the omission of all information, which had not happened; (iii) and, in principle, all the allegations based on defect of consent, had to be alleged through an action, not of exception, and this was not the case.

CONCLUSIONS

1. From a quantitative point of view, the degree of litigiousness in terms of franchising is very low in relation to the percentage of franchised establishments, maintaining **an average litigiousness of 0.09%.**

2. On the basis of the rulings, it can be seen that the **greatest number of procedures are initiated by the Franchisor with an average of 62.2%**, the main action being termination of the franchise agreement for breaches (post-contractual non-competition covenant), payment of royalties and claim of amounts owed.

3. A **tendency of resolutions favourable to the Franchisor is maintained with an average of 66.75%, although in 2016 there is a notable rise of resolutions in favour of the franchisee with** 43.59%.

4. In numerical terms, **the number of judgments issued at the Franchisor's request tends to decrease**, while procedures commenced by franchisees gradually increase.

Madrid, Barcelona, June 2019

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