Franchise Lawyers

AEF COMMITTEE OF LEGAL EXPERTS

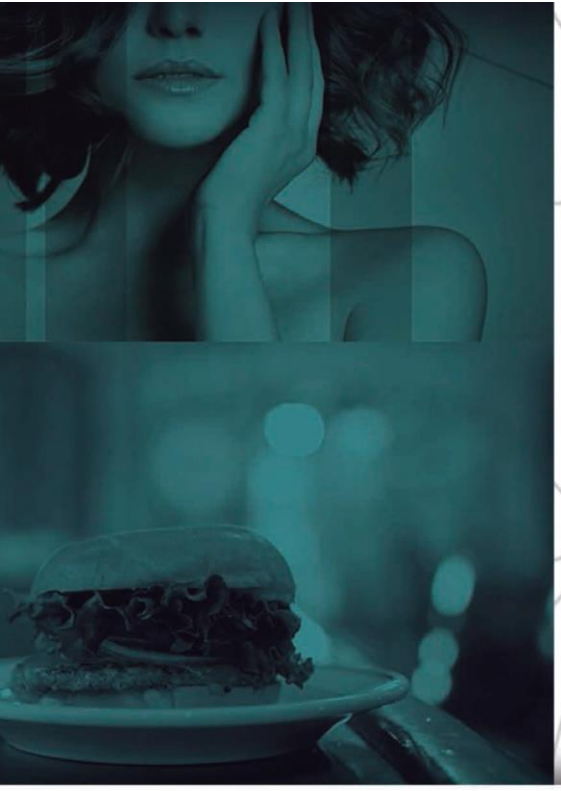
FRANCHISE CASE LAW OBSERVATORY

YEARS 2012-2017

Study conducted by the AEF Committee of Legal Experts

GRUPO COOPERATIVO CAJAMAR

SPANISH FRANCHISE ASSOCIATION



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GRUPO COOPERATIVO CAJAMAR

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1.-Letter of presentation

The Committee of Experts of the Spanish Association of Franchisors (AEF) was created in 2004. Its members are lawyers appointed by the Board of the AEF and chosen on the basis of criteria of excellence due to their expertise and practice in the franchise sector.

Throughout its history, the AEF Committee of Legal Experts has carried out numerous activities, including the preparation of reports on legislative projects that affect the franchise and lobbying activities with the authorities that processed the provisions, the adaptation of the EFF European Code of Ethics for Franchising to Spain and mediation in conflicts affecting members of the AEF, as well as participation in numerous events that contribute to the promoting franchising. The members of the Committee are also specialised franchise arbiters recognised by the World Intellectual Property Organisation, as well as by national courts of arbitration.

Among the informative tasks of the Committee are the writing of a periodic newsletter and the preparation and updating of a case law database that is available on the web www.abogadosdefranquicia.com.

On this occasion, I am pleased to present the second edition of the "Franchise Case Law Observatory". The Observatory consists of a statistical study that offers a quantitative and qualitative x-ray of litigation in the field of franchise in Spain. It therefore not only statistically analyses the number of judicial decisions related to the franchise 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 is an ongoing process which started in 2016 and will, therefore, be updated every year with new resolutions.

Jordi Ruiz de Villa
Chairperson of the AEF
Committee of Legal Experts
Partner of The
Franchise Area of Fieldfisher
JAUSAS

Cajamar Cooperative Group

After a very tough crisis, the business world is starting to regain momentum and pick up speed. In addition, it has broken free from the speculative bias of previous periods and now clearly believes in innovation and internationalisation as tools for generating value, as cannot be otherwise, within the framework of the global economy of knowledge and of the digital society. We are witnessing a profound transformation of all previous certainties. In this new era, the very concept of business is also about to be redefined. And, in this scenario, there are opportunities for development in all sectors of the economy. In this context, franchise has an increasingly prominent role.

Cajamar Group has among its clients over 120,000 commercial establishments throughout Spain, to whom we want to offer useful services that enrich our financial catalogue. We are the leaders in cooperative banking, and we want to continue growing with the small and medium businesses of our country, which are always the first in the firing line of the situation and experience, before anyone, changes to the economy and the transformation in the population's consumption habits. Entrepreneurs in this country are required to have an extraordinary ability to adapt to every new scenario and, in the Cajamar Group, we aspire to help our retail customers anticipate the future, covering all their internal needs, because they must either adapt to change quickly or find themselves expelled from the market.

We want to walk alongside these businesses and grow with them, not as just another financial provider, but as a long-term strategic partner, offering them solutions that add value to their business and improve their competitiveness. Therefore, from our Franchise Network, our International Platform and our Trading Platform, we support a business model with over 70,000 points of sale in Spain, one which year after year demonstrates its potential by growing in turnover, extension and employment, and even presents a low litigation, with an average of 0.08% in the years analysed between 2012 and 2017. This is reflected in the figures in this report, which the Committee of Legal Experts of the Spanish Association of Franchisors publish for the second consecutive year.

Ricardo García Lorenzo
BCC-Cajamar Group
Manager of Business Banking & Agri-food Business

2.-Methodology & Scope of Application

Several databases were consulted in preparing this report, mainly the Westlaw (Aranzadi) and CENDOJ, related to judgements of Provincial Courts and of the Supreme Court.

Unlike the previous edition, we have deleted the examination of arbitral awards (given the refusal of the arbitration courts to provide information on whether the awards are favourable to franchisees or Franchisors), as well as the judgements of the High Courts of Justice (since they deal with the validity and content of arbitration clauses). On the contrary, on this occasion, we have added some rulings of the Criminal Chamber of the Supreme Court and of the General Court of the European Union that are of special relevance for the franchise system. Likewise, the selection criteria of the Supreme Court's resolutions have been updated, in terms of deleting the court decrees non admitting to consideration appeals, focusing the study only on judgements, whether favourable or unfavourable, that resolve on the merits of the matter at stake.

Judgements handed down by Courts of First Instance have not been taken into account, given that there is no reliable database that publishes all judgements handed down in Spain. Both Westlaw (Aranzadi) and other databases consulted make a subjective selection of those judgments that they consider more significant, so statistical data cannot be obtained.

The judgements are classified according to the bodies that have passed them, as well as the years (2012 to 2017). A classification is done depending on whether the party that initiated the process was the Franchisor or the franchisee.

In addition, regarding the previous edition of the report (related to the years 2014 to 2016) not only the analysis of the year 2017 has been incorporated, but also the years 2012 and 2013 have been examined. Thus, the new edition includes a quantitative and qualitative analysis of the years 2012 to 2017, which indeed provides a broad view of the franchise system litigiousness.

Finally, the sector of activity was analysed in order to bring them into line with the main economic figures of the franchise. As a novelty with respect to the previous year, the percentage of judgements favourable to franchisees with respect to the total number has been calculated.

This analysis gives us greater knowledge of the degree of litigiousness of an activity that in 2017 grouped 53,778 franchisees with a turnover of € 16,786.04 million, and the main conflicts that arise between Franchisor and franchisees.

3. Aggregate Figures

Between 2012 and 2017 a total of 242 judgements[1] have been handed down in the field of franchising. The following table shows the number of rulings per annum.

TOTAL JUDGEMENTS	242
2012	41
2013	45
2014	45
2015	33
2016	39
2017	39

As it can be seen, the number of resolutions handed down during the analysed period is relatively stable, involving between 39 and 45 resolutions per year, with the sole exception of the year 2015, in which the number of judgements fell to 33.

On the other hand, the total number of judgements shows that franchising is a system in expansion but with little litigiousness. Probably, there are more disputes than merely judicial ones, but the fact that the parties do not resort to judicial assistance to resolve their differences shows that the systems of mediation, negotiation and/or conciliation are successful and allow their differences to be resolved in a reasonable manner.

The following table shows, in general terms, the total number of judgements per body, as well as the percentage they represent:

	COURT JUDGEMENTS	PERCENTAGE
General Court of the European Union	1	0.41
Supreme Court	7	2.89
Provincial Courts	234	96.70
TOTAL	**242**	**100 %**

In the following sections, we analyse the judgements according to different grouping parameters.

[1]These include the total rulings handed down by the General Court of the European Union, the Supreme Court and the Provincial Courts.

4.- Provincial Court Judgements

The number of judgements reflects a lack of litigation regardless of the prism with which they are analysed. If we were to analyse the overall number of resolutions, from 2012 to 2017, the Provincial Courts ruled 234 times on matters related to franchise agreements: 44 in 2014, 33 in 2015 and 39 in 2016.

TOTAL	234
2012	36
2013	44
2014	44
2015	33
2016	39
2017	38

The analysis by year shows that the number of judgements handed down by the Provincial Courts remained stable from 2012 to 2017, although it is true that they fell in 2014.

The following table shows an analysis of the judgements depending on who initiates the procedure - the Franchisor or the franchisee:

	TOTAL	REQUESTED BY FRANCHISEES [2]	REQUESTED BY FRANCHISOR[3]	IN FAVOUR OF FRANCHISEES	IN FAVOUR OF FRANCHISORS
TOTAL JUDGEMENTS	234	82(35.19%)	151(64.80%)	75(32.05%)	159(67.95%)
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	16(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(5789%)	11(28.95%)	27(71.05%)

From this table, it can be inferred that, during the period analysed, an average of 64.80% of the procedures started by Franchisors.

In absolute terms, the number of procedures initiated by Franchisors tends to decrease, going from 27 to 22, whereas the number of demands commenced by franchisees remains stable, at around 16. Therefore, even though there is an aggregate decrease of judgements, the percentage of procedures started by franchisees has increased.

In addition, we can also deduce that approximately 68% of the procedures were favourable to Franchisors.

[2]The percentages have been obtained on the basis of 233 judgements, since in one of them a consumer was the plaintiff, as results from the following comment.

[3]Only one Judgement comes from a third-party claim outside the contractual relationship. Judgment nº 192/2014, of 9th May 2014 of the Provincial Court of Granada dismisses a claim by a consumer versus a franchisee and its Franchisor for the damages experienced in the transportation of goods.

Regarding the result of the resolutions handed down, it can be seen that, in all years, with the exception of 2016, judgements are favourable to Franchisors in more than 65% of the cases, with the figure of favourable rising to almost 80% of the cases in 2015. It should also be noted that in the years 2014 to 2017, the number of judgements favourable to Franchisors is equal to or higher than the procedures initiated by them, which means that Franchisors have obtained numerous favourable judgements in proceedings filed by franchisees. On the other hand, in 2012 and 2013, the number of judgements in favour of Franchisors is very close to the number of rulings handed down. Finally, a comparison is made between the number of resolutions delivered in the years under study and that of existing franchisees, as well as an analysis of the sectors with the highest degree of litigiousness.

	TOTAL	NUMBER OF FRANCHISEES [1]	DEGREE OF LITIGATION (PERCENTAGE)	JUDGEMENTS IN FAVOUR OF FRANCHISEES	PERCENTAGE IN FAVOUR OF FRANCHISEES
TOTAL JUDGEMENTS	234	279.544	0.08	75	0.02
2012	36	42.849	0.08	12	0.02
2013	44	41.179	0.10	15	0.03
2014	44	44.619	0.09	13	0.02
2015	33	46.125	0.07	7	0.01
2016	39	50.994	0.07	17	0.03
2017	38	53.778	0.07	11	0.02

The degree of litigiousness during the years 2012 to 2017 remains stable and is certainly low, with an average percentage of 0.08% in relation to the number of establishments open to the public on a franchise basis in Spain. In addition, if the number of judgements favourable to franchisees is analysed, in relation to the number of franchises open to the public, the percentage decreases to 0.02%.

The sectors that present a greater litigiousness are the hospitality, catering and fashion sectors with a total of 45 procedures in the 6 years analysed, as well as financial services with 17 procedures.

Whilst the hospitality, catering and fashion sectors constitute the sectors with the highest number of brands and franchises, the financial services sector has an anomalous level of litigiousness.

In this sense, according to the AEF report "Franchise in Spain 2018", of the 1,348 existing brands in Spain in 2017, 238 belonged to the fashion industry and had 5,522 franchisees. In addition, the hospitality and restoration sector had 198 stores and 7,046 franchisees, whilst in the financial services sector only had 14 franchise stores and 305 franchisees.

The conclusion that emerges from the figures above is that approximately 7.26% of litigation comes from a very specific sector, mainly financial services, which means that apart from this specific situation, in the franchise system in Spain there are even less conflicts than the statistics show.

5.-Supreme Court Judgements

As indicated in the methodology, we have deleted all references to decrees of non-admission to consideration of the Supreme Court, to focus on the analysis of the judgements delivered.

However, it should be noted that of the fifteen cases that tried to access the Supreme Court, eight were not admitted, whilst seven ended up giving rise to a judgement on the merits. However, of the latter, five are from 2012, year in which the majority of matters that tried to access the Supreme Court were not admitted to consideration. All this denotes that the franchise, in spite of being a well-rooted legal institution, registered an unquestionable cassation interest in the said period. Most of these judgements shall be analysed in section 7.

As can be seen in the graph, the Supreme Court handed down a total of five judgements in 2012, one in 2014 and the other in 2017. Most of these resolutions are relevant and shall therefore be analysed in Section 7.

	2012	2013	2014	2015	2016	2017
Judgements	5	0	1	0	0	1

6.-Qualitative Assessment of Case Law

The analysis of case law relating to the disputes arising from the Franchisor-franchisee relationship allows us to separate six main issues related to court action.

It does not matter, for these purposes, whether the proceedings were initiated by Franchisors or franchisees since, in the majority of the cases, the defendant raises a counter-claim and in all of the previously analysed cases – Franchisors are finally required to demonstrate the due fulfilment of their three principal responsibilities which are: (1) assignment of the peaceful use of the trademark, (2) transfer of know-how, and (3) initial and continued assistance applicable to the concept of the franchise. Another recurring question is the viability of the franchised business. We will now explain the principal matters that have been submitted to the Spanish courts according to the most recent resolutions.

(I) NULLITY OF THEFRANCHISE AGREEMENT DUE TO LACK OF CONSENT OF FRANCHISEES

In some of the resolutions that are the subject of our analysis, franchisees have initiated legal proceedings based on the purported nullity of the franchise agreement due to a lack of consent, taking into account the basis summarised below:

- The agreement was requested to be ruled invalid due to lack of consent from franchisees;
- It was argued that the absence or insufficiency of the information provided by Franchisors before the agreement caused the erroneous consent of franchisees who, if they had received such information, or had received complete information, they would not have consented to the agreement;
- In several different proceedings, the difference in the financial results obtained by franchisees during the operation of their business, and the provisional accounts provided by Franchisors before signing the agreement, has been argued as a reason for the nullity of the agreement.

Case law is predominant in the sense that the franchise agreement does not promise a specific result to franchisees, who thus assume a commercial risk. However, the most notable exception is the “Foster’s” Judgement of the Provincial Court of Avila on 17thJune 2015, which we summarise in the following section. Various judgements (including one of the Supreme Court) agree on the fact that, when Franchisors recognise the limited experience of the business, by means of the information provided before the agreement, franchisees cannot avail themselves of this situation to terminate the agreement.

(II) NULLITY OF THE AGREEMENT DUE TO A LACK OF OBJECT THEREOF

The inexistence of know-how is argued as being both a cause of nullity of the agreement as well as, on occasions, a cause of termination of the agreement, by arguing the Franchisors' breach of the obligation to communicate this know-how to franchisees. Rulings tend to value the accreditation of the know-how not only by means of the delivery of the Franchise Manuals to franchisees, but also by the existence of training programmes, operational, functional elements and assistance and/or supervision provided by Franchisors.

(III) BREACHES BY FRANCHISORS

The only note worthy judgement which terminates the franchise agreement due to a breach by the Franchisors is the Judgement of the Supreme Court dated 30th July 2012, in which the Franchisor granted the right to sell the products object of the franchise in the exclusive area of another franchisee (specifically within El Corte Inglés).

(IV) BREACHES BY FRANCHISEES DUE TO UNPAID ROYALTIES

This is possibly the most common cause of litigation between Franchisors and franchisees. It involves a breach of agreement, which, normally, franchisees try to challenge by alleging the existence of previous breaches by Franchisors, such as the lack of communication of know-how, and the lack of training and/or commercial/technical assistance. Thus, the proceedings, as indicated previously, become a test of the degree of completion of the Franchisors' obligations derived from the agreement. Only the existence of a previous breach by Franchisors would permit franchisees to forego its obligation of payment of royalties. In the majority of cases, the rulings analysed decide the inexistence of previous breaches on the part of Franchisors, and, consequently, declare the existence of the breach on behalf of franchisees, due to the aforesaid unpaid royalties.

(V) BREACHES BY FRANCHISORS DUE TO INFRINGEMENT OF THE POST-CONTRACTUAL NO-COMPETITION COVENANT

The reported breach takes place in two different circumstances:

- The first is that franchisees continue to carry out activity in competition with that of Franchisors after the termination of the period of the agreement; this is prohibited in the agreement.
- The second is that, having terminated the agreement in the manner foreseen as the result of a breach of the agreement by franchisees, they continue to carry out activities in competition with Franchisors, which is also prohibited in the agreement.

Rulings require that there is no previous breach by Franchisors so that the latter may demand that franchisees fulfil their obligation of the post-contractual no-competition covenant. Judgments permit the application of prohibitions of post-contractual competition, as well as the possibility of establishing penalty clauses for the breach of the aforesaid obligation by franchisees, although the cost of the said penalty clause can be reduced by the judge if it is considered disproportionate. There are no judgments that require franchisees to cease activities due to a breach of their obligation of post-contractual no-competition covenant.

(VI) BREACH BY FRANCHISEES DUE TO THE MARKETING OF UNAUTHORISED PRODUCTS OR SUPPLIERS

Sometimes, the franchisees' obligation concerning the suppliers from whom franchisees may (and must) acquire the materials to use during the franchised activity, imposed by Franchisors, is questioned. Judgements consider that such imposition – and the consequential prohibition of acquiring products from other suppliers– is a logical consequence of the nature of the franchise agreement and of the control which Franchisors have over the know-how, which they communicate to franchisees.

The control that franchisees must have over the products obtained from Franchisors or from third parties, with the prior authorisation and verification of Franchisors, is no more than a consequence of the communication of know-how to franchisees; that is to say, the communication of knowledge or a body of technical knowledge not in the public domain that is necessary for the manufacture or commercialisation of the products; or, where appropriate, for the provision of the service, in that those who possess this knowledge have an advantage over the competitors and thus an effort is made to conserve such information without divulging it.

The obligations of franchisees to obtain, via Franchisors, the raw materials and any other goods related to activity, and of acquiring them from third-parties with the prior authorisation of Franchisors, must be understood to be consistent with the nature of the agreement and essential to maintain the good name and image of the franchised network.

(VII) BREACH OF FRANCHISORS FOR NOT PROVIDING TECHNICAL ASSISTANCE

The provision of commercial and/or technical assistance from Franchisors to franchisees during the period of the agreement is an essential obligation of Franchisors within the context of a franchise relationship. It has been established as such in the legal provisions and has been peacefully agreed by case law. For this reason, the absence or lack thereof (understanding by this, the lack of assistance for the purposes of providing franchisees with guidance relating to the effective franchised activity) is considered to be a sufficient breach by Franchisors to cause the termination of the agreement.

Judgements consider a diverse range of instruments as valid methods for the provisions of assistance, such as commercial training, technical training, marketing and/or publicity guidance and monitoring in the franchised store.

7. Some significant judgements

Judgement of the Supreme Court, Criminal Chamber, dated 16th February 2012:

A franchise agreement, whose trademark was not yet registered, as stated in the agreement, was signed. The franchisee was thus aware of this. Later, the franchisee ceased payment and issued a notarial notification to the Franchisor, indicating that the agreement was null, since the trademark was not registered, a fact that, according to the franchisee, was an essential part of the agreement. Finally, the same franchisee initiated legal proceedings for fraud, concluded by means of this final judgement. In this, the Court ruled that the franchisee was aware that the trademark was not registered, and for this reason the agreement was valid and there was no fraud.

Judgement of the Supreme Court, Civil Chamber, dated 27th February 2012:

The franchisee pleaded before the Court that it existed defective consent at the moment of the agreement. It was established that such defective consent did not exist, since the franchisee knew that the franchise was innovative and that the viability plans had not yet been calibrated. The franchisee could have contacted with the managers of the other three pilot establishments which had been in operation for a year. Furthermore, the franchisee had experience in the sector. Therefore, the franchisee did not succeed in his claim.

Judgement of the Supreme Court, Civil Chamber, dated 18th July 2012:

The case law requires that, in order to be able to call for a unilateral termination of a franchise agreement, due to a breach of the opposing party, the aforesaid breach must revolve around a principal and reciprocal obligation, whose violation frustrates the legitimate expectations of the parties or their economic interests. Thus, it must be a breach of a particular entity, which must be considered as material, because it undermines the purpose of the agreement.

Judgement of the Supreme Court, Civil Chamber, dated 20th July 2012:

The Franchisor granted exclusive zones to the franchisee. However, the Franchisor came to an agreement with El Corte Inglés to carry out, within the franchised store, and consequently within the exclusive area of the franchise, activities related to the commercialisation of the franchise's own products. This fact led to events that are identical or even worse, since the relationship between the Franchisor and El Corte Inglés was a hidden agreement and not known by the rest of the franchisees. The Supreme Court considered that the Franchisor infringed the exclusive nature of the agreement and breached an essential part of the agreement, by destroying the fundamental trust required for co-operation agreements. Similarly, the Court resolved that the reasonable expectations of profit, indicated prior to the agreement, cannot be confused with a hypothetical loss of profit duly quantified and accredited.

Judgement of the Supreme Court, Civil Chamber, dated 22nd October 2012:

The franchisee did not discuss or dispute some bills during the term of the agreement. Following the termination of the agreement, the franchisee challenged them judicially. The Court dismissed the claim, deeming that the franchisee contradicted his previous actions. The bills should have been disputed at the moment provided for the purpose; if not, the appearance is generated that the franchisee was in fact in agreement with them.

Ruling in Preliminary Reference from a Spanish Court by the Court of Justice of the European Union (ECJ), dated 7th February 2013:

The Court of Justice of the European Union ("ECJ") was questioned whether the meaning of the phrase "premises and land from which the buyer has operated during the agreement period" refers to the specific location from which the goods or contracted services are sold, or if, on the contrary, it refers, in a general manner, to all the territory in which the goods or services by virtue of the franchise agreement are sold. The Court ruled indicating that it refers to the specific location from which the goods or services are sold. To arrive at this conclusion, the Court made a restrictive interpretation of the terms "premises", "land" and "territory" in relation to the context of the use of these terms and their situation in Commission Regulation (EC) 2790/1999 (LC EUR 1999, 4030).

Judgement of the Provincial Court of Burgos, dated 5th April 2013:

The Franchisor filed a lawsuit against the franchisee claiming the fees pending payments until the expiration date of the agreement and €90,151.82 by way of a penalty clause, for the infringement of the no-competition covenant in the years following the termination of the agreement. The Provincial Court partially upheld the procedure lodged by the Franchisor, deeming that the no-competition covenant was valid and that the Franchisor was entitled to compensation for the violation thereof, but reduced compensation to €9,000. The reasoning given by the Provincial Court was as follows: the usefulness of the no-competition covenant lies in the fact that, once the agreement is terminated, the Franchisor is not hindered by the competition of its former franchisee. However, if the Franchisor has not shown signs of willing to continue exploiting the business in that territory, like in the case at hand, the damage would be minimal. Therefore, the compensation must also be so.

Judgement of the Provincial Court of Seville, dated 18th July 2013:

Although the franchisee duly operated the business, the economic prospects the Franchisor had indicated were not met. Finally, the franchisee terminated the agreement after several novations accepted by the Franchisor, who was aware of the situation of the franchise. The termination requested by the franchisee did not comply with the deadlines covenanted in the agreement. However, the Court understood that this could not be considered as a material breach of the agreement, since the franchisee could not be forced to continue with the operation of a loss-making and ruinous business, whose losses were not attributable to the franchisee's performance.

Judgement of the Provincial Court of Barcelona, dated 24th July 2013:

It declared the nullity of 3 clauses, since they were contrary to the Act on General Conditions of Contract and the Bankruptcy Act, specifically: a) Allowing the agreement to be terminated in the event of insolvency; b) Allowing the Franchisor to terminate the agreement in case of change of ownership of the company, change of administrative body or *succession mortis causa*; c) Establishing a penalty of €1,600 per day in case of any violation of the agreement by the franchisee if it were not resolved within a 30-day period.

Judgement of the Provincial Court of Barcelona, dated 10th October 2013:

The franchisee disassociated itself from the franchise agreement without terminating the agreement. It changed the name of the business and continued to provide identical services. In the agreement there was a prohibition of competition during the contractual relationship and also during the year that followed. The Franchisor suffered a significant drop in sales and verified that the franchisee was providing identical services under another name. The Court determined that there was unfair competition since the agreement had not been terminated, and even had it been terminated, the no-competition covenant was perfectly valid and applicable beyond the term of the agreement.

Judgement of the Provincial Court of the Balearic Islands, dated 17th October 2014:

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

Judgement of the Provincial Court of Valencia, dated 19th January 2015:

Since this was a dispute in which the intervening party was not a consumer but business companies, the latter would have been the ones that would have had to submit to the Court's consideration the agreement obligations that were allegedly infringed for debate and discussion Since the defendant limited its counterclaim to requesting the non-application of the no-competition covenant – not because of its unlawfulness, but because it was not applicable –the second instance Court could not declare anything in that regard.

Judgement of the Provincial Court of Ávila, dated 17th June 2015:

The pre-contractual information that the Franchisor gave to the franchisee, within the framework of a franchise agreement for the catering sector, did not correspond to reality. The calculations showed that turnover would be even higher than that of the five most central and best-known restaurants in the city. The franchisee failed to pay, and consequently the Franchisor terminated the agreement and claimed the amounts pending payment. The Court determined that the Franchisor had infringed its duty to provide accurate and real pre-contractual information, since the results provided to the franchisee, in which the latter lay its trust, were impossible to secure. Consequently, the Franchisor could not demand the fulfilment of the agreement or its termination under 1.124 Civil Code, since the Franchisor had previously failed to fulfil an essential obligation.

Judgement of the Provincial Court of Castellón, dated 22nd July 2015:

A claim by a franchisee was dismissed stating that some behaviours that had been declared encroachment in the United States were valid and fair under Spanish law. The Provincial Court accepted that the white paper allows the franchisees to know the requirements they must meet in order to sign a new franchise agreement, but also recognised that even if a franchisee were to meet all the requirements, the Franchisor would not be obliged to grant a new franchise agreement because he is free to enter into new agreements. This judgement was the first and most complete precedent in Spain and probably in Europe in relation to encroachment and to not bind the Franchisor's internal policies. [Defended by one of the members of the Committee].

Judgement of the Provincial Court of Madrid, dated 12th February 2016:

Within the framework of a unilateral termination of the agreement, the franchisee could not prove that the Franchisor had imposed a harmful pricing policy. The contractual intention would only have been considered to be infringed if the prices that were imposed had been abnormal in all the set of establishments that competed offering low prices, a fact that was not demonstrated.

Judgement of the Supreme Court of Las Palmas, dated 14th May 2016:

There was professional negligence on the part of a doctor who did not provide the patient with information about the consequences of the treatment he was receiving. In this case, the civil liability of the Franchisor against the franchisee was recognised, given that the latter had acted within the framework of the use of material and techniques.

Judgement of the Provincial Court of Madrid, dated 19th October 2016:

The franchise agreement was claimed to be null due to the lack of know-how, but this was considered inadmissible since the fact that the business was not the subject of long-term expertise could not be equivalent to the lack of know-how or the existence of error or deception. It could not be claimed that vice had mediated, due to the lack of knowledge of accounting data which could prove some success in the business, since this was also unknown to the Franchisor because of the incipient nature of the activity. The franchisee had access to this information before the signing of the agreement, so it was not possible to deem these reasons as valid for the termination thereof.

Judgement of the Supreme Court, Civil Chamber, dated 16th January 2017:

The franchisee requested the termination of the franchise agreement, also requesting compensation for damages, since the Franchisor had granted a franchise to a competitor, which sold similar products of other brands in the exclusive area of the plaintiff. In short, there was a debate 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 the exclusivity has not been infringed, since, from the agreement, the situation and the background of the case, it appeared that the exclusivity only affected the products and brands that were detailed in it, and not the others not included in the agreement.

Judgement of the Provincial Court of Valencia, dated 17th February 2017:

In the context of an aesthetic surgery intervention carried out at a franchised clinic, a patient claimed medical liability against the Franchisor for the damages caused by surgery. The Franchisor replied alleging lack of passive legitimacy, since the Franchisor and the franchised clinic were independent companies. The Court confirmed the first instance judgement and understood that the Franchisor was also responsible for the damage caused, although the Franchisor was not part of the agreement between the patient and the franchisee. The Franchisor appeared at all times as the entity providing the services, which caused the patient to trust in the prestige and commercial name of the latter as a guarantee of the operation success. It should noticed that, in the agreement between franchisee and patient, it was expected that, in order to cancel the transaction, the Franchisor would have to be addressed directly.

Judgement of the Provincial Court of Barcelona, dated 30th June 2017:

The franchisee rescinded the franchise agreement, alleging various contractual breaches such as the lack of know-how transmission, delay in the stocks provision, stipulated investment increase, etc. The Court ruled that the agreement termination was not correct since these irregularities had not been demonstrated. The franchisee was aware of the facts which the franchise was going to entail, inter alia, it knew that it was a new franchise. It cannot be expected that every business system being franchised must have an experience so verified that, practically, any risk for the franchisee is eliminated.

Judgement of the Provincial Court of Valencia, dated 10th July 2017:

A few months after the franchise agreement ended, the franchisee started up a business in which it provided identical services to those carried out previously. The agreement regulated a 10-year contractual and post-contractual no-competition covenant. Likewise, in case of non-compliance, a penalty clause of € 600 per day was stipulated. The Court understood that the behaviour of the former franchisee is contrary to competition law, although it determined that the duration of the contractual no-competition covenant is excessive, as is the penalty clause. The Court ruled that the period of no-competition must be 2 years and that the penalty clause would be €600 per month.

8. Conclusions

1) From a quantitative point of view, it is observed that the degree of litigiousness in franchising is very low in relation to the percentage of establishments under franchise, with an average litigiousness of 0.08%.

2) Based on the judgements, the largest number of procedures were initiated by Franchisors with an average of 64.8%, the main action being that of termination of the franchise agreement due to non-compliance, royalty payments and claim of amounts owed.

3) The tendency of resolutions favourable to Franchisors is maintained, with an average of 67.95%,

4) In absolute terms, the number of judgements tends to decrease, due to a lower number of lawsuits lodged by Franchisors, while the number of procedures started by the franchisee remains stable.

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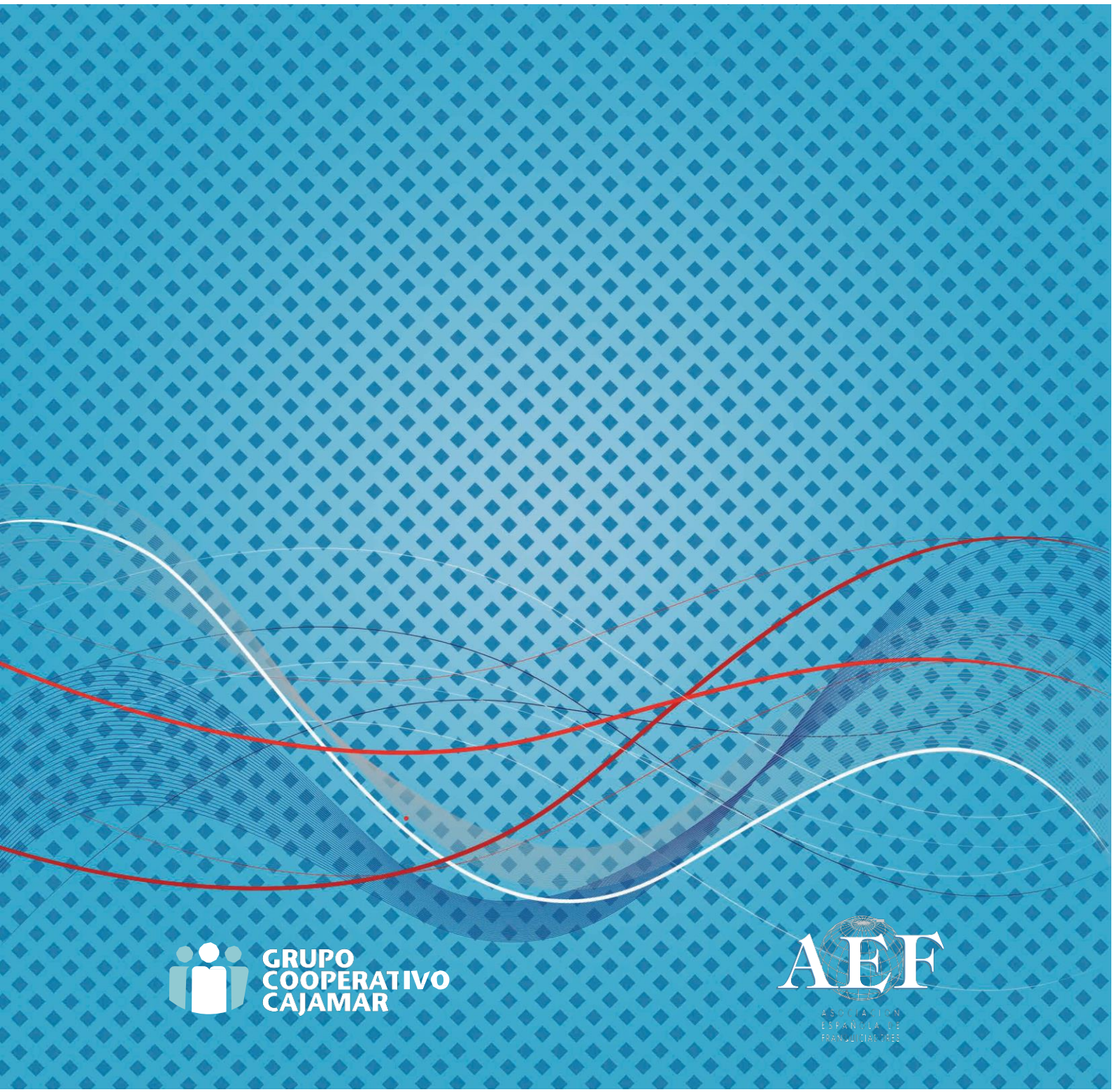
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