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Legal Regulation Of Commercial Concessions (Franchising) In Accordance With Russian And Foreign Law*

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Abstract. *The purpose of this work is to define the legal systems on commercial concession (franchising) regulation in the world practice, and also identification of the specifics of commercial concession contractual regulation in Russia, and analysis of all changes in civil legislation regulating the institution of commercial concession and the identification of trends in its development within the framework of the ongoing legal reform.*

The general scientific basis was formed by the general scientific (dialectical) method of obtaining knowledge, and also comparative legal and logical methods, which allowed us to consider the problems of the civil legislation development in the field of commercial concession.

The analysis of civil legislation reveals the directions of its development and improvement in the field of commercial concession. Using the example of a comparative analysis of foreign experience in regulating commercial concessions, trends in the development of Russian civil legislation are shown. Particular attention is paid to changes in Chapter 54 of the Civil Code of the Russian Federation as part of the civil legislation reform. A scientific study of the legal regulation system for commercial concession (franchising) abroad was carried out, as well as trends of changes in the norms of Russian civil legislation in the field of commercial concession were analyzed.

The theoretical provisions formulated in the article can be useful for determining the effectiveness of civil legislation that enshrines the contractual regulation of commercial concession, and they can be used in law enforcement practice, as well as in the course of "Civil Law" study.

Keywords: commercial concession, franchising, intellectual property, license agreement; contract law; The Civil Code of the Russian Federation.

Introduction

The use of commercial concession (franchising) in practice has caused many problems, the main cause of which is the imperfection of legal regulation. The shortcomings of legal regulation, as well as the spontaneous nature of the development of the Russian market, compel foreign franchisors to either refuse to use franchising in Russia or demand the development of new conditions for the introduction of a franchising business scheme to the Russian market, what prevents the inflow of foreign investments into our country.

Proceeding from an objective and real assessment of relations in the field of commercial concession, an attempt is made to solve the problem of improving the legal regulation of these social relations based on a combination of a fundamental approach and specific methods, relying on doctrinal conclusions, sources of legal regulation and law enforcement practice on the basis of the theory of civil and enterprise law.

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Methods

Commercial concession (franchising) is developing quite actively not only abroad, but also in Russia. The use of commercial concession (franchising) entailed the need for its legislative settlement.

There are several ways to regulate franchise relationships in the world:

- 1) by adopting special legislation on franchising;
- 2) by enshrining the institution of franchising in civil law which regulates exclusively contractual relations;
- 3) by regulation of franchising relations with general provisions on contracts within the framework of civil legislation and proceeding from the principles of "good faith", "justice", "reasonableness", "freedom of contract", etc.

The first type of legal regulation of franchising relationships, for example, is the United States, where there are two levels of special legislation on franchising:

- Federal: Decree of the US Federal Trade Commission (FTC) No. 436 "Requirements for disclosure of information, prohibitions on franchising, and favorable franchising conditions" of October 21, 1979; The Uniform Rules for the Sale of a Franchise (UFOC).¹

- Own legislation of 21 states, such as Washington, Virginia, Hawaii, Indiana, Illinois, New York, North and South Dakota, Minnesota and others..²

Results

The latest innovations envisaged by the lawmaker reflect its policy in changing the approach to state registration, that is, registration of the rights transferred over it rather than the contract itself.

The process of reforming civil legislation on commercial concession continues. The legal regulation of the commercial concession is complicated, it also causes a lot of contradictions and ambiguities which require further development and their elimination through law enforcement practice.

Analysis of sources of commercial concession legal regulation, trends and patterns of its development in Russia and abroad allows us to identify the shortcomings of legal regulation, as well as to form main directions of its development in our country.

If to consider the legal regulation of commercial concession in Russia in compare with the international regulation of franchising relations, then the legislator needs to include in Chapter 54 of the Civil Code of the Russian Federation the norms detailing this institution and excluding the possibility of applying general provisions of civil legislation that will promote a uniform interpretation of such relations. Moreover, when considering this civil law institute,

¹ Irmgard Schillgalis, "Pronuptia de Paris GmbH v. (1998)", in *Franchising. Law and Practice*, London, John Hamilton Pratt, 1998, p. A23001-A23030.

² S. A. Sosna, E. N. Vasilieva, *Franchising. Commercial concession (Text)*, Moscow, ICC "Academic Book", 2005.

it is necessary to develop a new method for analyzing the ways of legal regulation of commercial concession in Russia.

Discussion

The Law "On Franchising" No. 1335-XIII dated January 1, 1997, and related Chapter 21 of the Civil Code were issued in the Republic of Moldova.

In the Republic of Kazakhstan, Law No. 330-II dated June 24, 2002, "On the Integrated Entrepreneurial License (Franchising)" defines the subjects of franchising relationships, the principles and measures of state support for franchising relationships, the general contractual provisions of the franchising agreement, its types, etc.

In the UK there are: the Restrictive Trade Act of 1976; The Competition Act of 1980; The Retail Prices Act of 1976; The Law "On Fair Contract Conditions" of 1977; The Fair Trade Act of 1973; The Law "On Consumer Protection" of 1987.³

The countries of the former Yugoslavia (Slovenia, Croatia, Bosnia) apply to the franchise three groups of legislative acts: antitrust regulations; Acts regulating foreign trade, and general civil legislation on contracts (acts that establish rules of internal trade).⁴

The need to establish the legal basis for this type of business is not in doubt. At the same time, some authors argue that franchising does not need special legislative regulation due to the self-sufficiency of the terms of the franchising agreement, which in turn feeds on the richest contractual and judicial practice of common law, that is, it is established for the self-regulation of franchising, in particular, in the USA.

Thus, according to the experts of the World Intellectual Property Organization, from a legal point of view, franchising is sufficiently regulated by contract law, so its development does not require special laws and special structures.⁵

Countries that follow the way of consolidating the institution of franchising in civil law and regulating exclusively contractual relations include, for example, Belarus and Russia.⁶

In the Republic of Belarus, franchising relations are regulated by Chapter 53 of the Civil Code of the Republic of Belarus dd. December 7, 1998, No. 218-3.

The basis for the legal regulation of commercial concessions in Russia is Chapter 54 of Part Two of the Civil Code of the Russian Federation "Commercial

³ A. M. Doherty, (2009). "Market and partner selection processes in international retail franchising," in *Journal of Business Research*, LXII (2009), no. 5, p. 528-534.

⁴ A. A. Duissembayev, A. M. Ibrayeva, "Franchising as a form of business running," in *Eastern European Scientific Journal*, II (2014), p. 114-117.

⁵ J. Moon, A. Sharma, "Franchising effects on the lodging industry: optimal franchising proportion in terms of profitability and intangible value," in *Tourism Economics*, XX (2014), no. 5, p. 1027-1045.

⁶ N. B. Binh, A. Terry, "Meeting the challenges for franchising in developing countries: the Vietnamese experience," in *Journal of Marketing Channels*, XXI (2014), no. 3, p. 210-221.

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Concession", which enshrines exclusively contractual relations: the concept, subject, conclusion and execution of the contract.

However, Chapter 54 of Part Two of the Civil Code of the Russian Federation has undergone several changes since the moment of its introduction into effect. Let's consider them.

The first significant changes were introduced by the Federal Law dated December 18, 2006 "On the implementation of Part Four of the Civil Code of the Russian Federation" in connection with the adoption of Part Four of the Civil Code.

Firstly, the legislator outlined in the new wording the concept of a commercial concession agreement. So, according to item 1, Article 1027, of the Civil Code of the Russian Federation, under a commercial concession agreement, one party (the right holder) undertakes to provide to the other party (user) a fee for a term or without indication of the term the right to use in the entrepreneurial activity of the user a set of exclusive rights belonging to the rightholder, including a right to a trademark, service mark, as well as rights to other objects of exclusive rights provided for by the contract, in particular for commercial designation, and a secret of production (know-how).

Secondly, item 1 of Article 1027, paragraph 2 of Article 1032, paragraph 3 of Art. 1037, art. 1039, Part 2 of Art. 1040 of the Civil Code of the Russian Federation clarified and expanded the object of the commercial concession contract. In particular, Articles 1538-1541, Part 4, of the Civil Code of the Russian Federation provided legal protection for a new type of individualization means for legal entities: commercial designation.

Thirdly, the legislator refused to execute double registration of a commercial concession agreement.

Fourth, with regard to paragraph 2, item 1, Art. 1031 of the Civil Code of the Russian Federation, the mandatory obligation of a right holder to grant a user the licenses provided by the contract is excluded, having established their order of registration.

Fifth, the introduced item 4, Article 1027, of the Civil Code of the Russian Federation establishes that the rules of Section VII, Part Four, of the Civil Code of the Russian Federation on the license contract are applied to a contract on commercial concession if this does not contradict the provisions of Chapter 54, the Civil Code of the Russian Federation and the substance of the commercial concession contract.

Thus, it can be said that the legal regulation of commercial concession in the light of the adopted Fourth Part of the Civil Code is complicated and causes many contradictions and ambiguities that require further elimination by means of law enforcement practice.

However, there are opinions on the possibility of applying to the settlement of the commercial concession relations, the provisions of the Civil Code of the

Russian Federation on agency and distributor agreements, and in some cases a distribution agreement is identified as a commercial concession agreement.⁷

Clear position on this issue is held by E.A. Sukhanov and V.V. Vitriansky, who believe that the commercial concession contract (franchising) does not belong to the number of mixed (complex) contracts in the sense of cl. 421 of the Civil Code of the Russian Federation. In accordance with the Civil Code of the Russian Federation, this agreement is of a completely independent type of civil law contracts, which excludes the use of any other rules designed to regulate other contractual obligations. In this case, only general provisions on obligations and contracts are subject to subsidiary application.⁸

Thus, it is possible to conclude agency or distribution contracts as separate contracts, but only if it is necessary to organize a franchise system⁹, while the inclusion of the norms of Chapters 49, 51 and 52 of the Civil Code of the Russian Federation in a commercial concession contract is not allowed.

The following changes in Articles 1030, 1033, 1035, 1037 of the Civil Code of the Russian Federation were introduced by the Federal Law dated July 18, 2011 No. 216-FZ "On Amendments to Part Two of the Civil Code of the Russian Federation". The basis for the adoption of these changes was laid by the Decree of the President of the Russian Federation dated July 18, 2008 No. 1108 "On the Improvement of the Civil Code of the Russian Federation" and the Concept of the Development of Civil Legislation of the Russian Federation prepared on its basis.

So, in its initial version, remuneration under a commercial concession agreement could be paid by a user to the right holder in the form of fixed one-time or periodic payments. Now the legislator has envisaged the possibility of including in a commercial concession contract of a combined system of one-time and (or) periodic payments.

Restrictions on the rights of the parties under a commercial concession contract provided for in Article 1033 of the Civil Code of the Russian Federation, are completely stated in a new edition.

A significant innovation of Article 1035 of the Civil Code of the Russian Federation was the attribution to the user of not just the right to renew the contract for a new term, but the preemptive right, which, although it was supposed from paragraph 2 of the previous version of the Article, was not immediately distinguished in the law.¹⁰

The right of a user to enter into a new agreement with a rightholder after the expiry of the term of the previous agreement on the same conditions as set

⁷ Decree of the Federal Arbitration Court of the Moscow District dated 4.11.(1999). No. KG-A40 / 3549-99. - URL: <http://www.Consultant.ru/cons/cgi/online.cgi?Req=doc>, accessed 12. 07. 2017.

⁸ M. I. Braginsky, V. V. Vitriansky (eds.), *Contract law. Book #3: Agreements on the performance of work and the provision of services (Text)*, Moscow, Publishing house "Statut", 2002.

⁹ R. Levickaite, R. Reimeris, "Franchise business model: theoretical insights," in *Business: Theory and Practice*, XI (2010), no. 2, p. 134-142.

¹⁰ M. Müller, S. Gaudig, "An empirical investigation of antecedents to information exchange in supply chains," in *International Journal of Production Research*, IL (2011), no. 6, p. 1531-1555.

forth in Article 1035 of the Civil Code of the Russian Federation has been canceled. Paragraph 2, item 1 of Article 1035 establishes that when concluding a commercial concession agreement for a new term, the terms of the contract may be changed as agreed by the parties.

The consequences of non-conclusion of a commercial concession contract for a new term with the previous user have been changed. In particular, the term of ban on conclusion a commercial concession contract on the same terms has been reduced to 1 year. Also, a user has the right to demand at its choice in court to perform transfer of its rights and obligations under the concluded contract and compensation of losses caused by refusal to renew a commercial concession contract with it, or only to receive compensation of such losses.

Now, in paragraph 2 of item 1, Article 1037 of the Civil Code of the Russian Federation, the right of each party to a contract concluded for a certain period or without specifying a period has been enshrined to withdraw from a contract at any time within one month with notification of the other party, provided that the contract provides for the possibility of its termination by the payment of a monetary amount established as compensation.

There has been introduced the item 1.1, article 1037 of the Civil Code of the Russian Federation, which established for the right holder the right to unilaterally withdraw from a contract for a number of reasons being violations by a user. At the same time, the unilateral refusal of the right holder to perform the contract is possible if the user, after giving the right holder the written request to eliminate a violation, did not eliminate it within a reasonable time or committed again such violation within one year from the date of sending the specified demand.

Conclusions

Analyzing such changes, it is possible to come to a conclusion about strengthening the legal status of a right holder as a less protected party in the commercial concession contract.

To date, the latest changes were introduced by the Federal Law dated 12.03.2014, No. 35-FZ "On Amendments to Parts One, Two and Four of the Civil Code of the Russian Federation and Certain Legislative Acts of the Russian Federation", which will enter into force on October 1, 2014.

The new version is set forth for the item 2, Article 1028 of the Civil Code of the Russian Federation containing the following: "Granting the right to use in the entrepreneurial activity of a user of exclusive rights belonging to the rightholder under a commercial concession agreement is subject to state registration with the federal executive authority on intellectual property. If the requirement for state registration is not complied with, the granting of the right to use is considered to have failed".

In turn, the paragraph 2, item 2, Article 1031 of the Civil Code provides that if the commercial concession contract does not provide otherwise, the rightholder is obliged to ensure state registration of the granting the right to use in the entrepreneurial activity of a user of the complex of exclusive rights owned by

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the rightholder under a commercial concession agreement. The legal consequences of non-compliance with the requirement for state registration have been changed. Thus, if the requirement for state registration is not complied with, the granting of the right to use is considered to have failed.

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