

THE INTERNATIONAL FRANCHISING AGREEMENT IN THE FIELD OF HIGHER EDUCATION IN UKRAINE: PROBLEMS AND PERSPECTIVES

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Abstract. *The article analyzes different approaches, both theoretical and normative, to the construction of the international franchise agreement; in particular the legal nature of an international franchising agreement in the field of higher education is defined, namely: its subject, rights and obligations of the parties, their responsibility. The work focuses on such concepts as autonomy and self-government of higher educational institutions as necessary components for the realization of their powers to conclude international franchising agreements in the field of higher education with reference to the experience of foreign countries. The analysis of provisions of national legislation in the field of higher education is made, in the regulation of an international franchising agreement, a definition of this agreement in the field of higher education and the way of implementing such an agreement on the national market of Ukraine are proposed. The methods, which are used in this research, have systemic nature, which is manifested in the application of various methods of knowledge, depending on specific aspects of the study. In the course of the research a number of general-scientific and special methods were used, namely: comparative-legal, system-structural, logical-legal, technical-legal, method of forecasting and modeling.*

Key words: *franchising, international franchising, international franchising agreement in the field of higher education, franchisor, franchisee, higher educational establishment, educational activity, educational service.*

Introduction

In the past few decades, the process of globalization has had a significant impact on the main areas of the world economy, gradually a new business is created, foreign investments are attracted to national markets, and cooperation between foreign subjects of law is strengthened. This statement fully applies to the sphere of domestic higher education, which is caused by the inconsistency of Ukrainian higher education with European standards, the lack of demand for graduates of higher educational institutions of Ukraine, and the low level of material well-being of Ukrainian citizens. This issue is especially relevant for Ukraine also because the changes that have taken place in society (namely: the introduction of a visa-free regime; the availability of ERASMUS programs, distance learning with European higher education institutions (hereinafter - HEI) reduce the number of Ukrainian students, leads to a decrease of national universities authority and the quality deterioration of educational services provided by them. One way to solve the existing problem, in our opinion, can be the acquisition of a franchise of foreign universities and the introduction of European educational programs at the national level by concluding an international franchising agreement in the field of higher education.

The relevance of the study is also determined by the fact that at present there is no uniform approach to understanding the concept of an international franchising agreement as a generic category and an international franchise agreement in the field of higher education as a kind of international franchise agreement and its legal nature in the domestic legal doctrine and legislation. Therefore, there is an urgent need for deep theoretical comprehension of this contractual structure in order to elucidate the possibilities of its effective use in practice and the prospects for its replication in domestic legislation.

The object of the research is the social relations that arise while the implementation of the international franchising agreement in the field of higher education.

The purpose of research is to analyze the legal nature of the international franchising agreement in the field of higher education; find out its place in the domestic contractual law and legislation.

The objectives:

1. To conduct an analysis of the legal nature of the international franchising agreement in the field of higher education, to identify the features of the international franchising agreement in the field of higher education.
2. To study the foreign experience of legal regulation of franchising relations (on the example of legislation of the Republic of Lithuania).
3. To reveal the specifics of the contents of the international franchising agreement in the field of higher education.
4. To analyze the peculiarities of incurrence of liability under the international franchising agreement in the field of higher education.

5. To find out the possibilities of introducing an international franchising agreement in the field of higher education into the national market for higher education.

The methodological basis of this research is such methods of scientific knowledge as: the comparative legal method which is used in the analysis of the provisions of the regulatory legal acts of Ukraine and the Republic of Lithuania and the determination of ways to improve the domestic legislation on this basis; the system-structural method was useful in studying franchising legal relationships, clarifying their places in legal relations with the participation of a foreign element; the logical-legal method - in the study of domestic legislation in this field; technical and legal - allowed to develop the author's concept of an international franchising agreement in the field of higher education. The forecasting and modeling method predicted the consequences (both positive and negative) of the international franchise agreement in the field of higher education in the legislation of Ukraine.

Investigation. Foreign and domestic scientists such as Teicher U., Ayoubi R., Kevin Pon, Caroline Ritchie, Dmitrishin V. S., Kilmnik I., Evdokimova V. and others have been studying the legal nature of the international franchising agreement in the field of higher education. However, in spite of existing practices, this sphere needs further detailed analysis in the context of the study of the international franchising agreement in the field of higher education.

1. The legal nature of the international franchising agreement in the field of higher education.

Migrations of students to different countries take place on the basis of national and cultural characteristics. Historically, such processes were first observed in the Anglo-Saxon countries, especially in the United Kingdom of Great Britain and Northern Ireland and the United States of America. Such interest in education in these states was determined in English, which is the language of international communication.¹ Since 1990, the range of cooperation between the states of the world in the field of higher education has increased, especially in Great Britain,² and subsequently France and Germany have become new participants in the educational processes. At the present time, the most autonomy of HEI is provided in the UK. The activities of the British HEI are quite successful; in witness thereof it is possible to cite statistical data according to which 16.7% of foreign students study for British programs (2010/2011 years). Some foreign scholars place greater focus on that the main purpose of the activity of such HEI is profit, while others note that the British higher educational system provides an opportunity for national HEI to raise its credibility and prestige value by creating its own name in foreign

1 Teicher, U. Internationalisation as a challenge for higher education in Europe. *Tertiary Education and Management*. 1999, 5, p. 5–23.

2 Ayoubi, R. M. and Massoud, H. K. The strategy of internationalization in universities. *International Journal of Education management*. 2007, 21(4), p. 329–349.

markets.³ In our opinion, these positions do not exclude each other; the advantages of one over the other depend on the situation that has arisen directly at this particular time in the higher education market, the policy of each individual HEI, the level of sufficiency in financing its activities.⁴

The reason for such changes occurring in the modern world in the field of higher education was, first of all, the need for international scientific research on educational issues; the introduction of such mobility programs as European Socrates and Erasmus; the need to improve the quality of higher education to attract prospective students to their own state.⁵

In connection with the above mentioned in the context the possibility of introducing such form of cooperation as international franchising in the field of higher education, first of all, it is necessary to find out what exactly this agreement is. At present time in the scientific literature (both domestic and foreign) there is no unified approach to understanding the legal nature of international franchising agreement as a generic concept, and an international franchising agreement in the field of higher education as a kind of international franchising agreement, its place in the contract law system of any country in the world.

Thus, in particular, Shishka R. defines franchising, describing it as an agreement under which one party (the rightholder) is obliged to transfer to another party (the user) against compensation for a specified period or indefinitely the right to use in the entrepreneurial activity of a scope of exclusive rights: the right to brand name and (or) the commercial designation of the rightholder, the right to commercial information that is protected by law, as well as other objects of exclusive rights stipulated by the agreement – marks for goods or services.⁶

The definition of franchising, proposed by V. Yevdokymova, is interesting for legal analysis. In her opinion franchising is an agreement whereby one person (the rightholder) who has developed system of conducting certain activities, allows another person to use this system in accordance with the requirements of the franchise owner in exchange for a reward.⁷

There is no unity in the question of formulating the concept of this agreement and distinguishing its characteristic features among legislators of the countries of the world, as well as in the rules of *lex mercatoria*. So, according to the Washington Franchise

3 McBurnie, G. and Ziguras C. Trends and future scenarios in programme and institution mobility across borders. *Higher education to 2030*. 2009, Volume 2: Globalisation. Paris: OECD, p. 89–108.

4 Yorke, M. Quality assurance for higher education franchising. *Higher Education*. 1993, 26(2), p. 167–182.

5 Kevin Pon and Caroline Ritchie. International academic franchises: identifying the benefits of international academic franchise provisions. *London Review of Education*. 2014, Volume 12, Number 1, March, p. 105–120.

6 Dmytryshyn, V. S. Contract of commercial concession and franchising agreements. Correlation of concepts and legal nature. *Journal of Kyiv University of Law*. 2010, 3, p. 199–203.

7 Yevdokymova, V. Franchise and the contract of commercial concession. *Patents and licenses*. 1998, 1, p. 23.

Investment Protection Act, franchising is an oral or written agreement, according to which:

- the person is given the right to engage in business by offering, selling or distributing goods or services according to the marketing plan that is proposed or provided in significant part by the grantor or its affiliate;
- the activity of an enterprise is significantly associated with a trademark, service mark, trade label, advertisement or other commercial symbol that is designated, owned or licensed by the grantor or its affiliate;
- the person pays, agrees to pay or requires payment of a franchise fee, directly or indirectly.⁸

The European Commission in its resolution noted that franchising is agreement on granting to the rightholder a scope of exclusive rights to use intellectual property.⁹

At present time, in the Ukrainian legislation, the investigated type of franchising agreement is not regulated, although a draft law "On franchising" under No. 7430 dated December 21, 2017 has been proposed.¹⁰

In science of law, the international franchising agreement in the field of higher education (as a type of franchise agreement) is considered primarily as an agreement, according to which one HEI provides exclusive rights on the distribution of educational services to other HEI under its brand to a certain territory in exchange for receiving payments (royalties) from them, if the technology of providing such services is observed.¹¹ The World Trade Organization, in its act of the General Agreement for Trade in Services (GATS), in effect since 1994, noted that educational services can be manifested in the following forms:

- cross-border reception of foreign services in online mode;
- reception these services abroad (movement of students from one country to another);
- movement of persons providing the educational process (teachers);
- presence of a commercial component through the introduction of branches of foreign universities or introduction of foreign courses in national universities (the conclusion of a franchise agreement).¹²

From the above it is clear that the subject of such an agreement is the transfer of the franchise - a complex of intellectual property rights to the educational service, constitutes the object of franchising relations. The educational service can be defined (we also agree with this definition) as organized, purposeful, sustainable activity (actions),

8 Washington Franchise Investment Protection Act [accessed 2018-01-28]. <<http://apps.leg.wa.gov/w/default.aspx?Cite=19.100>>.

9 Resolution of the Commission of the European Community No. 4087 dated 1988. Franchising in Europe. L., N.Y., 1992.

10 Draft Law of Ukraine "On Franchising" No. 7430 dated December 21, 2017.

11 Erokhina, L. I. Franchising in education. Samara, 2011.

12 General Agreement on Trade in services [accessed 2018-02-02]. <https://www.wto.org/english/docs_e/legal_e/26-gats.pdf>.

carried out by one or several subjects (teacher, pedagogue or teaching staff) by means of communication tools (personal, direct interaction with another subject - learn) to transfer knowledge, the formation of skills, habits, the provision of influences that forming a person personality, a citizen, through the organization and management of his educational activities (actions).¹³

The content of the international franchising agreement in the field of higher education is the rights and obligations of its parties, which are essentially identical with the rights and obligations of the parties in any international franchising agreement. In the legislation (both domestic and foreign), there is currently no unified approach to determining the rights and obligations of the parties. For example, in the Republic of Lithuania, the rights and obligations of the parties are set out in the Civil Code, which was adopted in 2000. Thus, according to Article 6.770 in the part of duties the franchisor is obliged to transfer the technical and commercial documentation to the franchisee and to provide other information necessary for the franchisee to realize the rights granted to him under the franchising agreement; to provide training to the franchisee and his employees regarding issues related to the implementation of the transferred rights; issue licenses of franchisees provided for by the agreement and ensure its registration in accordance with the established procedure. Unless otherwise provided for by the franchise agreement, the franchisor is obliged: to ensure the registration of the franchising agreement; to provide the franchisee with constant technical and advisory assistance and assistance in training the franchisee's employees; to supervise the execution of the quality of provided services under the franchise agreement. The Article 6.771 of the above-mentioned act fixes the duties of the franchisee, in particular, the franchisee is obliged: to use in its activity the brand name, trade and service mark of the franchisor which are indicated in the franchising agreement; to ensure the quality of the products, work or services provided under the franchise agreement; to comply with the franchisor's directives and instructions on the use of the rights, external and internal design of the franchisee's premises, as well as any other conditions of activity specified in the franchise agreement; to provide customers (purchasers) any additional services that they could reasonably expect in purchase (order) of goods (works, services) directly from the franchisor; to hold in confidence the commercial (industrial) secrets or any other confidential information received from the franchisor to other persons; to conclude an agreement on a sub-franchise in the event that such a duty is provided by a franchising agreement; to inform customers (clients), the most obvious means for them, that the franchisee advocates a franchising agreement and uses the brand name, trademark and service marks of the franchisor, or any other individualization symbols.¹⁴

It should be noted that several other obligations of the parties to the agreement are provided for in the European Code of Ethics for Franchising, which was adopted in 1972 by the European Franchise Federation and is mandatory for its members to fulfil.

13 Sapargaliiev, G. S. Relationships for training and educating citizens - subject of legal regulation. *Soviet State and Law*. 1977, 8, p. 122–128.

14 Civil Code of the Republic of Lithuania, dated July 18, 2000, Law No. VIII-1864 [accessed 2017-07-28]. <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495>>, 2000.

According to this document, the franchisor must successfully implement the business concept within a reasonable time and in at least one pilot institution before starting the franchise network; to be the owner or have the legal right to use the trademark of its network, trade label or other distinctive identification. In turn, the franchisee is obliged to devote his efforts to the growing franchise business and to support the common identity and reputation of the franchise network, to provide the franchisor with verified operational data to facilitate the determination of the results of operations and financial reports necessary for effective management, and allow the franchisor and / or his agents to have access to individual premises and records of the franchisor at the request of the franchisor and within a reasonable time; not to disclose to third parties the know-how provided by the franchisor, neither during, nor after the termination of the agreement.¹⁵

From the analysis of the given provisions of normative documents it is seen that sufficient attention is paid to the obligations of the parties, while their rights are almost not mentioned. Considering the fact that the relations of international franchising in the field of higher education refer to civil legal relations with a foreign element where the dispositive method has an overwhelming force; we believe that the legislator can give to the parties the opportunity to independently determine their rights in the agreement, on condition that other is not provided for by law or an international agreement with the participation of the corresponding state of the nationality of the participant in these relations.

Another issue of discussion is the question of the incurrance of liability by the parties. Typically, the franchisor bears subsidiary liability for complaints filed by the franchisee regarding non-performance of services sold by the franchisee under the franchise agreement for quality conformance. In the case when claims are filed against the franchisee as a manufacturer of products, services, the franchisor is jointly and severally liable with the franchisee¹⁶. From an analysis of these approaches, it follows that in any case, the HEI-franchisor is responsible to consumers of educational services that constitute the subject of the franchise.

Thus, we believe that the introduction of such a contractual structure in the acts of national legislation and the definition of this agreement in the contractual system of Ukraine will overcome a number of problems, both theoretical and purely practical: for the doctrine of domestic private international law, the introduction of such a structure will enrich it with new ones interesting, original scientific solutions, and for the legislator - to resolve the issue of proper legal regulation of franchising relations, which is astonished by international franchising agreement in the field of higher education. In connection with the above, we propose, under the international franchise agreement in the field of higher education, to understand the agreement according to which the HEI-franchisor provides the HEI-franchisee, which is a foreign element in relation to the franchisor, for remuneration for a period or without indication of the term, the right

15 The European Code of Ethics for Franchising & its national Extensions & Interpretations [accessed 29.12.2017]. <<http://www.eff-franchise.com/Data/Code%20of%20Ethics.pdf>>.

16 Ibid, p. 14.

to use in the activities of the HEI -franchisee a set of exclusive rights that include the objects of exclusive rights provided for in this agreement, including the right to provide educational services related to the attraction the HEI-franchisees in activity of the HEI-franchisor and accompaniment the HEI-franchisees activity in its implementation.

2. Participation of state HEI in international franchising agreements in the field of higher education (problems and perspectives).

According to the Law of Ukraine “On Higher Education” (Article 32), the activity of the HEI is based on the principles of autonomy and self-admission. Autonomy is understood as the self-sufficiency, independence and responsibility of higher education institutions in making decisions on the development of academic freedoms, the organization of the educational process, scientific research, and internal management, economic and other activities, independent selection and placement of cadres within the limits established by this Law. It also provides for the right to manage funds that universities and other HEIs receive from the provision of paid services, but these funds are credited to treasury accounts¹⁷. In connection with the above, the question arises about the boundaries of the autonomy of the domestic state HEI regarding the possibility of concluding an international franchising agreement in the field of higher education.

Foreign researchers of this problematics point out that autonomy includes four components: organizational, financial, personnel and academic. Each of these components contains certain areas of activity, which the University can realize at its discretion. Organizational autonomy allows for HEI:

- to establish a procedure for the election of the chairman;
- to release head from office;
- to determine the deadline for the performance of head`s duties;
- to make decision on academic patterns;
- to create of legal entities.

Financial autonomy implies:

- to determination of amount and type of state financing;
- the ability to dispose of excess income;
- the ability to borrow funds;
- the right to install a tuition payment.

Personnel autonomy of universities, in turn, gives educational institutions the authority in the field of personnel, namely, the procedure for hiring and firing workers, setting wages and so on.

Finally, academic autonomy extends to the educational process. HEIs have the opportunity to determine the total number of students, to introduce curricula and to

17 On higher education: Law of Ukraine dated 01.07.2014 No. 1556-VII. *Vidomosti of Verkhovna Rada of Ukraine*. 2014, No. 37-38/2004.

develop their content, to choose the language in which the disciplines will be taught and the like.¹⁸

In our opinion, for the analysis of the international franchising agreement in the field of higher education, the financial (the possibility of disposing of own money) and academic components (the right to implement of new programs) are the most interesting ones, since Ukraine has a widespread approach in which state HEIs cannot conclude commercial contracts, since they have the status of non-profit institutions in accordance with part 133.4.6 Article 133 of the Tax Code of Ukraine¹⁹. We consider that the status of non-profit does not deprive state HEIs the possibility to attract additional funds to budgetary funds in order to improve the quality of higher education, provided that the funds received are spent exclusively on the maintenance of the relevant organization and are not distributed among the founders of the corresponding HEIs. The declarative nature of the provision on autonomy and the lack of clear mechanisms for its implementation only thwart progress of educational services development provided by domestic HEIs.

Another important point in the implementation of educational activities of the HEI under the international franchising agreement in the field of higher education is the need to obtain a license, because the franchisor's license does not apply to the activities of the franchisee. So, according to the laws of Ukraine "On Higher Education" and "On Licensing of Types of Economic Activity" dated March 02, 2015 No. 222-VIII, the educational activities in Ukraine are subject to licensing, during which the ability of an institution to conduct this activity at a certain level of higher education in a particular specialty is established, which is a composite area of knowledge for which training is provided. HEI, who received the license, is obliged to carry out its activities within the licensed volume, which establishes the maximum number of students simultaneously. From the contents of the above provisions it follows that the activity of the HEI will not violate the license conditions and does not require the receipt of an additional license in the event that under an international franchising agreement in the field of higher education does not introduce a new specialty or expand the range of subjects receiving educational services in a certain field of knowledge.²⁰

It should also be noted that, along with franchising, other means can be used to improve the quality of educational services in the context of internationalization of the links between HEIs of different states, namely: the conduction online programs (without the use of exclusive intellectual property rights - franchises), international courses, the use of outsourcing (attracting foreign teachers for training), the use of "twinning". The latter is a partnership of the HEI, according to which students from one educational institution are sent to another educational institution where they study for a certain period of

18 Enora Bennetot Pruvot, Thomas Estermann. University Autonomy in Europe III. The Scoreland 2017 [accessed 2018-01-21]. <<http://www.eua.be/Libraries/publications/University-Autonomy-in-Europe-2017>>.

19 Tax Code of Ukraine: Law of Ukraine dated 02.12.2010 No. 2755-VI. *Official gazette of Ukraine*. 2010, 92, Volume 1, p. 9, article 3248.

20 On licensing of economic activities: Law of Ukraine dated 02.03.2015 No. 222-VIII. *Vidomosti of Verkhovna Rada of Ukraine*. 2015, No. 23, p. 158.

time, after which they return to the national HEI for continuing education and have the opportunity to obtain a foreign institution document confirming their achievement. Franchising in comparison with the above-mentioned methods of education is a more progressive form of interaction between the HEIs of different countries that enhances the competence of students by providing the receiving party with a full package of rights for conducting educational activities and monitoring the observance of standards in the field of higher education.²¹

Conclusions:

In this research, we found that:

1. The emergence of Ukraine as a European higher education center slows the imperfection of the current legislation of Ukraine, does not meet modern needs, which ultimately affects the inconsistency of the domestic higher education with European standards, the absence of demand of graduates of the HEI of Ukraine on external labor markets. An effective mean of overcoming such a negative situation can be the introduction in the acts of national legislation of such a structure as an international franchise agreement in the field of higher education, which will allow to acquire franchises of foreign universities and introduce European educational programs.
2. Under the international franchising agreement in the field of higher education, it is necessary to understand the agreement according to which the HEI-franchisor provides to the HEI-franchisee, which is a foreign element in relation to the franchisor, for a fee for a term or without indication of the term, the right to use in the activity of the HEI-franchisee a complex of exclusive rights including objects of exclusive rights provided for in this agreement, including the right to provide educational services related to the involvement of the HEI-franchisee in the scope of activities of HEI-franchisor and support activities of HEI-franchisees in the process of its execution. An important feature of this agreement is the need, as a rule, to obtain a license in cases established by the legislation of the respective state. The international franchising agreement in the field of higher education is bilateral - it is concluded between a franchisor (right holder) and a franchisee (user); paid - the franchisee is obliged to pay royalties (payments for the use of the franchise); consensual - is concluded from the moment when the parties reach agreement on all essential conditions (or from the moment of signing by the parties if the international franchising agreement is concluded in writing).
3. By establishing legislation in the field of legal regulation of franchising relations and forming a national doctrine with a new conceptual apparatus through the formulation of the concept of an international franchising agreement in the field

21 Armstrong, Lloyd. Competing in the Global Higher Education Marketplace: Outsourcing, Twinning, and Franchising. *New Directions for Higher Education*, 2007, No. 140, p. 131-138.

of higher education, we have found (taking into account the experience of foreign countries) that the possibility of introducing such a contractual structure into legislation has both positive and negative aspects for Ukraine. The positive ones include: improving the quality of educational services at the national level, reducing the influence of competitors by introducing an exclusive product; the access to new markets and establishment of contacts with foreign countries; the development of their own scientific and methodological base, the upgrading of the teaching staff and the like. Negative aspects are in the need to attract foreign specialists for the implementation of teaching activities, which can lead to staff cuts due to incomplete workload; the possibility of problems in the presentation of programs related to differences in culture and mentality, the imposition by the franchisor of the “enslaving” terms of such contracts, provided there is no competitive environment in this service market, the lack of support from the state with regard to the potential opportunities for concluding these categories of contracts.

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TARPTAUTINĖS FRANŠIZĖS SUTARTYS UKRAINOJE AUKŠTOJO MOKSLO SRITYJE: PROBLEMAS IR PERSPEKTYVOS

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Anotacija. Straipsnyje analizuojami skirtingi požiūriai į tarptautinių franšizės sutarčių rašymo teorinius ir norminius aspektus; visų pirma apibrėžiamas tarptautinis franšizės susitarimo teisinis pobūdis aukštojo mokslo srityje, t.y. franšizės dalykas, šalių teisės ir pareigos, jų atsakomybė. Darbe daugiausia dėmesio skiriama tokioms sąvokoms kaip aukštojo mokslo institucijų savarankiškumas ir savivalda kaip būtinos sudedamosios dalys realizuojant jų įgaliojimus sudaryti tarptautinius franšizės susitarimus aukštojo mokslo srityje, atsižvelgiant į užsienio šalių patirtį. Analizuojant nacionalinės teisės aktus aukštojo mokslo srityje reglamentuojant tarptautines franšizės sutarčių formavimą, siūlomi šių sutarčių apibrėžimas aukštojo mokslo srityje ir įgyvendinimo būdai Ukrainos nacionalinėje aukštojo mokslo rinkoje. Šiame tyrime naudojami metodai turi sisteminių pobūdį, kuris pasireiškia taikant įvairius metodus, priklausomai nuo konkrečių tyrimo aspektų. Tyrimo metu buvo analizuojami šie lyginamieji aspektai: lyginamosios -teisės, sisteminis-struktūrinis, loginis-teisinis, techninis-teisinis, prognozavimo ir modeliavimo metodika.

Reikšminiai žodžiai: franšizė, tarptautinė franšizė, tarptautinės franšizės sutartis aukštojo mokslo srityje, franšizės davėjas, franšizės gavėjas, aukštojo mokslo institucija, švietimo veikla, švietimo paslaugos

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