



Usmoothie Franchise Contract Analysis

Report of procurement and contract management Course
Sharif University of Technology, School of Management and Economy

Presented to Dr. Ebrahimi

Author: Meisam Hejazinia

Summer 2010

Contents

1	General Overview on Franchise Contract.....	5
1.1	Franchise contract	5
1.2	Advantages of Franchising.....	7
1.3	General information about Usmoothie and Franchising	8
1.4	SWOT Analysis	9
1.4.1	Strengths of being franchise of Usmoothie	11
1.4.2	Weaknesses of being franchise of Usmoothie	11
1.4.3	Opportunities of being franchise of Usmoothie	11
1.4.4	Threats of being franchise of Usmoothie	12
1.5	Summary	13
2	Technical (Operational) Aspects.....	13
2.1	Supply issue and Supplier	13
2.2	Definition of scope of works and services	13
2.3	Additional work and Variation Order	15
2.4	Work Breakdown structure	15
2.5	Technical Auditing and Inspection	15
2.6	Civil and legal liability.....	15
2.7	HSE and safety.....	16
2.8	Code of standard and industry practice.....	16
2.9	Insurance	16
2.10	Progress reports.....	16
2.11	Documentation and Knowledge Management	17
2.12	Maintenance	17
2.13	Operational Risk	17
2.14	Technology and Know how	17
3	Financial and commercial aspects.....	17
3.1	Contract Price.....	17
3.2	Payment Terms and conditions	18
3.3	Currency issue and exchange policy	19
3.4	Cost breakdown structure.....	19
3.5	Tax and other rates.....	19

3.6	Exclusion and inclusion price	19
3.7	Unitization.....	19
3.8	Price revision and Price escalation.....	20
3.9	Cost recovery	20
3.10	Financing issue.....	20
3.11	Method of invoicing and payment	20
3.12	Verification invoice and auditing procedure.....	20
3.13	Project books and account.....	20
3.14	Financial settlement	20
3.15	Accounting and Auditing Procedure.....	21
3.16	Financial progress report.....	21
3.17	Lawful levies, fees, and charges	21
3.18	Guarantee and good performance guarantee.....	21
3.19	Liquidity and illiquidity damage.....	21
3.20	Financial risk.....	22
3.21	Risk of diversity of interest.....	22
3.22	Market condition risk	22
3.23	Insurance liability.....	22
3.24	Internal Rate of Return and Rate of Return	22
4	Contractual Aspects	23
4.1	Preamble	23
4.2	Parties of contract	23
4.3	Qualification Process	24
4.4	Objective of the contract.....	24
4.5	Definition of terms and expressions.....	24
4.6	Definition of contract area	25
4.7	Validity and effectiveness.....	25
4.8	Duration and schedule.....	25
4.9	Condition and Warranty.....	25
4.10	Coordination Procedure	25
4.11	Performance of worker.....	26
5	Legal Aspects.....	26

5.1	Franchise Law	26
5.2	Stabilization clause	27
5.3	Sovereign immunity and commercial transactions	27
5.4	Liability and Responsibility	27
5.5	Indemnification	27
5.6	Assignment	28
5.7	Depecage.....	29
5.8	Force Majeure	29
5.9	Termination.....	29
5.10	Confidentiality	30
5.11	Applicable Law	30
6	Conclusion	30
7	Resources	31

1 General Overview on Franchise Contract

1.1 Franchise contract

Most businessman just choose to franchise when they want to establish a business on their own since establishing a name for a business is difficult task to do. Although when you buy a franchise, you actually own it; you will have to follow the original concept and ideas, which have been established already. Buying a franchise of a product, you buy the rights to the franchisor, and you agree terms and conditions presented in the contract. The franchise contract is made for both parties' rights protection (Seina).

After intending to buy the franchise, and contacting the franchisor, the franchisor will expect applicant to complete the questionnaire or application form, which may include detail questions about applicant's finances, personal assets for instance, and applicant's spouse's financial situation to be sure that both are prepared to make financial commitment necessary to start and run the franchise successfully. Also questions about experience, background, and even aspirations are questions designed to help the franchisor determine whether or not you are the kind of person being able to run the business successfully and fit into the franchise business model. Too independent applicants or one who are going to "gum up the works" will not pass the evaluation process since franchisor cannot resist experimenting or applying franchisors' own idea. The next step in case of appropriate questionnaire response is meeting with the franchisor in the form of a job interview. The suitability, commitment, and interest will be evaluated in this meeting. Being recognized as suitable franchisee, the applicant will be offered a franchise contract, having some aspect open to negotiation like any other contract (Ward).

Legal commitment binding on both franchisor and franchisee, defining every aspect of the franchisor-franchisee relationship, franchise contract is very important legal document arising in conjunction with buying the franchise, translating required stipulations into a legally enforceable document for the protection of all parties involved. After the franchisee has done all the necessary research, receiving answers to all of the relevant questions the franchise contract comes into a play (gaebler.com).

Franchise contract consists of two parts, sometimes clearly separated and sometimes not: first the purchase agreement, which describes the upfront transaction, detailing the terms of initial purchase; and second the franchise (or license) agreement which describes the terms and conditions of franchise relationship on a go-forward basis.

Three primary issues should be addressed in the purchase agreement: first the initial purchase price of franchise and manner of the payment, if seems ambiguous clarification need to be get; second detail about the franchise package, which is equipment and inventory expected to receive when ownership transferred, and should include everything having been promised. More often on signature often a deposit is required to follow on delivery of the equipment. Finally we have initial service, the franchisor will provide once the franchise is owned before the franchisee is

ready to open for a business, including training, site selection assistance, and marketing assistance and service, but it is not limit to them.

Franchise agreement contains rights included with purchase, expected to receive with franchise, including rights granted to the franchisee, rights to trademarks, copyrights, territorial exclusivity, trade restrictions imposed upon the franchisee, recipes, and “secret formulas”. Obligation undertaken by the franchisor, everything expected to be received from the franchisor on an ongoing basis, and the obligations imposed upon the franchisee, including wide range of restrictions placed on issues such as operations, marketing strategy, advertising, training, insurance, clearance, corporate image, supplier, also would be discussed in a good franchise agreement. To avoid any misunderstanding, which results to breach of contract, royalty fees and other fees that the franchisor is obligated to pay, including Front-end fee, sales fee, and advertising fee, should also be clearly stated in the contract. Finally the franchise agreement includes not only assignment/death of franchisee provision but also the condition in which the relationship between the franchisor and the franchisee terminates, called termination provision (franchiseknowhow.com) (gaebler.com) (Seina).

The rights granted to the franchisee may include use of trademarks, including trade names and patents of the franchisor, use of the brand image and the design and décor of the premises developed by the franchisor, use of the franchisor’s secret methods, use of the franchisor’s copyright materials, use of recipes, formulae, specifications and processes and methods of manufacture developed by the franchisor, conducting the franchised business upon or from the agreed premises strictly in accordance with the franchisor’s methods and subject to the franchisor’s directions, guidelines established by the franchisor regarding exclusive territorial rights, rights to obtain suppliers from nominated suppliers at special prices, but is not limited to them.

The obligation imposed upon the franchisee may include carrying on the business franchised and no other business upon the approved and nominated premises, observing certain minimum operating hours, paying a franchise fee, following the accounting system laid down by the franchisor, not advertising without prior approval of the advertisements by the franchisor, using and displaying such point of sale advertising materials as the franchisor stipulates, maintaining the premises in good, clean and sanitary condition and to redecorate when required to do so by the franchisor, maintaining the widest possible insurance coverage, permitting the franchisor’s staff to enter the premises to inspect and see if the franchisor’s standards are being maintained, purchasing goods or products from the franchisor or his designated suppliers, training your staff in the franchisor’s methods to ensure that they are neatly and appropriately clothed, not assigning the franchise contract without the franchisor’s consent, but is not limited to them.

Trade restrictions provision states restrictions imposed upon franchisee, which prohibit him or her from carrying on a similar business except under franchise from franchisor. It also prohibits the franchisee from taking staff from other franchisees, and carrying on similar businesses in

close proximity to other franchised businesses within that chain. Also prohibition of continuing after termination of the franchise contract, to use any of the franchisor's trade names, secrets, and so forth is included in this provision. Assignment/death of the franchisee provision ensures that in the event of death his/her personal representative or dependent will be able to keep the business going until one of them can qualify as a franchisee; furthermore, that arrangements can be made to keep the business going until a suitable assignee can be found at a proper price (franchiseknowhow.com).

Articles of a typical franchise contract would include: object of the contract, independence of the parties, authorized establishment, territorial exclusivity, duration and renewal of the contract, commencement of activities, adaptation and furnishing of authorized establishment, license to industrial property rights, franchise fees, franchise handbook, assistance and training, provision of products, start-up stock, IT system, inventory and supervision rights, insurance, advertising, confidentiality, non competition, transferral of contract, termination of contract, post contractual obligations, force majeure, notification, applicable law and competent jurisdiction, and language. Also a franchise contract may contain annexes of property rights, premises, territorial exclusivity, preliminary training, general sales conditions, and information as to the franchised company (globalnegotiator.com).

1.2 Advantages of Franchising

As a shortcut to success, when it comes to starting a business, people think of buying a franchise. We could count five important pros when we talk about franchise contract including: lower failure rate, help with start up and beyond, buying power, star power, and profits. While independent business stand a 70 to 80 percent chance of not surviving the first few critical years, franchisees have an 80 percent chance of surviving, for when you buy a franchise you buy an established concept that has been successful; consequently, franchising has a lower failure rate. Furthermore, since by buying a franchise, you get all the equipment, supplies and instructions or training needed to start the business, including ongoing training, help with management and marketing, reaping the benefit of the parent company's national marketing campaigns for instance, you get a lot of help starting your business and running it afterward, mostly in turnkey operation kind.

In addition, inventory and supplies will cost less than running an independent company, since your franchise will benefit from the collective buying power of the parent company, while the franchisor can afford to buy in bulk and pass the proportion of saving along to franchisees. In case of franchise also you could leverage national brand-name recognition, so it is like buying a business with built-in customers, and finally according to statistics it is immensely profitable; however there are still a couple of cons in franchise business, including: their way or the highway, ongoing costs, ongoing support, cost, and shark-infested waters.

You are not actually the one running the show even if franchisor does not exert the degree of control that you may find excruciating, as a franchisee. In other words the main disadvantage of

buying a franchise is that you have to do it their way. Moreover original franchise fees, royalties, and a percentage of your franchise's business revenue are not the only costs encountered; franchisee needs to pay additional fees for services provided, such as cost of advertising. There is inconsistency between different franchisors service level, some offer just start up services and after is up to you, but others although have made promised of ongoing training and support; they do not follow up on. The cost disadvantage also plays a role in franchise business, since buying well known franchise is expensive, and you have to have extremely deep pockets to arrange the necessary financing. On the other hand buying little known, inexpensive franchise may be a real gamble, since there is no guarantee from franchisor side that the franchise you buy will be successful. Franchisor is interested in selling more franchises in some cases, so whether or not the franchise is successful is irrelevant to them (Ward).

1.3 General information about Usmoothie and Franchising

Usmoothie Ltd is the UK's premier supplier of equipment, fruit and consumables for the juice bar and smoothie industry. Complementing a wide range of directly imported machines from brand leaders, Usmoothie offers a national BRC accredited delivery service, technical support and full point of sale. Consultancy and advice is offered as a standard feature of Usmoothie service provision, for new start up and existing businesses wishing to introduce totally fresh and healthy beverages (lunchshow.co.uk).

Having first started in the USA, AC Nielsen reports that 60 million liters of Smoothies were consumed in the UK during 2008. Leading market research company, Mintel, also predict consumption trebling over the next 5 years. AC Nielsen data shows that the UK smoothie market has grown almost 600% from 2005 to 2007 and now accounts for more than 1 in every 5 chilled fruit drink consumed (hotfroguk.co.uk).

Smoothies have taken off in style in the UK, from airports retailers to shopping centers. As we mentioned Nielson data previously showed that the smoothie industry saw a year on year spend increase of £33m vs £73m which means 200%. Being Usmoothie franchise is not setting up as bricks and mortar juice bar, but the dynamic business model means that franchisee will service Usmoothie products already sited for him in trading outlets, by mean of no huge set up costs, no cold calling, and good profit potential (franchiseroute.co.uk).

Usmoothie franchisee will receivables include: exclusive territory, 10 Blendtec commercial blenders, already sited in trading outlets (no cold calls required), use of Usmoothie branding, Usmoothie special pre-portioned frozen fruit packs and the association with the government's official 'Five A Day' campaign, the right to expand and grow his business within his territory, qualified franchise management team, business plan, Usmoothie franchise newsletter, dedicated website and discussion forum and annual conference and awards dinner. Usmoothie's revolutionary partnership style deal, allows the outlet to receive both the Blender and the Fruit free of charge. The franchisee then shares profits with the Outlet. Usmoothie's packages start from as little as £18,800 +VAT. (hotfroguk.co.uk).

Usmoothie revolutionary partnership style deal, allows the outlet to receive both the Blender and the Fruit free of charge. The franchisee then shares profits with the outlet. The more successful the outlet is, the more successful franchisee's franchise will be, and the more success the franchisee has, the more successful Usmoothie will be. In other word it is true partnership all the way through. Outlets are selected, vetted and contracted by the Usmoothie Franchise Team, and there is no need for the franchisee to be experienced in sales.

Usmoothie's support package ensures that all franchisees have the correct tools to run a business, whether small or large. This package includes: comprehensive onsite training program, in-house customer service desk and order taking team, 24 hour maintenance service throughout the UK & Ireland, regular business reviews to help grow franchisee's business, onsite training and operational support by a qualified manager, and premium promotional brand support and point of sale material ensuring outlets maximize their profit. The franchisees are expected to achieve at least 8 drinks per day per site. Assuming this level of sales, for 6 days each week of the year, then franchisee's net profit will be ca. £14,000. However, the franchisee has exclusivity in his territory and is free to expand his machine base (with no further one-off franchise fee payable). So, for example, if the franchisee places a further similar batch of machines then this would raise his earnings to £28k rather than £14k. Furthermore, a full business plan will be prepared for the franchisee as part of franchisee's training and induction (franchiseroute.co.uk).

1.4 SWOT Analysis

To do SWOT analysis over a franchise contract first we need to think of the main characteristics of a franchise system which may suggest another way of starting a business because of not finding fit between what an applicant expect and what a franchise system is. Legal relationship between a franchisee and a franchisor are governed by the contract and important provisions are included for future actions if the relationship does not work out. First thing to know about the franchise contract is that agreement with strong franchise companies are typically non negotiable. Strong franchise companies are the one for who most prospective franchisee are looking, which successful system is, and where for their decisions current franchisees are happy with. The easiest way for a strong franchisor to administer its system with maximum benefit is to have each franchisee on the same program which means having a uniform contract for all franchisees.

On the contrary if the contract is open to negotiation it should be considered as a warning sign. In this case applicant has to question confidence and certainty level concerning brand validity and operating system of the franchisor. Not being strong in those issues would cast doubt on the received value in exchange of franchisee's paid fee. A positive answer to the question of changing possibility in case of finding literally only one word in the entire agreement that needed to be changed means the contract is negotiable, and applicant should get expert assistance to negotiate accordingly. One important thing to know about the franchise contract is that, franchise contracts are typically unilateral in nature; feeling unfair and unreasonable especially

with non-negotiating probability over terms or language are typical even when applicants are not an attorney. One of the main goals of the franchise agreement is to protect the franchise system, including brand, integrity of operation system, and franchisee's business in aggregate as a whole, and franchisor's know-how to accomplish this task is embedded in the written contract.

The franchise agreement contains fully of "must dos" and "can't-dos". In conjunction with operating your business, there are clearly outlined terms in contract. There's no chance for misunderstanding their importance since these rules helps franchisee understand and prioritize while operating business to attain success. To verify contractual "must-do" rules, applicant should call few existing franchisees and ask about them, and uncomfortable finding with any of mandatory contractual provisions, a different franchise to pursue should be found. In the other hand forbidden things to do while operating business are also outlined in detail in franchise agreement, including: non-competes, forbidding using trade secrets and operating techniques unless being part of the system, protecting the system and all franchisees from any rogue actions from fellow franchisee, and sufficient activity restrictions to prohibit all franchisees from conducting business in a manner injurious to the value and success of one franchisee and vice versa (Elgin).

Additions or restrictions may have been included in the franchise contract that do not seem relevant including clauses addressing future planning strategies and ideas, and clauses designed to protect the future rights of a company such as alternative channel distribution of products or services, so these help to evaluate the company better, and give some big clues to the company's potential future plans; consequently, their reason of being included should be asked. Moreover clauses restricting your ability to sell your business may be presented in franchise contract, affecting exit strategy you may have in place. In practice most franchise contracts are for an initial term of 10 to 20 years while most franchisee leave before that term is completed, so leaving the system terms should be considered as important as other terms. Operation manual, outlining all rules and requirements in detail for operating the business is the most commonly referenced document that is amended to the franchise contract, and franchisee will not receive and review it prior to signing the contract, so this document lets the franchisor to change the deal in terms of material after the fact without any recourse by the franchisee; consequently the applicant should be aware of franchisor's power in this term since operation manual can be changed at any time and the franchisee is required to conform under the terms of the franchise contract.

The change may mean making new investment requirements including: a new required computer system, remodeling to match a new décor need, or additional equipment in order to provide a new product or service. Although it may seem that franchisee is in a position where he has to trust the franchisor to do the right thing by him in the future, and he will get all of the protection he might like from franchise contract, franchisee does have one very important real world protection which safes him against arbitrary or capricious behavior of the franchisor. I one franchisor is out of line; he is not only hurting one franchise but hurting all of the franchisees.

Franchisees have “power of the purse” over the franchisor, as a collective group, since virtually all of the franchisor’s revenue comes from its franchisees. Franchisor recognize checks-and-balance factor, and smart ones keenly seek franchise support with important and potentially expensive decisions, such as elected advisory councils, regional meeting, and national conventions. New franchisee may not feel much power, but more experienced franchisees will be protecting their own interests and by extension new ones, so new one should learn from them and follow their lead when appropriate (Elgin, 10 Things About Franchise Contracts- Part 2).

From the SWOT view point of the contract we should also consider legal status of franchise tying contract since we already have Kodak franchise tying suit conviction. This issue is related to the antitrust violation arising from franchise behavior which is described as tying. There are five elements, including: involvement of two products, conditional sale, enjoyment of seller from substantial economic (or market) power in tying product market, anticompetitive effects or injuring the competitive process, and involving a not substantial volume of commerce, which in case of involvement of all the contract will deemed illegal per se. Not being able to prove all five elements, the contract must be judged under the rule of reasons. In other word, precompetitive consequences of tying contract will be weighed against the anticompetitive consequences. Predomination of each of the effects will identify legality or illegality of the arrangement (R. D. Blair, 1999).

1.4.1 Strengths of being franchise of Usmoothie

As could be seen in general review of Usmoothie’s contract, it is unilateral. This could be seen as strength if we decide to be Usmoothie’s franchise, since it is sign of confidence and stability in the system. In other word being Usmoothie’s franchise would mean sustainable business afterward, and would lead to low risk long run investment because Usmoothie uses the same binding contract for all its franchisees, so there is little worry about other franchisees’ side effect. The second strength in starting a franchise contract is being confident that there is an established network of Usmoothie franchisee which will protect the new franchisee in case of Usmoothie being out of line in its operation manual. Using Usmoothie’s know-how and support in starting operation also could be considered as an strength of being franchise of Usmoothie.

1.4.2 Weaknesses of being franchise of Usmoothie

Although we were unable to find whether Usmoothie’s contract is negotiable or not, since it has well known established brand and a kind of totally unilateral contract, it could be inferred that the contract would be non negotiable. Consequently the first weakness of being franchise of Usmoothie is that its contract is non-negotiable from the view point that we found some parts unsuitable for the way we conduct business.

1.4.3 Opportunities of being franchise of Usmoothie

One of the important points in defining whether this franchise contract would be opportunity or threat for both side, franchisor, and franchisee is the stage of life cycle the franchisee is in. According to Frazer (Frazer, 2001) franchises evolve and develop over a series of lifecycle stages ranging from introductory stage, to growth, and maturity, through to eventual decline, and

while in the early years, franchisees pass through a 'honeymoon' stage where they are willing to be guided by the franchisor and where few later, franchisees develop a greater sense of independence and may be more inclined to deviate from system procedures to demonstrate this independence. Consequently, communication problems and dispute situations are more likely to occur as the franchise matures. So for the franchisor in the early stages the franchise contract would be deemed as an opportunity. Regarding to advertising issue according to Singue (S. P. Sigue, 2009) in case of having economy of scale for image advertising franchise system would be considered as an opportunity for franchisees. According to Roh (Roh, 2002) franchising is an efficient form of organization when the marginal cost of monitoring company-owned store managers is greater than the marginal cost of undertaking a franchise agreement, so we could deem franchising in as an opportunity when prior condition is met. Moreover the primary role of brand name capital according to Roh (Roh, 2002) is to convey information about consistent quality that the consumer might find costly to obtain otherwise, so this is another reason why franchise contract is an opportunity. Risk sharing according to the same reference is another opportunity in franchise system, which is reached by utilizing franchisor's national identity, national advertising and training programs and materials.

Besides, according to Roh (Roh, 2002) the opportunity of franchise is bigger for franchisor if the franchisor is small and has lack of resources, and has lack of human resource and capital for monitoring them, and for franchisee franchise system would be as an opportunity since he could lease intangible asset, and could show his consistent quality of product. In general for franchisor the franchise system is more like an opportunity since it only collects positive royalty monthly. According to Haucapa et. al. (J. Haucapa, 2000) the firm can use different signals of quality such as use of country-of-origin, and since it requires tremendous amount of start-up capital, the firm leases the country's brand name instead and pays a franchise royalty in form of high taxes and wages. Therefore, from this view franchise contract would be a sign of quality, so it is an opportunity for the franchisee.

1.4.4 Threats of being franchise of Usmoothie

As we discussed in opportunity section by rational of Frazer for franchisee at the late stage of its lifecycle franchise contract could be deemed as a threat for both sides since misunderstanding can arise because of conflicting goals of franchisee and franchisor. According to Frazer (Frazer, 2001) older and larger franchises are more likely to suffer problems between franchisors and franchisees that results in substantial disputes and the conversion of previously franchise outlets to either company owned, independently operated or closed outlets. Free riding is always threat in a franchise system, although Singue's findings (S. P. Sigue, 2009) shows that when the franchisees do not cooperate and there is horizontal free-riding on franchise brand-image, the franchisor provides franchisees a large support rate. With cooperation between franchisees, the free-riding issue is solved, and the franchisor lowers his support rate for the franchisees' brand-image advertising, but we still consider free riding as an important threat in a franchise system. The main advantage of franchise system is using strong trademark of franchisor, and use the established concept of business and in case of their absence not only the franchise system would not be considered as an opportunity but also it could be considered as a threat.

1.5 Summary

In this section we discussed different aspect of general franchise contract. As we discussed franchise contracts are a kind of opportunity for entrepreneurs to establish a business with lower risk. On the other hand for the franchisor franchise system is a very good vehicle to expand the business without being stock into asset and human resource constraints. We named main provisions used in franchise contracts and related issues in this section in the next section we will discuss technical, financial, contractual, and legal aspect of Usmoothie franchise contract.

2 Technical (Operational) Aspects

2.1 Supply issue and Supplier

Part 4 on page 9 states the supply issues under franchisors obligations, which includes installment of Smoothie blenders free of additional charge for 10 outlets, franchise package, advice on the initial advertising campaign to launch the business, initial training detailed in operation manual, field training within the territory with marketing representative of the franchisor, and lending a copy of operation manual for the duration of the contract.

Also clause 5 provides the supply issue under franchisor's continuing obligation title, which includes know-how, advice and guidance relating to the business, for this purpose access to dedicated personal of franchisor, continuing operational business's additional support at the rate specified in operation manual, updated operation manual, Usmoothie's product or approval supplier for the supply of products, introductory and periodical refresher courses, resite Smoothie blenders within 3 month from their first installment on demand, and maintenance and support services for Smoothie blenders with the cost specified in operation manual.

Furthermore, as it is stated in franchisee's obligation supply issue also includes stationary, invoices, equipment, additional or different equipment and/or smoothie blenders specified by franchisor from time to time.

2.2 Definition of scope of works and services

For the definition of scope of the contract details of supply issues are referred to operation manual. Franchisees cannot access operation manual unless they sign a contract, and it is typical of franchise contracts. Moreover, in carrying on the business part in page 11 the scope of the business is limited to outlets and carrying out business from any other location other than the outlets without the franchisor's consent is prohibited. Also in clause 6.2.2 on the same page operation was restricted to the way stated in the operation manual and only under the trade mark. This point is also typical of franchising contract since according to Davies et. al. (M. A.P. Davies, 2009) only upon dedication and unconditional compliance of all entrepreneurial partners the profitable and comprehensive exploitation of market opportunities would be met. Clause 6.2.3 also restricted the franchisee to use only approved signs and packaging in connection with the business, and to apply trade marks to products only under expressed writing authorization by

the franchisor. Product offering is also limited to customer demand and franchisor's specification over time under clause 6.2.4.

Clause 6.2.8 restricts the scope of franchisee business to Usmoothie's product and services, and any extension is prohibited unless Franchisor's prior written consent. Clause 6.2.9 also restricts the franchisee to comply with all instruction given to him by the franchisor with regard to the preparation and sale of the Products including display merchandising and packaging in the conduct of the Business. Under clause 6.2.10 the franchisor not only must show respect interacting with the nominated franchisee but also must provide the required information as reasonably requested by them. Clause 6.2.15 on page 13 also restricts the franchisor to not pledge the credit of the Franchisor or represent himself as being the Franchisor or a partner or agent of the Franchisor unless otherwise provided for in this agreement. Clause 6.2.16 also extends this restrictions to person connected with franchisee to not to represent himself or the Franchisee in such a way that others dealing with him or the Franchisee might regard him or the Franchisee as a director, officer, employee, agent or otherwise authorized to act on behalf of the Franchisor. Clause 6.2.17 also imposed the restriction by restricting the franchisee to use specific sentence in his correspondence. Clauses 6.3.1, 6.3.2, and 6.3.3 define the work related to the outlets. Clause 6.3.6 states that training staff regarding Smoothie blender and their maintenance is on franchisee's shoulder. Clause 6.3.7 defines another aspect of franchisee's job which is finding and selecting further potential Outlets for the Smoothie Blenders in accordance with the Outlet selection criteria set out in the Operations Manual. Clause 6.3.8 shows that franchisee has the responsibility to visit further potential Outlets for the Smoothie Blenders in accordance with the Outlet selection criteria set out in the Operations Manual. Finally the franchisor preserves the right for himself to order discontinuing offering the product for sales in case of public health and safety or legal issues affect it, in clause 6.3.9 and franchisee must comply with it.

Clause 6.4.2 requires franchisee to replace or refund the cost of any sold products that were genuinely found to be defective or standard. For the complaints clause 6.4.3 page 17 states that specific procedure stated in the operation manual should be followed and in case of not having the problem solved notify the franchisor in 48 hours. Then clause 6.4.4 defines another aspect of franchisee's responsibility which is make contracts with customers for the sitting of the Smoothie Blender and the sale of the Products on the standard terms and conditions set out in the Operations Manual. Also this clause provides the franchisee with freedom to determine price after considering maximum prices recommended from time to time by the franchisor. In clause 6.5.1 discusses quality of service issue regarding staff appearance, and clause 6.5.2 discusses the required training by the franchisor to be conducted by the franchisee at the appropriate time with its complimentary clause 6.5.3 prohibiting untrained employees. Under training topic page 16 of the contract the franchisee is required to attend any training required by the franchisor for the staff, which is in addition to initial training.

Section 10 of the contract discussed another aspect of franchisees responsibility, which is advertising. Regarding advertising issue Singue's (S. P. Sigue, 2009) findings shows that the franchisees should cooperate if the franchisor delegates either both brand-image and promotional advertising or promotional advertising, although cooperation between franchisees does not necessary improve the franchisor's profits and the choice of an advertising arrangement critically depends on the margins as well as the costs of performing both promotional and brand-image advertising. Clause 10.1 restricts the franchisee to use only approved advertising, marketing or promotion. On the other hand the franchisee also should cooperate with franchisor on any

advertising campaign or sales promotion under clause 10.2. Also clause 10.3 states the rights franchisor holds for removing any unapproved advertising from franchisee's outlets and vehicles. Another responsibility of franchisee according to clause 12.2 is assisting the franchisor to register its Trade Mark at the Franchisor's and/or Ujuice Limited's expense. Also some restrictions regarding registration as proprietor of any trade or service mark similar to the franchisor's trademark is imposed in this provision. Furthermore the responsibility of reporting any possible trademark infringement is put on franchisee's shoulder according to clause 12.6. Other provisions related to this topic are 12.7, 12.8, 12.9, and 12.10. We have the same kind of conditions for domain name registration, web outlet, electronic mail address in clause 12.12. Also some restrictions regarding email format and internet advertising is imposed on franchisee under clause 12.13, and there is also some restrictions regarding participation and contribution in public medium in clause 12.14.

2.3 Additional work and Variation Order

Since the contract is not EPC type there is no additional work and variation order clause defined. Actually there was no need for such definition since all rates are defined periodically in operation manual. In other word these rates are accepted by the franchisees on the base of trust, providing that as we previously mentioned franchisees have aggregate power and also the franchisor needs to use franchisees participation in his strategy formation to have a successful strategy implementation according to Parsa (Parsa, 1999). Also The franchisor should avoid using coercive economic power, and should use noncoercive noneconomic power such as information and referent power (Parsa, 1999). Consequently we could expect that the rates for additional services stated in the operation manual would not be irrational.

2.4 Work Breakdown structure

There is no work breakdown structure in the contract and this is because of the nature of the franchise contract. However things like work breakdown structure could be found in operation manual which we do not have access to.

2.5 Technical Auditing and Inspection

Here we have a different kind of technical auditing and inspection than EPC contract. In clause 6.6.1 it requires the franchisee to maintain highest standards, and the franchisee delegates the right to correspond with customer in order to find out the quality of delivered products, to the franchisor. Clause 6.6.2 extends this right to accompanying the franchisee make contracts with customers for the sitting of the Smoothie Blender and the sale of the Products on the standard terms and conditions set out in the Operations Manual. The point is that not only the franchisor gets the right in this clause but also the franchisor could have representative that conducts such an action.

2.6 Civil and legal liability

Clause 3.2.7 on page 8 states that the "the Franchisee must release the Franchisor from all claims demands or liability in respect of this agreement or related matters in a form approved by the Franchisor;" but this is not done in nock to nock form. In other word, although the franchisee indemnifies the franchisor from all claims or liability, the franchisor does not do so for the

franchisee, and we have the same situation in clause 3.4 on page 9. Consequently this contract is biased, typical of franchise contracts.

Although clause 6.2.7 in page 12 is not directly under the exposure of civil and legal liability, but the relation could be inferred. This clause states that: “The franchisee must use all his reasonable endeavors to promote and extend the Business in the Territory and devote such of his time and attention to the Business as is necessary for this purpose;”. Clause 6.2.18 on page 13 puts specific responsibility on franchisee shoulder that prohibits franchisee from doing anything which may bring the Intellectual Property into disrepute or which may damage the interests of the Franchisor or any member of the **Usmoothie Network**, and there is the same kind of responsibility about franchisor good will and trademark in clause 12.4.

Under provision 15.2 although states that any franchisor appointed manager who is responsible to manage business in 3 or 6 month after death of the franchisor shall act as the agent of the said personal representatives or executors, but it say that manger shall not be liable (save in the case of gross negligence) for any loss, damages or claims arising from or as a consequence of such management.

2.7 HSE and safety

Clause 6.3.6 states that ensuring that the Smoothie Blender does not present a hazard to safety or health is on franchisee’s shoulder.

2.8 Code of standard and industry practice

Under minimum performance clause, provision 16.1 and 16.2 this issue is discussed.

2.9 Insurance

In section 11 of the contract insurance issue is discussed, and franchisee is required to insure with a reputable insurance company throughout the Term against all normal and reasonable foreseeable risks relating to the Business including liability for employees, public liability, product liability, and damage to property in such minimum sums as would be prudent under the circumstances from time to time under clause 11.1. Moreover clause 11.2 requires the franchisee to use his best endeavors to procure that the franchisor’ s interest is noted on such policies of insurance and shall provide the Franchisor on demand with copies of policies and evidence of payment of premiums and shall not do nor permit to be done anything whereby any insurance policy is rendered invalid. Two other responsibilities for the franchisee under clause 11.3 and 11.5 is use of best endeavors to arrange with its insurers that no policy will be terminated or cancelled for whatever reason unless 14 days notice has been given to the franchisor, and that not to do nor to permit to be done anything whereby any insurance policy is rendered invalid, void or unenforceable. Finally under clause 11.4 franchisor removes any liability to the Franchisee for recommending or not recommending any risks to be covered or minimum sums to be insured.

2.10 Progress reports

There is no such a thing as progress report in this franchise contract but we have definite kind of reporting responsibility for the franchisee such as the one in clause 6.2.6 in page 12 that states: “The franchisee must inform the Franchisor without delay in the event that any customer demand for the Products within the Territory cannot be met; “.

2.11 Documentation and Knowledge Management

Regarding knowledge management issue according to Paswan (A. K. Paswan, 2009) knowledge is the source of competitive advantage, and information system is only part of knowledge management since the important part of knowledge management is tacit knowledge which merely could be captured by information system. It seems that Usmoothie uses traditional franchise system and not network franchise system since there is no feedback loop for knowledge elicitation. Although there are some software stated in the contract that franchisee should install but it seems these softwares are more accounting softwares than information system to catch knowledge.

However there are some clauses that show an endeavor in Usmoothie to capture knowledge such as clause 6.4.1 which requires the franchisee to deliver a list of actual, past and potential customers of the Business upon request. There is another term regarding knowledge management in confidentiality section of the contract on clause 14.4 that requires the franchisee to disclose special information.

2.12 Maintenance

Maintenance and support services for Smoothie blenders with the cost specified in operation manual is defined under clause 5.1.7.

2.13 Operational Risk

About operational risk we could infer from different provisions of the contract that operational risk is on franchisee's shoulder.

2.14 Technology and Know how

There is no technology transformation in this contract; however we have known how transformation stated in clause 5.1.1 which is under the exposure of confidentiality clause that is discussed in legal area below.

3 Financial and commercial aspects

3.1 Contract Price

Generally price of franchise contracts consists of lump-sum fee to be paid when entering the system as well as royalties based on gross sales, and royalties are used to coordinate marketing activities of the franchisor and the franchisees (Hempelmann, 2006). There existed evidences to support the fact that franchisees are willing to pay more than independent business owners in term of capital outlay and franchise fees to enter franchising and presumably benefit from franchisor support services (Frazer, 2001). Moreover positive relationship between initial franchise fee and royalty is observed by Kaufmann et. al. (P. J. Kaufmann, 2001), and these two payment methods are the twin parts of a mechanism to insure that franchisees receive no more than a normal profit on their investment in a franchise. Regarding the contract price we have clause 8 in page 16 which states that the contract price consists of: initial fee (defined in terms definition of the contract), management fee (as stated in terms definition to £400 (plus VAT)

plus any agreed optional upgrades as per Schedule 4) and the service charge (stated in terms definition of the contract as a quarterly fee equal to 25 (plus VAT) per Smoothie Blender operated by the Franchisee in the Business), and product costs (stated in operation manual). As we could see the first and second cost is lump sum, but the third cost is unit price, also we have unit price for the product which is not included in the contract and would be announced in operation manual from time to time, so totally the contract is not lump sum and is kind of unit price with no specific ceiling although there are some ceiling in price variation of frozen fruit stock which is discussed below.

For further renewing the contract in clause 3.2.8.2 it is stated that the Franchisee will not be required to pay any sum expressed to be by way of initial franchise fee, but in clause 3.2.9 it is stated that he must pay a renewal fee equal to 20% of the then current Initial Fee being charged to new franchisees. In addition to previous cost according to clause 6.2.5 the franchisee is required to purchase the Products from the Franchisor or its Affiliate at the Franchisor's published list prices from time to time as notified by the Franchisor to the Franchisee. The Franchisor also agrees that it shall not increase the list price for all frozen fruit stock for a period of 6 months from the date of this agreement and that any increases in list prices thereafter shall not exceed 10% in any year of the Term. Also for the required training under section 7 of the contract its expense plus accommodation expense which he or his staff may incur in connection therewith is put on the franchisee shoulders. Moreover for any fault, defect or damages in any of the Smoothie Blenders at any of the Outlets serviced by the Franchisee that are not covered by warranty in clause 6.3.5 the Franchisee takes responsibility for the cost incurred by the Franchisor in rectifying the fault or defect or damage or the cost of replacing the Smoothie Blender.

Moreover under clause of selling the business, 13.2.7 the franchisee is supposed to pay the sum of £500 (plus VAT if applicable) to reimburse the Franchisor's costs incurred in investigating the application for consent whether or not the sale completes, or procure that the proposed purchaser shall pay to the Franchisor a sum equal to the Franchisor's then current cost of providing Initial Training to the proposed purchaser together with such reasonable sum as may be required by the Franchisor to reimburse its legal costs incurred in connection with the grant of a New Franchise Agreement to the proposed purchaser, and where the Franchisor introduced the proposed purchaser to the Franchisee a further sum equal to 7.5% of the sale price by way of commission. Under provision 15.1 we have some management cost equal to 150% of normal salary or daily rate of manager (as specified by manager or in the operation manual) plus traveling accommodation and subsistence expenses of management and VAT (calculated pro rata) which shall be paid by the franchisee for the manager appointed by the franchisor for the period of 3 to 6 month.

3.2 Payment Terms and conditions

In clause 8.1.1 it is stated that on execution of the contract the franchisee should pay initial fee, and get the franchisor acknowledgement on deposit receiving. In clause 8.1.2 it is stated that the Management Fee and the Service Charge on the last working day of each Quarter by standing order, and still there is the place of other agreement with the franchisor. The next provision 8.1.3 obliges the franchisee to pay the cost of any products ordered from the franchisor at the same time as placing the order. Also the other side of this arrangement is stated in clause 6.2.12 which requires the franchisee to promptly and within the time allowed pay all creditors of the Business.

For late payment clause 8.3 obliges the franchisee to pay 4% above HSBC Bank base rate from the date payment became due until payment is made, and this will cover all the payments, and in clause 8.4 the franchisor reserves the right for himself to suspend the provision of all goods and services until such payment is made. Finally in clause 8.5, franchisee undertakes to comply with all banking and payment procedures set out in this agreement and the Operations Manual. According to clause 13.4 all outstanding balance and the sales price share of the franchisor should be paid in seven days of sale of business by franchisee. For the amount of money paid for the franchisor's appointed managers during 3 or 6 month after death of the franchisee payment should be conducted at weekly intervals on Monday of each week under provision 15.1.5 of the contract, and provision 15.1.6 is put to ensure that the payment is thoroughly conducted.

Moreover set off issue is also predicted in the contract under clause 33 which states that franchisee agrees that he shall not have any right to withhold, make deductions or set offs against payment of any sums due from the franchisee to the franchisor unless such deduction or set off is in respect of any undisputed liquidated sums owing by the franchisor to the franchisee. The franchisee acknowledges that the limits in this agreement on his right to make deductions or set offs against payment of any sums due from the franchisee to the franchisor are fair and reasonable and accepts that the other remedies available to him are sufficient for his purposes.

3.3 Currency issue and exchange policy

It seems that since the contract is franchisee in U.K. All currency issue is handled in U.K.'s currency.

3.4 Cost breakdown structure

There is cost breakdown structure regarding franchise package in page 42 of the contract under the title schedule 1, and the rest of the cost breakdown structure is referenced to the operation manual. Moreover schedule 4, under the title of quarterly fee upgrades change rate of these costs are presented.

3.5 Tax and other rates

About VAT (Value added tax) in section 6.7 in page 16 of the contract it is stated that when required by law franchisee must register with HM Revenue & Customs for VAT. Also in provision 8.2 all sums due to be paid by the Franchisee to the Franchisor under this agreement shall where applicable be subject to VAT at the appropriate rate and in addition to such sums the Franchisee shall pay a sum equal to that VAT.

3.6 Exclusion and inclusion price

In provision 8.2 all sums due to be paid by the Franchisee to the Franchisor under this agreement shall where applicable be subject to VAT at the appropriate rate and in addition to such sums the Franchisee shall pay a sum equal to that VAT.

3.7 Unitization

Since all payments are done at product or service delivery in local market there was no need for unitization in this contract.

3.8 Price revision and Price escalation

Since the franchisor has the power in this contract, he imposed price revisions under his operation manual, but in clause 6.2.5 it is stated that list price of the frozen fruit stock will not change in the first 6 month and that any increases in list prices thereafter shall not exceed 10% in any year of the Term.

3.9 Cost recovery

There is no such a thing as cost recovery in this contract since all costs incurred by the franchisor should be paid at the time of service or product delivery.

3.10 Financing issue

Regarding financing issue there is only general responsibility that franchisee undertakes under clause 6.2.13 which states that franchisor ensures that he is creditworthy at all times and that adequate finance is available to him to enable him to perform his obligations under this agreement and by way of working capital.

3.11 Method of invoicing and payment

For invoicing and payment no specific method is established, but the franchisee is required to do the payment according to whatever invoices that franchisor provides. The rates are discussed in operation manual, but since it applies to all franchisees there should be no fear for the new franchisee since franchisee network has a collective power that never lets franchisor to set irrational prices for his products.

3.12 Verification invoice and auditing procedure

There is no invoice verification but clauses related to auditing procedure are discussed in section 3.15.

3.13 Project books and account

Under clause 9.1.2 and 9.1.3 it is required that the franchisee maintain maintain an accurate account and records of Gross Revenues and submit to the Franchisor a weekly statement of them (including each Sunday of the week) on the first working day of the week following the week to which the statement relates in the form and manner specified in the Operations Manual, and maintain on the Premises full and accurate books of accounts and all records needed to verify the Gross Revenues for not less than 6 years and keep such books of accounts and records separate from all other books and records (or so long as any dispute between the parties remains outstanding).

3.14 Financial settlement

There is not such issue in this contract.

3.15 Accounting and Auditing Procedure

In section 9 of the contract under clause 9.1 about accounting procedure it is stated that the franchisee should adopt the Accounting Reference Date as the end of its financial year, maintain an accurate account and records of Gross Revenues and submit to the Franchisor a weekly statement of them (including each Sunday of the week) on the first working day of the week following the week to which the statement relates in the form and manner specified in the Operations Manual, and maintain on the Premises full and accurate books of accounts and all records needed to verify the Gross Revenues for not less than 6 years and keep such books of accounts and records separate from all other books and records (or so long as any dispute between the parties remains outstanding).

Also in section 9 under clause 9.1.4 about auditing procedure it is stated that representatives of the Franchisor during normal business hours should be allowed to investigate the Franchisee's records and take copies of the Franchisee's accounts and records. Also we have another clause related to account auditing, clause 9.1.6, that states that franchisee shall provide the Franchisor with a copy of the certified accounts of the Business prepared by a registered auditor and such other accounting and financial information relating to it as the Franchisor may reasonably require within 4 months after the end of each financial year of the Business.

3.16 Financial progress report

In section 9 of the contract under clause 9.1.2 it is stated that the franchisor shall submit accurate account and records of Gross revenues to the franchisor through weekly statement (including Sunday of the week) on the first working day of the week following the week to which the statement related in the form and manner specified in the Operation manual. Clause 9.1.5 also asks the franchisee to submit required financial and fiscal information prior to franchisor's request.

3.17 Lawful levies, fees, and charges

In section 9 of the contract under clause 9.1.5 it is stated that the franchisor shall supply to the Franchisor copies of all VAT returns on the due date for their submission to HM Revenue & Customs and any other financial and fiscal information which the Franchisor may reasonably request.

3.18 Guarantee and good performance guarantee

There is no guarantee provided by the Usmoothie and shall not be provided by the franchisee either. Clauses about Guarantee are discussed in Warranty and Guarantee under legal section.

3.19 Liquidity and illiquidity damage

There is no liquidity damage in the contract, but there are some damages regarding payment issue which requires the franchisee to pay 3% higher than HBSC bank interest rate for any payment that is discussed under payment terms and condition section.

3.20 Financial risk

There is no financial risk defined in the contract, but from different provisions of the contract we can infer that financial risk is put on the franchisee's shoulder since franchisor could change the prices in operation manual.

3.21 Risk of diversity of interest

In clause 14.1 it is stated that except with the prior written consent of the Franchisor, franchisee shall not be directly or indirectly engaged concerned or interested (except as the holder of not more than 5% of the shares in any company whose shares are listed or dealt in on The Stock Exchange) in any business which is the same as or similar to the **Usmoothie Business** in the Territory or in any territory where it would compete with any member of the **Usmoothie Network** or the Franchisor, and also at any time employ or seek to employ any person then employed by the Franchisor or any of its franchisees is prohibited, nor shall franchisee directly or indirectly induce any such person to leave his or her employment without the previous written consent of such person's employer, nor will the Franchisee employ any such person without like consent within 6 months after the termination of such person's employment, also engaging directly or indirectly in any capacity in any other business venture except with the prior written consent of the Franchisor, which shall not be unreasonably withheld or delayed, is also prohibited.

3.22 Market condition risk

Market condition risk is not discussed on the contract, but since the franchisor announces the prices in his operation manual, and has complete authority to do so, he could handle market condition risk in his pricing.

3.23 Insurance liability

In section 11.1 of the contract the franchisor is required to insure in such minimum sums as would be prudent under the circumstances from time to time.

3.24 Internal Rate of Return and Rate of Return

No clauses regarding IRR and ROR are discussed in the contract, but the franchisor will do the required calculation for himself and handles it in his pricing. On the other side franchisor refused to accept any liability regarding ROR and ROI of the franchisee and clause 21.5 states that the Franchisee acknowledges that the business venture contemplated by this agreement involves business risks and that the Franchisee's success will be affected by the Franchisee's business ability and commitment and that he has been advised by the Franchisor to obtain independent legal advice before signing this agreement.

4 Contractual Aspects

4.1 Preamble

In page 1 of the contract we see the following statements for the preamble:

Whereas

A. Ujuice Limited and the Franchisor as a result of time and effort and practical business experience have developed the **Usmoothie Business** and have built up a substantial reputation and goodwill in the Trade Mark, which is associated with the highest standards of retail of the Products.

B. Ujuice Limited owns the System and the registered Trade Mark.

C. The Franchisor is a wholly owned subsidiary of Ujuice Limited and is authorized by the Ujuice Limited to use and licence the use of the System and the Trade Mark for the purposes of the **Usmoothie Business**.

D. The Franchisee wishes to acquire from the Franchisor the right and franchise to operate a **Usmoothie Business** in the Territory and the Franchisor has agreed to grant to the Franchisee the right to operate a **Usmoothie Business** in accordance with the terms of this agreement.

There is no miscellaneous clause in the contract that deems preamble an integrated part of contract so these statements do not bind the franchisor to any commitment.

4.2 Parties of contract

For the parties of the contract on page 1 of the contract we have the following statement:

(1) USMOOTHIE LTD incorporated and registered in England with company number 05764551 whose registered office is at 32A Clivemont Road, Maidenhead, Berkshire SL6 7BZ (“the Franchisor”); and

(2) [FRANCHISEE] of [ADDRESS] [and [FRANCHISEE] of [ADDRESS]] ([together the “Franchisee”]).

As we can see one party is Usmoothie, which is a limited company, and since it is an English company its domicile is also identified. The second party is also a company from a country that the companies are identified with their domicile. Important point is that the second party also could be more than one franchisee, and together they are called franchisee in the contract.

Term 1.6 in page 6 is as follows: “If there are two or more persons as Franchisee as parties to this agreement all covenants and agreements on the part of the Franchisee shall be deemed to be joint and several covenants and agreements on their part.”, and it means that all parties that are called franchisee in the contract have full responsibility in interaction with the franchisor, so this provision prevents franchisees to put responsibility on the shoulder of the other franchisee of the same contract.

Under provision 15.3 it is stated that in case of incapacity of the franchisee the franchisor shall have the right to appoint personal and manager with the cost 150% of the manager cost set out in operation manual or announce by the franchisor to conduct business and manage it, and in case of that incapacity lasting for a continuous period of 120 days or a total period of 160 days in any period of 365 days the same provisions as the death of the franchisee would be addressed. There is also an important provision of the contract, clause 20, which restricts partnership and

beneficial ownership changing between franchisees to written consent of the franchisor. We have another clause related to this section in clause 35 of the contract about rights of third parties.

4.3 Qualification Process

Not only there is the qualification process before the contract that finds the franchisee qualified or disqualified, but also for renewing the contract according to provision 3.2 there is requalification process by checking previous contract breach by franchisee, franchisee contract performance, franchisee software application, Smoothie blender installment, requirements or regulations complying.

4.4 Objective of the contract

Since the contract is kind of franchise contract objective of the contract includes rights granted to the franchisee over the established business concept of franchisor. In page 10 of the contract clause 2.1 states that: “The Franchisor grants the Franchisee the right to operate the Business using the Intellectual Property within the Territory for the Term subject to the terms and conditions of this agreement.”, so use of the granted right is restricted to the terms and conditions stated in the contract. Although clause 2.4 seems transparency provider for the rights of the franchisor in other territories it seems not relevant to this contract, so it could be removed.

4.5 Definition of terms and expressions

In page 1 until page 6 different terms used in the contract are defined, these terms include: Accounting reference date that may be changed by the franchisor, affiliate, approved suppliers that may be differently nominated from time to time by the franchisor, business, color combinations regarding the trade marks, confidentiality undertaking with reference to operation manual or franchisor definition from time to time, connected person identified by family relationship, franchise package with reference to schedule 1, gross revenue that is independent from receiving status regardless of source excluding VAT, incapacity, initial fee, initial training detailed in operation manual, intellectual property which is not limited to the stated issues, management fee that is not lump sum and has optional upgrade with reference to schedule 4, minimum performance target with reference to schedule 3, month, new franchise agreement containing higher fees, greater contribution and different terms, operation manual exposed to time to time update, outlets that may be more than one within the territory of each franchisee, product range that includes beverage, associated food, and drinking accessories changing over time as announced by the franchisor, products with reference to operation manual or writing notification of franchisor, quarter same like season, software required by the franchisor, service charge which seems like a royalty fee which is kind of unit rate cost, smoothie blenders that is a kind of machine used in this business, system of Usmoothie with more particular definition referenced to the operation manual, term defined for 5 years, termination, territory identified by specific post code, trade mark referenced to schedule 2 and exposed to alteration by the franchisor from time to time, Ujuice Limited, Usmoothie Business, Usmoothie Network, and VAT.

4.6 Definition of contract area

About this issue we discussed in contract scope section, but to name the few issues let say that it includes issues related to trademark registration and outlet management.

4.7 Validity and effectiveness

There is no condition that addresses effectiveness of the contract, and it seems the contract will start from day of signing. Furthermore, the contract has no validity issue since its objective has no conflict with law.

4.8 Duration and schedule

Duration of the contract according to definition of terms and definitions is 5 years. Vazquez (Vázquez, 2007) findings show an increase in length of contract with increase in the experience of the franchisor and decrease in case of high free riding probability. Consequently Usmoothie is kind of experienced franchisor, and it does not need shorter duration for maintaining flexibility to alter the franchise contract. Also it may be inferred that there is low probability of free riding although there are strict provisions for termination, so it seems that Usmoothie could control free riding more confidently. Moreover for renewal of the contract also the duration is the same, this point could be seen in clause 3.2.8.1 in page 8.

4.9 Condition and Warranty

As it is stated in clause 4.1.1 on page 9, “The Franchisor does not warrant or guarantee in any way the continued use of the Smoothie Blenders at any of the Outlets or the duration of any contract with any customer”, so there is no guarantee and warranty for smoothie blenders. Clause 6.3.4 also references to the warranty if it is available and asks the franchisor to follow up related issues to have the Smoothie blenders repaired. Clause 6.3.5 also states that in case of no warranty the responsibility of repair cost would be on franchisee’s shoulder. Furthermore under clause 12.11 it is stated that no warranty express or implied is given by franchisor with respect to the validity of the trademark. Moreover clause 21.2 prohibits employee or agent from making any warranty not contained in this agreement or operation manual, and no guarantee or warranty is provided for advice and assistance of franchisor in franchisee’s establishing the business.

In general terms of contract the condition of this contract is franchise package, required training, ongoing service, and use of franchisor trade mark, where as other provisions of agreement seem to be warranty in this contract. Moreover under clause 36 of the contract it is stated that the Franchisee shall make no statements, representations or claims and shall give no warranties to any customer in respect of the Products, Services and or the Business except as implied by law or as may have been specifically authorized by the Franchisor in writing or in the Operations Manual in force at the relevant time.

4.10 Coordination Procedure

Coordination is one of the important points in franchise contract while according to frazer (Frazer, 2001), communication problem leading to dispute, and the conversion of franchised outlets to some other form of ownership are two main factors associated with disruption. Clause 3.2.1 page 7 defines that the franchisee should inform the franchisor about his intention of

renewal between 6 and 3 month before expiry of contract duration. The other related issue could be found in clause 1.2 which states that “subject to clause 34, any reference in this agreement to writing includes facsimile transmission and email with confirmed receipt”. Also on clause 6.8.1 the franchisee is required to subscribe for at least one telephone line and a mobile phone connection and use such line and connection for conducting the Business and inform the Franchisor before commencing the Business of all telephone numbers proposed to be used in the Business. Also clause 13.2.8 and 13.2.9 contain formalities required regarding selling the business issue.

Another issue related to coordination procedure could be found under clause 34 of the contract which states that any notice or consent required to be given to any party in connection with this agreement shall be in writing and shall be sent by post or recorded delivery to the address of the party set out in this agreement or to such changed address as shall for that purpose be notified to the other party. Any notice sent by post shall be deemed to have been served 2 days after posting. In proving service it shall be sufficient to prove that a notice was properly addressed and stamped and put into the post. Any notice sent by fax shall be deemed to have been served on the next business day following the date of dispatch of it. Any notice delivered by hand shall be deemed to have been served when physically delivered at the relevant address.

4.11 Performance of worker

In section 16 of the contract minimum performance issue is discussed. As it is stated in provision 16.1, “In the event that the Franchisee fails to achieve the Minimum Performance Targets in any year of the Term the Franchisee shall within 14 days of a notice to that effect from the Franchisor meet the Franchisor’s representative to discuss ways of improving the Franchisee’s performance and the Franchisee shall comply strictly with any requirements of the Franchisor in that respect following the meeting”. Also more strictly under provision 16.2 of the contract the franchisor reserves the right for himself to reduce the area of territory, remove the franchisee’s right to exclusivity within the territory, or terminate the contract, in case of failure in complying with the requirement of the franchisor under clause 16.1, failure to achieve the minimum performance targets at any time during the year following the year in which the initial failure referred to in clause 16.1 occurred, or failure in achieving the Minimum Performance Targets on more than three occasions during the Term. More thoroughly in schedule 3 on page 44 of the contract the definition of the minimum performance targets are presented.

5 Legal Aspects

5.1 Franchise Law¹

Franchise law keeps franchises in check, making sure that franchisees are not ripped off. Although franchising provides a good opportunity for both the franchisee and the franchisor, some cases have appeared during years that some franchisors were quick Lube. They were quick to promise the world and collect franchise fees, but fail to follow through on their end of the

¹ <http://www.gaebler.com/Franchise-Law.htm>

bargain. In the end, the franchisees are left without a functioning franchise and no resources (or enthusiasm) to start over. To protect enthusiastic franchisees, the government has implemented policies and enacted legislation to provide legal protection from franchise scams. There are two important legal protections for franchisees. First is the federal trade's commission franchise rule that requires the franchisor to fully disclose all relevant information pertaining to franchise to potential franchisees. The material that is supposed to be provided to potential franchisees includes all information the franchisee needs to reasonably decide whether or not to invest in a franchise. The timeframe for which this information must be provided is at the first personal contact and a minimum of 10 days prior to the signing of a formal franchise contract to make sure that the potential franchisee has time to carefully consider what is required. Second is the Uniform Franchise Circular Offering (UFCO) that states that the disclosure presented to potential franchisees by the franchisor needs to be in the form of a Uniform Franchise Circular Offering. The UFCO must contain detailed information about the franchise as well as the responsibilities and rights of franchisee. Additionally, franchisors are required to present franchisees with a copy of documents that need to be signed at least (5) days prior to the actual signing. Again, this is done to ensure that potential franchisees have the ability to carefully review and consider the documents before they have made a commitment (gaebler.com e. r.).

5.2 Stabilization clause

No stabilization clause is defined in the contract.

5.3 Sovereign immunity and commercial transactions

There is no sovereign immunity and commercial transactions found in the contract.

5.4 Liability and Responsibility

Since the nature of the contract is different from EPC contracts, it seems there is no such a differentiation between liability and responsibility in this contract. Still there is some reference to the liability issue in clause 21 of the contract that limits representations and pre-contractual negotiations to the terms and conditions obviously stated in the contract. Moreover clause 23 discusses about improvements which is liability of franchisee. Moreover there is somehow related issue in clause 26, which states that nothing in the agreement shall be construed as making the parties partners or joint ventures nor render any party liable for any of the debts or obligations of any other party. One more provision related this issue could be clause 29 about waiver that states the failure of any party at any time to enforce any of the provisions of this agreement or to exercise any right under this agreement shall in no way affect that party's rights after any failure or constitute a waiver of that right.

5.5 Indemnification

Clause 3.2.7 on page 8 states that the "the Franchisee must release the Franchisor from all claims demands or liability in respect of this agreement or related matters in a form approved by the Franchisor;" but this is not done in nock to nock form. In other word, although the franchisee indemnifies the franchisor from all claims or liability, the franchisor does not do so for the franchisee, and we have the same situation in clause 3.4 on page 9. Moreover clause 13.2.6 states that for selling the business the Franchisee must execute a release or discharge in the Franchisor's favor of all claims he may have against the Franchisor and indemnify the Franchisor

against any claim or liability arising from the period of operation of the Business by the Franchisee in a form approved by the Franchisor. We have another indemnification clause in clause 15.5 that states that the Franchisee in signing this agreement expressly binds his executors and personal representatives in respect of and to ratify and confirm all actions by any person or persons so acting under this agreement and to indemnify the Franchisor from all liabilities or responsibilities whatsoever in respect of such action except in the event of the Franchisor's gross negligence.

Moreover clause 22 of the contract states that the Franchisee shall indemnify the Franchisor against all loss, damages, liability, costs and expenses suffered or incurred by the Franchisor arising from any failure by the Franchisee, his agents or employees to comply with any provision of this agreement or the Operations Manual or the lease of the Premises or to use any of the Intellectual Property or the System or the Operations Manual in accordance with the terms of this agreement or from any deliberate or negligent act, error or omission by the Franchisee, his employees or agents. Clause 25.2 also indemnifies the franchisor against any claims regarding data protection act.

5.6 Assignment

Clause 2.2 in page 7 of the contract forbids the delegation, sub-license, or sub franchise the rights granted by this contract to franchisee without prior written approval of franchisor. In contrast clause 2.3 forbids the right delegation by the franchisor in the franchisee territory during the contract. Under clause 6.2.14 the franchisee shall not sub-contract or delegate the performance of any of his obligations under this agreement without the Franchisor's consent. Furthermore, about the sale of business section 13 under clause 13.1 allows the franchisee to the Business subject to obtaining the Franchisor's prior written consent in accordance with clause 13.2 and subject to clause 13.3. Whereas in clause 13.2 states that the franchisor preserves the right to accept or reject the purchaser, for not being qualified according to his criteria, or failure in passing the initial training. Moreover the franchisee must not be in material breach, and he must provide the Franchisor with a financial statement of affairs and a business history of the proposed purchaser and any other information reasonably required by the Franchisor. Not being involved in similar business is mandatory condition for the purchaser, and clause 13.2.10 requires the franchisee or purchaser not to pay any initial fee or other obligations. Clause 13.3 also preserves the right for the franchisor to purchase the Business in 29 days for the same amount and on the same terms as those set out in any copy purchase offer submitted to the Franchisor pursuant to clause 13.2.8 above.

We also classify the clauses related to death of franchisee, clause 15.1, in this section; there is two option for remained relatives of deceased franchisee first to find qualified people among them that is under approval of the franchisor and will pass the required formality, or to sell the business according to provision 13, but in case the franchisor would provide managers to manage business within 3 month or 6 month. Besides, under provision 15.1.7 the franchisor entitled himself to withdraw manager services, terminate the agreement by forthwith notice in writing, purchase some or all assets at market value or price determined by independent charter accountant who acts as an expert not as a arbitrator (without taking into account any goodwill or additional value but nature of license and intellectual property right).

Finally under clause 37 of the contract we have the following statements: "The Franchisor may assign or otherwise deal with the benefit and burden of the whole or any part of this agreement without consent from the Franchisee, and in the case of an assignment, if it procures

that the assignee enters into a direct covenant with the Franchisee to observe and perform all the Franchisor's obligations in this agreement the Franchisor shall be released and discharged from all obligations hereunder.", and it confirms that the contract is completely biased typical of franchise contracts, and the franchisor is totally free to assign his role.

5.7 Depeçage

We have this issue under the title of continuing provision in section 30 of the contract, which states that if any item or provision contained in this agreement or any part of it (the Offending Provision) is declared or becomes unenforceable, invalid or illegal for any reason whatsoever, including but not detracting from the generality of the foregoing, a decision by the competent domestic or European courts, an Act of Parliament, European Union legislation or any statutory or other bye laws or regulations or any other requirements having the force of law, the other terms and provisions of this agreement shall remain in full force and effect as if this agreement had been executed without the Offending Provision appearing in it and if the exclusion of the Offending Provision will in the Franchisor's opinion adversely affect either the Franchisor's right to receive payment of all or any fees or remuneration by whatever means payable to the Franchisor, or the Trade Marks or the System the Franchisor may terminate this agreement by 30 days written notice to the Franchisee. Furthermore under provision 31 of the contract we have "If any clause or paragraph of this agreement is held invalid or is otherwise unenforceable the remainder of the agreement shall not also be invalidated unless in the reasonable opinion of the Franchisor the purpose of this agreement is frustrated as a result".

5.8 Force Majeure

Force majeure issue is discussed on the same title in provision 27 of the contract, and it named some force majeure issues, but it did not limit it to those. Additionally, clause 27.2 reserves right to termination after 180 days with obligation of all due payment settlement.

5.9 Termination

In clause 3.5 in page 9, regarding the renewal issue, it is stated that in case of not renewing the contract, but continuing the business by the franchisee, it is subjected to the terms of this contract except termination by the written notice is provided by the franchisor. In section 17 of the contract there is comprehensive discussion regarding this issue, whereas provision 17.1 states that "If at any time during the Initial Training it shall become apparent to the Franchisor that the Franchisee does not meet the Franchisor's standards and requirements, the Franchisor shall have the right upon, notice in writing, to terminate this agreement forthwith. Upon such termination and subject to the Franchisee complying fully with his obligations under clause 18 and 19, the Franchisor shall return to the Franchisee any Initial Franchise Fee paid to the Franchisor less a deduction of such sum as is equal to all reasonable costs and expenses incurred by the Franchisor in connection with this agreement and the Franchisee". Furthermore clause 17.2 also lists some provisions that under the breach of them the franchisor has right to terminate the contract, but the point is that as it is stated "list shall not be deemed to be exhaustive, and upon such termination all rights of the Franchisee under this agreement shall cease", so this strict provision could be deemed as a risk since it does not detail all the conditions in which the termination right exists.

The conditions stated in this term of the contract includes: providing false or misleading information, challenging validity or ownership of any of Usmoothie's the intellectual property,

being bankrupt or insolvent, failure to pay due payments even within 7 days of notice, fail to submit required accounting and management information even within 10 days of notice, being patient, being convicted of criminal offence, acting in immoral manner that brings the franchisor or franchisee into disrepute, existing of satisfaction problem among customers, existing of evidence of confidential information divulge, engaging in similar competing business, and being in breach or any of the other terms of the agreement, the operation manual, or franchisor's reasonable instructions, and not solving the issue within 20 days of notice. Certain responsibilities is on the shoulder of franchisee upon termination stated under provision 18.1 and 18.2 of the contract, so the franchisee shall cease operating the business, and using all intellectual property of the franchisor. Moreover the payment settlement including legal costs, account audition and submission within 30 days, list of customer and contracts delivery, creditor settlement, domain name, electronic mail, and website transferring, sale leads and records providing, document transferring should be done upon termination of the contract, and the franchisee undertakes to fully cooperate with franchisor regarding selling the Usmoothie Blenders at market value or lesser amount. Finally certain and reasonably type of restrictions imposed on franchisee after the termination of the contract under clause 19 of the contract.

5.10 Confidentiality

First under clause 6.2.10 in page 12 although the franchisee must provide required information reasonably requested by nominated franchisee, the Franchisee shall not however disclose any confidential information relating to the Business, the System, the Franchisor or the Operations Manual. For franchisee staff clause 6.5.4 and 6.5.5 restricts the franchisee to have confidentiality agreement of every one of his employees and takes required steps at his own expense to enforce any confidentiality undertaking. More thoroughly confidentiality provision could be found in clause 14.2 for information, and 14.3 for agreement, and remedy for the confidentiality bridge is stated in clause 14.5. Moreover the franchisee is also obliged to conform to all aspects of data protection act.

5.11 Applicable Law

Under clauses 38 and 39 of the contract applicable law of the contract is set to laws of England and Wales and it is stated that parties submit to the exclusive jurisdiction of the English courts.

6 Conclusion

In this report we tried to have an analysis of franchise contract by TFCL (technical, financial, contract, and legal) framework. First we discussed general issues about the franchise contract. Then we focused on different pros and cons of franchise contract. We tried to have an analysis of Usmoothie franchising contract, so we first introduced Usmoothie, then we discussed different issues related to SWOT analysis of franchise contract. In section 2 of the contract we discussed each of the technical, financial, contractual, and legal issues relating to Usmoothie franchise contract. We found this framework useful to have better understanding of risks of contract. Although some of the topics only apply to EPC contracts, this framework covers most of the contract. Finally we should state that our analysis has many shortcoming and could be completed by future studies over this issue.

7 Resources

A. K. Paswan, C. M. (2009). Knowledge management and franchise systems. *Industrial Marketing Management* , 173-180.

Elgin, J. (n.d.). *10 Things About Franchise Contracts- Part 1*. Retrieved July 31, 2010, from entrepreneur: <http://www.entrepreneur.com/franchises/buyingafrenchisecoachjeffelgin/article201514.html>

Elgin, J. (n.d.). *10 Things About Franchise Contracts- Part 2*. Retrieved July 2010, 31, from entrepreneur: <http://www.entrepreneur.com/franchises/buyingafrenchisecoachjeffelgin/article201914.html>

franchiseknowhow.com. (n.d.). *Understanding the Franchise Contract*. Retrieved June 28, 2010, from franchiseknowhow.com: <http://www.franchiseknowhow.com/articles/contract.htm>

franchiseroute.co.uk. (n.d.). *Usmoothie*. Retrieved July 30, 2010, from franchiseroute.co.uk: <http://www.franchiseroute.co.uk/franchises/usmoothie>

Frazer, L. (2001). Causes of disruption to franchise operations. *Journal of Business Research* , 227– 234.

gaebler.com. (n.d.). *Franchise opportunities for entrepreneur:Franchise Contracts 101*. Retrieved July 28, 2010, from gaebler.com: <http://www.gaebler.com/Franchise-Contracts.htm>

gaebler.com, e. r. (n.d.). *Franchise law*. Retrieved August 2010, 08, from gaebler.com resources for entrepreneurs: <http://www.gaebler.com/Franchise-Law.htm>

globalnegotiator.com. (n.d.). *Franchise type of contract*. Retrieved July 29, 2010, from globalnegotiator.com: <http://www.globalnegotiator.com/tienda/international-franchise-contract.html>

Hempelmann, B. (2006). Optimal franchise contracts with private cost information. *International Journal of Industrial Organization* , 449– 465.

Hennessy, D. A. (2003). Property rights, productivity, and the nature of noncontractible actions in a franchise system. *Journal of Economic Behavior & Organization* , 443-468.

hotfroguk.co.uk. (n.d.). *About Usmoothie franchise*. Retrieved July 30, 2010, from hotfroguk.co.uk: <http://www.hotfroguk.co.uk/Companies/Usmoothie-Franchise>

J. Haucapa, C. J. (2000). Location costs, product quality and implicit franchise contracts. *Journal of International Economics* , 69–87.

lunchshow.co.uk. (n.d.). *lunch2009*. Retrieved June 30, 2010, from lunchshow.co.uk: http://webcache.googleusercontent.com/search?q=cache:NL6TEXM_xrEJ:lunchshow.co.uk/LUNCH2009/public/Content.aspx%3FID%3D508%26sortMenu%3D113000+Usmoothie+about&cd=9&hl=en&ct=clnk

M. A.P. Davies, W. L. (2009). A model of trust and compliance in franchise relationships. *Journal of Business Venturing* .

P. J. Kaufmann, R. P. (2001). The pricing of franchise rights. *Journal of Retailing* , 537–545.

Parsa, H. G. (1999). Interaction of Strategy Implementation and Power Perceptions in Franchise Systems: An Empirical Investigation. *Journal of Business Research* , 173–185.

R. D. Blair, J. (1999). THE MISAPPLICATION OF KODAK IN FRANCHISE TYING SUITS. *Journal of Business Venturing* , 397–415.

Roh, Y. S. (2002). Size, growth rate and risksharing as the determinants of propensity to franchise in chain restaurants. *Hospitality Management* , 43–56.

S. P. Sigue, P. C. (2009). Advertising strategies in a franchise system. *European Journal of Operational Research* , 655–665.

Seina, L. (n.d.). *What You Need to Know About Franchise Contract*. Retrieved July 29, 2010, from ezinearticles.com: <http://ezinearticles.com/?What-You-Need-to-Know-About-Franchise-Contract&id=4438990>

Vázquez, L. (2007). Determinants of contract length in franchise contracts. *Economics Letters* 97 , 145-150.

Ward, S. (n.d.). *Should You Buy A Franchise? Franchises Can Be A Shortcut to Success*. Retrieved July 29, 2010, from sbinfocanada.about.com: <http://sbinfocanada.about.com/od/franchiseinfo/a/buyfranchise.htm>