

# The hotel franchise contract in the HoReCa domain and applicable ADR methods from a comparative perspective<sup>1</sup>

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## **Abstract**

*The hotel franchise contract in the HoReCa field is of particular importance from the point of view of the development of this network, of increasing the profitability of the business of both contracting parties, respectively of the franchisor and the franchisee. The interpretation of the clauses resulting from this contract, specific to this domain of activity, implicitly generates a series of disputes. This article provides an overview of the clauses specific to this type of contract as well as the alternative dispute resolution methods (ADR) used in the case of disputes resulting from the international hotel franchise contract and, in particular, of mediation and arbitration. The article also presents considerations regarding legal solutions adapted to online platforms, in particular regarding the ADR method of online mediation (ODR).*

**Keywords:** *HoReCa, hotel franchise contract, foreignness, disputes, ADR methods, arbitration, mediation.*

**JEL Classification:** *K12, K15, K29, K39*

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## **1. Preliminary specifications**

The term *HoReCa* consists of an abbreviation for the following words: Hotels, Restaurants and Cafes/Catering, used the most in Europe, namely in Scandinavia, Benelux and France, where it is considered that spaces such as cafes and canteens can be included in the restaurant category. It is used in the hospitality industry, in the tourism sector, in order to describe an activity that simultaneously refers to: accommodation and catering services (food and drink) as well as other related services.

## **2. Ensuring hotel operational activity**

In the context of the current economic, social and geopolitical climate, the decision to open a hotel is essential because, the ability to obtain financing, to stabilize the profit of a business and to reach the thresholds of return on investment within a (commercial) company, determines the economic conditions, within the contractual relationship with the owner of a hotel brand.

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In this sense, the management bodies of a company that manages a hotel, may decide to operate under the auspices of a renowned international hotel brand, based on a hotel franchise contract. Within it, the hotel has the status of franchisee and the international hotel chain under which it will operate has the status of franchisor.

The reputation, name and standard level of the owner of a hotel brand, as well as the spending restrictions of a hotel owner, are important elements in the negotiation of a franchise agreement.

Most 4 and 5 star hotels opt for a hotel franchise contract taking into account considerations such as: the duration of the contract, the location and history of the hotel property, the performance in exploiting its goodwill, the notoriety of the hotel brand and the facilities offered by it, etc.

The solution of concluding a hotel franchise contract gives the hotel owner numerous advantages, both from the point of view of the presence and power of the respective hotel brand within his property, as well as regarding the reduced cost of expenses.

The capacity of the hotel owner to negotiate the franchise contract is based on the power, impact and extent of the power of a hotel brand, on the profile market, in contrast to the need for its presence within a determined territory, on its spatial extent (which consists of a certain number of km around the hotel property), the location of the hotel building in relation to the city in which it is located (if it is in the center or the outskirts of the city), the structure of the hotel building and its character and age, the brand's marketing strategy itself.

## 2.1 The hotel franchising contract, considerations

Etymologically, franchise means: immunity, concession, tax exemption, a right, a priority, an authorization, a privilege<sup>3</sup>.

In accordance with the provisions of Government Ordinance no. 52/1997 (Ordinance)<sup>4</sup>, the franchise contract is a consensual, synallagmatic contract (both parties aim to obtain mutual advantages), whose obligations are executed in time<sup>5</sup>, *intuitu personae* and of adhesion.

According to the provisions of art. 1,5 and 6 of Ordinance, the franchising contract represents a set of contractual relationships through which the franchisor aims to expand its franchising network, with the aim of promoting, developing and

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<sup>3</sup> According to the explanatory Dictionary of the Romanian language, the term franchise, francize, s.f., represents "The right granted by a reputable enterprise to another enterprise through which the latter can exploit the franchisor's intellectual or industrial property rights, in exchange for a financial contribution, in the purpose of producing or delivering goods or providing services".

<sup>4</sup> In accordance with the provisions of Government Ordinance no. 52 of August 28, 1997 regarding the legal regime of the franchise, published in the Official Gazette of Romania no. 180 of May 14, 1998, with subsequent amendments and additions.

<sup>5</sup> In accordance with Art. 6 of OG 52/1997, the duration of the contract will be fixed so as to allow the beneficiary to amortize his investments.

distributing a product<sup>6</sup> and collect the related royalties, and in return, the franchisee seeks to exploit the franchisor's business concept, in order to make a profit. Thus, the basis of their collaboration lies in the common interest in achieving the purpose of the franchising activity<sup>7</sup>.

More precisely, in the case of the distribution franchise, this represents the contract by which one party - the international hotel chain (the franchisor) - grants to another independent party - the hotel (the *franchisee*), in exchange for the payment of remuneration/royalties, the following: the right to exploit its commercial or service brand (hotel brand), the know-how<sup>8</sup> together with the technical assistance for the organization of the hotel business as well as the set of methods for its organization, the training and professional training of the hotel staff, means of marketing, work procedures, etc.

All this is likely to allow management in the best profitability conditions for both contracting parties, preserving the homogeneity of the franchise network as well as the quality of the services and products offered to the hotel's consumer customers<sup>9</sup>.

In accordance with the provisions of art. 4 of Ordinance, the franchisor thus establishes the same legal regime for several franchisees, which helps the homogeneity and profitability of the franchising network. At the same time, the franchise agreement must reflect the interests of the members of the hotel franchise network, protecting the industrial or intellectual property rights of the franchisor, by maintaining the common identity and its reputation.

The franchise agreement thus represents "a complex legal technique, a group of contracts"<sup>10</sup> which consists of a legal license agreement concluded between the franchisor (the owner of the brand of the international hotel chain) and the owner of the hotel (the franchisee), which gives the latter the rights and the obligations of operating, managing the hotel, under the brand of the franchisor, in exchange for the payment of taxes. In this situation, the hotel brand belongs to the franchisor and the owner of the hotel is the franchisee.

Thus, the parties sign a franchise contract for a certain hotel brand<sup>11</sup> according to which the franchisee will bear all the risks, but will have control over the hotel asset. The contract involves the payment of franchise fees, trademarks, incentive fees, marketing fees, distribution and loyalty fees, IT taxes, etc. On the one hand, the franchisor is the owner of the rights over the internationally registered hotel brand as well as other rights over some hotel products and services, and on the other hand, the franchisee represents the party that has the right to exploit the industrial and intellectual property rights over these products and services, along with technical

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<sup>6</sup> See Charlotte Ene, *International Franchising Contract*, University Press, Bucharest, 2009, p. 219 et seq.

<sup>7</sup> See Stanciu D. Cărpănu, Liviu Stănculescu, Vasile Nemeș, *Civil and commercial contracts*, Hamangiu Publishing House, Bucharest, 2009, p. 445.

<sup>8</sup> See Gheorghe Piperea, *Contracts and commercial obligations*, C.H.Beck Publishing House, Bucharest, 2019, p. 683.

<sup>9</sup> See Charlotte Ene, *op. cit.*, p. 20-21.

<sup>10</sup> See Gheorghe Piperea, *op. cit.*, p. 341.

<sup>11</sup> For example - Marriott, Starwood International, IHG, Hilton, Accor/SBE.

assistance from the franchisor, throughout the duration of the hotel franchise agreement.

The brand of the franchisor must be well-known on the international hotel market<sup>12</sup>, a symbol of the reputation of the hotel franchise network, which constitutes the guarantee of the services and products provided by the hotel to its consumer customers<sup>13</sup>.

Consequently, the hotel franchise contract involves complex legal relationships, involving different branches of law: intellectual property law, civil law, obligations, competition law, alternative dispute resolution methods (domestic and international commercial arbitration, mediation, negotiation), trade between professionals, etc.

## **2.2 Advantages and disadvantages of concluding a hotel franchise contract**

For the franchisee, the advantages of the hotel franchise contract consist of the following: full operational control over brand standards; the right to use the hotel brand, its reservation system and operational investments; easy access to design, development, support from the point of view of organizing the hotel activity, from the franchisor; increased power of attraction of the franchisor's brand as well as its experience and know-how, which have proven their profitability over time; the financial consolidation of the franchisee, as part of the international hotel franchise chain; existing hotel market and access to *global distribution system (GDS)*; its consolidation through a solid and stable position on the hotel market, in relation to other competitors in the same field of activity, due to the operation of the hotel under a strong international brand; increased power to act on the hotel market, thanks to the notoriety of the hotel brand, which has the consequence of increasing the effectiveness and profitability of its activity; the development of a network of common customers of the members of the franchise network (the entire international hotel chain), through means of publicity and advertising, based on the policies imposed by the franchisor; managerial and technical assistance from the franchisor, consisting of training courses and professional training of its own employees; access to the technology, research and development programs developed by the franchisor, with the preservation and continuation of the independence of the franchisor's activity from an economic and legal<sup>14</sup> point of view; increased potential of financial profit after payment of fees and taxes<sup>15</sup>, etc.

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<sup>12</sup> See Elise Vâlcu, *Brief consideration of the impact of the regional development policy on tourism in Romania*, „The Annales of the "Ștefan cel Mare" University Suceava. Fascicle of the University of Economics and Public Administration", volume 9, special issue, 2009, p. 60-65.

<sup>13</sup> See Elise Vâlcu, *Sustainable Development and Sustainable Tourism in the European Union*, „The Annales of the "Ștefan cel Mare" University Suceava. Fascicle of the University of Economics and Public Administration"; volume 9, special issue, 2009, pp. 66-70.

<sup>14</sup> See Charlotte Ene, *op.cit.*, p. 223.

<sup>15</sup> Usually, fixed fees between 5-9% of the rooms revenue - the income from accommodation.

Also, following the conclusion of a merger procedure between two large international hotel chains<sup>16</sup>, another great advantage results, enhanced in favor of the franchisee, due to the takeover of all their common consumer customers, which results in the signing of a significant number of hotel service contracts.

The disadvantages of concluding this contract consist of the following: the request for operational experience of the entire hotel operation team as well as increased effort on the part of the management team; risks assumed by the organization of the activity as well as a too large hotel market; risks resulting from losses of actual hotel activity as well as taxes to be paid to state institutions; developing a network of the hotel's own customers, based on the used hotel brand as well as the franchisor's reputation, services and goods; lack of control over the franchisor's reputation as a result of which business failure can lead to insolvency/bankruptcy of the franchisee; dependence on the initiatives/decisions related to the hotel brand adopted by the franchisor at a global level<sup>17</sup>, a fact that leads to the assimilation of this with an adhesion contract, from the perspective of certain obligations that were not negotiated by the parties but appear during its development; paying the royalty to the franchisor as well as maintaining at its exclusive expense all quality standards and suppliers of materials/products; expenses related to the advertising and promotion of hotel products offered to customers, imposed by the franchisor, etc.

For the franchisor, the advantages and disadvantages of signing the hotel franchise contract are as follows: increase of the hotel brand and revenues resulting from the use of the brand and from efficient management, based on a minimal investment; continuing to retain its industrial property rights over the brand; low market risk and lack of risk related to hotel activity; possibility of terminating the contract in case of non-compliance with the obligations by the franchisee<sup>18</sup>; high risk regarding the quality in operation as well as the dissatisfaction of consumer customers and hotel employees; affecting the image of the hotel brand; collection of fees limited to those agreed according to the contract; the lack of a contribution regarding the increase in the structure of the organization of the hotel activity.

### 3. Clauses of the hotel franchise contract

The clauses of a hotel franchise contract can be the following:

a. the object of the contract, financial conditions, conditions for modification, termination and termination of the contract, interpretation of the contract, declarations and guarantees of the parties to the contract, notifications,

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<sup>16</sup> For example, the merger registered between Starwood Hotels & Resorts and Marriott International in September 2016, according to <https://hospitality-on.com/en/fusions-acquisitions/marriott-starwood-official-birth-new-giant>, accessed on 14.02.2023.

<sup>17</sup> For example, the obligation to make investments at a certain period within the hotel, to change and purchase room linen from certain agreed international suppliers, at a higher price compared to the local hotel market.

<sup>18</sup> See Ioana Nely Militaru, *Business law. Introduction to business law. The legal business report. Contract*, Universul Juridic Publishing House, Bucharest, 2013, p. 80 et seq.

force majeure, sanctioning measures and anti-corruption laws, fire prevention and extinguishing measures, applicable legislation the contract, etc;

b. the duration or term of the contract, its termination conditions. In this sense, the contract that will have a fixed duration, which will allow the franchisee to amortize his investment, a clause that will also benefit the franchisor<sup>19</sup>;

c. exclusivity clause in favor of the franchisee;

d. the non-competition clause through which the franchisee is prohibited from carrying out a commercial activity similar to that of the object of the franchise agreement;

e. the confidentiality clause protecting the know-how transmitted by the franchisor to the franchisee;

f. obligations of the franchisor such as: transmission of exploitation, use of the brand; communication of the know-how<sup>20</sup> under which the franchisee will operate; communication of the standards, operating procedures of the hotel; providing technical and commercial assistance to the franchisee; ensuring in favor of the franchisee the publicity of the services and products offered to the hotel's consumer customers; guarantee, by which the franchisor will adopt all the necessary measures in order to hold a valid title on the hotel brand in favor of the franchisee, for the entire duration of the contract; continuous improvement of the franchising network; to preserve the notoriety of the hotel brand; of concluding a civil liability insurance policy, under the conditions requested by the franchisor and in his favor, in which he is named as an additional beneficiary of the policy, which may include the following types of liability: bodily injury and accident signaling, damages materials, for cars in the hotel parking lot, regarding fires and acts of terrorism, for hotel employees, regarding interruption of activity (loss of income) and hotel possession, etc.;

g. the franchisee's obligations such as: use of the franchisor's brand, under its conditions (including within a determined territorial perimeter); maintaining the good reputation of the franchisor's hotel brand; to obtain and maintain in force all the notices, authorizations and approvals necessary for the proper operation of the hotel, for the entire duration of the contract; remuneration of the franchisor in exchange for the use of his brand, etc.<sup>21</sup>;

h. other clauses regarding: confidentiality, non-competition, exclusivity; preventing and combating money laundering and terrorist financing<sup>22</sup>; protection of

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<sup>19</sup> See Stanciu D. Cărpănu, Liviu Stănculescu, Vasile Nemeș, *op.cit.*, p. 451-452, p. 456.

<sup>20</sup> *Ibid*, p. 450.

<sup>21</sup> Usually, this consists of a sum of money called a license fee that will be paid in monthly installments based on the gross income obtained from the sale of hotel rooms.

<sup>22</sup> In accordance with the provisions of Law no. 129/2019 for the prevention and combating of money laundering and the financing of terrorism, as well as for the modification and completion of some normative acts, with subsequent modifications and additions, published in the Official Gazette of Romania no. 589 of 18.07.2019.

personal data<sup>23</sup>; mutual representations and warranties of the parties; force majeure<sup>24</sup>, which also includes pandemic cases (e.g., the state of emergency generated by the Covid 19 pandemic, following its declaration by the World Health Organization as a pandemic situation), etc.;

i. the inclusion of certain taxes (for example, periodical royalty, amounts owed by the franchisee as a special contribution, etc<sup>25</sup>); other amounts and time periods for the purchase of raw materials and materials from certain international suppliers agreed by the hotel chain;

j. the change of furniture and equipment within the hotel, requirements and costs for improving the hotel property<sup>26</sup>; assignment and financing obligations from creditor banks as well as termination provisions; the repair of any damage suffered, resulting from the hotel's activity under a certain brand<sup>27</sup>, the process of approving the hotel's income and expenditure budget, centralized services as well as their related tariffs;

k. alternative methods of resolving disputes, etc. Within it, the parties can provide, for example, several stages that contain a built-in calendar regarding when and how disputes resulting from the contract are handled. They may require negotiation as a first step and may allow either party to request the use of mediation or arbitration if negotiation fails to reach an agreement within a certain time frame.

If, within another term, the parties cannot resolve the dispute amicably, it may be resolved either by means of the arbitration procedure or by the competent state courts according to law.

<sup>23</sup> In accordance with the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council/ April 27, 2016 on the protection of natural persons with regard to the processing of personal data and the free movement of such data and repealing Directive 95/46/EC (GDPR Regulation).

<sup>24</sup> In accordance with art. X, para. (3) of Emergency Ordinance no. 29/2020 regarding some economic and fiscal-budgetary measures published in the Official Gazette of Romania no. 230 of 21.03.2020, "The unforeseeable, absolutely invincible and unavoidable circumstance referred to in art. 1,351 para. (2) of the Civil Code, which results from an action by the authorities in the application of the measures imposed to prevent and combat the pandemic caused by the infection with the COVID-19 coronavirus, which affected the activity of small and medium-sized enterprises, damage certified by the emergency situation certificate ". Also in this sense, art. 1351 Civil Code, para. (1) provides that: "Unless the law provides otherwise or the parties do not agree to the contrary, liability is removed when the damage is caused by force majeure or fortuitous event" and para. (2) provides that: "Force majeure is any external, unforeseeable, absolutely invincible and unavoidable event and paragraph (3) If, according to the law, the debtor is exempted from contractual liability for a fortuitous event, he is also exempted and in case of force majeure".

<sup>25</sup> See Charlotte Ene, *op.cit.*, p. 195.

<sup>26</sup> In practice, this type of contract is onerous. In this sense, a hotel property must be renovated, redecorated at a certain time interval (number of years), in order to offer a "new product" to its customers. For example: installing sprinklers in hotel rooms and hallways, etc.

<sup>27</sup> The damage can include both the loss actually suffered by the hotel (actual damage - *damnum emergens*) and the benefit it is deprived of (unrealized profit - *lucrum cessans*). In this sense, the sub-chapter Execution of obligations is included in the Civil Code of 2009 (Law no. 287/2009), republished, Official Gazette of Romania no. 505 of 15.07.2011, within the V<sup>th</sup> Book entitled *On Obligations*, Title V - *Enforcement of obligations*, Chapter II - *Forced enforcement of obligations*, Section 4 - *Enforcement by equivalent*, art. 1531-1537 inclusive.

In the situation where, within the hotel franchise contract, the arbitration clause is provided, it clearly mentions the issues, the types of disputes to be resolved through the arbitration procedure.

#### **4. The advantages of using alternative dispute resolution methods (ADR) regarding the hotel franchise contract, within the HoReCa domain**

##### **4.1 Advantages of using ADR methods**

Regarding the disputes that may arise in the HoReCa activity regarding hotel franchise contracts, they can be distinguished in: (i) B2B disputes (respectively business-to-business), in which the dispute takes place between the owner of the unit hotels and other commercial companies with which it has commercial relations and (ii) B2C (respectively business-to-consumer) disputes, in which the dispute takes place between the franchised hotel unit as a hotel service provider and who may be the owner of the unit or the operator hotelier, on the one hand, and consumer customers of such services, on the other.

The analysis of the advantages of ADR differs according to the categories above. Disputes arising from hotel franchise contracts concluded between hotel owners or operators - as franchisees and franchisors, fall under the category of B2B disputes and can have both a national and international component. We will analyze this category further.

The category of ADR methods in the HoReCa field include, for example, the following: arbitration, conciliation<sup>28</sup>, mediation, anticipated neutral evaluation, mini-trial<sup>29</sup>, extrajudicial expertise, ombudsman institution, online dispute resolution, litigation commissions, etc.

The advantages of using ADR methods, in general, are the following:

- the parties agree to resolve their dispute through a single procedure. For example, in the case of hotel franchising which involves intellectual property rights over a brand that is protected in a number of different countries. In this way, the expenses of the involved parties as well as the complexity of multi-jurisdictional litigation are avoided, as well as the risk of pronouncing inconsistent solutions;
- can be used in almost all fields of activity, by legal or natural persons<sup>30</sup> as well as by governmental or non-governmental organizations;
- the autonomy of the parties. Due to the private nature of ADR methods, they give the parties more control over how the dispute is resolved compared to legal disputes settled by state courts. In other words, the parties can decide on the most

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<sup>28</sup> See Julian M. Lew; Loukas A. Mistelis; Stefan Michael Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, The Netherlands, 2011, pp. 12-13.

<sup>29</sup> See Gary B. Born, *International Arbitration: Law and Practice*, Kluwer Law International BV, The Netherlands, 2012, p. 14.

<sup>30</sup> See Manuela Sîrbu, *ADR methods in the European and international context*, University course, Hamangiu Publishing House, Bucharest, 2020, p. 15.



relevant factors of their dispute, the applicable law, the place and language of the applicable proceedings, all of which lead to material cost savings, a faster, more efficient trial;

- the neutrality of ADR methods in relation to the applicable law, the language as well as the institutional culture of the parties, thus avoiding any strategic advantage of the intervention of local state courts;

- confidentiality. The procedures used in the case of ADR are private, the parties being able to agree on confidentiality<sup>31</sup> and the possible consequences resulting from them. This fact allows them to focus on the advantages of their use without worrying about their public impact and is thus of particular importance in the situation where trade reputations and trade secrets, international brands of repute such as in the case of hotel franchising are involved. The confidential character thus certifies the absence of negative publicity that would endanger and affect the image, equally, of both the international hotel brand and the prosperity of the franchisee's business;

- in the situation of the choice of the arbitration procedure by the parties, the advantages of international commercial arbitration considerably outweigh its disadvantages and the main reasons underlying its choice are the following: the enforceability of decisions<sup>32</sup>;

- the equal treatment of the parties<sup>33</sup> as well as the flexibility of the procedure, the ability of the parties regarding the selection of the applicable law<sup>34</sup> and the arbitrators, the confidentiality granted during the entire duration of the procedure and after it, etc.

Also, through the pronouncement of the arbitral decisions, both their binding character for the parties and the fact that they do not constitute a precedent are certified, a situation that represents an advantage for the field of hotel franchising, of renowned international hotel brands.

In this sense, arbitral awards also have the following characteristics:

- final character. Compared to court decisions issued by state courts, which can be challenged through one or more appeals, arbitration decisions are not subject to appeal;

- enforcement character. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>35</sup>, also referred to as the New York Convention, generally provides for the recognition of arbitral awards on

<sup>31</sup> See Gary B. Born, *op.cit.*, p. 7-11, 15, 195-200.

<sup>32</sup> See in this regard, [https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy\\_2006.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf) accessed on 09.02.2023.

<sup>33</sup> See Ilias Bantekas, *Equal treatment of the parties in international commercial arbitration*, „Journal International & comparative law quarterly”, volume 69, article number PII S0020589320000287, p. 991-1011, Cambridge University Press, United Kingdom, October 2020.

<sup>34</sup> See Crenguța Leaua, Flavius A. Baias, *Arbitration in Romania, A Practitioner's Guide*, Wolters Kluwer Romania Publishing House, 2016, p. 75-79.

<sup>35</sup> The Convention of June 10, 1958 regarding the recognition and enforcement of foreign arbitral awards, issued by the United Nations, published in the Official Gazette of Romania no. 19 of July 24, 1961.

an equal footing with state, national court awards, without review on the merits. This fact particularly facilitates the recognition and enforcement of foreign arbitral and judicial decisions rendered by foreign arbitral courts;

- involves specialized experts. Depending on how the parties structure their process, ADR methods allow for the use of experts and arbitrators specializing in hotel franchising. They demonstrate competence in decision making on critical issues where judges do not have the quick ability to understand and decide on the nuances and specialty of the dispute at hand.

Therefore, the advantage of using international arbitration, especially in the situation of cross-border contracts that involve an element of foreignness, as is the case with hotel franchise contracts, results from the fact that a significant majority of companies (professionals in the B2B category) prefer it to resolve disputes arising from such contracts. In this sense, a percentage of 73% of them prefer to use international arbitration, (i) either on its own (29%), (ii) or in combination with another ADR method, in a dispute resolution procedure carried out on several levels (44%). Thus, the use of the other ADR methods by the parties, constitutes a precondition for the use of international arbitration.

#### **4.2 The advantages of using mediation in the case of the international hotel franchise contract**

The mediation procedure is a voluntary way of amicably resolving disputes, conflicts between the parties, with the help of a specialized third person, called a mediator. This is carried out under conditions of impartiality, neutrality and confidentiality as well as on the basis of the free consent of the parties.

Regarding hotel franchise law, in the case of mediation, it is proving to be more and more widespread, as many franchisees execute franchise agreements that include clauses regarding the use of mediation as an ADR method.

Thus, mediation, being a non-binding procedure by definition, multiple choice generators<sup>36</sup>, offers an alternative dispute resolution whereby both parties wish to resolve a dispute in a less adversarial manner. Therefore, this fact is an essential element, given that the parties clearly express their intention to continue their business relationship based on the franchise in the future.

The mediation procedure being totally confidential, no other third party will know its content or result, the mediator also being obliged to respect it. The confidential character thus allows a great freedom of expression of the parties and offers the possibility of a wide range of advantageous solutions for them, since they can ignore the contract and the applicable law, in favor of establishing a common agreement.

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<sup>36</sup> See Mugur Mitroi, *Mediation and conflict. Conflict analysis - Sum of disputes*, Rotech Pro Publishing House, Bucharest, 2010, p. 61.

### 4.3 Mediation, applicability in the context of Romanian, European, international legislation

Many of the dispute resolution clauses in hotel franchise agreements require mediation before the parties proceed to arbitration or eventual litigation in court.

As long as it is not a binding procedure for the parties and the recommendations of the chosen mediator are only optional proposals<sup>37</sup> for them, mediation gives the parties involved an opportunity to resolve their issues.

Thus, they receive from the mediator, an impartial answer regarding the strong and weak points of the inferred case and, at the same time, the possibility of resolving the dispute before the relationship between the franchisor and the franchisee incurs significant costs or causes additional damage.

As mediation is not a mandatory procedure, it gives the parties involved an opportunity to resolve their issues, receive an unbiased response from the chosen mediator on the strengths and weaknesses of the case at hand, and also to resolve the dispute before that the franchisor-franchisee relationship incurs significant costs or causes additional damage.

Because the mediator is an intermediary, who does not decide anything but instead tries to help the parties reach an agreement, they may ultimately choose to sign a settlement (and not a decision or court order) on to the dispute referred to mediation.

Thus, due to the non-binding character of the mediation between the franchisor and the franchisee, it can lead to the adoption of a "win-win" solution regarding the category of B2B disputes. In this sense, it not only represents a less expensive process, but also constitutes a system that promotes a more stable partnership between the parties, compared to the adversarial roles that attract the intervention of state courts.

In Romania, the preliminary mediation procedure is regulated by Law no. 192/2006 regarding mediation and the organization of the mediator profession (law of mediation)<sup>38</sup>. The information session on the advantages of mediation became mandatory from 2013, based on the provisions of art. 2 paragraph 1 of Law no. 115/2012 for the amendment and completion of Law no. 192/2006. Thus, starting on August 1, 2013, all summons requests of the parties who did not appear at the preliminary information session could be rejected by the state courts.

Following the completion of the mediation procedure, it can be closed by the parties signing a protocol (i) either by the parties concluding an agreement, under the conditions in which they resolve the conflict, or (ii) by establishing the failure mediation, by the mediator. The mediation agreement attested by a lawyer or notary public constitutes an enforceable title.

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<sup>37</sup> See, Ilias Bantekas, *An introduction to international arbitration*, Cambridge University Press, University Printing House, Cambridge, United Kingdom, 2015, p. 9.

<sup>38</sup> Law no. 192/2006 regarding mediation and the organization of the mediator profession, published in the Official Gazette of Romania no. 441 of 22.05.2006, with subsequent amendments and additions.

Later, however, from 2014, the Constitutional Court of Romania declared these regulations as unconstitutional, through Decision no. 266/2014<sup>39</sup>, citing the fact that the two provisions of Law no. 192/2006, contrary to the provisions of art. 21 of the Romanian Constitution regarding free access to justice. Following the provisions of the Decision, the information meeting is thus no longer mandatory. Therefore, the state courts will no longer reject the summons requests of the parties who no longer go through the prior mediation procedure, including in the case of disputes resulting from hotel franchise contracts.

At the level of the European Union, mediation is regulated by Directive 2008/52/CE<sup>40</sup>.

Within the member countries of the francophone area<sup>41</sup>, the representative institutions of mediation promote the development of mediation<sup>42</sup>, actively and in accordance with the principles of the Charter of Francophonie<sup>43</sup>. Mediation is defined as an appropriate way of preventing and amicably resolving disputes, conflicts, which encourages the parties to promote an active and responsible society.

In French law, for example, civil mediation is introduced by Law no. 95-125 of February 8, 1995, regarding the organization of courts and procedure in civil, criminal and administrative litigation matters. Also, Ordinance no. 2011-1540 of November 16, 2011, transposes Directive 2008/52/EC into French law, which thus establishes a framework that facilitates the amicable settlement of disputes between the parties, with the help of a third party called a mediator. The Ordinance thus extends the scope of the provisions of the Directive, both regarding cross-border mediation and that without a cross-border element (with the exception of disputes regarding employment contracts or administrative law falling within the competence of the state).

Also in this sense, Law no. 2019-222 of March 23, 2019, regarding programming for the period 2018-2022 and the reform of the judicial system introduces the obligation to use methods of alternative resolution of disputes/disputes, such as mediation, regarding requests for the payment of an amount (which does not exceed the amount of 5,000 euros) or in case of a dispute between neighbors. Therefore, the parties must, before sending a request to the court, prove an amicable conciliation procedure led by a legal conciliator, through mediation or a participatory procedure. Otherwise, the state court can rule ex officio

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<sup>39</sup> Decision 266/2014 [A/R] regarding the exception of unconstitutionality of the provisions of art. 200 of the Civil Procedure Code, as well as those of art. 2 para. (1) and (1<sup>2</sup>) and art. 60<sup>1</sup> of Law no. 192/2006 regarding mediation and the organization of the mediator profession, issued by the Constitutional Court of Romania, published in the Official Gazette of Romania no. 464 of 25.06.2014.

<sup>40</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, published in the Official Journal of the European Union L 136/3.

<sup>41</sup> For example, France, Belgium, Canada, Switzerland, etc.

<sup>42</sup> See in this regard, <http://www.imef.be/> accessed on 08.02.2022 as well as <https://www.anm-mediation.com/> accessed on 08.02.2022.

<sup>43</sup> The Charter of Francophonie, adopted in 1997 at the Summit in Hanoi, Vietnam, revised by the Ministerial Conference in November 2005, in Antananarivo, Madagascar.

regarding the inadmissibility of this request.

In this regard, according to the provisions of art. L.111-3 1 of the CPC, the agreement concluded as a result of the judicial/extrajudicial mediation ordered by the state court and to which the courts of common law/administrative litigation confer enforceable force, constitutes an enforceable title.

Therefore, following the conduct of the mediation procedure in the francophone area, it is noted that 85.8% of the cases were resolved positively for the parties involved. The parties thus managed to reach a total agreement in their favor and in over 60% of cases they settled with a proposal accepted by the parties, the cost of the mediation system being borne by the B2B professionals.

In the situation of professionals in the B2B category, according to French statistics<sup>44</sup>, in 2021, specialized mediators were referred to a number of more than 5,200 mediation cases, compared to 9,600 cases in 2020 and 2,342 in 2019. This share shows the trust companies, B2B professionals in alternative dispute resolution methods, including the use of mediation in complex, sensitive matters involving parties doing business around the world, such as international hotel franchises.

Also in this sense, other countries such as the USA, run in this sense specialized mediation programs on the franchise<sup>45</sup>, used successfully by many franchise associations, franchisees and franchisors of international renown, supported by the Association of Hotel Owners of Asia and America, the Association American Association of Franchisees and Franchise Dealers as well as the International Franchise Association. In this sense, more than 80% of disputes were resolved amicably, with the help of mediation<sup>46</sup>.

Compared to the other countries and states mentioned above, in Romania, although, over time, it has been tried by organizing numerous congresses, symposiums, conferences<sup>47</sup>, to publicize the advantages of using mediation in the case of disputes between professionals and not only, however it was not possible to increase the percentage of their use on the Romanian territory.

However, due to the fact that the EU legislated through Directive no. 2008/52/EC, the use of the ADR method of mediation, with a view to the effective out-of-court settlement of disputes/disputes in civil and commercial matters, and Romania as a member country of the EU, as well as under the provisions of art. 11 paragraph 1 as well as of art. 20 of the Romanian Constitution<sup>48</sup>, will have to increase

<sup>44</sup> See in this regard, <https://www.economie.gouv.fr/mediateur-entreprises-bilan-activite-2021> as well as <https://www.cmap.fr/barometre-de-la-mediation-2020/> accessed on 08.02.2023.

<sup>45</sup> See in this regard, <https://drs.cpradr.org/rules/mediation/franchise-procedure>, accessed on 09.02.2023.

<sup>46</sup> See in this regard, <https://www.cpradr.org/##>, accessed on 08.02.2023. According to F. Peter Phillips, International Institute for Conflict Prevention & Resolution's senior vice president for dispute resolution: "Mediation works in almost all cases. Of the franchise disputes that were officially submitted to the National Franchise Mediation Program, more than 80 percent were resolved amicably."

<sup>47</sup> For example, see in this regard, <https://www.cmediere.ro/page/939/b-zilele-medierii-francophone-la-bucuresti-les-journees-de-la-mediation-francophone-a-bucharest-2013->, accessed on 09.02.2023.

<sup>48</sup> See in this sense, the Constitution of Romania from 1991, republication, Official Gazette of Romania no. 767 of 31.10.2003.

the percentage of disputes resolved with its help. This will be possible through the conclusion by the parties of the agreements resulting from the mediation, adapted to their requirements and needs, which will be respected voluntarily and thus maintain an amicable and sustainable business relationship between the parties over time. These advantages are even more important in mediation cases that present elements of extraneousness, such as the situation of international hotel franchise contracts.

#### **4.4 Legal solutions tailored to online platforms, online mediation**

The solution to the procedures for using the ADR method of online mediation, including in the insurance statement, has arisen as a result of the pandemic situation caused by Covid 19. Thus, they have intensified through virtual environments (virtual ADR or online dispute resolution: E-ADR/ ODR), either hybrid or fully virtual.

Although the law of mediation does not expressly provide that mediation can also take place online, as a flexible procedure that can be carried out easily from a distance through online platforms, it thus offers the possibility of having debates, successful dialogs between the parties, and from a distance. This is possible if the meeting between the parties and their representatives cannot be easily organized because they live at a distance from each other or the parties want to resolve the dispute as urgently as possible, etc.

Thus, if the mediation procedure takes place online, the method of communication between the chosen mediator and the parties is carried out through modern technology (for example, dedicated E-ADR or ODR platforms, videoconference, audio communication, email, etc.).

In this respect, the chosen mediator must have more skills, digital, technical, logistical skills, such as: The ability to configure and operate the online platform used (e.g. slack, zoom, etc.); the ability to use the computer efficiently and to manage technical problems effectively; integration of privacy implications in the storage of digital information, in compliance with applicable legal provisions<sup>49</sup>; possibility of simultaneous communication with parties to the procedure, located in different countries/regions; good ability to communicate, transmit verbal and non-verbal information, in a clear and efficient manner, etc.

Therefore, the advantages of the virtual ADR involving the mediation method are as follows: extension of the programming and time allocated to the parties involved, respectively greater accessibility in space and time, flexibility of the procedure itself; reduced costs related to the ability to meet the parties at the same time, although they are not physically present in the same space, location, mediation session; delegation of powers of the parties in participation in the proceedings to other persons with a hierarchical function reduced to the organizational chart of the

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<sup>49</sup> According to the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and the repeal of Directive 95/46/ CE (General Data Protection Regulation), published in the Official Journal of the European Union L 119/1.

company party; respond and anticipate for the future the needs of the parties; scheduling the online session, including on non-working days, free, due to the fact that all parties involved can participate at any time and from any location; in the case of disputes involving multiple insurers, the possibility to segment the discussions into separate, individual sessions between the mediator and the parties.

## 5. Conclusions

The conclusion of the hotel franchise contract allows the hotel owner to have a greater ability to react to economic changes that directly affect both the hotel property and the profit generated by it.

The use of ADR methods by the parties, including in the case of hotel franchises, gives them the opportunity to resolve their conflicts (disputes) in a much faster and more efficient manner compared to a traditional process resolved by state courts. Hotel franchise relationships are well-suited to the efficient and cost-effective dispute resolution solutions that can result from using the alternative method of mediation. Thus, both the franchisee and the franchisor have a common interest, namely, to keep their businesses. This means that they do not have to waste time in order to identify a solution to the conflicts they face, risking, moreover, their aggravation. This is especially true where the parties have invested substantial time, effort and financial resources in becoming partners in a hotel business and developing it to be mutually profitable long before they became adversaries.

Keeping business also means identifying solutions to avoid damaging mutual collaborative relationships between the two contracting parties or organizing them so that companies are not put at risk by their misunderstandings. The affairs of the parties involve professional, human relations, working capital, which should not be affected by conflicts or egos that prevail over reason. During the mediation procedure, both the franchisee and the franchisor have the opportunity to rediscover the human side of their collaboration, which thus makes the franchise relationship between them more profitable for both.

Arbitration is also traditionally considered to be the preferred alternative way of resolving disputes because it offers the parties a safe, reliable, fast and economically efficient solution, thus playing a significant role in the development of franchise law in the HoReCa field.

The successful use of ADR methods can be anticipated when the franchisee perceives the franchisor as a value to his business and the franchisor, in turn, similarly views the franchisee for the entire international franchising system. The use of ADR methods offers more flexible solutions to problems for the parties, while state court rulings tend to be much more structured, rigid. In addition, the parties have more power to reach a mutually beneficial solution compared to court proceedings. This means that all parties involved work together and are invested in achieving a common goal and interest.

Through ADR methods that are facilitated by people, it is possible to dissipate mutual misunderstandings as well as restore the interrupted dialogue between them. An additional advantage of using ADR methods is that they can be

used to resolve disputes at any time, efficiently, to save time, expense and uncertainty for the parties involved, thus adopting a solution to avoid possible additional expenses as well as anticipation of an appeal.

Therefore, the use of ADR methods, especially mediation and arbitration, in the case of disputes resulting from international hotel franchise contracts, leads to the harmonious development of business relations between the contracting parties, in a whole context of a structured human society, with common and sustainable values.

Also, the advantages of using the virtual ADR outline a particular importance regarding insurance disputes, indicating that it represents a significant tool in the near future, available both to insurers, regarding the settlement of claims for compensation and of lawyers in matters of coverage of insured risks. In this sense, the speed with which these procedures are carried out determines the possibility of prompt reimbursement of the insured loss as well as the rapid recovery of the damage caused to the party, and thus, the safe continuation of the hotel business. This way of resolving disputes ensures increased effectiveness in terms of supporting the injured party both in the competitive relationship of the hotel market and in its collaborative relationship with insurers.

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