

THE FRANCHISE LAW
REVIEW

SIXTH EDITION

Editor
Mark Abell

THE LAWREVIEWS

THE
FRANCHISE LAW
REVIEW

SIXTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in February 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Mark Abell

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Sophie Emberson, Katie Hodgetts

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Gavin Jordan

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Robbie Kelly

SUBEDITOR

Anne Borthwick

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2019 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of January 2019, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-002-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARAMIS

ATIEH ASSOCIATES LAW FIRM

BASHAM, RINGE Y CORREA, SC

BECCAR VARELA

BIRD & BIRD

CHANCERY CHAMBERS

DANNEMANN SIEMSEN ADVOGADOS

DBS LAW, CORPORATE LEGAL ADVISERS

DESCHKA KLEIN DAUM LAWYERS

GORODISSKY & PARTNERS

GRATA LAW FIRM LLP

HANNES SNELLMAN ADVOKATBYRÅ AB

HOGAN LOVELLS (SOUTH AFRICA) INC

JONES & CO

K&K ADVOCATES

KENNEDY VAN DER LAAN

LADM LAWYERS

MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

MST LAWYERS

NIXON PEABODY LLP

NOBLES

PLESNER LAW FIRM

PORZIO, RIOS, GARCIA

STEWART GERMANN LAW OFFICE

TAY & PARTNERS

WORKBUZZ

YOON & YANG LLC

CONTENTS

PREFACE.....	ix
<i>Mark Abell</i>	
Chapter 1 WHAT IS FRANCHISING?	1
<i>Mark Abell</i>	
Chapter 2 FRANCHISING AS PART OF AN INTERNATIONAL MULTICHANNEL STRATEGY	3
<i>Mark Abell</i>	
Chapter 3 THE REGULATION OF FRANCHISING AROUND THE WORLD.....	8
<i>Mark Abell</i>	
Chapter 4 SUSTAINING RELATIONSHIPS	27
<i>Steven Frost and Mark Abell</i>	
Chapter 5 INTELLECTUAL PROPERTY.....	34
<i>Allan Poulter and Robert Williams</i>	
Chapter 6 DATA PROTECTION.....	40
<i>Ruth Boardman, Francis Aldhouse and Elizabeth Upton</i>	
Chapter 7 TAX CONSIDERATIONS.....	47
<i>Zoe Feller</i>	
Chapter 8 TRADE SECRETS AND FRANCHISING.....	98
<i>James Froud and Mark Abell</i>	
Chapter 9 FRANCHISEES AS CONSUMERS.....	106
<i>Jiri Jaeger and Frederik Born</i>	
Chapter 10 RESOLVING INTERNATIONAL FRANCHISE DISPUTES.....	115
<i>Victoria Hobbs</i>	

Chapter 11	E-COMMERCE AND FRANCHISING.....	127
	<i>Ben Hughes</i>	
Chapter 12	THE COMPETITION LAW OF THE EUROPEAN UNION	133
	<i>Mark Abell</i>	
Chapter 13	THE IMPACT OF BREXIT ON FRANCHISING.....	140
	<i>Mark Abell</i>	
Chapter 14	EDITOR'S GLOBAL OVERVIEW	144
	<i>Mark Abell</i>	
Chapter 15	AFRICA OVERVIEW	152
	<i>Nick Green</i>	
Chapter 16	GCC OVERVIEW	157
	<i>Melissa Murray</i>	
Chapter 17	ARGENTINA.....	168
	<i>Florencia Rosati and Gustavo Papeschi</i>	
Chapter 18	AUSTRALIA.....	184
	<i>Philip Colman</i>	
Chapter 19	AUSTRIA.....	206
	<i>Eckhard Flohr and Alfons Umschaden</i>	
Chapter 20	BARBADOS	221
	<i>Giles A M Carmichael</i>	
Chapter 21	BRAZIL.....	230
	<i>Luiz Henrique O do Amaral, Cândida Ribeiro Caffé, Rafael Atab de Araujo, Luciana Gonçalves Bassani, Mariana Reis Abenza, Fernanda Souto Pacheco and Juliana Bussade Monteiro de Barros</i>	
Chapter 22	CANADA.....	249
	<i>Paul Jones and Katya Logunov (Stepanishcheva)</i>	
Chapter 23	CHILE.....	260
	<i>Cristóbal Porzio</i>	

Chapter 24	CHINA.....	273
	<i>Sven-Michael Werner</i>	
Chapter 25	CZECH REPUBLIC	285
	<i>Vojtěch Chloupek</i>	
Chapter 26	DENMARK.....	296
	<i>Jacob Ørskov Rasmussen</i>	
Chapter 27	FRANCE.....	310
	<i>Raphaël Mellerio</i>	
Chapter 28	GERMANY.....	321
	<i>Stefan Münch, Alexander Duisberg, Markus Körner and Michael Gaßner</i>	
Chapter 29	HONG KONG	329
	<i>Michelle Chan</i>	
Chapter 30	HUNGARY.....	339
	<i>Péter Rippel-Szabó, Bettina Kövecses and Zsófia Ottóffy</i>	
Chapter 31	INDIA	353
	<i>Nipun Gupta and Divya Sharma</i>	
Chapter 32	INDONESIA.....	365
	<i>Risti Wulansari</i>	
Chapter 33	IRAN	381
	<i>Shelley Nadler and Farid Kani</i>	
Chapter 34	ITALY	391
	<i>Claudia Ricciardi</i>	
Chapter 35	KAZAKHSTAN	404
	<i>Nick Green and Saule Akhmetova</i>	
Chapter 36	KOREA	415
	<i>Jason Sangoh Jeon, Jin Woo Hwang and Seung Hyeon Sung</i>	
Chapter 37	MALAYSIA	426
	<i>Lee Lin Li and Chong Kah Yee</i>	

Contents

Chapter 38	MEXICO	451
	<i>Eduardo Kleinberg</i>	
Chapter 39	NETHERLANDS	463
	<i>Martine de Koning</i>	
Chapter 40	NEW ZEALAND	483
	<i>Stewart Germann</i>	
Chapter 41	POLAND	497
	<i>Kuba Ruiz</i>	
Chapter 42	PORTUGAL	509
	<i>Magda Fernandes, José Maria Montenegro, Vasco Stilwell d'Andrade, Dzhamil Oda and Diogo Pinto</i>	
Chapter 43	RUSSIA	524
	<i>Sergey Medvedev</i>	
Chapter 44	SAUDI ARABIA	541
	<i>Melissa Murray</i>	
Chapter 45	SINGAPORE	549
	<i>Lorraine Anne Tay and Just Wang</i>	
Chapter 46	SOUTH AFRICA	563
	<i>Ian Jacobsberg</i>	
Chapter 47	SWEDEN	576
	<i>Elisabeth Vestin and Sara Heikfolk</i>	
Chapter 48	UKRAINE	588
	<i>Volodymyr Yakubovskyy and Graeme Payne</i>	
Chapter 49	UNITED KINGDOM	599
	<i>Graeme Payne</i>	
Chapter 50	UNITED STATES	624
	<i>Steven Feirman, Daniel Deane, Andrew Loewinger, Keri McWilliams, Arthur Pressman and Kendal Tyre</i>	

Chapter 51	DISPUTE RESOLUTION APPENDIX	645
	<i>Beatriz Díaz de Escauriaza</i>	
Appendix 1	ABOUT THE AUTHORS.....	647
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	677

PREFACE

Since the publication of the fifth edition of *The Franchise Law Review*, there have been yet more major economic and geopolitical developments that have had a significant impact on world trade; the Sino-American trade war, the renewal of Iranian sanctions and Brexit being only three of these. Through all this, however, the apparently inexorable march towards the globalisation of commerce has continued unabated. Despite the slow emergence of a few economic bright spots, the global economy is not performing as well as it might, and there are concerns that the US economy may be approaching a crash.

As a consequence, businesses are often presented with little choice but to look to more vibrant markets in Asia, the Middle East and Africa for their future growth. At the same time, South–South trade is on the increase, perhaps at the expense of its North–South counterpart. All of this, coupled with the unstable wider geopolitical landscape, presents business with only one near certainty: there will be continued deleveraging of businesses in the coming years and, thus, growing barriers to international growth for many of them. All but the most substantial and well-structured of such businesses may find themselves facing not only significant difficulties through reduced access to funding for investment in their foreign ventures, but also challenges arising from their lack of managerial experience and bandwidth.

Franchising, in its various forms, continues to present businesses with one way of achieving profitable and successful international growth without the need for either substantial capital investment or a broad managerial infrastructure. In sectors as diverse as food and beverages, retail, hospitality, education, healthcare and financial services, franchising continues to be a popular catalyst for international commerce and makes a strong and effective contribution to world trade. We are even seeing governments turning to it as an effective strategy for the future of the welfare state as social franchising gains still more traction as a way of achieving key social objectives.

Given the positive role that franchising can play in the world economy, it is important that legal practitioners have an appropriate understanding of how it is regulated around the globe. This book provides an introduction to the basic elements of international franchising and an overview of the way that it is regulated in 37 jurisdictions.

As will be apparent from the chapters of this book, there continues to be no homogenous approach to the regulation of franchising around the world. Some countries specifically regulate particular aspects of the franchising relationship. Of these, a number try to ensure an appropriate level of pre-contractual hygiene, while others focus instead on imposing mandatory terms upon the franchise relationship. Some do both. In certain countries, there is a requirement to register certain documents in a public register. Others restrict the manner in which third parties can be involved in helping franchisors meet potential franchisees. No two countries regulate franchising in the same way. Even those countries that have

a well-developed regulatory environment seem unable to resist the temptation to continually develop and change their approaches – as is well illustrated by the recent changes to the Australian regulations. The inexorable march towards franchise regulation continues, with countries such as Argentina, which previously had not specifically regulated franchising, adopting franchise-specific laws over the past 12 months.

Many countries do not have franchise-specific legislation but nevertheless strictly regulate certain aspects of the franchise relationship through the complex interplay of more general legal concepts such as antitrust law, intellectual property rights and the doctrine of good faith. This heterogeneous approach to the regulation of franchising presents yet another barrier to the use of franchising as a catalyst for international growth.

While this book certainly does not present readers with the complete answer to all the questions they may have about franchising in all the countries covered – that would require far more pages than it is possible to include in this one volume – it does seek to provide the reader with a high-level understanding of the challenges involved in international franchising in the first section, and then, in the second section, explains how these basic themes are reflected in the regulatory environment within each of the countries covered. I should extend my thanks to all of those who have helped with the preparation of this book, in particular Caroline Flambard and Nick Green, who have invested a great deal of time and effort in making it a work of which all those involved can be proud. It is hoped that this publication will prove to be a useful and often-consulted guide to all those involved in international franchising, but needless to say it is not a substitute for taking expert advice from practitioners qualified in the relevant jurisdiction.

Mark Abell

Bird & Bird LLP

London

January 2019

CHILE

*Cristóbal Porzio*¹

I INTRODUCTION

The Chilean franchise market has been growing at a steady pace over the past few years. This growth has been strongly linked to the positive and consistent economic results shown by the national economic figures. The slowdown of the Chilean economy that began in the second half of 2014 and has continued up to the present has apparently yet to affect the growth of franchising figures in Chile, certainly in terms of the number of brands present and entering the Chilean market. It is still difficult to anticipate at this stage what will happen in the medium and long term. In addition to the difficulties presented by the international economy – with the slowdown in China and its direct consequences for those countries in which commodities are very economically important, as with Chile and copper – there is also the prospect of how important legal reforms, including fiscal and labour reforms, that have already been approved, and are gradually entering into force, will impact the Chilean economy. It is difficult, therefore, to anticipate the direct impact these changes will have on franchising. In fact, a significant impact is already being felt in some sectors, such as mining and construction. Furthermore, although commerce has slowed down – and as sales have slowed the owners of the stores also complain – as yet unemployment in the sector has not increased, and new franchises continue to appear in the market and are visible in Chile's various cities. Furthermore, while the commerce sector's complaint regarding the slowdown in sales is also heard from franchisees, new malls continue to open their doors, with many hosting new brands.

In spite of the economic slowdown, there still appears to be an active interest in franchising in the Chilean market and articles on the subject continue to appear in local newspapers and magazines. Some of these articles have dealt with particular brands (local and foreign) that have chosen to use the franchising system to grow their business. While other articles have been about the franchising industry in general, some have simply announced or confirmed rumours that certain companies are exploring the Chilean market or are ready to enter the local market.

The interest of the Chilean market in the franchising model is only confirmed by the fact that the International Franchise Fair (FIF) took place once again in 2017, for the fourth consecutive year. The stands were numerous and attendance figures were correspondingly

¹ Cristóbal Porzio is a partner at Porzio, Ríos, García. The information in this chapter was accurate as of January 2018.

high. The interest of the public was very clear, not only during the fair, but also especially during the conferences, as was evident at the extremely well-attended conference on the legal aspects of franchising, which the author led.

In terms of the figures concerned, according to an investigation conducted by the Faculty of Economics and Business of the University of Chile² – one of the of the country's main universities – the statistics from 2016 concerning the franchise market are still quite impressive. In fact, the franchise market has generated sales of approximately US\$1,957 million per year, which corresponds to a growth of 31 per cent between 2012 and 2016. This figure is three times the amount it was eight years ago. From a social and employment point of view it is estimated that the franchise market currently employs approximately 53,500 people. This investigation remains probably the most recent and most extensive study made locally on this subject as, at the time of writing, no updates to this report have been published.

The number of brands operated by franchising is over 200.

The services and food sectors remain the most important as far as franchising is concerned. In fact, franchises in those sectors comprise over 78 per cent of existing franchised brands. In addition, while a very large number of foreign brands are present in the Chilean market by means of franchising systems, domestic brands also constitute a significant market presence.

The Chilean franchise market features important international players such as 5àSec, GNC Live Well, Applebee's, Alamo Rent A Car, Sixt Rent a Car, Best Western, Starwood Hotels, Burger King Domino's Pizza, Dunkin' Donuts, Holiday Inn Express, Kentucky Fried Chicken, McDonald's, Movistar, the Wall Street Institute, Engel & Völkers (real estate), Fast Fitness, Fruzco, Papa John's and Johnny Rockets, among others.

Among the most important local franchises operating in Chile are International Center (education services), Fuenzalida Propiedades (real estate agencies), Doggis (restaurants serving mainly hot dogs), Emporio La Rosa (restaurants and ice cream producers), Copec (fuel distribution and petrol stations), Juan Maestro (fast-food restaurants, serving mainly sandwiches), Pedro, Juan y Diego (fast food) and Soquimich Comercial (producer and seller of speciality fertilisers, iodine and derivatives, lithium and derivatives, industrial chemicals and potassium).

Although the franchise market plays an important role in the current economy, there is no official government agency in charge of this matter, nor a public report concerning franchising activity in Chile.

II MARKET ENTRY

i Restrictions

The Chilean Political Constitution provides in Article 19 No. 21 for the right of any person to develop any economic activity, provided the activity is not immoral or contrary to public policy or national security. The Constitution does not differentiate between foreign nationals and Chilean nationals – all of them being equal in the law. In view of this, foreign nationals and foreign companies are entitled to deal with Chilean people (individuals and corporations) and to enter into the Chilean market directly.

2 Pinaud Verde-Ramo, Nicole, 'Mercado de las Franquicias en Chile 2016', Departamento de Administración, Facultad de Economía y Negocios, Universidad de Chile, 2016.

The Chilean legal system does not provide for a franchise law. Having said that, at the time of entering the Chilean market, a foreign investor or foreign franchisor will not be required to obtain special permission or prior approval but will be required to comply with the Chilean laws that regulate commercial activity, the declaration and payment of taxes, labour relationships, the treatment of foreign investments, etc.

As far as the grant of a master franchise or the grant of development rights to a local entity is concerned, no special restrictions will apply. As mentioned, however, a foreign entity wishing to do business in Chile through a franchise system will have to comply with the applicable Chilean laws.

Depending on the field of activity where the foreign entity will do business in Chile, specific or particular rules may apply, in addition to the normal commercial, labour and tax laws indicated above. This is the case, for instance, in the food industry, for which specific rules will apply, and in the telecommunications sector, among others. With regard to the food industry, 2014 was a year of heated debate following the enactment of the 'Super 8 Law' (a law aimed at limiting children's access to junk food while at school), the enactment of its regulations and the withdrawal of the same from Congress. This debate continued during 2015. A local discussion on plain packaging also started to develop slowly and a draft bill is currently before Congress.

Notwithstanding rules and concerns such as those noted above, which may affect its chosen field of activity, a foreign company is free at the time of deciding to enter into the Chilean market to elect the best route for its project, in accordance with the 'principle of the autonomy of the will', established in the Chilean Civil Code.³ As a result, practice indicates that the solutions chosen are very different from one case to another. Some may consist in the franchisor simply granting a master franchise for the Chilean territory to a Chilean entity, while others may consist in the entry into the Chilean market and incorporation of a local entity that will interact with franchisees, or that will incorporate a joint venture with a local entity, etc. Basically, 'all legal solutions' can at least be explored

ii Foreign exchange and tax

Business entities are, for the most part, legally structured, and in different ways, using the main types of company or corporation provided for by Chilean law. At the time of making a decision to enter the Chilean market, the franchisor will have to decide whether a legal entity is to be incorporated in Chile. If the decision is affirmative, it will then have to determine what kind of legal entity will have to be considered. For that decision, the franchisor will take into account the limitations on responsibility, the tax consequences, the needs of the local entity, the power of leverage with a possible local partner, the possibility of amending the structure quickly, the possibility of withdrawing from the business, etc.

In this regard, Chilean law provides for several types of corporation, such as limited liability companies, stock corporations and corporations, among others. The choice of one of the foregoing alternatives will depend on what the foreign franchisor is looking for in its business (e.g., free transfer of shares, number of partners, administration and tax considerations).

Whatever the solution or model chosen, the foreign investor will consider on the one hand that money can be obtained locally at competitive rates, or brought into Chile easily

3 Article 1545.

without major obstacles, and on the other hand that money can be changed at a market exchange rate with no major limitations or boundaries. Finally, and from a strict tax point of view, the foreign investor will know or will have to know from the beginning that a withholding tax will apply to most of the amounts of money that are to be exported from Chile to the country of origin of the foreign investor.

As the franchising model is not currently regulated as such in Chile, the franchisor and franchisee will be liable to pay Chilean taxes for activity carried on in Chile using this model. There could be an exception in the case of an international franchising contract in which one company (franchisor or franchisee) is Chilean and the other company (franchisor or franchisee) is foreign, if Chile and the country concerned have a treaty to avoid double taxation.

It is important to bear in mind that every time a franchisor who has no domicile in Chile, or has not incorporated a company in Chile, is to export to its country of origin the sums of money consisting in rents or payments made to it by the franchisee, this will be subject to payment of a withholding tax, on the terms mentioned above. The responsible entity for the withholding tax will be the person or company responsible for its payment, such as the franchisee. Said tax will have to be paid by means of a formal deposit of money in the official account of the state of Chile.

III INTELLECTUAL PROPERTY

i Brand search

The Chilean Patent and Trademark Office (INAPI) has an online system that provides most of the information regarding trademark registrations and pending applications. The same information can be obtained in the case of patent applications.

In the case of trademarks, the search engine allows the user to search for phonetical and graphical coincidences, and also to check the classes and goods or services descriptions. All this information is public and can be accessed through INAPI's website. However, although the system is undergoing constant improvements, the information may not be completely accurate and might need completion by means of a material review of some files.

In addition, there are private services that perform more detailed searches and that are in a position to prepare and draft thorough reports on the registrability of a trademark.

ii Brand protection

In Chile, it is possible to obtain trademark protection for goods and services. Applications will need to designate classes (using the Nice Classification) and to contain a description of the products or services that are to be covered by the trademark.

Protection can be sought for word marks and for figurative marks. The same can be done for slogans and for sound marks. Three-dimensional trademarks cannot be registered.

To obtain trademark rights in Chile, a trademark application must be filed with INAPI and prosecuted according to the rules established in the Chilean IP Law and its implementing regulations. Some basics that can be highlighted are as follows:

- a* trademark applications can be filed by individuals or by corporations;
- b* trademark applications can be filed by Chilean persons or entities, or by foreign persons or entities;
- c* trademark applications are the subject of a formal examination and examination as to substance;

- d* trademark applications are published in the Chilean Official Gazette, for third parties to file their possible opposition in writing;
- e* the final decision, independently of whether the application has been the subject of opposition, can be appealed before the Court of Industrial Property; and
- f* the final decision of the Court of Appeals can be the subject of an annulment recourse filed before the Supreme Court of Chile.

Trademark registrations are granted for 10 years. This term can be renewed for further periods of 10 years provided a trademark renewal application is properly filed.

Currently, the IP Law does not provide for mandatory trademark registrations. In other words, the registration of a trademark is not mandatory for its use as a trademark in Chile, provided, of course, it does not interfere with the legally superior rights of third parties. In addition, if a person decides to file an application for the registration of its trademark, and finally a registration is granted by the Chilean authority, said registration will not be subject to cancellation on the grounds of non-use. In fact, the use of a trademark is not mandatory to maintain a trademark registration in force. In this respect, a bill for a new IP law is still being discussed by the Chilean Congress, and this draft contains a provision concerning the mandatory use of trademark registrations.

The Chilean IP Law also provides for the application, prosecution and granting of other IP rights, such as patents, industrial designs (3D), industrial drawings (2D) utility models, geographical indications and integrated circuits.

As far as franchising contracts are concerned, it would be advisable, although not mandatory, for the owner of a trademark and owner of a franchising programme to file for a trademark application for its trademarks before entering the Chilean market and, in some cases, before offering franchises locally or even before starting a search for potential franchisees or a master franchisee.

While it may seem expedient to forego this process, as it is not mandatory, the use of a trademark alone will not give significant rights to its user. Trademark property or ownership is acquired in Chile through filing a trademark application, the prosecution of this application and the final granting of trademark rights by the Chilean authority, INAPI.

iii Enforcement

According to Chilean practice, all franchising agreements contain a trademark licence agreement. In some cases, the licence agreement is part of the main body of the franchise agreement while in other cases it is drafted in an annex or exhibit of the franchising agreement.

On the assumption that the trademark will be registered in the name of the owner of the trademark or the franchisor, for a licence agreement to be enforceable against third parties, it will be necessary to register it with INAPI. Although, according to Chilean law, a licence agreement will be valid between the signatory parties because of the sole fact of their having a valid executed agreement, granted in good faith and with a clear intention to enter into the agreement, for the agreement to be valid or enforceable against third parties, it is necessary to register the contract with INAPI.

iv Data protection, cybercrime, social media and e-commerce

Chilean legislation does not provide for a data protection law as such. Nevertheless the Industrial Property Law⁴ contains provisions regarding protection of ‘industrial secrets’.

In addition, Chilean legislation provides for a Law on Protection of Consumer’s Rights,⁵ a Law on Electronic Documents and Electronic Signature⁶ and for a Law on Privacy Protection.⁷ The latter regulates the ‘adhesion contracts’ usually found on internet websites under the title of ‘general terms and conditions of use’.

In Chile, the sole visit to a website that offers access to certain services does not impose any obligation on the user, unless the user has unequivocally previously accepted the conditions offered by the provider. Typical clauses such as ‘by accessing this website you acknowledge that you have read, understood and accepted these terms and conditions of use’ do not obligate users in Chile.

To comply with the legal requirements for the ‘electronic formation of consent’, users must accept the terms and conditions of a website in writing. This can be achieved by clicking the relevant box to indicate acceptance of the terms and conditions. Once the contract is agreed, the provider must send written confirmation to the consumer.

Law No. 19,799 on Electronic Documents and Electronic Signature and its Certification recognises the validity of the acts and contracts agreed electronically, and gives them the same value as a written document.

Regarding personal data, Law No. 19,628 on Privacy Protection states that the user must authorise in writing the use of its personal information. This written agreement can be replaced by an electronic registration process if the identification of the user can be determined and a record of the authorisation can be kept.

IV FRANCHISE LAW

i Legislation

Chile does not have a law on franchising. Therefore, the main applicable law is the contract, which is considered to be law for the parties, according to the provisions of Article 1545 of the Chilean Civil Code. In addition to that, civil and commercial codes will apply, together with the general rules of law and the existing case law on franchising. However, case law will not be binding for a court.

The parties are free to determine both the structure and content of the franchise agreement. In other words, a franchise agreement contract should be subject to general contract rules and certain limitations provided by local law, just as with any other contract.

Practice indicates that most franchising agreements are drafted on the basis of ‘international models’ and ‘current international practice’.

4 Law No. 19,039.

5 Law No. 19,496.

6 Law No. 19,799.

7 Law No. 19,628.

ii Pre-contractual disclosure

Generally speaking, Chilean law considers the parties that enter into a contract to be equals. In consequence, it does not impose more pre-contractual obligations than those that are the result of the application of the principle of good faith. The Chilean Civil Code states that 'the contracts must be executed in good faith'.

Under normal conditions, the parties to a contract only have to comply with the requirements of pre-contractual disclosures that are necessary to credit that both parties are in good faith; in other words, to be in a position to prove that the information granted to the other party is the information necessary to execute the contract in its natural meaning.

The obligations of the parties at the time of negotiating the agreement are not specifically established, and therefore franchise contracts are treated as any other contract. Therefore, what was discussed at the time of the negotiations in principle has no value unless it is possible to prove by means of strong evidence that the discussion was not a simple discussion but an agreement that was made before the execution of the document, and that is to be considered the contract.

In this respect, the Chilean Civil Code, Article 1554, states that:

The promise to enter into a contract does not produce any obligation unless the following conditions are met:

- 1) *That the promise is in writing;*
- 2) *That the contract promised is not one of those that the law declares ineffective;*
- 3) *That the promise contains a term or condition that sets the time of the conclusion of the contract;*
- 4) *That the promised contract is specified therein in such a manner that to be perfect the only thing missing is the tradition of the thing or the solemnities prescribed by law.*

Finally, the Civil Code contains rules for the interpretation of contracts (Articles 1560 to 1566), of which the following are examples: 'if the intention of the parties is known, it should be given greater consideration than the literal wording of the contract'; 'the terms of the contract, even if they are general, will be applied only for the contract'; 'the interpretation of a clause that produces effects will be preferred over an interpretation that does not'; 'unless there is a clear intention of the parties against it, the contract should be interpreted in the way that best suits its nature'; 'the clauses of common use are considered part of the contract even when they are not expressly included'; and 'the clauses should be interpreted in a way that favours the whole execution of the contract'.

The local practice indicates that in the case of franchises, memoranda of understanding (MOU) are common. A document of this sort will be useful to channel the discussions and negotiations of the contract. However, in most cases, practice indicates that they will have little weight from a legal point of view. In any case, such a document will in all probability include clauses regulating points such as confidentiality, transfer of information, ownership of information, a possible non-compete clause in case of not reaching an agreement, etc. While such clauses are normally considered an enforceable contract, the MOU or letter of intention is not sufficient for the prospective franchisee to force the franchisor to enter into the final agreement.

iii Registration

As mentioned above, Chilean law does not prescribe any formalities regarding the execution of franchise agreements.

Nevertheless, to facilitate the enforcement of franchise contracts, it is very common for these contracts to be executed before a notary public, the involvement of which provides certainty regarding the date of execution and the parties to the contract.

iv Guarantees and protection

Guarantees are valid and often used in Chilean contracts. According to local law, there are the following three guarantees:

- a* mortgage: guarantees involving real estate;
- b* pledge: guarantees involving different kinds of movable property; and
- c* personal guarantee: guarantee involving the goods of a person, in case the principal debtor does not pay its commitments.

The following formalities are required by law in respect of these different kinds of guarantee:

- a* mortgages: Chilean law requires a public deed, and the registration of this deed in the Registry of Mortgages and Encumbrances of the competent real estate registrar. There are some special cases that require other formalities (i.e., mortgage on certain ships), though these are not common;
- b* pledges: pursuant to local law, there are several kinds of pledge for which the law requires different formalities. The most common pledges are the pledges on shares, credits and the non-possessory pledge, among others. Each of these has its own specific formalities (notarisation, registration, among others); and
- c* personal guarantee: Law No. 18,092 provides that this guarantee shall consist of a written document, signed by the person who grants the guarantee, clearly identifying this document as a 'personal guarantee' to ensure the fulfilment of a specific obligation. This guarantee can be limited to a specific amount. Its notarisation is recommended.

V TAX

i Franchisor tax liabilities

As briefly mentioned above, pursuant to Articles 58 et seq. of the Chilean Income Tax Law, foreign nationals with no residence or domicile in Chile, or foreign legal entities incorporated abroad, shall pay a withholding tax on any income produced by a Chilean source before they export that income from Chile.

In addition, franchisor and franchisees will pay tax on profits made in Chile through the franchising activity. In the case of international or cross-border franchising contracts, treaties to avoid double taxation may apply.

ii Franchisee tax liabilities

The local franchisee must collect the withholding tax and pay it to the Treasury. Therefore at the time of negotiating a contract of this nature and at the time of its execution, it is very important for the franchisor and franchisee to be clear on the exact amounts to be paid from one party to the other, and to the state (tax). In other words, at the risk of having a longer clause (which may even repeat that the burden of the withholding tax will be on the

franchisee), it may be wise to go into some detail to establish clearly how the calculations will take place, the exact amount to be paid ultimately by the franchisee to the franchisor, and when it should finally be received by the franchisor.

According to Chilean law, there are no currency restrictions that may affect a franchise relationship between a US franchisor and a Chilean franchisee.

Notwithstanding the aforementioned, any operation in which the local franchisee receives payment of an amount exceeding 10,000 Chilean pesos shall be notified to the Central Bank of Chile. (This obligation, however, is generally fulfilled by the corresponding Chilean commercial bank that receives the payment.)

iii Tax-efficient structures

Practice indicates that in the case of franchisors domiciled abroad, it is common to establish in the contract the exact amount to be received abroad by the franchisor. Any deduction or payment to be made is the responsibility of the franchisee and does not affect the final amount received by the franchisor. Therefore, the cost to the franchisee is the total sum due for payment plus the withholding tax.

VI IMPACT OF GENERAL LAW

i Good faith and guarantees

As indicated above, the Chilean Civil Code imposes a duty of good faith that applies to all contracts, including franchising.

Furthermore, there are some general provisions that should always be taken into consideration in an agreement subject to local law, such as the rules of the interpretation of contracts already mentioned above.

ii Agency distributor model

As indicated above, Chilean law does not provide for a law on franchising. The same can be said for distribution. Therefore the law of the contract will be the main applicable law for the parties.

iii Employment law

The franchisee will not normally be considered an employee of the franchisor. In addition, practice indicates that most local franchising agreements contain a special clause by means of which the parties establish that the relationship they have is not a labour-law relationship but a commercial relationship.

On the other hand, franchisees are considered employers of the employees they hire to run the business. As a consequence, the franchisees must comply with all Chilean labour legislation, which always regulates the relationship between employer and employees in the country.

Jurisprudence has determined that if a franchisee who is an employer breaches Chilean labour law, the affected worker could pursue the fulfilment of the relevant legal obligations against the franchisor, which is considered to have subsidiary liability.⁸

⁸ Chilean Supreme Court, *Ortiz Huaiquil Claudia v. Comercial Proventa S.A.*, No. 4012-2008, decision of 25 September 2008.

Discussion on the reform of the Labour Code is ongoing, and even if the current situation does not change, it cannot be assessed at present.

iv Consumer protection

Unlike in other countries where the jurisprudence and doctrine have developed a criterion that establishes that under special circumstances franchisees could be treated as consumers (for example, in pre-contractual disclosures), this is not the case in Chile.

v Competition law

Franchise agreements are not subject to special treatment under Chile's competition law. Therefore general rules apply. Particularly relevant among these are the Chilean Antitrust Law⁹ and the Unfair Competition Law.¹⁰ In these matters, and in contrast to what was indicated in Section VI.iv, the Chilean legal system that regulates antitrust and unfair competition gives a very special role to case law, which is examined, studied and applied in court decisions.

Some parts of the legal provisions concerned are worth citing:

Any person that enters into or executes, individually or collectively, any action, act or convention that impedes, restricts or hinders competition, or sets out to produce said effects, will be sanctioned . . . notwithstanding preventive, corrective or prohibitive measures that may be applied to said actions, acts or conventions in each case.

The following will be considered to be, among other things, actions, acts or conventions that impede, restrict or hinder competition or which set out to produce said effects:

- a) Express or tacit agreements among competitors, or concerted practices between them, that confer on them market power and consist of fixing sale or purchase prices or other marketing conditions, limit production, allow them to assign market zones or quotas, exclude competitors or affect the result of bidding processes.*
- b) The abusive exploitation on the part of an economic agent, or a group thereof, of a dominant position in the market, fixing sale or purchase prices, imposing on a sale another product, assigning market zones or quotas or imposing other similar abuses.*
- c) Predatory practices, or unfair competition, carried out with the purpose of reaching, maintaining or increasing a dominant position.¹¹*

In general, an act of unfair competition is any act against good faith or good custom which, by illegitimate means, is carried out with the purpose of diverting the clientele of a market agent.¹²

The Unfair Competition Law contains a, merely illustrative, list of acts considered 'acts of unfair competition'. These include, among others:

- a* any conduct that takes advantage of another's goodwill, or that aims to confuse a third party's goods, services, activities, distinctive signs or establishment with those of the infringer;
- b* the use of signs or diffusion of facts or assertions, incorrect or false, that lead to misinformation about the nature, provenance, components, characteristics, price,

9 DL No. 211 of 1973.

10 Law No. 20,169 of 2010.

11 Article 3, Law No. 20,169.

12 Id.

production process, brand, appropriateness to fulfil the objectives, quality or quantity, and, in general, about the advantages that are really provided by the offered goods or services; and

- c* any incorrect or false information or assertion about the goods, services, activities, distinctive signs, establishment or commercial relations of a third party that is capable of harming its goodwill or any expression directed to discredit or ridicule such a person without any objective basis.¹³

In principle, the parties to the franchise agreement are free to determine its contents.

Practice indicates that most franchising contracts are drafted in a such a manner as not to impose final prices for the end consumer but instead propose a range in which the price should move, to maintain the international standards and position of the product and brand; not to force the franchisee to buy necessarily very specific amounts of goods but, on the contrary, to try to reach some agreement concerning annual sales, and to give bonuses when the goals are reached; and to establish certain rules on 'how to sell' and 'how to make discounts' without jeopardising the position of the brand in the local market and at international level, etc.

vi Restrictive covenants

In Chile, competition and confidentiality covenants are often agreed by the parties. Pursuant to Chilean law, these are valid and fully enforceable. These covenants are usually either contained within the contracts (specific clauses) or agreed in a specific and separate document (non-competition agreement or non-disclosure agreement). However, case law and practice indicate in a rather consistent manner that non-compete clauses are acceptable and enforceable as they are limited in time and provide that the one benefiting from the clause will somehow compensate the one who bears the burden of not competing.

vii Termination

Once again, and as indicated above, the contract will be the law of the parties. In addition, in practice there is a consistent use of rather detailed termination clauses, since if nothing is said, general rules of commercial and civil law will apply, and in most cases those laws will have to be applied by a court. Also in this context, in cases of termination local franchising contracts are repeatedly seen to be used to regulate the following areas:

- a* protection of trademarks;
- b* pending payments between parties;
- c* the possibility of having the franchisor continue with the business, with the aim of protecting the brand, the employees of the franchisee, the location, etc.;
- d* payment of stock and destination of stocks;
- e* rights of the parties during the time of termination and possible legal actions and waivers within determined conditions; and
- f* confidentiality, etc.

As indicated above, non-competition agreements are usually enforceable. In most cases, specific terms and conditions are agreed upon.

13 Id.

Chilean law does permit placement of restrictions regarding transfers of equity interest in franchisees, to the extent that the parties agree to it. Where the parties have provided for a prohibition on the franchisee assigning the contract, a breach of such a provision will be a cause for the franchisor to terminate, in principle, with no doubt. If the parties have not agreed to a clause of this nature, and given that the franchising contract is a contract *intuitu personae*, it is understood that the franchisee will not be entitled to assign its contract or rights without the prior consent of the franchisor.

viii Anti-corruption and anti-terrorism regulation

Prior to joining the Organisation for Economic Co-operation and Development,¹⁴ Chile enacted Law No. 20,393 of 2009 introducing criminal liability for legal entities in cases of money laundering, financing of terrorism and bribery.

The law states that:

Legal entities will be responsible for the crimes that were committed directly and immediately in their interest or to their advantage, by its owners, drivers, managers, executives, representatives or those engaged in administration and supervision, provided that the commission of the offence is the result of the failure by the latter of the management and supervisory duties.

The most relevant consequence for franchising is the obligation for the franchisor and franchisee, to different degrees, to exercise strict control to prevent the situations mentioned above.

ix Dispute resolution

Practice indicates that there is no uniform option chosen by the parties as far as applicable law and forum are concerned. Foreign laws and Chilean law (in spite of the lack of franchise law) are common. The same can be said regarding forum; some parties choose court proceedings while others prefer alternative dispute resolution methods such as arbitration (national or international).

Chilean laws permit the parties to reach an agreement to choose from all these options. In fact, there are no restrictions upon the choice of a foreign law or a venue outside Chile for dispute resolution purposes. However, this choice and, in consequence, foreign law, will be applicable only to the extent that there is no conflict with Chilean public policy. Taking into consideration the foregoing, there are some topics in which the applicable law will necessarily be Chilean law, even if the signing parties have agreed something different. For example, Chilean law will apply to the sale or rent and other transactions made in relation to real estate located in Chile, to employment matters, to tax issues, etc.

Commonly, franchising agreements give a mandate to the Arbitration and Mediation Centre of the Santiago Chamber of Commerce as it has gained a favourable reputation in recent years.

Mediation in these cases is recognised, but it is not mandatory unless the parties to the franchise contract have so agreed.

14 7 May 2010.

Both judgments and awards are usually enforceable without many issues. Chile has been a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 3 December 1975.

Equitable remedies are available in Chile. The Civil Procedure Code provides several remedies, and specific requirements for each of them. The Industrial Property Law provides for the possibility of obtaining an interim or permanent injunction to prevent someone – and, therefore, a former franchisee – from continuing to trade in breach of a non-compete provision or from using the franchisor’s trademarks and other intellectual property rights duly registered in the name of the franchisor.

As far as damages are concerned, liquidated damages are contemplated in the Chilean Civil Code.¹⁵ These clauses are used often in civil and commercial contracts, and they are fully enforceable. Notwithstanding the aforementioned, their amounts are generally reasonable, and therefore they are not understood as punitive. The Civil Procedure Code and the Industrial Property Code contain rules for the calculation of damages, under specific circumstances.

VII CURRENT DEVELOPMENTS

The Chilean economy has been growing consistently for many years. The slowdown that began in 2014 and continues today does not seem to have affected franchise development yet or, at least, does not seem to have affected franchise sales in a different manner from commerce sales in general, if these are compared as distinct areas of economic activity. That said, franchise-specific case law is still rather limited at the moment and it could be argued that we have yet to obtain a clear indication of how the continuing economic slowdown and the tax law reforms will ultimately impact on the franchising business.

Despite franchising being discussed and studied today in some Chilean law schools, we have not yet seen a discussion concerning the need for a specific law on the matter. Current commercial, civil and competition laws seem to provide a good framework for franchising businesses in Chile.

It is hoped that, in the short term, both jurisprudence and doctrine development will give more definitive positions and practical answers regarding those topics that have still not been treated in a detailed or consistent manner.

The success of the franchise model in Chile and the still-growing economy have seen several international brands featured in Chilean newspaper and magazine articles as candidates for entry into the Chilean market by means of a franchise system. Finally, in 2017, the FIF organised by the Chamber of Commerce of Santiago took place successfully once again in Chile, with a significant number of participants, and the 2018 FIF event is already being planned.

15 Articles 1535 et seq.

ABOUT THE AUTHORS

CRISTÓBAL PORZIO

Porzio, Rios, Garcia

Cristóbal Porzio joined Porzio, Rios, Garcia in 1993 and has been a partner since 2002. He was admitted to practise in 1994 after gaining his JD at the Pontifical Catholic University of Chile in 1993. His practice areas include intellectual and industrial property, distribution law and franchising, and corporate law.

He advises local and foreign clients in matters related to patents, trademarks and technology transfer. Moreover, he participates on the boards of directors of companies and acts as local counsel for foreign companies in Chile.

He is a professor at the School of Law of the Pontifical Catholic University of Chile and he is the immediate past president of the Chilean Association of Intellectual Property (ACHIPI). He is the Chilean expert for the International Distribution Institute, a member of honour of the International Association of Young Lawyers (AIJA), and a member of the Chilean Bar Association, AIPPI, AIPLA and INTA. Cristóbal Porzio is also an accredited International Distribution Institute (IDI) arbitrator and an appointed member of the IDI IDArb list of arbitrators (providing dispute resolution in the field of international distribution).

PORZIO, RIOS, GARCIA

Av Cerro el Plomo 5680
Piso 19, Las Condes
Santiago
Chile
Tel: +56 2 2729 0600
Fax: +56 2 2729 0601
cporzio@porzio.cl
www.porzio.cl



ISBN 978-1-83862-002-8