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# THE FRANCHISE LAW REVIEW

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EDITOR  
MARK ABELL

LAW BUSINESS RESEARCH

# THE FRANCHISE LAW REVIEW

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This article was first published in The Franchise Law Review, 1st edition  
(published in February 2014 – editor Mark Abell).

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# THE FRANCHISE LAW REVIEW

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Editor  
MARK ABELL

LAW BUSINESS RESEARCH LTD

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Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
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[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

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ISBN 978-1-909830-11-0

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

# ACKNOWLEDGEMENTS

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

ADVOKATFIRMAN NOVA

ARAMIS

BEAUCHAMPS SOLICITORS

BIRD & BIRD

COULSON HARNEY ADVOCATES

DANNEMANN SIEMSEN ADVOGADOS

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# EDITOR'S PREFACE

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The apparently inexorable march towards the globalisation of commerce has continued unabated despite, or perhaps even because of, the uncertain economic times that we have endured over the past few years. Businesses from what was once called the 'developed' world are often presented with little choice but to look to more vibrant markets in Asia and the Middle East for their future growth. However, the unstable geopolitical landscape in some regions of the world and changes in both national and the global economies present businesses with only one near certainty: there will be continued deleveraging of businesses in the coming years and therefore growing barriers to international growth for many of them. All but the most substantial and well-structured of such businesses can find themselves facing not only significant difficulties due to their reduced access to funding to invest in their foreign ventures, but also challenges arising from their lack of managerial experience and bandwidth.

Franchising, in its various forms, presents businesses with one way of achieving profitable and successful international growth without the need for either substantial capital investment or a broad managerial infrastructure. It is therefore likely to continue to be a popular catalyst for international commerce and make a strong and effective contribution to world trade.

Given the positive role that franchising can make 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 33 jurisdictions.

As will be apparent from the chapters of this book, there is no homogenous approach to the regulation of franchising around the globe. 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 instead focus on imposing mandatory terms upon the franchise relationship. Some do both. In certain countries there is a requirement to register certain documents on a public register. Others restrict the manner in which third parties can be involved in helping franchisors to meet potential franchisees. No two countries regulate franchising in the same way.

Many countries do not have franchise-specific regulation, 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 its use as a catalyst for international growth.

This book does not pretend to present the reader with a full answer to all the questions he or she 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, however, try 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, explain 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 me in the writing of this book, in particular Babette Märzheuser-Wood, Graeme Payne, Victoria Hobbs and Caroline Flambard, who, despite having had a busy and challenging 2013, have invested a great deal of time and effort in making it a work that all those involved can be proud of.

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 2014

## Chapter 17

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# CHILE

*Cristóbal Porzio*<sup>1</sup>

### 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 constant economic results shown by the national economic figures. According to an investigation conducted by the School of Economy and Administration of the University of Chile<sup>2</sup> – one of the main universities of the country – the figures from 2012 concerning the franchise market are quite impressive. In fact, the franchise market has generated sales of approximately US\$1,500 million per year. 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 31,000 people, which is an increase of 24 per cent on the figure five years ago.

The number of companies operating as a franchise has increased by 12 per cent in the last five years, and by 40 per cent in the last eight years.

The services and food sectors remain the most important as far as franchising is concerned. In fact, those sectors comprise over of 60 per cent of existing brands subject to franchise. In addition, it is interesting to see that even if a very large number of foreign brands are present in the Chilean market by means of a franchising system, domestic brands already contribute in a significant manner.

The Chilean franchise market features the presence of important international players such as 5àSec, GNC Live Well, Applebee's, Alamo Rent a Car, Best Western,

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1 Cristóbal Porzio is a partner at Porzio, Ríos & Asociados.

2 Pinaud Verde-Ramo, Nicole, Mercado de las Franquicias en Chile 2012, Departamento de Administración, Facultad de Economía y Negocios, Universidad de Chile, 2012. ISSN No. 0718-3909.



Burger King Domino's Pizza, Dunkin' Donuts, Holiday Inn Express, Kentucky Fried Chicken, McDonald's, Movistar, the Wall Street Institute, among others.

Among the most important local franchises we can name International Center (education services), Fuenzalida Propiedades (real estate agencies), Doggis (restaurant serving mainly Hot Dogs), Emporio La Rosa (restaurant and ice cream producers), COPEC (fuel distribution and gas stations), Juan Maestro (fast food, serving mainly sandwiches), Pedro, Juan y Diego (fast food) and Soquimich Comercial (producer and seller of specialty plant nutrition, 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 its 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 will be entitled to deal with Chilean persons (individuals and corporations) and to enter into the Chilean market directly.

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 called to comply with Chilean laws that rule the 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, the foreign entity that wishes to do business in Chile through a franchise system will have to comply with the local national laws.

Depending on the field of activity in which 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 the telecommunications sector, among others.

In other words, at the time of deciding to enter into the Chilean market, a foreign company shall decide what route is better suited for its project, in a rather free manner, complying with the 'principle of the autonomy of the will', established in the Chilean Civil Code (Article 1545). As a result, the practice indicates that solutions are very different from one case to another. Some consist in the simple granting by the franchisor to a Chilean entity of a master franchise for the Chilean territory, while others 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, etc. Basically, 'all legal solutions' can be at least explored.

## ii Foreign exchange and tax

Business entities are in most cases legally organised in different manners, using the main type of companies and corporations provided for by Chilean law. At the time of making a decision to enter into 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 formed. For that decision, the franchisor will take into account the limitations to responsibility, the tax consequences, the needs of the local entity, the power of leverage with a possible local partner, the possibility to amend the structure quickly, the possibility to withdraw from the business, etc.

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

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 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.

The normal rate of such a withholding tax is 35 per cent. Some reductions to this percentage may apply in special cases.

It is important to bear in mind that every time a franchisor, who has no domicile in Chile nor has 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, such a rent will be subject to payment of a withholding tax, in 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 (Instituto Nacional de la Propiedad Industrial, 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/services descriptions. All of 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 International Classification), and 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.

For the obtention of trademark rights in Chile, a person will need to file a trademark application with INAPI and prosecute the same according to the rules established in the Chilean IP Law and the ruling of the same. 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 the subject of a publication in the Chilean Official Gazette, for third parties to file their possible oppositions in writing.
- e* The final decision, independently of the fact that the application may or may not have been the subject of an opposition, can be appealed before the Court of Industrial Property.
- 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 extended 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 to maintain the trademark in force. In addition, a trademark registration cannot be cancelled on the grounds of non-use. In this respect, the Chilean Congress is currently discussing a project of law for a new IP Law. The draft in discussion in Congress 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, utility models, geographical indications, integrated circuits, etc.

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 trademark(s), before entering the Chilean market, and in some cases, before offering franchises locally or before starting a search for potential franchisees or a master franchisee.

In this respect, and regarding this convenience, the use of a trademark will not give major rights to its user. Trademark property or ownership is acquired in Chile by means of the filing of a trademark application, the prosecution of same and the final granting declared by the Chilean authority, INAPI.

### **iii Enforcement**

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

In the assumption that the trademark will be registered in the name of the owner of the trademark or the franchisor, in order to make a licence agreement enforceable against third parties, it will be necessary to register it with the Chilean Trademark Office. In fact, according to the Chilean Law, a licence agreement will be valid between the signatory parties, due to the sole fact of having a valid executed agreement, granted in good faith and with a clear intention to enter into the agreement. However, for such a licence agreement to be valid or enforceable against third parties, it will be necessary to register the contract with the Trademark Office.

### **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 Law (Law No. 19,039) contains provisions regarding protection of 'industrial secrets'.

In addition, the Chilean legislation provides for a Law of Protection of the Consumer's Rights (Law No. 19,496), Law of Electronic Documents and Electronic Signature (Law No. 19,799) and for a Law on Privacy Protection (Law No. 19,628). The latter will rule the 'adhesion contracts' usually found on the internet websites under the title of 'General Terms and Conditions of Use'.

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

In order 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 box with the option of 'accepting the terms and conditions'. Once the contract is celebrated, the provider must send a 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 celebrated 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 will be the contract, which shall be considered as law for the parties, according to what is provided in 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, we must point out that 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 contracts general rules and certain limitations provided by local law, just as any other contract.

Practice indicates that most franchising agreements will be drafted using as the basis ‘international models’ and ‘current international practice’.

### ii Pre-contractual disclosure

Generally speaking, Chilean law will consider the parties that are to enter into a contract as 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 this ‘usual’ scheme, the parties to a contract will 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 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 will in principle have no value unless it is possible to prove by means of strong evidence that the discussion was not a simple discussion but an oral agreement that was taken before the execution of the document, and that such oral agreement is to be considered as 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, except if the following is to occur:*

*1st That the promise is in writing; 2nd That the contract promised is not one of those that the laws declare ineffective; 3rd That the promise contains a term or condition that set the time of conclusion of the contract; 4th That the promised contract is specified therein in such a manner, that the only missing thing to be perfect are the tradition of the thing or the solemnities prescribed by laws.*

Finally, the Civil Code contains rules for the interpretation of the contracts (Articles 1560 to 1566). As an example we can cite: ‘if the intention of the parts is known, it should be more considered than the literal words of the contract’; ‘that the terms of the contract, even if they are general, will be applied only for the contract; that the interpretation of a clause that produce effects will be preferred over an interpretation that does not’; ‘unless a clear intention of the parts against it, the contract should be interpreted in the way that better fits is 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 case of franchises, memoranda of understanding (MOUs) are common. A document of the sort will be useful to canalise the discussions and negotiations of the contract. However, in most of cases, practice indicates that they will have little weight from a legal point of view. In any case, a document of that nature will in all probability include some clauses, ruling points such as confidentiality, transfer of information, ownership of information, a possible non-competition clause in case of not reaching an agreement, etc. These clauses will normally be considered as an enforceable contract, in spite of the fact that the MOU or letter of intention will hardly permit the prospective franchisee to force the franchisor to enter into the final agreement.

### iii Registration

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

Nevertheless, in order to facilitate the enforcement of the franchise contracts, it is very common for these contracts to be executed before a notary public. The latter will give certainty on 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 three guarantees, these are:

- a* Mortgage: guarantees involving real estate.
- b* Pledge: guarantees involving different kinds of moveable property.
- c* Personal guarantee: guarantee involving the goods of a person, in case the principal debtor does not pay its commitments.

Regarding formalities required by law applicable to each kind of guarantees, we can briefly comment on the following

- a* Mortgage: Chilean law requires a public deed, and the registration of such public deed in the Burden and Mortgage Registry of the competent Real State Register. There are some special cases, not very often, which require other formalities (i.e., mortgage on certain ships).
- b* Pledges: Pursuant to local law, there are several kinds of pledges for which the law requires different formalities. The most common pledges are the pledge on shares, credits, and the non-possessory pledge, among others. Each one of them has its own specific formalities (notarisation, registrations, among others).
- 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 Article 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 35 per cent tax over any income produced by a Chilean source before they export such income from Chile.

### **ii Franchisee tax liabilities**

As a withholding tax, it must be withheld and paid by the local franchisee to the National Treasury. Therefore at the time of negotiating a contract of this nature and at the time of executing this contract, it will be very important to have the franchisor and franchisee clear on the exact amounts to be paid from one party to the other, and to the state (tax). In other words, at risk of having a longer clause that could even repeat that the burden of the withholding tax will be on the franchisee, it may be wise to enter into detail and establish clearly how the calculations will take place, and the exact amount that will finally need to be paid by the franchisee to the franchisor, and when it should finally be received by 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, where the local franchisee receives any payment of an amount exceeding US\$10,000, this operation shall be notified to the Chilean Central Bank. (Nevertheless, this obligation is, in general, fulfilled by the corresponding Chilean commercial bank that will receive such payment.)

### **iii Tax-efficient structures**

Regarding tax-efficient schemes in franchising, practice indicates that in the case of franchisors established abroad, it is common to establish in the contract the exact amount that will be perceived abroad by the franchisor. Therefore, any deduction or payment to be made will be responsibility of the franchisee and will not affect the final amount received by the franchisor. Therefore, for the franchisee, the cost will be 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 rules all contracts. This will be applicable to 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 as an employee of the franchisor. In addition, practice indicates that most of the 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, the franchisees will be considered as employers of the employees they will hire to run the business. As a consequence, the franchisees must comply with all the Chilean labour legislation, which will always rule the relationship between employer and employees in the country.

Some jurisprudence has determined that if the franchisee who is an employer breaches the Chilean labour law, the affected worker could pursue the fulfilment of the legal obligations against the franchisor, which will be considered to have subsidiary liability.<sup>3</sup>

**iv Consumer protection**

Unlike in other countries where the jurisprudence and doctrine have developed a criterion that establishes that under special circumstances the franchisees could be treated as a consumer, 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 will apply. Among those, we can especially mention the Chilean Antitrust Law (D.L. No. 211 of 1973) and the Unfair Competition Law (Law No. 20,169 of 2010). In these matters, and to the contrary of what was indicated above, the legal Chilean system ruling antitrust and unfair competition gives a very special role to case law, which is examined, studied and applied in decisions of the courts.

As far as the legal provisions are concerned, some parts 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 as, among others, 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 them market power and consist of fixing sale or purchase prices or other marketing*

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



*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.<sup>4</sup>*

*In general, an act of unfair competition is any act against good faith or good costumes which, by illegitimate means, is carried out with the purpose of diverting the clientele of a market agent.<sup>5</sup>*

The Unfair Competition Law contains a merely illustrative list of conducts considered as ‘acts of unfair competition’. Among others:

- a* Every 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, 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.
- 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 person without any objective basis.<sup>6</sup>

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 so as not to impose final prices for the end consumer but instead propose a rank in which the price should move, in order to maintain the international standards and position on 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 of ‘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, they are valid and fully enforceable. These covenants are usually either contained within the contracts (specific clauses), or agreed in a specific and separate

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4 Article 3, Law No. 20,169.

5 Idem.

6 Idem.

document (non-competition agreement or non-disclosure agreement). However, case law and practice indicate in a rather consistent manner that ‘non-competition’ 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 will have the burden of not competing.

#### vii Termination

Once again, and as indicated above, the contract will be the law of the parties. In addition, practice is consistent in showing 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. Along this same line of thinking, local franchising contracts repeatedly tend to rule for the cases of termination the following subject matters:

- a* protection of the trademarks;
- b* pending payments between the 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, they are agreed upon specific terms and conditions.

Chilean law does permit placement of restrictions regarding transfers of equity interest in franchisees, to the extent that parties agree to it. Where the parties have provided for a prohibition for the franchisee to assign 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 the franchising contract being 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 OECD (7 May 2010), Chile enacted Law No. 20,393 of 2009 introducing the criminal liability of the legal entity 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 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, in different degrees, to exercise a 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. In addition, in this last case, some parties choose court proceedings while others prefer ADR methods such as arbitration (national or international).

Chilean laws permit the parties to an agreement to choose from all of 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 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 on real estate located in Chile, to employment matters, to tax issues, etc.

Commonly, franchising agreements give a mandate to the CAM (Arbitration Center of the Chamber of Commerce of Santiago, Chile), 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.

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 Arbitration Awards (the New York Convention) since 3 December 1975.

Equitable remedies are available in Chile. The Civil Procedure Code provides several remedies, and specific requirements for each of them. On the industrial property side of the matter, the Industrial Property Law provides for a possible obtention of 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 (Article 1535 et seq.). 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 the damages, under specific circumstances.

## VII CURRENT DEVELOPMENTS

The Chilean economy has been growing consistently for many years. As a consequence, and in parallel, as anticipated in the first part of this chapter, franchises have grown enormously. If the economic figures continue along the same lines, the same should

happen for franchise developments, although franchise-specific case law is still rather limited at the moment.

Despite franchising being discussed and studied today in some Chilean schools of law, we have not yet seen a discussion concerning the need for a specific law on the matter.

It is hoped that in the short term both jurisprudence and doctrine development will give more definitive positions and practical answers regarding some topics that are still not treated in detail or in a consistent manner.

The success of the franchise model in Chile and the still-growing economy have put several international brands in articles of Chilean newspapers and magazines as candidates for entry into the Chilean market by means of a franchise system.

## Appendix 1

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# ABOUT THE AUTHORS

### **CRISTÓBAL PORZIO**

*Porzio, Ríos & Asociados*

Cristóbal Porzio joined Porzio, Ríos & Asociados in 1993 and has been a partner since 2002. He was admitted to practise in 1994 after gaining his JD at Pontificia Universidad Católica de 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 in the boards of directors of companies and he acts as local counsel for foreign companies in Chile.

He is a professor at the School of Law of the Pontificia Universidad Católica de Chile and a member of the board of the Chilean Association of Intellectual Property (ACHIPI). He is also the Chilean expert for IDI (the International Distribution Institute), a member of honour of the AIJA (Association Internationale des Jeunes Avocats), and a member of the Chilean Bar Association, AIPPI, AIPLA and INTA.

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