FRANCHISING IN LATIN AMERICA

Pablo Hooper
González Calvillo, SC
Mexico City, Mexico

Jane W. LaFranchi
Marriott International, Inc.
Bethesda, Maryland, USA

Erik B. Wulff
DLA Piper LLP (US)
Washington, DC, USA

October 13 – 15, 2010
The Hotel del Coronado
San Diego, California

© 2010 American Bar Association
# TABLE OF CONTENTS

I. INTRODUCTION ................................................................................................................................. 1  
   A. Cultural Diversity in Latin America ......................................................................................... 1  
   B. Latin American Politics ......................................................................................................... 2  
   C. Latin American Economies .................................................................................................. 2  
   D. Latin American Challenges and Barriers ......................................................................... 3  
   E. Regulation of Franchising in Latin America ............................................................... 4  

II. ARGENTINA ............................................................................................................................................... 7  
   A. Regulation of Offers and Sales of Franchises ................................................................. 7  
   B. Governing Law and Dispute Resolution .......................................................................... 7  
   C. Taxes ................................................................................................................................. 10  
   D. Foreign Exchange Controls ............................................................................................. 11  
   E. Competition Laws ............................................................................................................ 11  
   F. Relationship Laws ............................................................................................................. 12  
   G. Trademark Requirements and Licensing Considerations ........................................ 13  
   H. The Court System and Recent Court Decisions .......................................................... 14  

III. CHILE ....................................................................................................................................................... 16  
   A. Regulation of Offers and Sales of Franchises ................................................................. 16  
   B. Governing Law and Dispute Resolution .......................................................................... 16  
   C. Taxes ................................................................................................................................. 17  
   D. Foreign Exchange Controls ............................................................................................. 17  
   E. Competition Laws ............................................................................................................ 17  
   F. Relationship Laws ............................................................................................................. 18  
   G. Trademark Requirements and Licensing Considerations ........................................ 19  
   H. The Court System and Recent Court Decisions .......................................................... 19  

IV. COLUMBIA ................................................................................................................................................. 21  
   A. Regulation of Offers and Sales of Franchises ................................................................. 21  
   B. Governing Law and Dispute Resolution .......................................................................... 22  
   C. Taxes ................................................................................................................................. 24  
   D. Foreign Exchange Controls ............................................................................................. 25  
   E. Competition Laws ............................................................................................................ 25  
   F. Relationship Laws ............................................................................................................. 27  
   G. Trademark Requirements and Licensing Considerations ........................................ 29  
   H. The Court System and Recent Court Decisions .......................................................... 30  

V. COSTA RICA ............................................................................................................................................... 32  
   A. Regulation of Offers and Sales of Franchises ................................................................. 32  
   B. Governing Law and Dispute Resolution .......................................................................... 35  
   C. Taxes ................................................................................................................................. 37  
   D. Foreign Exchange Controls ............................................................................................. 37  
   E. Competition Laws ............................................................................................................ 38  
   F. Relationship Laws ............................................................................................................. 40  
   G. Trademark Requirements and Licensing Considerations ........................................ 41  
   H. The Court System and Recent Court Decisions .......................................................... 42
FRANCHISING IN LATIN AMERICA¹

I. Introduction

Latin America can mean different things to different people. It is essentially a region of the Americas where Latin-derived languages, particularly Spanish and Portuguese (but also French) are primarily spoken. Thus, under this view it encompasses most of Central and South America, as well as parts of the Caribbean. Latin America can also be viewed as any part of the Americas south of the U.S. border. Under this view, the reference sometimes includes the Caribbean Islands and often includes a number of countries where a Latin language is not the primary language, such as Belize, Suriname, Jamaica, Barbados, Trinidad and Tobago, the Netherlands Antilles (to be dissolved in October 2010), and Aruba.

Notwithstanding these various ways of looking at Latin America, the exact scope of what constitutes “Latin America” is not particularly important here, as the purpose of this paper is to survey the laws of a select number of important countries in Central and South America that have experienced an active interest by international franchise companies seeking to expand into the region. As Brazil has been covered in other programs, the authors have focused attention on the following countries: Argentina, Chile, Colombia, Costa Rica, El Salvador, Honduras, Mexico, Panama, Peru and Venezuela. This survey has involved expert input and analysis from prominent legal practitioners in these jurisdictions, and the authors wish to acknowledge with gratitude these contributions.²

A. Cultural Diversity in Latin America

The countries of Central and South America display a remarkable variation in ethnic diversity. The mix of ancestries, ethnic groups and races varies widely among the various countries, with certain ones having a predominance of European populations, such as Argentina; others, Amerindian, such as Bolivia; and others, mixed (“Mestizo”) populations, such as Mexico. People of African and Asian ancestry (particularly Japanese and Chinese) comprise significant parts of the population in some of these countries. The particular mix of ethnic groups exerts significant cultural influences and provides each country with a measure of uniqueness. These ethnic differences along with business and social customs and practices that have evolved over the last 500 years with the melding of cultures and values, even within individual Latin American countries, can not only have a significant impact on the types of products and services that will be successful in the development of franchising activities, but can also affect attitudes regarding business relationships. For franchising, it is imperative that a foreign franchisor be well educated not only on the legal system in the Latin American country it is interested in entering, but also on the cultural landscape of the particular country, with an understanding that no two Latin American countries can be considered identical.

¹ The authors wish to thank Tao Xu, an associate at DLA Piper's Washington DC and Northern Virginia offices, for his assistance with this paper.

² These local practitioners include: Guillermo J. H. Mizraji (Argentina), Juan Alberto Díaz Wiechers (Chile), Eduardo Zuleta J. (Colombia), Carlos M. Valverde (Costa Rica), Gladys Marina Chavez (El Salvador), Dr. Roberto Zacarias Jr. (Honduras), Miguel A. De Puy III (Panama), Raúl Lozano Merino (Peru), and Enrique Cheang V. (Venezuela). Their contact information appears towards the end of this paper, after the country-specific analyses that follow the introduction section.
B. Latin American Politics

Latin America is known for political extremes with a colorful history of military dictatorships, right wing regimes, revolutions, coup d’états and left wing regimes, with Communists dominating Cuba for many years. The U.S. government has also played an often unpopular role by interfering in the internal affairs of various countries in an effort to ward off leftist regimes. Nevertheless, much of the region has stabilized since the 1990s, with many countries having democratically elected governments and open economies. While there is a growing perception outside Latin America that leftist populist regimes are on the rise again across the region (e.g., the Hugo Chavez movement in Venezuela), imperiling democratic and capitalist institutions, and affecting many spheres of commerce, including franchises, the extent of the impact of these movements should be carefully considered. The reality is that extremist populist regimes have not yet gained much influence outside the countries where they govern. Indeed, Juan Manual Santos – a center/right candidate – was recently elected President of Colombia. Although populist regimes have had adverse effects on the economies of Bolivia, Ecuador, Nicaragua, and Venezuela, many of the regimes in power that have populist roots take a more pragmatic approach that encourages economic development – prime examples are Brazil and Peru. Generally, political extremism on both sides of the spectrum tends to be more muted these days, with the right wingers being more center-right, and the left-wingers more center-left.

However, President Chavez recently mandated that the Central Bank of Venezuela cease granting authorizations required in order for monies to be paid abroad. It is no longer possible for franchisees in Venezuela to pay royalties in any foreign currency, although the government has since indicated its willingness to reconsider the issue. This represents the most extreme exchange control in Latin America and it seriously impacts foreign franchised businesses located in Venezuela. This situation, along with the uncertainty of other governmental actions that could be taken against private businesses (such as expropriation or nationalization), makes Venezuela the most challenging country for investment in Latin America.

Drug-related crime continues to occur in Mexico at a high rate, and President Felipe Calderon's crackdown on drug cartels in recent years has intensified fighting both between the Federal Government and drug cartels, and among drug cartels. The security situation is especially dire in cities like Ciudad Juarez in the state of Chihuahua, Reynosa in the State of Tamaulipas, and Gomez Palacio in the State of Durango, but as indicated by the U.S. Department of State's current advisory\(^3\), violence has occurred in many cities, mainly in the north. Franchising, just like other commercial and business activities, has been affected by the lack of security.

C. Latin American Economies

As of 2009, Latin America's population was estimated at close to 600 million with a combined GDP in excess of 4 trillion U.S. dollars.\(^4\) With a combined population in excess of that of the U.S., the region continues to be an attractive market for expansion of international franchise concepts.

---


As a result of relatively open economies, conservative banking systems, and commodity price stability, Latin America has weathered the recent recession remarkably well. Indeed, real GDP projections for South America and Mexico combined is expected to be 4.1% (2010) and 4% (2011), for Central America 2.7% (2010) and 3.7% (2011) and for the Caribbean 1.5% (2010) and 4.3% (2011). The projected lag in recovery for the Caribbean is noteworthy as it is attributed primarily to continued reduced levels of international tourism (especially from the U.S. and Europe). This is of particular interest to franchising companies, as many franchise concepts are fueled not only by local customer bases, but also by tourism. Of the South American countries, Peru, Chile, Brazil and Uruguay are expected to see the greatest growth; and Mexico also stands out. Not surprisingly Ecuador and Venezuela, and some of the Central American countries (Belize, Honduras), are expected to lag behind in economic recovery.

International franchising is a just component of the increasing globalization of the world economy and interdependence of national economies. As such, one can look at factors and trends that may have a significant effect or provide remarkable opportunities for franchise companies. Take for example the upcoming 2014 FIFA World Cup and 2016 Olympics in Rio de Janeiro, Brazil. The entire world was fascinated with these events as they took place in Johannesburg and Beijing, respectively, and they provided a significant opportunity for a wide variety of companies selling consumer products and services to gain both worldwide and local acceptance. If history repeats itself, one can expect that many well-known consumer brands will flock to Brazil in the run up to the FIFA World Cup and the Olympics in Rio. Franchise companies have an opportunity to participate in these extraordinary opportunities. Furthermore, we should not be surprised that the global branding efforts that accompany these highly visible sporting events will spill over more broadly into other South American countries. Consequently, we can reasonably expect franchising activity to be robust in Latin America in the near future.

D. Latin American Challenges and Barriers

Although each country has its own unique circumstances, there are certain common threads to the challenges and barriers of doing business in Latin America.

One factor that can surprise U.S. businesses as they embark on international franchising in Latin America is the high degree of government intrusion into commercial activity. The U.S. enjoys a comparatively free economy compared to many other countries. It is not uncommon to encounter multiple levels of governmental approvals for all sorts of commercial activity, requiring an excessive amount of time dealing with numerous bureaucracies and often a high degree of formality with the submission of documentation. For example, it is common throughout Latin America, in connection with government filings, for foreign companies to have to submit documents translated into Spanish, with original signatures, properly notarized, the notary’s signature certified by the appropriate state official, and then further certification by the country’s embassy in the U.S.

---


6 Id.

7 It should be noted that factors described in this paper are not unique to Latin America and also often are present in other developing nations.
In addition to the higher degree of government intrusion into commercial activity, some countries in Latin America are plagued by government corruption. The need to make payments to governmental officials in order to obtain necessary permits and approvals within some commercially reasonable time frame is endemic in many Latin American countries. Given the prohibitions of the Foreign Corrupt Practices Act and the Justice Department’s aggressive enforcement posture, doing business in certain Latin American countries can pose major challenges for U.S. companies.

Many Latin American countries, particularly those governed by populist regimes, have highly regulated and costly systems of labor relations. In a number of these countries, unionization is strong, and the labor laws are inflexible and impose high costs to employers, particularly in connection with adjusting work forces. The costs of employment benefits can be as much as 50% to 80% of base compensation levels in certain Latin American countries.

Another challenge in many Latin American countries is the complex and ever changing tax regime. Most of the Latin American countries have not entered into bilateral tax treaties with the U.S. and consequently licensing intellectual property rights results in relatively high non-resident withholding tax rates. In some jurisdictions (e.g., Brazil, which is not the subject of this paper), it is difficult to “gross-up” non-resident withholding taxes and the licensee may even be limited in the deductibility of royalty fee payments for tax purposes.

Many Latin American countries also suffer from overburdened and inefficient judicial systems. Judges are oftentimes underpaid and not well trained, leading to susceptibility to corruption. Consequently, it is important to be able to resolve commercial disputes through other means such as mediation or international arbitration. In this respect, the franchise model is vulnerable because the cornerstone of the relationship is the licensing of intellectual property rights that ultimately need to be enforced in the local court system. Injunctive relief for the misuse of intellectual property is also rarely available and, when available, is generally not provided on an expedited basis.

E. Regulation of Franchising in Latin America

The Latin American landscape in connection with franchising is a positive one. Since the 1990s, when borders began to open up and trade barriers were diminished, the franchise industry has become increasingly sophisticated and accepted among Latin Americans. As an example, in 2008, despite the challenging economic climate, the franchise industry in Mexico alone grew by 14%.  

Latin American countries have not only adopted the franchise format that was originated in the U.S., but have embraced it, making it part of the entrepreneurial culture. The diversity of the goods and services offered through franchises in Latin America has grown exponentially, attracting new consumers with more diverse backgrounds and preferences. As a result of the success of initial foreign franchises in the region, local franchise concepts have developed dramatically since the 1990s. In fact, as an example, in Mexico, 70% of the franchises are Mexican, 24% are from the U.S., 4% from Spain, and Canada and Brazil each have 1% of the market.  

9 Id.
In Latin America, only Brazil and Mexico have enacted laws that specifically regulate franchising. Both of these laws date from the 1990s when there was a significant increase in the number of foreign franchise concepts entering the markets in these countries. The only Latin American country that has seen any recent legislative activity related specifically to franchise regulation is Mexico. In 2006, amendments to the Mexican Industrial Property Law were enacted that provide increased regulation of the franchisor-franchisee relationship.

Several countries in Latin America have protective agency laws which could be construed as applying to franchise relationships. These agency laws are particularly prevalent in the Central American countries and, while no local practitioners are aware of any decision awarding franchisees the type of compensation required by the agency laws upon termination of the franchise relationship, they are aware of franchisees utilizing the agency laws’ benefits in connection with termination negotiations. These agency laws generally restrict the ability of a foreign entity to enforce or terminate the agent’s agreement, provide for an exclusive territory for the agent and demand appropriate indemnification be paid to the agent upon termination to compensate the agent for the good-will generated in the territory for the foreign entity’s goods or services. These protective agency laws were of serious concern to the U.S. delegation during the negotiation of the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), and each of Costa Rica, The Dominican Republic, El Salvador, Guatemala and Honduras agreed to undertake specific commitments related to its agency law in effect in 2004 when the CAFTA-DR was signed. Generally, since then, these countries have adopted changes to the agency laws to provide for freedom of contract so that the parties can determine appropriate provisions related to exclusivity, termination and renewal rights and obligations, and compensatory damages, if any, for termination, and to encourage the parties to settle disputes through arbitration. Therefore, franchisors need not be concerned about the application of protective agency laws in Central America to franchise arrangements in connection with agreements executed since the date of the changes to the particular agency law. However, the changes adopted by the Central American countries are not retroactive to contracts already in place. Franchisors will need to continue to evaluate carefully the impact of any of these protective agency laws on existing franchise agreements.

Evidence of the increased interest and viability of franchising in Latin America is the creation of and influence of franchise associations in a number of countries as well as the Iberian-American Franchising Federation that gathers together franchise associations from more than ten countries including Argentina, Brazil, Colombia, Ecuador, Guatemala, Mexico, Peru, Portugal, Spain, Uruguay and Venezuela. In 2010, the first franchise association has been created in Costa Rica. The Mexican Franchise Association played an important role in achieving the recent amendments to the Mexican law that regulates franchising.

While Codes of Conduct for franchises are rare in Latin America, there are several examples. In Venezuela, the private sector, through the Venezuelan Chamber of Franchises, created a Code of Ethics for franchises in order to establish standards and formats for the operation of franchised businesses, as well as the content and execution of franchise agreements. In Colombia, a franchise committee was created within the National Traders Association with the task of developing standards for franchising. It recently created and published Guidelines for the Pre-Contractual Period in the Negotiations of Franchise Agreements. These guidelines explain the franchise format and concepts involved in franchising and best practices for the pre-contractual period, including due diligence reviews that should be undertaken by both the prospective franchisor and franchisee. We should not be surprised to see these types of activities increase in Latin America, particularly in the countries without franchise legislation, and to see these types of codes and guidelines utilized by courts
as well as arbitrators when franchise disputes arise. In addition to reviewing legal provisions in
place in a particular country that affect franchising, such as those included in this paper,
prospective foreign franchisors should also investigate if codes or other rules exist in one of the
Latin American countries that could impact the franchise relationship.

* * * * *

The remainder of this paper will be devoted to country-by-country analyses covering
topics of particular interest to franchising. A detailed discussion of the laws in each country
appears separately in chapter-style, and was initially prepared by the author listed as a
contributor for such country at the end of this paper. We are hopeful that franchise companies
and their advisors will find them valuable in expanding into Latin America through franchising.
II. Argentina

A. Regulation of Offers and Sales of Franchises

1. Laws

a. Disclosure Laws

In Argentina there are no specific laws that regulate the offer and sale of franchises. Legislation requiring pre-contractual disclosure for franchise transactions has been proposed, but has not yet been adopted.

Under Argentine law, franchise agreements are treated as “atypical contracts,” which are regulated by analogy – that is, by rules applicable to the most similar contracts or situations.

This does not mean that there is no body of law governing franchising. The Civil Code, in the Chapter on “Consent in Contracts,” prescribes in Sections 1114 to 1156 the procedures and requirements for the effectiveness of the offer and acceptance of contracts. In addition, the Civil Code covers a set of rules governing pre-contractual obligations and effectiveness of contracts. Section 1197 essentially establishes the parties’ freedom to contract with each other. This rule is also associated with the principle of contractual freedom which is guaranteed by the Argentine Constitution (Sections 14 - 35, 17 and 19).

However, contractual freedom is not absolute. The Civil Code itself contains a number of restrictions, including, for example, public policy (Section 21), morality norms and social conventions (Section 953), subjective injury (Section 954), being excessively onerous (Section 1198), and abuse of law (Section 1071).

In particular, Section 1198 of the Civil Code imposes a pre-contractual “good faith” requirement on the parties. Under Argentine law, “good faith” implies duties such as acting honestly, complying with applicable laws, and refraining from abusive and unlawful acts that may undermine trust in the formation and performance of the contract. The Argentine courts actively enforce this pre-contractual “good faith” requirement. However, this requirement does not oblige a franchisor to provide a disclosure document to a franchisee before signing the franchise agreement.

b. Commercial Agency Laws

Commercial agency relationships are not regulated in Argentina. They are “atypical contracts” governed by the general principles applicable to contracts under the Argentine Civil and Commercial Codes. Generally, neither the courts nor legal writers in Argentina have treated franchisees as agents of franchisors; rather, they are treated as independent contractors.

2. Government Agency Regulation

In Argentina, there are no government agencies that specifically regulate the offer and sale of franchises.
B. Governing Law and Dispute Resolution

1. Governing Law

By virtue of the principle of contractual freedom, the parties are free to choose the governing law of their agreement, but in order to choose a foreign law the agreement must have a substantial connection to the chosen jurisdiction.

2. Arbitration

The parties may agree that their disputes will be resolved by arbitration. The parties may agree either in or out of the contract, and before or after its execution, that conflicts arising between them will be resolved by arbitration outside Argentina. Argentina ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”)\(^\text{10}\) (Law No. 23.619) with two reservations, namely that the New York Convention will only apply: (a) to awards rendered in the territory of another Member State, and (b) to awards issued in connection with commercial matters.

Grounds for Argentine courts to refuse to enforce a foreign arbitral award are restricted mainly to the causes contemplated in the New York Convention (Section V of the New York Convention).

3. Foreign Judgments

In Argentina, treaties set out the provisions for the enforcement of foreign judgments. If there are no signed treaties on point, the National Code of Civil and Commercial Procedure (the “CPCC”) applies. The recognition of foreign judgments is addressed by the federal procedure rules (i.e., the CPCC) which, in principle, presides over any affair in which a foreigner is involved.

Subject to certain guidelines, the Argentine courts will uphold foreign rulings concerning disputes and establish the rights and duties of the parties to an agreement. In order to be recognized without further investigation (§ 517 of the CPCC):

- The judgment must be final and originate from a court with jurisdiction over the subject matter and personal jurisdiction over the defendant company according to Argentine law.
- The defendant company must have been personally served with the summons and, in accordance with due process of law, given an opportunity to defend itself against the foreign action;
- The judgment must have been valid in the jurisdiction where it was rendered and its authenticity must be established in accordance with the requirements of Argentine law;
- The judgment must not violate the principles of international public policy of Argentine law; and

• The judgment must not conflict with a prior or contemporaneous Argentine judgment on the same dispute involving the same parties.

Argentine courts do not require reciprocity in order to recognize a foreign judgment.

Argentine courts will not automatically acknowledge the foreign court’s original jurisdiction over the matter. The foreign court’s competence is analyzed according to Argentine rules. The foreign court will be considered competent where the defendant is living in the jurisdiction of the court, the obligations of the parties to an agreement are to be performed in that jurisdiction, or, in contractual disputes of a pecuniary nature, the foreign court had jurisdiction as a result of a valid forum selection.

Argentine civil procedure prescribes an *exequatur* proceeding in order to domesticate a foreign judgment provided the following standards are satisfied. Specifically:

• A request and copy of the foreign judgment (translated, notarized and authenticated) is delivered in the form of a *letter rogatory* to the local court.

• All documents must be duly apostilled or authenticated by the Argentine consulate with jurisdiction over the country where the documents were issued.

• All documents in a language other than Spanish must be translated into Spanish by a translator registered in Argentina in order to be admitted by a local court.

• An Argentine federal court judge performs a preliminary analysis of the judgment’s compliance with the above formalities.

A party can expect to wait from six to eight months from when the *letter rogatory* is filed until domestication by an Argentine court. Pending the decision, the applicant may request and obtain protective remedies from a local court at the start of the proceedings or thereafter, which may consist of the seizure of assets or a general or specific injunction. In order to grant a protective remedy, a local court requires the petitioner to post a bond or guarantee for costs, expenses and/or legal fees.

When a foreign judgment has been proven to fulfill all local requirements for recognition and to comply with all formalities, the local court is not permitted to reopen a case that has been previously tried by a foreign court.

In order to obtain recognition of a foreign money judgment, a court tax must be paid. The current tax in the federal courts of Argentina or the courts of the City of Buenos Aires is 3% of the stated amount of any foreign judgment sought to be enforced, including accrued interest. The amount of this tax is added to the amount stated in the foreign judgment, if enforcement is granted by the Argentine court. Accordingly, a successful petitioner can recover from the defendant company both the amounts stated in the judgment and any amounts paid as legal fees, other costs and expenses and, if applicable, court taxes.

It may be problematic in trying to enforce a foreign judgment when the choice of jurisdiction is unreasonable, that is, when the jurisdiction chosen by the parties has no substantial connection, or no connection at all, to either party, the contract or the dispute. As for the choice of jurisdiction, in general, Argentine law foresees two hypotheses: (i) if the contract is to be executed in Argentina, even when the defendant is not domiciled there, it can be sued
before an Argentine court; and (ii) if the contract is to be executed in another country and the
defendant is domiciled in Argentina, the plaintiff can sue him either in Argentina or in the place
where the contract was executed, even if the defendant is not located there.

4. Injunctive Relief

Judicial restrictive measures are available in Argentina to protect the rights of the
franchisor or the franchisee. Such measures can be requested as part of the final decision or
as precautionary measures. In the first case, the procedure is provided for under the regular
procedure law, and this proceeding usually takes at least three years in the court of first
instance and one year on appeal. In the case of precautionary measures, the proceeding can be
very short (less than a week) but the petitioner must demonstrate the immediate need for action
and offer a guarantee to cover possible damages if the claim is unfounded.

C. Taxes

1. Royalties

The term “royalty” is defined in Section 47 of the Income Tax Law, notwithstanding the
definitions included in the treaties signed to avoid double taxation. If the beneficiary is a foreign
resident, the applicable rules are set out in Section 93 of the Income Tax Law or (if any) the
relevant treaties for the avoidance of double taxation. There is no treaty signed with the U.S. to
avoid double taxation.

The taxation treatment varies depending on whether the agreement must be filed for
record under the Technology Transfer Law No. 22.426. If yes, the rate is 35% over 80% of the
payment made (which means the effective rate is 28%); if no, the rate is 35% over 90% of the
amount paid (which means the effective rate is 31.5%).

It is worth noting that: (a) the rate will vary if a treaty is applied to avoid double taxation;
and (b) there are limitations in the deduction of expenses that may not be applicable if a treaty
to avoid double taxation is applied.

2. Service Fees

Argentine tax laws are based on the principle of “worldwide income”. This means that
income generated within the country (Argentine source income) by foreign beneficiaries and
income generated abroad (foreign source income) by Argentine residents are subject to
Argentine income taxes.

The general concept of Argentine source income is defined in Section 5 of the Income
Tax Law. In essence, if the income is treated as fees for technical, financial or other advisory

---

11 For the purposes of this law, royalty means any consideration received in cash or in kind for the transfer of
ownership, use and enjoyment of things, or for the assignment of rights, the amount of which royalty shall be
determined in relation to a unit of production, sale, exploitation, etc, however it may be designated.

12 In general terms and notwithstanding the special provisions contained in the following sections, Argentine source
income means income from goods located, placed or used for economic purposes in Argentina, or income from the
performance in Argentina of any act or activity capable of generating benefits, or income from events occurring within
Argentine boundaries regardless of the nationality, domicile or place of residence of the beneficial owner or of the
parties participating in the operations and regardless of the place where the agreements are signed.
services rendered from abroad, the rule considers such income as having an Argentine source.\(^\text{13}\)

An analysis of both the agreement and the service to be rendered will be required in order to determine whether the income falls within the scope of such definition, taking into account the following:

- If it falls within the scope of Section 12 of the Income Tax Law, the rate is 35% over 90% of the service fees paid, which means the effective rate is 31.5%.

- In the case of services rendered abroad that do not fall within the scope of Section 12 of the Income Tax Law, such expense is considered as having a foreign source and, therefore, no sum is withheld in Argentina and must be allocated by the payer exclusively against foreign source income.

3. **Double Taxation Treaties**

Argentina has signed treaties with other countries with a view to determining the tax treatment to be applied to transactions carried out between residents of different countries. One of the benefits arising out of the application of these treaties is the use of lower rates than those prescribed by the Income Tax Law regarding withholdings.

4. **Gross Up Provisions**

Although franchisors, as the recipient of royalties and/or service fees, are obligated under Argentine law to pay certain withholding taxes as we discussed above, the franchisee, as the party that is making the payments, is obligated to withhold those taxes and pay them to the appropriate tax authority. However, the franchisor may contractually require the franchisee to increase (that is, “gross up”) the payment to offset the withholding taxes.

D. **Foreign Exchange Controls**

Currently, there are no restrictions on the amount of payments that may be made to foreign parties, including royalties and services paid to foreign franchisors. However, the Central Bank is empowered to impose such restrictions. Banking requirements must still be met for payments for services rendered abroad. Also, if there are payments based on trademark or technology licenses, one should consider registering such licenses with the Registry of Technology Transfer, to obtain more desirable tax treatment (as discussed above).

E. **Competition Laws**

1. **Prohibition on Common Franchisor Practices**

The Law on Protection of Competition (Law 25.156 and its amendments) applies to franchise agreements. This law prohibits restrictions on competition and abuse of dominant position. Specifically, the following clauses may be considered illegal: (a) imposing fixed or minimum resale prices on the franchisee; or (b) requiring the franchisee to purchase inputs from the franchisor or a designated supplier, unless such requirement is warranted because of technical reasons, quality control, or protection of the mark or trade secrets. If there is a

\(^{13}\) Income Tax Law, § 12.
violation, administrative action may be initiated or upon complaint, which can result in summons, prohibitions and other actions. The damaged party may seek civil actions for damages.

2. **Restrictive Covenants**

In general, Argentine law allows a franchisor to include clauses restricting a franchisee’s competitive activities during the term of the contract, even “exclusive party” or "full time effort" clauses that effectively require the franchisee to limit its activities to the business contemplated under the franchise agreement. Moreover, such restrictions may extend to incorporating companies or otherwise being associated with third parties who carry out an activity that is the same as or similar to the franchise.

While these restrictions may also be extended past the term of the contract, the post-term restrictions will be subject to more scrutiny, and courts may not enforce restrictions they find to be too extensive or disproportionate. In making these decisions, a court may consider the nature of the franchised business – for example, if computer technology is key to a franchised business, and such technology changes very quickly, then a court might be reluctant to enforce a post-term restriction although the same restriction would be found enforceable for a more conventional franchise.

F. **Relationship Laws**

There are no specific franchise laws governing the ongoing relationship between the franchisor and the franchisee. In general, various court decisions have set the standard that should be followed. For example, if a franchise agreement has been renewed or extended a number of times, it may become an agreement of perpetual effectiveness under Argentine law. As a result, the party that wishes to terminate the agreement will be required to issue a prior written notice of such termination, although there is no uniform agreement as to how long the notice period should be.

In additional to the general Contract Law, other laws might also affect the ongoing relationship between the parties to the contract, including, for example, Company Law and Joint Ventures, Electronic Trade, Technology Transfer, Exchange Control Restrictions on Royalties and Remittances, Copyright, Taxes, Labor Law, Antitrust and Competition Laws, and Immigration Laws.

The Argentine Civil Code contains a general obligation on the franchisor and franchisee to deal with each other in good faith, in Sections 953 and 1198.\(^\text{14}\)

1. **Defaults**

If the franchisee is in default of its obligations under the franchise agreement, the franchisor may: (a) require compliance (see Section 505 of the Civil Code), or (b) terminate the contract and claim damages.

---

\(^{14}\) Section 953: “The subject matter of legal acts must consist in things which exist in commerce or in relation to which, for some special reason, there is no prohibition barring them from being the subject matter of any legal act, or in facts that are not impossible, illicit, contrary to good mores or forbidden by law or contrary to freedom of actions or of conscience, or in facts which do not damage third party rights. Legal acts that do not comply with this provision shall be null and void as if they had no subject matter whatsoever.”

Section 1198: “Contracts are to be made, interpreted and executed in good faith, according to what the parties understood or could have understood, acting with care and foreseeability.”
In addition, the franchisor may, without terminating the contract, be exempted to comply with its obligations (see Section 1201 of the Civil Code) based on the principle of "exceptio non adimpleti contractus." As a result, the franchisor may terminate the exclusivity granted under the franchise agreement if the franchisee is in default.

In principle there are no restrictions on liquidated damages clauses in franchise agreements. However, a court may adjust the amount of liquidated damages if it finds them to be unfair, unconscionable or too high. See, for example, Section 1198 of the Civil Code.

2. Termination

Under the Argentine law, the franchisor may terminate the agreement based on breach that is of a "material" nature, or where the conduct of the franchisee can harm other members of the network or the reputation of the brand. The courts have generally focused on whether the franchisor's decision to terminate involves any abuse or inappropriate behavior. See, for example, Section 1071 of the Civil Code.

3. Nonrenewal

The franchisor may refuse to renew the contract for good cause. For example, it can rely on the covenant "intuitae personae." In Argentina, franchise contracts are considered to be "intuitu personae" contracts (which are contracts based on personal qualifications). Therefore, a franchisor may restrict a franchisee's ability to transfer or renew unless the franchisor is satisfied with the franchisee's (or the transferee's) qualifications. Franchisee's failure to perform may also be the cause for the refusal to renew.

However, the franchisor, in deciding not to renew, should always try to avoid any behavior that could be found to be abusive. Thus, for example, if a franchisor requires its franchisee to commit capital investments that cannot reasonably be expected to be recouped during the contract period, such behavior might suggest that the franchisor intends to continue the contractual relationship after the initial term. If the franchisor then refuses to renew without good cause, it may expose itself to franchisee claims of abuse.

G. Trademark Requirements and Licensing Considerations

1. Trademark Registration

The trademark system of Argentina is governed primarily by the provisions of Law No. 22,362, and is administered by the National Institute of Industrial Property (INPI).

Every application for registration of a mark will be given a number, and will be published in the Brand Registry by the INPI. Currently, it takes about 3 months to publish an application once it is submitted. During the 30-day period after the publication, any third party may lodge opposition to the application. If there is one or more objections, the applicant will have one year during which to negotiate with the opponents the withdrawal of the protests. If a settlement cannot be reached within this one-year period, a mediation process provided for by Law No. 24,573 will commence. If the mediation fails, the only resort the applicant has would be to file an action at the Federal and Commercial Court for termination of opposition to registration of the mark. If the court rules in favor of the applicant, it will notify the INPI for it to proceed with the grant of the registration.
As long as there is a pending application for a mark, a franchise agreement can be entered into. However, it is advisable to do so only if there has been no opposition filed.

2. Registration of Licenses of Trademarks

In Argentina, it is not necessary to register all trademark licenses. However, it is advisable to register the license of trademark with INPI for various reasons. For example, as noted above, the registration of a trademark license can reduce the rate of withholding tax on royalty fees paid to the foreign franchisor.

The license registration process is carried out by the National Technology Transfer under INPI. Three copies of the contract with their corresponding Spanish translations will be required, along with a fee of 0.2% of the total value of the contract.

While it is not legally required to notarize the signatories to a contract, it is advisable to do so. There are no requirements for the franchisor and the franchisee to give a local attorney a power of attorney to perform the registration process. What is needed is to have the signature of the legal representative of the party that will be carrying out the registration process.

H. The Court System and Recent Court Decisions

1. Court System

Argentina has a representative, republican, and federal form of government. The 1853 Constitution establishes a federal government composed of the Executive, Legislative and Judicial Branches and recognizes that provincial governments have all powers not expressly granted to the federal government. The provinces therefore became responsible for the administration of justice in some areas. As a result, Argentina has two justice systems: a national system that is administered by the National Judicial Branch, and provincial structures that are managed by each province.

Argentina’s federal justice system consists of numerous institutions, including the National Judicial Branch (Poder Judicial de la Nación) and the National Judicial Council (Consejo de la Magistratura de la Nación). The system also includes the Public Ministry (Ministerio Público), which includes the Attorney General's Office (Procuración General de la Nación), the Public Prosecutor’s Office (Ministerio Público Fiscal) and the Public Defender’s Office (Ministerio Público de la Defensa). Other federal justice system institutions include the National Ministry of Justice and Human Rights, the Federal Penitentiary Service and the Federal Police. Argentina’s provinces have a similar structure, with some local variations. For example, the Province of Buenos Aires justice system includes the provincial judicial branch, which is composed of the Public Ministry (with both prosecutors and public defenders), the provincial Judicial Council, the provincial Ministry of Justice and the Buenos Aires Provincial Police.

The Argentine judicial system is based on the continental European tradition of codified law. For the most part, court proceedings are written, with the exception of criminal proceedings where oral debates take place at the sentencing stage.

In Argentina, justice is administered by the Judiciary composed of the Supreme Court of Justice and the remaining lower courts, both at a federal level and a provincial level. The Judicial Branch is in charge of controlling the constitutionality of the laws and government acts.
The procedure applicable before most of the aforementioned courts is written and may involve any of the following stages: complaint, answer, defenses to the complaint, counterclaim, evidence stage and final ruling, whereas criminal proceedings are generally comprised of two stages, a probable cause hearing followed by an oral trial before a three-judge court.

To take part in a judicial controversy, it is necessary to act with a registered attorney, since only registered attorneys are allowed to file writs before the Courts.

2. Recent Decisions

In several recent cases, the appellate court in Buenos Aires (CNCom\textsuperscript{15}) stated that contracts of undetermined term could be terminated by either party upon reasonable notice, even without cause.\textsuperscript{16}

\textsuperscript{15} Cámara Nacional de Apelaciones en lo Comercial: Court of Appeals for Commercial Matters of the City of Buenos Aires.

\textsuperscript{16} See, e.g., Sala E, marzo 24/2003. Laiño, Nestor Cesar c/ Nestle Argentina S.A s/ ordinario; Sala E, octubre 2-2002. Autoestrada S.A c/ Sevel Argentina S.A s/ ordinario; and Sala C 30 de mayo de 2003. Méndez, Daniel A c/ Manuel Tiendas de León S.A.
III. Chile

A. Regulation of Offers and Sales of Franchises

1. Laws

In Chile there are no specific laws on franchising.

In general, the Chilean legal system grants absolute economic freedom for parties to negotiate and include any provisions in their contracts. Franchise agreements are considered, in practice, as contracts of adhesion because the franchisor sets all the rules and standards, and the franchisee has limited ability to negotiate.

Certain Chilean statutes of general applicability apply to franchise agreements, including: (a) Industrial Property (covering trademarks, patents, utility models, industrial designs and trade secrets), Law No. 19.039; (b) Intellectual Property or Copyrights Law No. 17.336; and (c) Plant Varieties, Law No. 19.342.

The Chilean Constitution guarantees the right of ownership. Specifically, Clause 25 guarantees the protection of intellectual property, copyrights and industrial property for patents, trademarks, models, technological processes or other similar creations (such as plant varieties), for a certain period of time specified in the Constitution.

For franchising, the Industrial Property Law 19.039 is perhaps the most important, because it protects marks that are the subject of the franchise relationship.

a. Disclosure Laws

With regard to franchise transactions, no disclosure laws exist in Chile nor are there requirements for disclosure in any other laws in Chile.

b. Commercial Agency Laws

There are no commercial agency laws in Chile that apply to franchising.

2. Government Agency Regulation

There is no state agency which regulates franchising. The INAPI (National Institute of Industrial Property) is not responsible for franchising. The only requirement of the INAPI is that the franchise be registered with the INAPI in order to evidence effective use of the marks by the franchisee and provide protection to the marks contained therein from any third party that may challenge the marks for lack of use by the trademark owner.

B. Governing Law and Dispute Resolution

1. Governing Law

As a general rule, all contracts performed in Chile are governed by Chilean law. However, it is permissible for the parties to choose foreign law as governing law for their franchise agreement.
2. Arbitration

The parties can agree that disputes be resolved by arbitration. Arbitration proceedings may be held in a country other than Chile. If the arbitration is conducted outside Chile, the Supreme Court of the country where the award was entered must send a warrant to the Supreme Court of Chile requesting that the award be enforced in Chile.

Chile ratified the New York Convention on September 4, 1975. It is in force under Law No. 664 dated October 2nd, 1975, which was published in the Official Gazette on October 30, 1975.

3. Foreign Judgments

Foreign judgments can be enforced in Chile. The Supreme Court of the country where the judgment was entered must send a warrant to the Supreme Court of Chile requesting that the judgment must be enforced in Chile.

4. Injunctive Relief

In Chile there is no injunctive relief that is similar to what exists in the U.S. However, the Industrial Property Law does permit a trademark owner to seek precautionary measures issued by the competent court in order to stop third parties from infringing upon its trademark rights.

C. Taxes

Chile recently entered into a double taxation treaty with the United States, although it has not yet been ratified by the Chilean Congress. If ratified, and once in force, it is expected to reduce withholding on royalties and other payments under a franchise agreement with a U.S. franchisor.

Pursuant to local Chilean regulations, the rate of withholding tax applicable to royalties as well as payment of other fees typically charged under a franchise agreement (including marketing fund charges, technical services, other service fees) is 30%.

There is no prohibition against the use of “gross up” provisions in franchise agreements. The withholding rate is applied to the gross amount to be paid by the franchisee to the foreign franchisor as indicated on the invoice provided by the franchisor.

D. Foreign Exchange Controls

In Chile, there are no laws or regulations restricting the franchisee’s ability to make payments to a foreign franchisor in the franchisor’s domestic currency.

E. Competition Laws

Chile has a strong antitrust law, despite the broad freedom to contract. The agency in charge is the Chilean Antimonopoly Committee.

1. Prohibition on Common Franchisor Practices

In Chile, a franchisor may restrict a franchisee’s sources of supplies on a reasonable basis to guarantee the quality of products and benefits to the consumer, provided no other
products may be found in the market from alternate sources that may reasonably comply with the franchised business. A franchisor can be an exclusive supplier of the franchisee. The only requirements are that exclusivity must be reasonable and the actual effect on the competition and consumers must also be reasonable. A franchisor may profit on the sale of supplies to franchisees provided such profit is reasonable and does not interfere unduly with competition in the market or consumer rights to receive a reasonably priced, quality product.

2. Restrictive Covenants

In Chile, a franchisor may prevent a franchisee from engaging in a competing business during the term of the franchise and even beyond that term, provided: (i) economic benefit is granted to the franchisee to avoid violation of freedom of commerce rights; and (ii) such restriction is reasonable and necessary for the parties’ interests (as reflected in the franchise agreement), and has been agreed upon by the parties at arms’ length.

There are no special temporal limits for this type of restriction, as long as the reasonableness of any term agreed to by the parties may be proved and sustained. Similarly, geographical limits must obey the principle of reasonableness.

Owners of the franchisee may also be bound by these restrictions on the basis that the identity and special qualifications of the franchisee (and its owners) is a key factor that motivated granting the franchise to such franchisee. In that regard, local practitioners highly recommend the practice of including language substantiating such motivation in the franchise agreement.

F. Relationship Laws

As explained above, there are no specific laws governing the relationship between the franchisor and the franchisee in Chile.

1. Default

Generally, the principles of good faith and protection of the parties’ contractual relationship should prevail, allowing the parties to cure, if at all possible and within mutually acceptable terms, any defaults. However, there is no obligation to provide a cure period in favor of the defaulting party; thus, anyone in default is liable for any damages caused to the non-defaulting party.

In a franchise relationship the parties are free to specify the terms of any cure rights and obligations in the event of default. In the absence of such terms, the franchisor is not bound to provide the franchisee with any right to cure; however, the franchisee is bound in good faith to minimize to the extent possible any damages caused to the franchisor resulting from its default.

2. Termination

In general, the parties’ termination rights are only subject to the terms and conditions of the franchise agreement.

3. Non-renewal

There is no law in Chile that requires a franchisor to renew a franchise agreement.
G. Trademark Requirements and Licensing Considerations

1. Trademark Registration

As in other Latin American countries, the registration process mostly resembles the process in the U.S., with the variation being that a declaration of use is not mandatory.

A franchise cannot be granted if there is only a pending application for a trademark and not a registered trademark in Chile. It can only be granted for registered trademarks due to the fact that they are considered as definitive rights.

2. Registration of Licenses of Trademarks

It is not mandatory to record franchise or license agreements in Chile. However, it is advisable to do so in order to evidence effective use and protect the trademark registrations in the event a third party challenges the marks. Likewise, for import-export and tax matters, in order to have an acknowledgment (office action) by the INPI indicating that the franchisee/licensee is an authorized user, such recordal is necessary. Both franchise and license agreements are allowed to be registered at the INPI.

3. Execution Formalities

A franchise/license agreement only needs to be subscribed before a Notary Public in the place of execution; however it may also be fully notarized as a public document. In order for the judicial acts to have full effect before third parties, they must also be annotated or recorded in their respective trademark registrations found in the INPI. The latter is of vital importance for the franchises to be enforced not only between the signing parties, but also against third parties.

H. The Court System and Recent Court Decisions

1. Court System

Although Chile drew on the example of the United States in designing the institutions of government, they drew on Roman law and Spanish and French traditions, particularly the Napoleonic Code, in designing the country's judicial system. Chile's ordinary courts consist of the Supreme Court, the appellate courts (cortes de apelación), major claims courts, and various local courts (juzgados de letras). There is also a series of special courts, such as the juvenile courts, labor courts, and military courts in time of peace. The local courts consist of one or more tribunals specifically assigned to each of the country's communes, Chile's smallest administrative units. In larger jurisdictions, the local courts may specialize in criminal cases or civil cases, as defined by law.

Chile has sixteen appellate courts, each with jurisdiction over one or more provinces. The majority of the courts have four members, although the two largest courts have thirteen members, and Santiago's Appellate Court (Corte de Apelación) has twenty-five. The Supreme Court consists of seventeen members, who select a president from their number for a three-year term. The Supreme Court carries out its functions with separate chambers consisting of at least five judges each, presided over by the most senior member or the president of the court.

Members and prosecutors of the Supreme Court are appointed by the president of the republic, who selects them from a slate of five persons proposed by the court itself. At least two
must be senior judges on an appellate court. The others can include candidates from outside
the judicial system. The justices and prosecutors of each appellate court are also appointed by
the president from a slate of three candidates submitted by the Supreme Court, only one of
whom can be from outside the judicial system. In order to be appointed, ordinary judges at the
local level are appointed by the president from a slate of three persons submitted by a court of
appeals. They must be lawyers, must be at least twenty-five years old, and must have judicial
experience. Ministers of the appeals courts must be at least thirty-two years old, and Supreme
Court ministers must be at least thirty-six years old, with a specified number of years of judicial
or legal experience. Judges serve for life and cannot be removed except for inappropriate
behavior.

2. Recent Decisions

We are not aware of any recent franchise cases of significance.
COLOMBIA

IV. Colombia

A. Regulation of Offers and Sales of Franchises

1. Laws

a. Disclosure Laws

There are no franchise disclosure laws in Colombia. Franchise agreements are considered as atypical contracts, which means they are not regulated by any specific law.

However, article 863 of the Colombian Commercial Code, which applies to all contracts, provides that “the parties shall act in good faith free from neglect during the pre-contractual period, under penalty of indemnifying any damages caused”.\(^{17}\) Based on this, the Civil Chamber of the Supreme Court of Justice\(^ {18}\) has held that in the pre-contractual or negotiation period, the parties shall provide each other with all the information required for the adequate execution of the contract. In addition, each of them must comply with the following duties: (i) provide relevant information; (ii) confidentiality; (iii) preserve any goods exchanged during the negotiations; and (iv) not to unjustifiably abandon the negotiations.

b. Commercial Agency Laws

In principle, franchising will not be affected by commercial agency provisions in Colombia.

The elements of a commercial agency agreement under Colombian law are: (i) an entrustment (encargo) from one person (principal) to another (agent), where the latter remains independent from the former; (ii) the promotion and exploitation by the agent of the principal's business activity (as the object of such entrustment); (iii) the payment of remuneration by the principal to the agent; and (iv) the agent's acts to be made at the risk and interest of the principal.\(^ {19}\) Only if a franchise agreement fulfills all of the foregoing requirements, will it be subject to the rules applicable to commercial agency. Generally, a franchise agreement will not satisfy these elements, because, for example: (i) the franchisor is paid by the franchisee franchise and royalty fees, which makes it different from a principal (who pays a remuneration); and (ii) the franchisee develops the business activity at its own risk and interest, which is different from the agent.

Nonetheless, it is not uncommon for franchisees to allege that their contract was actually a commercial agency agreement. These contentions are motivated by the consequences that follow such a designation. Under Colombian statutory law, when a commercial agency agreement terminates, the agent is entitled to two types of payments. First, a special compensation (cesantía comercial) amounting to one twelfth of the average of the commission, royalty or profit it received during the last three years, for each year of the duration

\(^{17}\) Colombian Code of Commerce, Art. 863.

\(^{18}\) On the effects of the principie of good faith in the pre-contractual period, see Supreme Court of Justice, Dolly Mejía Montes et. al. v. La Nacional Compañía de Seguros de Vida, 2 August 2001; Supreme Court of Justice, Salcedo Ltd. v. Banco de la República, 12 August 2002.

\(^{19}\) Colombian Code of Commerce, Art. 1317. For this interpretation, see Preparaciones Belleza S.A. [Prebel S.A.] v. L'Oreal Paris, Award, 23 May 1997, Ch. IV.II.
of the contract. Second, if the contract was unjustifiably and unilaterally terminated by the principal, the agent is entitled to an additional indemnification, as retribution for its efforts to position the trademark, products or services of the principal in the market. Local counsel is not aware of any case in which a franchisee has been held to be an agent.

2. Government Agency Regulation

Colombian law does not specifically regulate franchising. Thus, there is neither a government agency specifically controlling the offer and sale of franchises, nor any applicable regulatory requirements.

B. Governing Law and Dispute Resolution

1. Governing Law

As a general rule, all contracts performed in Colombia are governed by Colombian law. However, Law 315 of 1996 on International Arbitration allows the parties to agree otherwise. Thus, the parties are free to choose the law applicable to a franchise agreement in two scenarios: (i) if it is provided that disputes will be resolved through arbitration and the arbitration agreement is valid under the provisions of article 1 of Law 315 of 1995, or (ii) where the contract will be performed abroad.

2. Arbitration

Colombian law expressly authorizes private individuals and the State itself to conclude arbitration agreements. Where arbitration is “international” (based on criteria set forth by Law 315 of 1996), Colombian law allows the establishment of an arbitral seat located abroad, and even if the seat is in Colombia, permits the hearings to be held in another country. As regards the enforcement of foreign awards, Colombia adopted the New York Convention through Law 39 of 1990, which is currently in force.

24 An arbitration is international if any one of the following conditions is met: “1. The parties have their domicile in different States at the time of the conclusion of the arbitration agreement. 2. The place of performance of the substantial part of the obligations that is directly linked to the object of the dispute is outside the State in which the parties have their main domicile. 3. The place of arbitration is outside the State in which the parties have their domicile, provided this eventuality is agreed in the arbitration agreement. 4. The matter that is the object of the arbitration agreement clearly involves the interest of more than one State and the parties thus expressly agreed. 5. The dispute referred to arbitration directly and unequivocally affects the interests of international commerce...”. Law 315 of 1996, Art. 1. Translation provided by the International Encyclopedia of Laws. Now, as established by the Constitutional Court, the third criterion also requires that “at least one of the parties is foreign”. Free Translation (Decision C-347/97).
27 See note 8, supra.
The fact that Colombia is a party to the Convention would indicate that a foreign award’s enforcement may be denied only for one of the grounds listed in article V thereof. However, a decision of the Supreme Court of Justice established that a foreign award must cumulatively comply with the requirements set forth by the Convention and the relevant *exequatur* provisions of the Colombian Code of Civil Procedure (CCP). In turn, article 694 of the CCP provides that, to be enforceable in Colombia, a judgment or award shall: (i) not be related to *in rem* rights over assets located in Colombia when the proceedings commenced; (ii) not conflict with Colombian public policy provisions; (iii) be final under the law of the country where it was issued; (iv) not refer to matters subject to the Colombian courts’ exclusive jurisdiction; (v) not concern a dispute decided by national judges or subject to judicial proceedings in Colombia; and (vi) be the result of a proceeding for which the Respondent was duly notified and had the opportunity to respond to the claim, in accordance with the law of the country of origin (the fulfillment of the latter requisite is presumed because of the final character of the decision).

### 3. Foreign Judgments

Foreign judicial decisions are enforceable in Colombia, as long as they fulfill the requirements set forth by article 694 of the CCP, listed above (Section II.B)). Two procedures must be followed for such execution, i.e.: (i) an *exequatur* proceeding; and (ii) an executory proceeding.

The *exequatur* claim must be submitted before the Civil Chamber of the Supreme Court of Justice, where it is necessary to: (i) provide a copy of the judicial decision and, where applicable, a translation thereof to Spanish; (ii) summon the losing party before the Court; and (iii) request the production of any pertinent evidence. Failure to fulfill any of these requisites will prevent the admission of the claim.

The decision admitting the claim must be notified to: (i) the defendant; and (ii) a Delegate Civil Attorney (*Procurador Delegado en lo Civil*). There is a five-day period for each of them to join the court proceedings. During such period, the Civil Attorney and the defendant may request the production of whichever evidence they consider necessary. After the expiration of the period, the Supreme Court will decide on the requests for the production of evidence. Thereafter, each party submits its closing arguments within a five-day term, and the Court will subsequently issue its decision.

With a favorable *exequatur* judgment, the Claimant may commence an executory proceeding (*proceso ejecutivo*) to enforce the judgment.

### 4. Injunctive Relief

Colombian law provides three basic types of interim measures (*medidas cautelares*): (i) the registration of the claim in the public registry of certain goods; (ii) the seizure of goods; and (iii) the sequestration of goods. In addition, whenever an act of a company’s Board of Directors or General Shareholders Assembly is challenged, it is possible to suspend such act provisionally (*suspension provisional*), provided that: (i) it is so requested by a party to the claim;

---


31 *Id.*, Art. 695.

32 *Id.*, Arts. 681-692.
(ii) it is *prima facie* clear that the act is in violation of law or the company’s by-laws; and (iii) the judge considers such measure convenient for avoiding serious prejudice.\(^{33}\) Similarly, when there is an unfair competition act, it is possible to request such act to be provisionally suspended (*cesación provisional*).\(^{34}\)

Interim measures are generally requested in the claim itself and are granted or denied in the order admitting it (*auto admisorio de la demanda*) after approximately two months. However, if the respondent offers to provide security for the interim measure to be revoked, or an appeal is filed, the proceedings may take longer.\(^{35}\) In addition, there is a special procedure for competition disputes: where there is a serious imminent risk, provisional measures may be ordered in a 24 hour-term and even without the appearance of the counterparty.\(^{36}\)

In the context of franchising, interim measures may be available to protect intellectual property such as trademarks that are used in connection with goods if the goods can be sequestered. However, interim measures would not be available in Colombia to address the situation of a terminated franchisee continuing to use the trademarks of the franchised business.

**C. Taxes**

Foreign entities are obligated to pay income tax in Colombia based on Colombian-sourced income. The following are the applicable withholding rates:

- Royalties: 33% on the gross payment.
- Technical assistance services, technical services and consulting services: 10% on the gross payment regardless of the place where the services are provided.
- Software licenses: 26.4% on the gross payment.

Colombia has entered into tax treaties with Chile, Spain, Switzerland, France, Mexico and Canada. Nonetheless, only the agreements concluded with Chile and Spain are currently in force. The treaties with Chile and Spain both provide in article 12 that royalty payments are subject to a 10% withholding tax rate. The expression *royalties* in this context refers to payments of any kind received in consideration of the use or the right to use any patent, trademark, design or model, plan, secret formula or process, as well as for information concerning industrial, commercial or scientific experience. It further includes technical assistance fees, technical services and consulting services.

Under the Andean Community rules applicable to transactions between residents in Colombia, Peru, Ecuador and Bolivia, royalties can only be taxed in the country in which the intangible good is used.\(^{37}\) The same rules establish that technical services, technical assistance services and consulting services are to be taxed solely in the country where the benefit arising

\(^{33}\) *Id.*, Art. 421; Colombian Code of Commerce, Art. 191.

\(^{34}\) Law 256 of 1996, Art. 31.

\(^{35}\) On the general procedural rules related to interim measures, see: Colombian Code of Civil Procedure, Arts. 678-692.

\(^{36}\) Law 256 of 1996, Art. 31.

\(^{37}\) Commission of the Andean Community, Decision 578, 4 May 2004, Art. 9.
from such activities is produced, which in turn is presumed to be that where the relevant expense incurred for providing the service was recorded or registered. 38

“Gross-up” clauses are valid and binding among private parties in Colombia. However, such clauses do not bind tax authorities, which may require compliance with legal tax obligations, regardless of the existence of a gross-up clause.

As a general rule, Value Added Tax (“VAT”) is levied on: (i) the provision of services within the Colombian territory; (ii) the sale of tangible goods; and (iii) import of tangible goods. Generally, the rate is charged at 16%.

Additionally, for VAT purposes: (i) technical assistance services; (ii) consulting services; (iii) advisory services; (v) audit services; and (iv) licenses and authorizations for the use and exploitation of intangible assets rendered or granted from abroad by foreign persons are always deemed to be provided in Colombia and subject to VAT at a 16% rate. This tax, however, must be paid to the Colombian tax authority by the beneficiary of the service or license – that is, the franchisee.

D. Foreign Exchange Controls

Under present exchange laws there are no restrictions for the remittance of royalties or for the payment thereof in any currency.

E. Competition Laws

Colombia has a competition law regime in which the antitrust rules and those for unfair trade practices are clearly distinguished.

• Antitrust:

The general regime for antitrust (which applies to all sectors of the economy, in addition to sector-specific rules for certain areas of the economy) is contained in Law 155 of 1959, Decree 2.153 of 1992 and Law 1340 of 2009. The general regime follows, in its form, the model established by the Treaty of Rome. It includes general rules for anticompetitive agreements, anticompetitive acts, dominant position abuses and control of merger operations. However, in substance, Colombian antitrust rules are interpreted under a complex blend of principles based on the United States federal antitrust regulations and others stemming from the antitrust rules of the European Union.

Colombia has issued a general prohibition against restricting competition, along with a series of specific rules regarding prohibited conduct. The latter are sufficiently detailed, so that there has been no significant debate concerning the scope of the general prohibition and whether a rule of reason-like analysis needs to be adopted to apply it. Nonetheless, this general prohibition has been construed as applying to all forms of non-competition agreements, including those being ancillary to lawful contracts.

Generally speaking, Colombian law bans the execution of agreements to: (i) fix prices; (ii) allocate markets; (iii) discriminate against third parties; (iv) establish production or supply quotas; (v) allocate sources of raw materials; (vi) abstain from producing a good or service; (vii)
collude in bidding processes; and (viii) establish tying arrangements. In structuring these prohibitions, Colombian law does not make a distinction between horizontal and vertical arrangements. Thus, it is generally understood that both types of agreement are included. This means that resale price maintenance, for instance, is banned in any of its forms (at least as far as the main competition authority — the Superintendence of Industry and Commerce — has interpreted the rule) because it is understood to be a price-fixing scheme. There is one exception to this all-encompassing criterion for forbidden agreements: the allocation of territories. Territorial allocation is generally accepted in intra-brand situations, which means that manufacturers are allowed to allocate territories for their own distributors, as long as these agreements do not include competitors.

In addition to the prohibition of the abovementioned types of agreement, there is a ban against certain acts, listed in article 48 of Decree 2,153 of 1992, i.e.: (i) the violation of the advertising rules established in consumer protection provisions; (ii) influencing others to raise or abstain from reducing prices; and (iii) unilateral refusals to deal, when they appear in the context of retaliation for pricing policies.

In terms of unilateral conduct, there is no well-developed general rule against the abuse of dominant position, as there is for the offense of monopolization under Section 2 of the Sherman Act in the United States, for instance. There is simply a list of prohibited conduct, which is essentially limited to: (i) tying arrangements; (ii) predatory pricing; and (iii) three different forms of price discrimination. All of these acts are considered as power offenses and, consequently, are banned only when they are performed by market participants with significant market power (dominant position). The measurement of market power in Colombia is still relatively unsophisticated and market share is usually taken as a virtual synonym for market power, even in light of differing market structures.

Finally, there is a control mechanism for merger operations (which includes all combinations of productive assets, irrespective of their legal form). Asset sales, share purchases, some forms of joint ventures and other deals, are included in this regime. Under article 9 of Law 1340 of 2009, these rules include horizontal and vertical mergers, but not conglomerate operations. All mergers in which the companies involved exceed a specific amount for their previous year’s operational income, or a specific threshold for their combined assets, must be notified to the Superintendence of Industry and Commerce and an authorization to merge must be granted. If, in spite of meeting the threshold requirements for notification, merging parties that combined would possess less than 20% of the relevant market must still provide the notification, but do not have to receive an authorization. Merger control takes place under rather vague principles, with a tendency of the Superintendence to define relevant markets narrowly. There is also a rather evident bias toward market structure criteria, with market concentration playing a crucial role, followed by entry-barrier analysis. Different concentration indices are used, but a United States-style measurement predominantly using the Herfindahl Hirschman Index prevails.

Unfair Trade Practices:

The general regime for unfair trade practices is contained in Law 256 of 1996 and was modeled after the Spanish law of unfair trade practices. It applies to all sectors of the economy (as opposed to the previous regime, which applied only to professional merchants, as they were defined by the law) and provides for preventive as well as regular remedies. There is a general prohibition against unfair trade practices, which means that given conduct need not fall under a specific prohibition in order to be considered unfair. On the contrary, for it to be considered
unfair, particular behavior must deviate only slightly from good faith and honest commercial conduct, as established in article 7 of Law 256 of 1996.

In addition to the general prohibition, there are specifically-banned acts, such as (among others): (i) exploiting others’ reputation; (ii) generating confusion between products; (iii) violating the law to gain a competitive advantage; (iv) tortious interference; and (v) violation of secrets. Unfair trade practices are sanctioned with a prohibition against continuing the conduct, as well as the payment of damages, provided that the damages were indeed caused by the prohibited act.

1. **Prohibition on Common Franchisor Practices**

   As a general rule, any time limits or restrictions on a franchisee’s rights and obligations will be subject to the parties’ agreement, subject to the restrictions imposed by the antitrust laws (see the discussions above).

2. **Restrictive Covenants**

   Clauses providing for exclusivity are valid and binding during the term of the agreement in Colombia. The validity after the term has been questioned by scholars and courts. As a general rule, the parties may freely agree on the duration of exclusivity during the term of the agreement. There are no restrictions as to the scope of the exclusivity in geographical terms within the territory of Colombia. Owners of franchisees may be bound to the extent that they sign the franchise agreement or give their consent in any other valid manner.

**F. Relationship Laws**

There are no specific laws governing the relationship between the franchisor and the franchisee. As explained above, franchise agreements are treated as atypical contracts in Colombia. Nonetheless, any contractual provision embedded within such agreements must conform to mandatory laws, public policy, morality and good usages; otherwise, it may be declared void. Additionally, particular commercial provisions may be applicable to certain matters involved in franchising, depending on the type of business franchised.

There are also well-developed commercial practices regarding franchising in Colombia. For example, a very useful document on the negotiation of franchise agreements was issued by Colombian Institute of Technical Norms (ICONTEC) in 2005.

1. **Defaults**

   Any payment or quality default, as well as any right to cure provided by the franchisor to the franchisee, will be subject to the parties’ agreement. There are restrictions on the interest amount chargeable for overdue payments. If the interest rate charged exceeds one and one-half times the common bank interest rate \( (\text{interés bancario corriente}) \), the creditor must pay the debtor two times the amount of the overcharged interest; and there may be a penalty from two (2) to five (5) years of prison and a fine between fifty (50) and five hundred (500) times the

---


40 ICONTEC, Guidelines for the Pre-Contractual Period in the Negotiation of Franchise Agreements (\( \text{Guía para la etapa precontractual en la negociación de las franquicias} \)), No. GTC 126 (26 October 2005).

monthly legal minimum wages. The monthly legal minimum wage for 2010 was fixed at COP $515,000, which is equivalent to approximately US $275.53.

Where the contract is validly subject to foreign law, the civil and criminal consequences of charging interest exceeding the statutory limits described above must be considered separately. With regard to the civil sanction, two scenarios must be considered.

If a foreign judgment or award concerning a contract which has been completely performed abroad grants excessive interest, nothing indicates that the exequatur will be denied in Colombia. In fact, the only ground which could possibly affect such decision’s recognition would be the violation of public policy provisions. Even if the rules establishing limits to the interest rate were held to be mandatory, the foreign decision would have to be contrary to international public policy for the exequatur to be denied. Nonetheless, there is a risk of non-recognition of the foreign judgment if excess amounts of interest were allowed.

Alternatively, if (i) a contract is validly subject to foreign law and (ii) such contract provides for excessive interest and (iii) a dispute arises under such contract which is being decided in arbitral or court proceedings in Colombia, nothing should prevent the court from granting interest exceeding the statutory limits if under the law applicable to the contract such restriction would not apply.

In connection with the criminal consequences of charging excessive interest pursuant to a contract validly subject to foreign law, Colombian criminal law will apply to any person infringing such law in the national territory. Thus, there is a risk that criminal penalties for overcharged interest will be applied regardless of the fact that the contract is governed by a foreign law, particularly where the interest is being charged in Colombia, as could be the case when a foreign franchisor charges a Colombian franchisee the stipulated interest amounts on overdue payments.

2. Termination

Colombian law provides that contracts may be terminated by agreement of the parties or on other legal grounds. Thus, the termination of a franchise agreement is possible in the circumstances agreed by the parties and subject to any restriction to which they consent.

3. Nonrenewal

Pursuant to article 1602 of the Colombian Civil Code, the parties are bound by the contracts they have concluded. Thus, a refusal to renew a franchise agreement will be subject to the parties’ agreement.

43 Decree 5053 of 2009.
44 Supreme Court of Justice, Exequatur Decision, File 6130, 5 November 1996.
46 Colombian Civil Code, Art. 1602.
47 Id., Art. 1602.
G. Trademark Requirements and Licensing Considerations

1. Trademark Registration

According to the Andean Community Decision 486 of 2000 and Colombian administrative law, the registration process of a trademark begins by filing an application before the Colombian Trademark and Patent Office (PTO) of the Superintendency of Trade and Commerce (Superintendencia de Industria y Comercio (SIC)).

Approximately one month after the filing date, the Colombian PTO will conduct a preliminary examination to verify whether the application complies with all formal requirements established by the relevant rules. Afterward, the same entity orders its publication in the Colombian Intellectual Property Gazette, thereby permitting those who believe the new trademark infringes their rights to file oppositions against its registration within a thirty-day period. Once the period provided for submitting oppositions and answering them has expired, the PTO will perform a final examination and decide whether registration of the trademark will be finally granted or denied.

In either case, the parties are entitled to file a request for reconsideration, as well as a subsequent appeal, in order to discuss the Resolution at issue. Thereafter, a final Resolution putting an end to the administrative procedure will be rendered.

However, the opposing party or any third party may still file a judicial nullity action before the Council of State, under article 172 of Decision 486. Thereby, it is possible to request the declaration of a decision on a trademark registration as null and void. The affected party has five (5) years from the issuance of the last decision by the Colombian PTO for filing the latter type of lawsuit. The proceeding commenced pursuant to this type of action takes between three and four years to conclude.

Colombian law allows a license of use to be granted, even if the registration procedure of the respective trademark has not been completed. In case the trademark’s registration is not granted, the license will expire because of the absence of a right to license.

2. Registration of Licenses of Trademarks

According to article 162 of Decision 486, any license granting the use of a trademark must be registered before the competent national office (i.e., the SIC in Colombia). Otherwise, the license will be unenforceable against third parties.

The major benefit of registering a license is that, in the event the cancellation of the trademark’s registration is requested on grounds of non-use, evidence of its use by the licensee may be submitted for the benefit of the trademark owner. In addition, if registration of the license is not completed, other persons may request the same trademark be registered, even in the same international class.

Thus, where the parties have negotiated a license for using a trademark, the franchisee may lose its interest in the contract if the license is not registered. Indeed, a non-registered license has no effect before third parties. Thus, a failure to register the license may lead a third party to file a successful non-use cancellation action, precisely because the use of the trademark would be shown to be insufficient to prevent non-use.

---

trademark by the licensee has not been recognized in any evidentiary manner before third parties. The registration of a license agreement must be made at the SIC and takes an average of two weeks to complete.

3. Execution Formalities

In order to register the license, the parties can submit either the franchise agreement or a separate license agreement. The agreement in question may be in any language; however, an official translation into Spanish must also be submitted. There is no need for the license to be signed before a notary or to be properly legalized prior to registration. Either the franchisee or the franchisor is entitled to issue a required power of attorney to local counsel for the registration process.

H. The Court System and Recent Court Decisions

1. Court System

The judiciary in Colombia is basically comprised of three jurisdictions (jurisdicciones). First, the ordinary jurisdiction (jurisdicción ordinaria) is competent to decide civil, labor and criminal cases. It is hierarchically organized as follows: (i) Supreme Court of Justice; (ii) Superior Tribunals of the Judicial Districts (Tribunales Superiores de Distrito Judicial); (iii) circuit judges; and (iv) municipal judges. However, this hierarchy may vary in criminal, labor and family matters.

Second, the administrative jurisdiction (jurisdicción contencioso-administrativa) decides disputes related to administrative law. It is composed of the following organs: (i) Council of State (Consejo de Estado); (ii) Administrative tribunals; and (iii) Administrative judges.

Third, there is a sort of constitutional jurisdiction (jurisdicción constitucional). Under constitutional jurisdiction, all judges may rule on actions for the protection of constitutional rights (acción de tutela) and any such judgments may be discretionally chosen to be reviewed by the Constitutional Court; the Constitutional Court decides on the constitutionality of any law at the request of any person; and the Council of State may be requested by any person to determine whether an administrative act is in compliance with the Constitution and the law.

2. Recent Decisions

Several decisions related to franchising have been issued in Colombia in the past years. Following are three significant decisions:

On March 8, 2010, an arbitral tribunal analyzed a case concerning the non-fulfillment of a franchise agreement and held that each party bears the burden of proving its own compliance therewith.49

In an award rendered on September 16, 2008, arbitrators relied on the franchising definition provided by the UNIDROIT Franchising Guide to explain the core elements of a franchise agreement.50

On June 6, 2001, an arbitral award that studied whether a certain contract could be classified as a franchise agreement was issued. The decision reads in pertinent part: “[the contract] is different from a franchise agreement because there was no [agreement for the] distribution of a product or service under the trademark or name of the [person] granting it, nor the use or exploitation by the franchisee of the franchisor’s know-how. The trademark and the know-how are the fundamental elements of modern franchising.”

While there is no specific legislation applicable to franchising in Colombia, these cases and awards indicate that arbitrators in Colombia are familiar with franchising concepts and issues. Moreover, they indicate that foreign sources and practice, such as the UNIDROIT Franchising Guide, are being used to understand and evaluate franchise agreements.

V. Costa Rica

A. Regulation of Offers and Sales of Franchises

1. Laws

As confirmed by the Costa Rica Supreme Court, there are no specific regulations in Costa Rica dealing with the offer and sale of franchises.\(^{52}\) These transactions are governed by general contracts law, which is found in the Costa Rican Civil Code\(^ {53}\) and the Code of Commerce.\(^ {54}\) The Codes essentially provide that parties have the freedom to structure transactions in their free will.\(^ {55}\)

a. Disclosure Laws

There are no specific requirements pertaining to the disclosure of information in connection with franchise sales. Neither are there any general civil law requirements in this regard.

b. Commercial Agency Laws

Generally, assuming the franchise agreement specifically negates any agency relationship between the parties, the franchisee should not be considered as an agent of the franchisor. Vicarious liability claims may arise \textit{vis-à-vis} third parties in connection with products, services and intellectual property that are involved in the franchised business, if the franchisor exerts control over the provision of such products or services.

However, in limited cases, based on the legal terminology commonly used in Costa Rica, certain commercial agency regulations in Costa Rica could have an impact on franchising activities, particularly when the relationship between franchisor and franchisee is that of a foreign franchisor and a local franchisee. In such cases, statutory damages (as defined below) could be claimed from the party in breach of contract, or a claim for damages may be based on general provisions of Articles 692, 702 and 704 of the Civil Code.

Act No. 6209 was originally enacted in 1978 to govern the rights and duties of all local agents, distributors and manufacturers of foreign companies, branches and subsidiaries doing business in Costa Rica.\(^ {56}\) This legislation was issued with the specific purpose of making it difficult for the foreign concern, both legally and financially, to terminate a local representative unilaterally. Act No. 6209 was enacted for public policy reasons. Thus, its provisions are expressly acknowledged as protective,\(^ {57}\) may not be waived and have been construed and

\(^{52}\) Costa Rica Supreme Court, First Chamber, Resolution No. 73 of 15:40 hours of July 17, 1996, in matter of Femaka, S.A. v. Derivados de Maíz Alimenticio, S.A.

\(^{53}\) Act No. 30 of April 19, 1885.

\(^{54}\) Act No. 3284 of June 1, 1964.

\(^{55}\) Civil Code, Art. 1022.

\(^{56}\) Act No. 6209 of March 9, 1978.

\(^{57}\) See Costa Rica Supreme Court, Fourth Chamber, Decision of November 27, 1980; Supreme Court, Fourth Chamber. Decision No. 108 of 10:22 hours of January 9, 1998.
enforced by local courts in favor of the local interest.\textsuperscript{58} It is possible, although not probable, that a Costa Rica court could determine that a franchise agreement in existence prior to December 18, 2007, between a foreign franchisor and a local franchisee is covered by the Act, especially if the franchise relationship involves distribution of products by the franchisee that are purchased from the foreign franchisor. However, there have been no reported cases addressing the application of Act No. 6209 to franchises and in the one reported case involving a franchise, there was no suggestion that Act No. 6209 was applicable to the relationship. (See Section I, below).

In 2007, as a result of Costa Rica's entering into the Central America Free Trade Agreement with the United States of America (CAFTA-DR), Act No. 6209 was substantially amended to lessen much of the protection originally granted to local concerns.\textsuperscript{59} As a result, the amended Act No. 6209 allows parties to express their respective rights and obligations in a written agreement, which is subject only to general contracts law.

Therefore, franchise agreements entered into subsequent to the amendment are clearly not subject to Act No. 6209's strict requirements, while earlier agreements could, at least theoretically, be subject to such Act (the so-called "Old Protection Rules").\textsuperscript{60}

To the extent that a franchise agreement between a foreign franchisor and a local franchisee were found to be subject to Act No. 6209, the Act's provisions would apply regardless of the parties' agreement. As such, governing law provisions agreeing upon a foreign law could be held null and void to the extent that they would prevent Act No. 6209 from applying to any dispute between the franchisor and the franchisee for the termination of the franchise, and for the payment of any indemnities resulting from such termination. Pursuant to Article 7 of Act No. 6209, the jurisdiction of Costa Rican courts cannot be waived. Moreover, term and termination clauses could be declared inapplicable under the Old Protection Rules, as agreements under such Act are deemed indefinite in term and may not be terminated on a unilateral basis, unless due or just cause exists.

Theoretically, absent a "due or just cause" under Act No. 6209, a franchisor could be liable for payment of a termination indemnity to the franchisee in case the franchisor decides to terminate or not renew an existing franchise relationship. Pursuant to Article 5 of Act No. 6209, "due or just cause" only includes the following: crimes committed by the franchisee against the franchisor's property or goodwill; any serious breach by the franchisee resulting in damage to the franchisor; a breach of the duty of the franchisee to maintain certain confidentiality required by the franchisor; and a judicial declaration of negligence or ineptitude of the franchisee, including a substantial decrease or stagnation of the franchisee's sales caused by the franchisee.

The franchisee, on the other hand, would be authorized to terminate a franchise agreement with just cause, entitling the franchisee to request indemnification from the

\textsuperscript{58} See Costa Rica Supreme Court, Fourth Chamber, Decision No. 0108-S-98 of 10:21 hours of January 9, 1998; Supreme Court, First Chamber, Decision No. 1 of 15:00 hours of January 5, 1994.

\textsuperscript{59} Act No. 8629 of December 18, 2007. Amendments took place after strong pressure was exerted by the Government of the United States during negotiations. Prior attempts to deem the protection of local interests in violation of free trade under GATT regulations had been rejected by Costa Rican courts. See Costa Rican Supreme Court, Fourth Chamber, Decision No. 2001-05925 of 15:37 hours of July 3, 2001.

\textsuperscript{60} This protection follows Act No. 6209 as grandfather rights applicable to contracts already in force at the time Act No. 8629 was enacted.
franchisor, in the following cases:\textsuperscript{61} crimes committed by the franchisor or its employees against the franchisee; the franchisor's cessation of business activities not caused by force majeure; the imposition of unjustified restrictions on the franchisee's sales by the franchisor that may result in a decrease in the franchisee's average transactions; the appointment of another franchisee whenever an exclusive relationship has prevailed;\textsuperscript{62} the unilateral modification of the franchise agreement by the franchisor whenever it may result in damages to the franchisee; changes in the franchisor's domicile or corporate name, its transformation into a new entity, subdivision, merger with or absorption by another company; and any other gross breach of the franchise agreement by the franchisor.

Upon unilateral termination of the franchise agreement by the franchisor, without a "due or just cause," the franchisee might be entitled to statutory damages under the Old Protection Rules if Act No. 6209 was found to be applicable to franchise agreements. If so, under Section 2 of Act No. 6209, the indemnification would be equal to the average gross profits of the franchisee (amount of sales less cost of merchandise less import costs) for a four (4) month period, for each year and any part thereof that the franchise agreement had been in force, up to a maximum indemnity payment of thirty-six (36) months. The gross profits for each month would be calculated by using the average earnings of the franchisee over the past four (4) years of the franchise. In addition to the indemnification, to the extent applicable, the franchisor would be obligated to repurchase the remaining stock of its products from the franchisee, at a value of original cost for the franchisee plus ten percent (10\%) for administrative expenses.\textsuperscript{63}

The local franchisee would not be entitled to any additional damages or other remedies,\textsuperscript{64} unless fraud or deceit is involved.\textsuperscript{65}

Local counsel considers that the only franchise agreements that might be found subject to the terms of Act No.6209 by Costa Rican courts are those involving foreign franchisors that provide significant product sales to franchisees pursuant to franchise agreements entered into prior to the CAFTA-DR (at least in the case of U.S. franchisors).

2. Government Agency

No government agency specifically regulates the offer and sale of franchises in Costa Rica.

\textsuperscript{61} Act No. 6209, Art. 4.

\textsuperscript{62} Under case law based on Act No. 6209, exclusivity of a license right will be assumed inasmuch as the agent has acted, de facto, as the principal's sole agent for a certain period of time, regardless of the existence of any written language describing the relationship as non-exclusive. Under the new statute (Act No. 8629), such exclusivity needs to be specifically agreed upon by means of a written contract between the parties.

\textsuperscript{63} Act No. 6209, Art. 3.

\textsuperscript{64} See 2\textsuperscript{nd} Superior Civil Tribunal of San Jose, 1\textsuperscript{st} Section, Decision No. 426 of 9:10 hours of November 26, 2004; Supreme Court, First Chamber, Decision No. 1 of 15:00 hours of January 5, 1994.

\textsuperscript{65} See 2\textsuperscript{nd} Superior Civil Tribunal of San Jose, 1\textsuperscript{st} Section, Decision No. 105 of 14:20 hours of March 19, 2002.
B. Governing Law and Dispute Resolution

1. Governing Law

For all franchise agreements signed after December 18, 2007, except in matters of public policy, such as consumer protection issues or employment regulations, the parties are free to select the governing law. As to contracts executed prior to December 18, 2007, Act No. 6209 may be applicable regardless of the parties’ choice of governing law for the agreement.

2. Arbitration

In Costa Rica, arbitration of patrimonial issues (i.e., private, monetary matters) is freely allowed and even promoted. Arbitration proceedings may be held in a country other than Costa Rica based on the parties’ agreement. However, there may be limitations if the franchise agreement was executed prior to December 18, 2007, and is considered subject to Act No 6209. If the agreement was executed after December 18, 2007, arbitration of disputes is permitted, as long as no public policy issues are involved in the dispute.66

Costa Rica has been a member of the New York Convention since December 1977.67 There are no particular impediments to the enforcement of foreign arbitration awards.

3. Foreign Judgments

Foreign judgments may be recognized and enforced in Costa Rica following the exequatur rules (Articles 705 through 708) of the Code of Civil Procedure68. The exequatur is the procedure by which a foreign decision may be domesticated and enforced in Costa Rica as though it had issued by a Costa Rican court of competent jurisdiction. The purpose of the recognition of a foreign judgment through an exequatur is twofold: (a) to establish whether the matter has been decided by a foreign judicial authority, creating res judicata; and (b) to verify the compulsory nature of a foreign resolution. Such procedure is governed by the principle of non bis in idem which bans the initiation of new proceedings with identical parties, matter and cause, as well as the addition of the matter addressed in the exequatur in other proceedings.

The requirement of recognition in Costa Rica is a measure to ensure compliance with due process and other procedural guarantees and to assure that the enforcement of the foreign judgment does not contravene public policy. The exequatur procedure does not imply a substantive review of the foreign judgment.

The request for enforcement of a foreign judgment must be made to the First Chamber of the Costa Rican Supreme Court of Justice.

According to Article 423 of the Bustamante Code and Article 705 of the Code of Civil Procedure, judgments issued by foreign courts must meet the following procedural and formal requirements to permit the Supreme Court to issue an exequatur: The original judgment may not be subject to further appeals and must be enforceable under the laws of the forum where issued and its full text must be provided for review; all interested parties must have been duly

66 See Costa Rica Supreme Court, Fourth Chamber, Decision No. 10352-00 of 14:58 hours of April 22, 2000, as added by Decision No. 2001-02655 of 14:00 hours of April 4, 2001.
68 Act No. 7130 of May 3, 1990 (as amended.)
notified and summoned to appear before the competent court, in accordance with the laws of the jurisdiction where the judgment was issued, ensuring compliance with due process; the matter tried must not be within the exclusive jurisdiction of the Costa Rican courts; the judgment must not contravene Costa Rican public policy; no lawsuit based on the same grounds must be pending before the Costa Rican courts (litis pendencia); and no previous judgment may have been rendered creating res judicata; the original documents must be legalized according to the rules of the forum and also by the Costa Rican Consul in the jurisdiction of such forum; and documents must be translated to Spanish by an official translator authorized by the Costa Rican Ministry of Foreign Affairs.

Upon recognition of the judgment as valid, the Supreme Court will issue the exequatur, consisting of an order directed to the corresponding local court for the enforcement of the foreign judgment.

4. Injunctive Relief

Injunctive relief is available in Costa Rica. Though rather conservative in this regard, local courts are entitled to: (i) authorize a party to perform a certain non-persona (not personal) act on behalf of the party who is not willing to comply with a certain obligation;69 or (ii) enjoin a party in a judicial action from performing a certain act, provided in this latter case that such act is unjust, inequitable or may have irreparable consequences for the plaintiff while litigation takes place.

It is common to enjoin party defendants from transferring and/or encumbering assets, including cash, real estate, machinery, securities, shares, and other valuable assets, by placing a judicial attachment on such assets at the request of the plaintiff.

Article 242 of the Code of Civil Procedure provides that the Costa Rican court may allow other precautionary measures, at the court's discretion, if there is a founded fear that the plaintiff's interests may be actually harmed by the defendant as a result of the court's inaction and the lapsing of time while a final resolution of the dispute is obtained.70 It appears that Costa Rican courts are more and more willing to grant such precautionary measures in favor of a plaintiff, subject only to their reasonableness, proportionality, actual need and legality.71 Costa Rican law provides that precautionary measures may be requested and granted prior to filing of a complaint or during the pendency of a lawsuit.72

---

69 Civil Code Arts. 693 et seq., and Arts 715 et seq.; Code of Commerce Art. 429.

70 See the following decisions of the Constitutional Chamber of the Supreme Court: No. 2506-96 of 15:21 hours of May 28, 1996; No. 2036-M-90 of 14:54 hours of July 20, 1993; No. 6786-94 of 15:27 hours of November 22, 1994; No. 3929-95 of 15:24 hours of July 18, 1995; 2897-96 of 9:39 hours of June 14, 1996. See also Second Tribunal in Civil Matters, First Section, Decision No. 083 of 9:45 hours of March 5, 1999.


C. Taxes

In Costa Rica, withholding taxes apply to payments made by a local payor from a local source to a foreign payee. The applicable rates differ based on the type of the payment, and the rates of greatest interest for franchises are the following:

- 25%: royalties paid from a Costa Rican source in connection with franchises, licenses, and/or intellectual property use.
- 25%: technical-financial assistance services, or other services.
- 15%: financing costs, such as interest.
- 30%: other payments not specifically enumerated.

The withholding applies on gross amounts, though it is common for a franchisor to require payment of the full amount of the agreed-upon payments from the franchisee and have the franchisee assume any and all withholding tax obligations derived from income generated locally by the franchisee. This type of gross-up arrangement is not expressly authorized by law but has never been contested by the local tax authorities.

The franchisor may obtain an exemption from the above withholding taxes if it can demonstrate to the Costa Rican Tax Administration that it does not receive any credit in its country of origin for withholding taxes paid in Costa Rica. This right, however, is controversial and is expected to be abrogated in the future. There are no treaties in effect that lower the withholding rates provided in the Income Tax Act.

The franchisee is primarily responsible for withholding the corresponding tax, though technically, any payment of this kind is made in the name of the franchisor.

D. Foreign Exchange Controls

There are no monetary exchange controls under Costa Rican law that are applicable to payments made to foreign franchisors.

---

73 Income Tax Act, No. 7092 of April 21, 1988, Arts. 61 and 62.
74 Id., Art. 59.
75 Id., Art. 59, ¶ 10.
76 Id.
77 Id., Art. 59, ¶ 9. An exception applies to payments made to the benefit of “first order banks” as registered with the Costa Rican Central Bank (i.e., banks normally engaged in international business transactions (Id., Art. 59, ¶ 8, and Art. 64.).)
78 Id., Art. 59, ¶ 11.
79 Id., Art. 60.
80 Id., Art. 65. Some formalities do apply to this process, which will require compliance with local tax regulations and confirmation by the local tax authorities.
81 Id., Arts. 62 and 65.
E. Competition Laws

In Costa Rica, competition regulations are found in the Competition Promotion and Consumer’s Effective Defense Act of 1995. Under this statute, monopolistic practices result from the undue exercise of influence by a dominant market participant (based on this participant’s substantial power over such market) to benefit itself and restrict competition to the detriment of consumers and other market operators.

Generally, monopolistic practices may be divided into two categories:

- Horizontal (among business competitors in detriment to consumers and other market participants), which are deemed totally null and void and are not susceptible of being subject to a reasonableness scrutiny; and

- Vertical (among related parties), which may be annulled depending on the specific circumstances, but for which the parties’ willful participation and effects on competition must be fully demonstrated.

As an exception, monopolistic practices may be allowed when they are specifically designed to achieve business efficiencies among market operators that may later be translated to the benefit of consumers.

Sanctions may be imposed based on third party claims or ex-officio investigations, once (i) the affected party has had a chance to defend itself under due process requirements; and (ii) the local authorities have verified any undue monopolistic practices in the market based on the party’s substantial power within such market.

The Competition Promotion Commission of the Ministry of Economy and Trade is the agency in charge of enforcing the mandates of Act No. 7472. Based on the limited franchise activities to date within Costa Rica, and the lack of specific regulations and formalities regarding franchise operations, there has been no relevant case law on franchise issues emitted by the Competition Promotion Commission.

---

82 Act No. 7472 of January 19, 1995 (as amended.)
84 Id., Art. 13.
85 Id., Art. 11. See Competition Promotion Commission, resolution No. 4-95 of September 5, 1995.
87 Act No. 7472, Art. 12.
90 Act No. 7472, Art. 21.
1. Prohibition on Common Franchisor Practices

In Costa Rica, a franchisor may restrict a franchisee’s sources of supplies on a reasonable basis to guarantee the quality of products and benefits to the consumer, provided no other products may be found in the market from alternate sources that may reasonably comply with the franchise purposes. A franchisor can be an exclusive supplier of the franchisee. The only requirements are that exclusivity must be reasonable and the actual effect on the competition and consumers must also be reasonable.

A franchisor may profit on the sale of supplies to franchisees provided such profit is reasonable and does not interfere unduly with competition in the market or consumer rights to receive a reasonably priced, quality product.

A franchisor may mandate minimum, fixed or maximum retail prices provided such pricing is required for the correct operation of the franchise, or in order to provide reasonable protection for the franchise product or service in the market, or to insure market efficiencies and benefits for consumers.

2. Restrictive Covenants

In Costa Rica, a franchisor may prevent a franchisee from engaging in a competing business during the term of the franchise and even beyond that term, provided: (i) consideration is paid to the franchisee to avoid violation of freedom of commerce rights, and (ii) such restriction is reasonable and necessary for the parties' interests (as reflected in the franchise agreement), and has been agreed upon by the parties at arms' length.

There are no special temporal limits for this type of restriction, as long as the reasonableness of any term agreed to by the parties may be proved and sustained. Similarly, geographical limits must obey the principle of reasonableness.

Owners of the franchisee may also be bound by these restrictions on the basis that the identity and special qualifications of the franchisee (and its owners) is a key factor that motivated granting the franchise to such franchisee. In that regard, local practitioners highly recommend including language substantiating such motivation in the franchise agreement.

---

91 Id., Art. 12(c).
92 See Competition Promotion Commission, resolution No. 09-95 of November 28, 1995, §2.
93 Act No. 7472, Art. 12(d).
94 Id., Art. 12(b).
95 Id., Art. 12(d).
96 Costa Rican Constitution, Art. 46.
97 2nd Superior Civil Tribunal of San Jose, 2nd Section, Decision of 9:20 hours of May 4, 2001.
98 Act No. 7472, Art. 12(e); Civil Code, Art. 1023.
99 The First Chamber of the Costa Rican Supreme Court determined in Femaka, S.A. v. Derivados de Maiz Alimenticio, S.A., that exclusivity within a certain geographical area was a reasonable right/limitation resulting from a franchise arrangement. Thus, it would be fair to interpret that such level of reasonableness should also apply to any competition restrictions imposed as a result of a franchise agreement. Costa Rican Supreme Court, First Chamber, Resolution No. 73 of 15:40 hours of July 17, 1996.
F. Relationship Laws

In Costa Rica, there are no specific laws governing the ongoing relationship between a franchisor and a franchisee.\(^{100}\) Such relationship is subject to civil and commercial contracts requirements, including the general principle of “good faith.”\(^{101}\)

1. Defaults

Generally, the principles of good faith and protection of the parties’ contractual relationship should prevail, allowing the parties to cure, if at all possible and within mutually acceptable terms, any defaults. However, there is no obligation to provide a cure period in favor of the defaulting party; thus, anyone in default is liable for any damages caused to the non-defaulting party.\(^{102}\)

In a franchise relationship the parties are free to specify the terms of any cure rights and obligations in the event of default.\(^{103}\) In the absence of such terms, the franchisor is not bound to provide the franchisee with any right to cure;\(^{104}\) however, the franchisee is bound in good faith to minimize to the extent possible any damages caused to the franchisor resulting from its default.\(^{105}\)

Interest may be charged on overdue payments at the rate so fixed by the parties in the franchise agreement. In the absence of such provision and should Costa Rican law apply, the applicable regular interest rate (“interés corriente”) will be equivalent to (i) that fixed by the Costa Rican Central Bank for local loan operations for debts in colones (local currency);\(^{106}\) or (ii) Prime Rate for U.S. dollar denominated debts.\(^{107}\) Under Costa Rican law, late payment interest rates (“interés moratorio”), if so agreed upon by the parties, shall be equal to the regular interest rate unless a different rate is agreed upon, in which case it cannot exceed 1.3 times the regular interest rate.\(^{108}\)

2. Termination

In general, the parties’ termination rights are subject only to the terms of the franchise agreement and general contract rules.\(^{109}\)

\(^{100}\) See id.

\(^{101}\) Civil Code, Art. 1023. See also 2nd Superior Civil Tribunal of San Jose, Decision No. 104 of 13:05 hours of March 16, 2001.

\(^{102}\) Id., Arts. 701 and 702.

\(^{103}\) Id., Art. 1022.

\(^{104}\) Code of Commerce Art. 417.

\(^{105}\) Civil Code Art. 1023.

\(^{106}\) This interest rate is locally known as “tasa básica pasiva.”

\(^{107}\) Code of Commerce, Art. 497.

\(^{108}\) Id., Art. 498.

\(^{109}\) See Section I.A.2, supra.
3. **Nonrenewal**

Renewal rights are governed by the franchise agreement. An agreement may be validly subject to a term and, should its renewal be a prerogative of the franchisor under the terms of the agreement, such right should be upheld under Costa Rican law.\(^{110}\)

**G. Trademark Requirements and Licensing Considerations**

1. **Trademark Registration**

Trademarks are registered with the Costa Rican Industrial Property Registry (the “Registry”),\(^{111}\) an agency ascribed to the Ministry of Justice.

It takes approximately two (2) weeks to be informed of possible objections made ex-officio by the Registry to a trademark application based, *inter alia*, on existing registered trademarks and notoriety issues.\(^{112}\) If there are no objections, the Registry authorizes an announcement to be published on three (3) consecutive dates in the Official Gazette, giving public notice of the application.\(^{113}\) The announcement provides a term of two (2) months from the date of publication to third parties in order to file any opposition to the application.\(^{114}\)

In case of oppositions, the matter is decided by the Registry usually between eight (8) to twelve (12) months.\(^{115}\) Processing times may also be delayed by administrative overloads. If no objections are made ex-officio by the Registry and no oppositions are filed against the application it usually takes between four (4) and eight (8) months from the filing date to complete the registration process. Upon registration, the Registry will issue a certificate of registration.\(^{116}\)

2. **Registration of Licenses of Trademarks**

There is no specific requirement to register licenses of trademarks in Costa Rica; however, it is advisable to do so, particularly if the franchisor is interested in letting third parties know the extent and limitations under which the franchise may operate and its trademarks may be used, which could be useful if a local authority needs to be involved as a result of a dispute between the parties.\(^{117}\)

The license registration process takes approximately one (1) to two (2) months.

If the trademark license is not registered, but trademarks are registered and actively used in the market, there is no risk of a claim of abandonment. The licensor will have a number of documents (including the franchise agreement) to prove the terms of such trademark use. As

---

\(^{110}\) See *id.*

\(^{111}\) Trademarks and Other Distinctive Signs Act, No. 7978 of December 22, 1999 (as amended), Art. 9.

\(^{112}\) *id.*, Arts. 13 and 14.

\(^{113}\) *id.*, Art. 15.

\(^{114}\) *id.*, Art. 16.

\(^{115}\) *id.*, Arts. 17 and 18.

\(^{116}\) *id.*, Art. 19.

\(^{117}\) *id.*, Art. 35.
to third parties, lack of publicity of a license arrangement is not per se a cause of abandonment of the corresponding trademarks, much less if such trademarks are notorious and, as a fact, actively used in the market.

3. Execution Formalities

If a franchisor decides to record the trademark license, a trademark license or use agreement should be executed separately from the franchise agreement, as the Costa Rican Public Registry will not record a franchise agreement. The license agreement should be drafted in Spanish, but it can be executed as a bilingual document and registered in such format. Should the document be executed abroad, notary formalities are required; i.e., legalization by a Costa Rican Notary Public or a Costa Rican Consul in the jurisdiction where the document is being signed. A power of attorney must also be issued by the parties, in favor of franchisor’s local counsel, to proceed with recordation of the document.

The license should specify the following: general information about the licensor and licensee; information regarding the trademark, including the licensed trademark registration and/or application information; type of license, term and territory to be covered; indication of any exclusivity of the license in the territory; and limitations to the license, if any.

If the owner of a licensed trademark wants to reserve the right to cancel the license at any point prior to the end of its term, such condition should appear in the license agreement. Cancellation can then be requested by the franchisor by means of a written request formally filed with the Registry without the need for consent of the franchisee.

H. The Court System and Recent Court Decisions

1. Court System

The Costa Rican Judiciary is a separate branch of the Government in charge of the administration of justice as per the mandate of the Constitution. It is organized according to the Judiciary Structural Act (Ley Orgánica del Poder Judicial) based on three main factors: (i) subject matter jurisdiction (civil and commercial matters; administrative, government and tax matters; criminal matters; environmental and agrarian matters; and constitutional matters); (ii) territorial jurisdiction (based on the administrative division of the country in provinces and counties); and (iii) the amount of money involved in a particular dispute.

The Judiciary consists of three levels of courts: (i) first instance courts (alcaldías or juzgados, depending on the amount of the dispute); (ii) appellate courts (juzgado for an alcaldía decision, and tribunal superior for a juzgado decision); and (iii) the Supreme Court (casación), for certain qualifying matters.

In addition to courts, the Judiciary is also comprised of certain offices or departments charged with the task of administering justice: the Public Ministry (Prosecutor’s Office), the Judicial Investigation Agency (Judicial Police), the Public Defenders Department, the Judicial School, the Electronic Center for Case Law Information, and the Judicial Archives and Registry.

---

118 Costa Rica is not a member of the Apostille Convention; thus, the level of formalities is somewhat more complex in this case.

119 Act No. 7333 of May 5, 1993 (as amended).
The judicial system can be slow and procedures complicated; however, contracts are generally upheld, and investments are secure, though it may take, on average, more than two years, to resolve contract-related legal complaints.

The main type of civil proceeding is declaratory (juicio ordinario); i.e., proceedings in which a right is formally declared in favor of a party after such right has been contested by the other. Other types of civil proceedings are:

- Summary proceedings, which are shorter than declaratory proceedings, as the matters are simple and require quick resolution (e.g., collection on a promissory note, or eviction of a tenant).
- Special proceedings, which include incidental proceedings, third party claims and the enforcement of declaratory money judgments (procesos monitorios de ejecución.)
- Collection monetary proceedings, such as those based on a mortgage, chattel mortgage or commercial paper.
- Enforcement proceedings, which include among others those applicable to final court decisions, arbitral awards, conciliation agreements, and judge approved settlements.
- Incidental proceedings, such as (i) suspension (incidente de suspensión), which are processed and resolved as part of the main proceeding, while such main proceeding is suspended (e.g., lack of jurisdiction defenses, annulment defenses); and (ii) non-suspension (incidentes que no suspenden la tramitación), which are processed and resolved in a separate docket, but which do not interfere with the continuation of the main case.

2. Recent Decisions

In a decision of the 2nd Superior Civil Tribunal of San Jose, the court clearly establishes the features of a franchise agreement and the rights and obligations of the parties thereto, in spite of the lack of specific legislation on franchising in Costa Rica. The court also indicates how certain business issues such as (i) territorial clauses; (ii) supply, distribution and marketing obligations; (iii) licensing of know-how and other intellectual property rights; and (iv) technical assistance possibilities, specifically interrelate in a franchise arrangement to further characterize the parties’ relationship as being a franchise relationship, regardless of the parties’ characterization.

The plaintiff (franchisee) claimed that the respondent had unilaterally terminated the franchise relationship without cause and that damages were therefore due to the plaintiff as a result of such termination. The respondent (franchisor) denied all charges and claimed it had the right to: (i) appoint an additional franchisee in the market, changing the territorial arrangements agreed upon with the franchisee; and (ii) restrict the technical equipment originally offered to the franchisee in light of the new territorial restrictions imposed.

The franchisor was found liable for termination without cause of the franchise agreement and ordered to pay damages to the franchisee. In this case the franchisee did not claim statutory damages under Act No. 6209 and the court did not award any damages under Act No.

---

120 See 2nd Superior Civil Tribunal of San Jose, Resolution No. 294 of 9:10 hours of December 11, 1996, in the matter of Industrias de Alimentos del Comal, S.A. v. Derivados del Maiz Alimenticio, S.A.
6209. Instead, general damages to be calculated by expert witnesses under the Civil Code were awarded, further supporting the presumption that the franchise relationship was never intended to be subject to Act No. 6209.
VI. El Salvador

A. Regulation of Offers and Sales of Franchises

1. Laws

a. Disclosure Laws

In El Salvador, there are no specific disclosure laws applicable to franchise sales. The general pre-contractual good faith requirement, which encourages disclosure of relevant information and any special circumstances, is applicable to franchise agreements.

b. Commercial Agency Laws

The El Salvador Legislature has not enacted any specific commercial agency laws that affect franchising relationships. According to the Salvadoran Commerce Code (Código de Comercio) (the “Commerce Code”) commercial agents of a company are “individuals empowered to direct companies or a specific branch or an establishment of the same.”121 As such, the “commercial agent” as defined under the Commerce Code is more of a manager/director who handles certain activities on behalf of the principal.

The Commerce Code defines the term “representative distributor or agent” as follows: “The agent or distributor is the individual or legal entity that, continuously with or without legal representation and pursuant to a contract, has been designated by a principal for the representation agency or distribution of determined products or services within the country…. The representation agency or distribution can be exclusive or any other type agreed by the parties.”122 If a franchise agreement (particularly one with a product distribution component) were considered to be a “distributor agency” relationship, the franchisor would be able to terminate or refuse to renew the contract only for “just causes,” which include, among others, non-compliance with the agreement, fraud, serious negligence or incompetence, continuous reductions in the sale and distribution of the product attributable to the actions of the agent, and disclosure of confidential information.123 Mandatory indemnification payments would also be required from the franchisor to the franchisee if the agreement were terminated without “just cause.”124 The Commerce Code provides for indemnification of a terminated agent calculated as follows: the costs and expenses incurred by the agent that cannot be recovered; plus the value of the agent’s investment in the location, equipment, furniture and fixtures and tools that can only be utilized in connection with the distribution or agency; plus the value of the inventory on hand (cost plus transportation plus duties and taxes); plus the amount of gross profit earned by the agent over the last three years; plus the amount of any loans the agent extended to third parties in connection with sales.125 However, there has been no reported case in which a franchisee has been found to be a “representative distributor or agent” under the Commerce Code.126

121 Salvadoran Commerce Code § 365.
122 Id., § 392.
123 Id., § 398.
124 Id., § 397.
125 Id.
126 Id., § 392.
The Dominican Republic Central America-United States Free Trade Agreement (CAFTA-DR) has been effective in El Salvador since March 6, 2006. The provisions of the CAFTA-DR that specifically allow parties to agree on their respective rights and obligations in agreements, based on general contracts law, are applicable in El Salvador to contracts between a U.S. franchisor and a Salvadoran franchisee. In particular, the CAFTA-DR provides that parties to a franchise agreement may expressly provide that the agency provisions of the Commerce Code (Sections 394-399B) do not apply to the relationship established in the agreement in order to eliminate any risk of characterization of the franchise relationship as a “representative distributor or agent.”

2. Government Agency Regulation

In El Salvador, there are no government agencies that regulate the offer and sale of franchises.

B. Governing Law and Dispute Resolution

1. Governing Law

Franchise agreements, as private contracts, may be governed by the law selected by the parties.

2. Arbitration

The franchisor and the franchisee can agree upon arbitration as the means to resolve disputes, including arbitration to be held in another country. The New York Convention was ratified by El Salvador on February 26, 1998, and entered into force on May 27, 1998. Courts in El Salvador may only refuse to enforce an arbitral award issued by a jurisdiction that is a signatory to the New York Convention based upon the grounds specifically authorized by Article V of the New York Convention.

3. Foreign Judgments

Foreign judgments are enforceable in El Salvador, but the applicant must follow the prescribed procedures before the Salvadoran Supreme Court.

Foreign judgments will be recognized in El Salvador as set forth in any applicable international law or treaty. If there is no applicable international law or treaty, foreign judgments will be recognized in El Salvador if they meet the following requirements:

- The judgment related to a personal action;
- The judgment was not a default judgment;
- The judgment relates to an obligation that is legal under the laws of El Salvador; and
- The judgment complies with all the requisites of the country in which it was emitted to be considered final and all the requisites of El Salvador to be recognized as final in El Salvador.

127 Salvadoran Code of Civil and Mercantile Procedure § 556.
128 Id.
4. Injunctive Relief

In El Salvador, injunctive relief is available under Article 436 of the Code of Civil and Mercantile Procedure. Such relief is available for civil, commercial, criminal and intellectual property claims. The petition for such relief must be presented and justified before a competent court. Injunctive relief can be preliminary or it can be part of a final award.\[129\]

C. Taxes

The applicable withholding tax rate on royalty payments made by a domestic franchisee to a foreign franchisor should be one of the following:

- 20%: Pursuant to the Salvadoran Tax Code, a 20% withholding tax rate is applicable to payments by a domestic party to a foreign party for services used or rendered in El Salvador; for the transfer of intangible assets; or for the use or grant of use of rights over tangible and intangibles assets such as authors’ rights in artistic, literary, or scientific work, tapes and other media for data, image and sound reproduction or transmission, patents, manufacturing or commercial trademarks, drawings, designs, plans, or secret formulas or procedures, or industrial, scientific or commercial equipment.\[130\]

- 25%: Pursuant to the Tax Code, amounts paid to a party in a “Tax Haven” jurisdiction, are subject to a 25% withholding tax.\[131\] “Tax Haven” jurisdictions are those where there is no income tax or the corresponding income tax rate over net income is less than the 80% of the Salvadoran income tax rate as well as those jurisdictions classified as such by the Organization for Economic and Commercial Development (OECD) and the Financial Action Task Force (FATF – GAFI). Additionally, the tax authorities in El Salvador publish a list of Tax Havens and low tax jurisdictions that is updated annually.

The only country with which El Salvador has entered into a double taxation treaty which reduces the withholding rate on royalty payments or other payments under a franchise agreement is Spain. The treaty became effective on January 1, 2010, and provides for a reduced rate of 10%.

In El Salvador, there is no prohibition against the use of “gross-up” provisions in franchise agreements; however, the withholding tax rate is applied over the gross amount paid by the franchisee to the foreign franchisor as reflected on the invoice provided by the franchisor.

D. Foreign Exchange Controls

In El Salvador, there are certain reporting requirements in connection with the transfer of funds to foreign accounts, but payments to foreign parties in foreign currencies are not

\[129\] Id., §§ 431 and 442.

\[130\] Salvadoran Tax Code§ 158 ¶¶ 1 and 2.

\[131\] Id., § 158-A.
otherwise restricted. In El Salvador, the U.S. dollar has been a legal form of tender since 2001.132 Funds in El Salvador can be readily converted into U.S. dollars.

E. Competition Laws

The Salvadoran Competition Law prohibits certain anti-competitive behavior such as placing obstacles on competition, lowering prices to drive out competition, and charging different prices in different parts of the country with the objective of eliminating competition in certain parts of El Salvador.133 These prohibitions only apply if the franchisor has a dominant position in the relevant market. The Competition Law requires approval of certain mergers and acquisitions to assure no violation of antitrust measures. The Competition Superintendence is the authority that enforces the Competition Law in El Salvador.

1. Prohibition on Common Franchisor Practices

As long as a franchisor does not have a dominant position in the relevant market, the franchisor can: (i) restrict a franchisee’s sources of supplies in order to maintain the standards required by the franchise agreement; (ii) be an exclusive supplier; (iii) profit on the sale of supplies to franchisees; and (iv) mandate minimum, fixed or maximum retail prices.

2. Restrictive Covenants

In general, a franchisor is permitted to prevent a franchisee from engaging in a competitive business during the term, and after the term, in a certain geographic area, all subject only to the parties’ agreement. However, such restrictive covenants would not be enforceable against the franchisee’s owners, unless the owners are also parties to the franchise agreement containing such restrictions.

F. Relationship Laws

In El Salvador, there are no specific relationship laws applicable to franchisor-franchisee relations. The general principle of “good faith” set out in the Civil Code and the Code of Civil and Mercantile Procedure is applicable to all franchise agreements. It provides that “parties, their legal representatives, counselors, and in general, anyone who is involved in the contracting process must act with veracity, loyalty, good faith and procedural integrity.”134 The principle of good faith means that the franchisor must act with rectitude and honesty (understood as the opposite of fraud and deceit).

1. Defaults

The parties to a franchise agreement are free to determine the events of default, subject to the principle of “good faith.” In the context of interest on overdue payments, the parties are free to establish the amount.

---

132 Salvadoran Monetary Integration Law
133 Art. 30 of the Salvadoran Competition Law
2. Termination

The franchisor is permitted to terminate the franchise agreement in accordance with the provisions of the agreement.

3. Nonrenewal

The franchisor is permitted to refuse to renew the franchise agreement in accordance with the provisions of the agreement.

G. Trademark Requirements and Licensing Considerations

1. Trademark Registration

The registration of trademarks in El Salvador is similar to the process that is commonly found in most other jurisdictions: the applicant submits the application; the trademark authority will review and, if satisfied, publish the application; there is a time period for lodging opposition; and if there is no opposition, a registration certificate will be issued and the registration will be effective for 10 years.

A franchisor is permitted to enter into a franchise agreement when its trademark application is pending in El Salvador.

2. Registration of Licenses of Trademarks

Pursuant to the Trademark and Other Distinctive Signs Law, registration of a trademark license agreement with the Intellectual Property Registry is not necessary in order for it to be valid in El Salvador.135

3. Execution Formalities

While there is no requirement or need to register a trademark license agreement in El Salvador, if a trademark license agreement is to be registered or offered as evidence in a Salvadoran court, the agreement, if executed in another language, must be translated into Spanish before a Salvadoran notary public.136 If executed abroad, the license agreement must be duly apostilled or legalized by the appropriate Salvadoran consulate.

H. The Court System and Recent Court Decisions

1. Court System

The Salvadoran judicial system is unitary, meaning that, unlike the U.S. judicial system, there are no federal courts. The court system includes peace tribunals at the lowest level of the judicial hierarchy, followed by first instance courts, intermediate level appellate courts and at the highest level, the Supreme Court. The Supreme Court has 15 magistrates selected by the Legislative Assembly for a period of 9 years apiece.

---

135 Salvadoran Trademark and Other Distinctive Signs Law § 35.
136 Id., § 333.
The court system permits appeals from the first instance court decisions to the appellate level courts. Certain cases can be further challenged through a casación process before the Supreme Court and if a court decision violates a constitutional right it can be appealed through an amparo proceeding.

2. Recent Decisions

The legal proceedings concerning McDonald’s and its former franchisee in El Salvador, Servipronto (which is owned by Roberto Bukele, a figure said to have influence within both the government and the judiciary), have gained great notoriety in franchising communities in both El Salvador and the United States. Servipronto operated 3 McDonald’s restaurants since the late 1970s, and in the early 1990s opened another 3 McDonald’s restaurants after McDonald’s contributed US$1 million to improve existing operations. By 1996, McDonald’s declined to renew the franchise agreements, claiming grossly deficient operations at the restaurants. Litigation ensued. Although McDonald’s was successful at the trial court, the Supreme Court of El Salvador ultimately decided in favor of the franchisee with a decision in November 2009 that awarded the franchisee almost US$24 million. Since then, McDonald’s has filed a constitutional appeal (amparo), but the Supreme Court has not yet decided whether to accept it.

137 See, e.g., U.S. Commercial Service, Department of Commerce, “Doing Business in El Salvador: A Country Commercial Guide for U.S. Companies,” 2009 (“Complaints from U.S. firms that have invested in El Salvador have increased over the past year…. The judicial system presents increasingly significant hurdles for U.S. companies. The system is slow and tends to favor national interests. Attempts at establishing commercial arbitration have not been supported by the judiciary…. A longstanding dispute between a prominent U.S. franchise and its former franchisee suggests that enforcement of franchise contracts in the courts can be difficult.” See also U.S. Commercial Service, Department of Commerce, 2009 Investment Climate Statement (“There has been no progress in a significant intellectual property and related contractual dispute involving trademark and copyright infringement by an ex-franchisee. . . . Judiciary and regulatory enforcement continue to be the weakest pillars of intellectual property protection in El Salvador.”).
VII. Honduras

A. Regulation of Offers and Sales of Franchises

1. Laws

There is no specific law in Honduras that regulates the offer and sale of franchises. In general, contracts are regulated by the Honduran Civil Code, Decree 76 (Código Civil de Honduras, Decreto 76) and the Honduran Commercial Code, Decree 73 (Código de Comercio de Honduras, Decreto 73).

a. Disclosure Laws

There are no specific disclosure laws for franchise sales in Honduras. There is also no general disclosure requirement or obligation before a sale. However, Honduran civil law requires a seller to indemnify the buyer or rescind the transaction in case any hidden encumbrances are discovered once the sale has taken place.

If a franchisor provides a prospective franchisee with a disclosure document, local counsel recommends that the franchisor have the franchisee acknowledge in writing that they have received a copy of the disclosure document, and have had the opportunity to review such material (preferably with legal counsel), and represent that the investment is being made at its own risk.

b. Commercial Agency Laws

In Honduras, a franchisee generally is not considered an agent of a franchisor. Local counsel is of the opinion (after consultations with the officials at the Secretary of Industry and Commerce) that Decree 549, the Honduran Distributors Law, Law of Representatives, Distributors and Agents of National and Foreign Companies (Ley de Representantes, Distribuidores y Agentes de Empresas Nacionales y Extranjeras) does not in any manner affect franchising. Also, there has been no known reported case involving franchising under this law. The law limits the liability of foreign companies to terminate local representatives, distributors or agents and requires a significant indemnification to be paid to any improperly terminated local representative, distributor or agent.

Decree Number 16-2006 published on March 24, 2006, Law for the Implementation of the Free Trade Agreement With Dominican Republic, Central America and the United States (CAFTA-DR), Article 61, (Ley de Implementacion del Tratado de Libre Comercio, Republica Dominicana, Centroamerica, Estados Unidos), establishes that any contract of representation, distribution or agency entered into in writing as of the date of effectiveness (or thereafter) of the CAFTA-DR is not subject to the application of Articles 4,6,14,15 and 22 of Decree 549, the Honduran Distributors Law described above. The Free Trade Agreement came into effect in Honduras on April 1, 2006.

2. Government Agency Regulation

There is no specific government agency that regulates the offer and sale of franchises in Honduras, and franchise agreements are not required to be recorded in Honduras.
B. Governing Law and Dispute Resolution

1. Governing Law

A franchisor and a franchisee are free to select the law that will govern their franchise agreement. Honduran legislation guarantees the parties freedom to contract. Thus, the parties are free to agree on the terms and conditions of such agreement and the applicable law. However, if Honduran government agencies or government entities are parties to an agreement, such agreement cannot be governed by foreign law, with the only exception to such prohibition being certain international loan agreements.

2. Arbitration

Under Honduran law, a franchisor and a franchisee may agree that disputes will be resolved by arbitration, and the arbitration may be held in a different country. Honduras ratified the New York Convention on October 3, 2000, and it became effective in Honduras on January 1, 2001.

A Honduran court might refuse to enforce a foreign arbitration award, however, if the award was granted in a matter that Honduran law does not allow be resolved through arbitration. According to Honduran law, the following are not subject to arbitration: (i) criminal cases; (ii) future alimonies; (iii) conflicts relating to a person’s civil status; (iv) matters in which a judicial sentence has already been granted; (v) matters in which the District Attorney’s office is obligated to intervene; (vi) all matters for which damages are not an appropriate remedy; and (vii) individual labor disputes.

3. Foreign Judgments

Foreign judgments are enforceable in Honduras, unless they were issued in a country where Honduran judgments are not enforceable.

To domesticate a foreign judgment, the following requirements have to be met:

(i) the judgment was based on a personal action;
(ii) the judgment was not a default judgment;
(iii) the obligation is legal in Honduras; and
(iv) the letters rogatory have been prepared according to the legal requirements both in the country of origin and in Honduras.

The petition must be filed before the Honduras Supreme Court. The party that will be affected by the judgment must be notified so that it can contest the judgment or provide an explanation within three days. The Honduras Supreme Court must permit an appearance by the


Public Ministry (District Attorney) and then must rule on whether or not the judgment can proceed to execution. If it is allowed, the competent judge for the territory where the judgment is to be enforced will be notified. If not allowed, the judgment is returned to the person who filed the petition.\textsuperscript{140}

4. **Injunctive Relief**

Under Honduran law, injunctive relief is available for all types of commercial and civil claims. Injunctive relief is commonly applied to commercial disputes, debt and obligations in loan agreements, family matters, labor matters and in general any matter permitted by Honduran law and granted by a court with proper jurisdiction.

In general, a petition must be filed before the court, along with supporting documentation and testimony from two (2) witnesses. The judge analyzes the petition, and grants or denies it. If granted, the court will notify the Registry or appropriate entity that will have to enforce the judge’s ruling. Depending on the matter, the process to obtain an injunction is fairly expeditious, generally within one to six weeks.

C. **Taxes**

Under Honduran law, all royalties, commissions, fees and/or payments made from a Honduran source to a foreign person or entity is taxed at a 10% withholding rate.\textsuperscript{141} There are no tax treaties in effect that reduce the withholding rate.

Because Honduran law is silent on whether it is permissible to “gross-up” withholding taxes, this practice is allowed since it is not expressly prohibited.

D. **Foreign Exchange Controls**

Technically, Honduran Law requires obligations that are to be executed or paid in Honduras to be payable in Honduran currency, the Lempiras.\textsuperscript{142} Exceptions to this general rule include Article 4 of the Monetary Law, which allows certain payments to be made in another currency, including those debts or other obligations that are contracted and documented in a foreign currency through the authorized Banking and Stock Market Financial System. Another exception is provided in Article 709 of the Honduran Commercial Code, which establishes the possibility for payments required in a foreign currency to be paid in that currency when there is an explicit requirement of “payment in cash” in the document evidencing the payment obligation.

In practice, however, payments in Honduras and from Honduras are made on a daily basis in U.S. Dollars or Euros, without complying with the above-mentioned rules. The ability of a franchisee to pay a foreign franchisor in a foreign currency is largely a question of whether the franchisee can obtain the relevant currency.

\textsuperscript{140} Decree No. 76, containing the Procedural Code of Honduras of 1906, Arts. 238, 239 and 240 (\textit{Codigo de Procedimientos Civiles de Honduras}, Decreto 76, Artículos 238, 239 y 240). This Code will be replaced by the new Procedural Civil Code, Decree 211-2006, Decree 168-2009 and will enter into effect on November 1, 2010 (\textit{Codigo Procesal Civil}, Decreto 211-2006, Decreto 168-2009, entroendo en vigencia a partir del 1ro de noviembre del 2010).

\textsuperscript{141} The Law for the Strengthening of Income, Social Equality and Rationing of Public Expenses, Decree 17-2010, valid as of May 11, 2010 (\textit{Ley de Fortalecimiento de los Ingresos, Equidad Social y Racionalizacion del Gasto Publico}, Decreto 17-2010, en vigencia a partir del 11 de mayo del 2010).

\textsuperscript{142} Monetary Law, Decree 51-1950, Art. 3 (\textit{Ley Monetaria}, Decreto 51-1950, Artículo 3).
E. Competition Laws

Honduran law prohibits practices or agreements that encourage or establish (among others): price fixing, fixing of customer volumes, territorial agreements or designations, agreements to prohibit acquisition of certain goods or services, or production, distribution, or technological advancement by commercial enterprises. The competition law does not place any specific restrictions on franchising.

The Public Ministry can pursue civil and criminal claims for anti-competitive behavior. The Commission for the Defense and Promotion of Competitiveness can also impose monetary sanctions, fines, administrative sanctions, inspections, and other measures. To local counsel’s knowledge, there has been no case involving franchises and the application of the Honduran Law for the Defense and Promotion of Competitiveness.

1. Prohibition on Common Franchisor Practices

Under Honduran law, a franchisor may: (a) restrict a franchisee’s sources of supplies; (b) be an exclusive supplier; and (c) profit on the sale of supplies to franchisees.

A franchisor can also mandate minimum, fixed or maximum retail prices, unless those prices apply to products of first necessity for the general public (for example, certain medications), or are included in the list of essential staples for proper nutrition (which are subject to price control by the government) including packaged beans, rice, wheat flour, milk, eggs, vegetable oil, sugar, coffee, water, pasta, chicken, and ham.

2. Restrictive Covenants

Under Honduran law, a franchisor can prohibit a franchisee from engaging in a competitive business during and after the term of the franchise agreement if such restrictive covenants are included in the franchise agreement. Such restrictive covenants can also apply to the franchisee’s owners, if they are also made parties to the restrictive covenants.

The geographic and temporal reach of such restrictive covenants may be subject to review based on a “reasonableness” standard, which requires the restricted activities actually to be “competitive” to the franchisor’s business.

F. Relationship Laws

There are no specific laws in Honduras that govern the ongoing relationship between the franchisor and the franchisee. Generally, the ongoing relationship between parties to a contract

---

143 Law for the Defense and Promotion of Competitiveness, Decree No. 357-2005, Art. 7 (Ley Para la Defensa y Promocion de la Competencia, Art. 7).
144 Id., Art. 5.
145 Honduras Commercial Code, Arts. 800 and 801.
HONDURAS

is governed by Decree No. 73, the Honduran Commercial Code and Decree No. 76, the Honduran Civil Code.

Honduran law assumes that all contractual parties act in good faith, unless otherwise proven.

1. Defaults

The parties to a franchise agreement are free to agree to terms such as what constitutes a default, rights to cure, and notice periods.

With respect to interest on overdue payments arising out of franchise agreements governed by Honduran law, for commercial transactions in which neither party is a bank, financial institution or individual loan agent, the maximum interest rate that may be charged for overdue payments is 7% annually, which is the standard non-bank interest rate (commercial / mercantile interest rate).  

2. Termination

In Honduras, a franchisor may terminate a franchise relationship in accordance with the terms of the franchise agreement. Even if a termination clause is not incorporated into a franchise agreement, such omission does not preclude the right to terminate by either party following a default of the other party.

3. Nonrenewal

A franchisor can refuse to renew the franchise agreement provided that it does so in accordance with the franchise agreement.

G. Trademark Requirements and Licensing Considerations

1. Trademark Registration

In Honduras, the first appropriate step in the trademark registration process is a background search in order to verify that the proposed trademark has not already been applied for or registered. Once a petition for registration is filed and if there are no issues with the petition, approximately 15 days later, a registration notice must be published three consecutive times in the government’s Official Newspaper “La Gaceta”.

After the three publications have been made and the evidence of such publications has been filed with the Trademark Registration Office, there is a mandatory 30 day waiting period during which opposition or objection to the registration of the trademark may be filed. If no opposition or objection is filed, the registry office will grant an Official Registration Fee Receipt, so that the petitioner may proceed to pay the registration fee prior to obtaining the registration certificate, which is generally granted 10 days after the receipt has been paid. Protection of the registered trademark is granted for a period of 10 years. An annual maintenance fee must be paid during the protection period.

A franchise can be granted if there is only a pending application for a trademark and not a registered trademark in Honduras.

2. Registration of Licenses of Trademarks

Local counsel recommends that trademark licenses be registered, even though such registration is not required, in order to make public that the trademark is in use by a third party but owned by the franchisor.

If the license is not recorded, there is a risk of a claim of abandonment of the trademark by the franchisor should the trademark registration not be timely renewed or should the trademark not be exploited by or on behalf of the franchisor within one year after registration. The registered trademark license agreement would be an element of proof to refute such allegation, since the use of the trademark by the franchisee would inure to the benefit of the franchisor.

To record a trademark license, a petition is filed before the registration authorities, along with an apostilled and translated (Spanish) copy of the parties’ incorporation documents, as well as the license agreement. The petition for recordation must be submitted by a lawyer with sufficient powers to proceed with recordation. Once received by the registration authority and the authority determines that the petition conforms with all formalities, the recordation usually issues within 2-4 weeks.

3. Execution Formalities

For recordation, a license agreement separate from the franchise agreement must be executed by the franchisor and franchisee either in the Spanish language or officially translated into Spanish. The license agreement may also be executed in both English (or other language) and Spanish versions, with Spanish as the governing language. If the agreement is signed in Honduras, it must be signed before a notary. If it is executed in a foreign country, it must be properly legalized or apostilled.

The franchisor and franchisee must issue Powers of Attorney to local counsel to complete such recordation. The law requires that these types of administrative procedures must be conducted by a lawyer authorized to practice law in Honduras.\textsuperscript{148}

H. The Court System and Recent Court Decision

1. Court System

The Honduras Judicial Power is divided into a judicial area, a judicial auxiliary area and an administrative area, that encompass the bodies that are known as first instance courts, courts (second instance courts or courts of appeals) and tribunals. The Supreme Court of Justice is Honduras’ highest tribunal, and is composed of 15 Chief Justices, who are each appointed for a term of seven (7) years.

\textsuperscript{148} Administrative Procedure Law, Art. 56, Decree 152-87, valid as of January 1\textsuperscript{st}, 1988 (Articulo 56 de la Ley de Procedimiento Administrativo, Decreto 152-87, en vigencia desde el 1ro de Enero de 1988).
The Supreme Court's jurisdiction is on a national level, in all areas of law, and is divided into four (4) chambers: Penal, Labor, Civil and Constitutional. The President of the Supreme Court appoints the Chief Justices for each of the chambers.

The Courts of Appeal handle appeals filed against decisions of courts of first instance and protection claims against acts and decisions of regional authorities.

The courts of first instance handle proceedings in the following areas: civil, penal, labor, family, minors, domestic violence, landlord / tenant, and administrative. In addition, these courts review appeals of actions of the Justice of the Peace.

The Justice of the Peace Court, which is the lowest court in Honduras, handles matters of a civil, penal or domestic violence nature. In the case of civil matters, this court hears cases that involve up to a maximum of Fifty Thousand Lempiras (Lps. 50,000.00), currently, approximately Two Thousand Six Hundred Dollars (US$2,600.00). In the penal area, this court will hear misdemeanors. In the domestic violence area, such court will hear all cases alleging domestic violence that occur in their territorial reach.

2. Recent Decisions

There have been cases related to trademarks involving franchisors, but no cases regarding the franchise relationship. Two of the similar trademark cases involved questions related to “Popeye’s Chicken & Biscuits” and “Dunkin Donuts.” In both cases, an individual in Honduras had registered the respective trademark and was operating a commercial business under that trademark. When the foreign franchisor decided to establish its franchise business in Honduras, each fought for the rights to the trademarks, given that the marks had been registered in the United States long before they were registered in Honduras and were well-known. In both cases, the ruling from the court granted property rights over the trademark to the foreign franchisor, and forced the local business to operate under a different trademark or commercial denomination. Both of these cases are well-known in Honduras, but there are no available published case reports.149

149 The Honduran fried chicken business that had called itself “Popeyes” changed its name to “El Hondureño” and locales continue to refer to Popeyes as “Popeyes ‘gringo’” (Popeyes from the States) to distinguish it from the prior name of the local business.
VIII. Mexico

A. Regulation of Offers and Sales of Franchises

1. Laws

Unlike the situation in most of the countries surveyed in this paper, the offer and sale of franchises as well as franchise agreements are specifically regulated in Mexico. Articles 142, 142 Bis, 142 Bis 1, 142 Bis 2 and 142 Bis 3 of the Industrial Property Law (the "IPL"), as well as Article 65 of the Industrial Property Regulations (the “Regulations”) comprise the legal framework for regulation of franchises in Mexico. However, the development of laws to regulate franchises and franchise agreements has occurred somewhat gradually in Mexico, beginning in the 1990s and continuing until most recently January 2006, when an amendment to the IPL was adopted. Before then, a sole article, Article 142, in the IPL regulated franchises. It provided the following definition and requirements for franchises in Mexico:

A franchise shall exist when, together with the licensing of the use of a mark, know-how is transferred or technical assistance is provided so that the person to whom the license is granted can produce or sell goods or provide services consistently according to the operating, commercial and administrative methods established by the owner of the mark, in order that the quality, prestige and image of the products or services distinguished by said mark be maintained.

The franchisor shall provide the prospective franchisee, prior to the signing of the corresponding agreement, with the relevant information on the state of the franchised business, as provided in the regulations under this Law.

The provisions of this Chapter shall be applicable to the registration of franchises.

The increase in the number of sections of the IPL that now govern franchise arrangements is an indication of the level of sophistication and maturity that the concept of franchising has achieved in Mexico over the last fifteen or so years. Although the legal concept of a franchise is essentially the same, Mexican law now states that a franchisor must provide a prospective franchisee with a disclosure document, which includes the corporate and business information of the franchisor, at least 30 days prior to the execution of the franchise agreement. Prior law had been silent on the amount of time that would constitute the “cooling-off” period. Furthermore, Article 142 Bis lists various requirements which must be included in a franchise agreement, such as a description of the site for the franchise, its dimensions and the required investment, reimbursement policies, criteria for the supervision or quality control of the franchisee by the franchisor, and whether or not the franchisee has the right to sub-franchise. There are now more than twelve requirements included in the IPL that must be in franchise agreements for the franchise agreement to be considered valid. Mexican franchise agreements are “formal”, which means that they must contain specific phrases for them to be recognized by law. An example is the “Just Cause” clause, in which the exact wording of the phrasing, or its equivalent in any language, must be included in the termination provision of all franchise agreements for franchises that are located in Mexico.

The list of the required provisions for all franchise agreements as provided in Article 142 of the IPL includes:
1. The geographical zone in which the franchisee shall primarily perform the activities which are the subject matter of the agreement;

2. The location, minimum size and investment characteristics of the infrastructure, relating to the premises in which the franchisee shall carry out the franchised activities;

3. The policies regarding inventories and marketing and advertising, as well as provisions related to the merchandise supply and engagement with suppliers, if applicable;

4. The policies, procedures and terms for any reimbursements, financing and other consideration under the respective responsibility of each of the parties in the terms established in the agreement;

5. The criteria and methods applicable to determine the franchisee's commissions and/or profit margins;

6. The characteristics of the technical and operational training of the franchisee's personnel, as well as the method or manner in which the franchisor shall provide technical assistance;

7. The criteria, methods and procedures for supervision, information, evaluation and grading of the performance and the quality of the services under the respective responsibility of franchisee and franchisor;

8. The terms and conditions under which the franchisee is permitted to sub-franchise, if agreed by the parties;

9. The grounds for termination of the franchise agreement;

10. The assumptions under which the parties may review, and if such is the case, may mutually agree to amend the terms or conditions related to the franchise agreement;

11. Unless otherwise agreed, the franchisee shall not be bound to sell its assets to franchisor or franchisor's designee, upon the termination of the franchise agreement; and

12. Unless otherwise agreed, the franchisee shall in no event be bound to sell or transfer any ownership interest in the franchisee to the franchisor, or to make the franchisor a partner of such company.

The Regulations also establish compulsory requirements for the disclosure document. If all the required items are not addressed in the disclosure document, the Mexican Institute of Industrial Property (the “IMPI”) could rule that the franchisor never provided a disclosure document to the franchisee that complied with Mexican requirements.

The provisions of the IPL must be observed in the territory of Mexico, along with applicable provisions of international treaties to which Mexico is a party. The IPL applies to franchises to be located in or to be operated within the Mexican territory, regardless of the nationality of the entities or individuals involved in or participating in the franchise agreement.
MEXICO

a. Disclosure Laws

The IPL establishes the obligations of franchisors to provide prospective franchisees with certain information regarding the franchisor.

Franchisors are not required to register the disclosure document before the IMPI, an independent body of the Ministry of the Economy, or any other Mexican governmental authority.

Neither the IPL nor the Regulations specify the language in which the franchise disclosure document must be prepared; however, if the disclosure document is prepared in a different language other than Spanish, it is advisable to have a written confirmation from the franchisee that he/she reads and understands such language, in order to avoid any excuses or protests by the franchisee before the IMPI or a court that he/she was not able to read and understand such language.

Article 142 of IPL provides that at least thirty days prior to the execution of the respective franchise agreement, a franchisor must provide to a prospective franchisee certain required information regarding the status of its enterprise, in the terms set forth in the Regulations.

Article 65 of the Regulations provides 10 requirements for information that must be included in the disclosure document, as follows:

1. Franchisor’s name, corporate name, address and nationality;
2. Description of the franchise;
3. Experience of the franchisor and the amount of time that the franchisor has operated the subject franchise;
4. Intellectual property rights comprised by the franchise and marks;
5. Types and amounts of payments to be made by the franchisee to the franchisor;
6. Types of services and technical assistance which the franchisor shall provide to the franchisee;
7. Definition of the geographical area in which the franchise is to be operated;
8. Disclosure as to whether the franchisee is granted the right to grant subfranchises and under what circumstances and conditions;
9. Franchisee’s obligations with regard to confidential information provided by the franchisor; and
10. Description of the general rights and obligations of the franchisee under the terms of the franchise agreement.

Furthermore, Article 142 provides that any lack of accuracy in the information required to be included in the disclosure document shall entitle the franchisee to request that the agreement be declared null or void and, additionally, to claim the payment of any damages and losses caused by virtue of such misrepresentations. This right may be exercised by the franchisee during the one year period after the execution date of the franchise agreement. After such term
has elapsed, the franchisee shall only be entitled to request that the agreement be declared null or void.

Finally, Section XXV of Article 213 of the IPL provides that it is an administrative infringement when the franchisor fails to provide a franchisee with a proper disclosure document that contains all required information. However, the burden is on the franchisee to prove that it requested such information if the disclosure document has not been provided within the required timeframe.

b. Commercial Agency Laws

Since there is a specific law, the IPL, that regulates franchising in Mexico, the franchise relationship is not subject to being shoe-horned into any other laws that apply to commercial arrangements such as agency, representation or distributorships. There are, however, other laws that may have application to franchises, depending on the type of activity performed in Mexico, such as the Commerce Code, the Consumer Protection Law, the Economic Competition Law, the General Law of Business Organizations and the Federal Civil Code.

2. Government Agency Regulation

The IMPI is the government agency with jurisdiction for enforcement of the IPL in Mexico. According to Article 2, Section VII, of IPL, the purpose of the IPL with respect to franchising is to establish legal certainty among the parties in the operation of franchises, as well as to guarantee nondiscrimination among all franchisees of the same franchisor. The IMPI has not yet applied or cited this purpose in any of its resolutions. When questioned about the enforcement of the nondiscrimination policy, officials at IMPI responded that it is very controversial, difficult to consider and noted that there have been no official pronouncements by the IMPI on the subject.

B. Governing Law and Dispute Resolution

1. Governing Law

A franchisor and a franchisee are free to select the law that will govern the franchise agreement.

2. Arbitration

According to Mexican law, it is possible to agree on arbitration as an alternative mechanism to resolve disputes.

Under Mexican law, the franchisor and the franchisee may also include mediation obligations in the franchise agreement prior to the commencement of an arbitration or judicial proceeding. Generally, however, such an obligation to mediate is not enforceable.

3. Foreign Judgments

The arbitration process does not have to be subject to Mexican law. Arbitration awards which do not contravene public order laws are enforced in Mexico through a recognition and enforcement procedure before a Mexican judge, by means of a homologation (domestication) process. Mexico is a party to the New York Convention.
Pursuant to the Federal Code of Civil Procedures, a judgment issued abroad may be enforceable in Mexico, provided it meets the following conditions: (i) compliance with formalities required under international treaties on letters rogatory; (ii) it is not based on a real property action; (iii) the issuing court had jurisdiction to hear and resolve the matter by virtue of international law rules that are consistent with Mexican law; (iv) personal notice or service of process was given to the defendant respondent; (v) the judgment has a res judicata effect or it is otherwise deemed final in the country where it was issued or there is no pending recourse against it; (vi) there is no resolution or pending suit in Mexico on the same cause of action between the same parties and in which the court should have been advised; and (vii) the obligation to be executed is not contrary to Mexican public policy; and (viii) the judgment is duly certified/authenticated. It is important to mention that, even if the judgment meets the aforementioned statutory conditions, the Mexican courts may deny execution if it is shown that in analogous cases courts sitting in the country in which the judgment was issued did not execute Mexican judgments or jurisdictional resolutions.

Once the judicial proceeding abroad is concluded and the final judgment is issued by the competent foreign court, such court or tribunal shall proceed to prepare and issue a letter rogatory addressed directly to the competent Mexican court, requesting its assistance to enforce the judgment. Subsequently, the letter rogatory shall be forwarded and filed before the competent Mexican court, together with: (i) the original/certified copy of the foreign judgment to be enforced; (ii) the original/certified copy of the documents proving that the defendant was duly served and that the foreign judgment is a final and irrevocable resolution; (iii) the necessary translations into Spanish of all the abovementioned documents; (iv) the corresponding apostille of all the abovementioned documents; and (v) a domicile in Mexico, appointed to receive notifications in the city where the foreign judgment will be enforced. Once received, the Mexican court will examine the authenticity of the foreign judgment and determine whether this type of resolution/order is enforceable under Mexican Law. At this point, each party may submit allegations, and the attorney general of Mexico has the right to challenge the enforceability and the finding of the Mexican court prior to enforcement. The court’s ruling is subject to appeal, but limited to the authenticity and enforceability of the judgment. When the judgment is not enforceable in its entirety, if so requested, the court may issue a ruling of partial recognition or execution.

Assuming that the foregoing requirements and proceedings are properly completed, a Mexican court will normally recognize a foreign judgment without a review on the merits of the case, and will execute them against persons or property within its jurisdiction, provided that they do not purport to affect matters that fall within the exclusive jurisdiction of Mexican courts and, as previously mentioned, their execution is not contrary to Mexican public policy.

4. Injunctive Relief

In addition to the dispute resolution mechanism set forth in the franchise agreement, a franchisor may always initiate an administrative action at the IMPI against any person violating the provisions of the IPL in prejudice of intellectual property rights of the franchisor. In such a

---

150 According to Mexican Law (Article 568 of the Federal Code of Civil Procedures) the following instances are reserved to the exclusive jurisdiction of Mexican courts: (i) cases involving lands and waters located in Mexico’s national territory, including its subsoil, air space, the territorial sea and the continental shelf, whether with respect to realty or concession rights, or the leasing of said assets; (ii) marine resources in Mexico’s 200-nautical mile exclusive economic zone; (iii) acts of authority or pertaining to internal regime of the Nation, including federal and state agencies; and (iv) the regime applicable to the Mexican embassies and consulates abroad, and their official functions.
case, the IMPI may impose precautionary measures. Examples of precautionary measures include the retirement from circulation of goods infringing any rights protected by the IPL; prohibition of the sale or use of products that violate the rights protected by the IPL; seizure of goods; and closing of businesses. Other than these types of measures, injunctive relief, as known in the U. S., does not exist under Mexican Law.

There are certain violations classified under the IPL as felonies, such as the intentional falsification, for commercial speculation purposes, of any trademark protected by the law; the disclosure of industrial secrets; or the disclosure of confidential information to a third party.

Administrative Resolutions issued by the IMPI can be appealed to the Federal and Tax Judicial Court, but an appeal does not suspend the actions taken by the IMPI.

C. Taxes

Mexico and the U.S. have a tax treaty that reduces the amount of withholding taxes for certain types of payments. For royalty payments, the withholding tax rate is 10%; for technical assistance, the withholding rate is 0%. For all other countries, payments of royalties are subject to a withholding tax rate of 25%. There is no prohibition against the use of “gross up” provisions in franchise agreements. The withholding rate is applied to the gross amount to be paid by the franchisee to the foreign franchisor as indicated on the invoice provided by the franchisor.

D. Foreign Exchange Controls

There are no laws or regulations in Mexico restricting a franchisee’s ability to make payments to a foreign franchisor in the franchisor’s domestic currency.

E. Competition Laws

The Federal Economic Competition Law in Mexico prohibits absolute monopolistic practices such as supply agreements between competitors when as a result of such agreements (i) the price of goods or services is fixed, increased or manipulated, (ii) a restriction on producing, distributing or processing a limited amount of goods is established, or (iii) a restriction on participation in bids is stipulated.

It is a common practice to include in franchise agreements certain negative covenants, generally related to the obligation of the franchisee not to use the licensed marks or system for purposes different from those contained in the franchise agreement. As a general rule, Mexican law establishes that in the event a negative covenant is breached, the remedy available at law for the non-defaulting party for such breach is indemnification for damages and losses arising from such breach. There also exists the possibility to seek rescission or cancellation of the Agreement.

Since some of the negative covenants agreed upon in franchise agreements are related to industrial property rights, precautionary measures which are intended to stop or prevent any infringement or violation of industrial property rights are also available to remedy the breach of certain negative covenants.

A common obligation often included in a franchise agreement is a non-compete clause, providing that the franchisee shall not be involved in the same activities as the franchised
business for a specific period of time after the termination or expiration of the franchise agreement.

On certain occasions, such provisions have been alleged to be unconstitutional and, consequently, a monopolistic practice prohibited by the Federal Economic Competition Law. However, the Federal Competition Commission (Antitrust Commission) issued the following criteria related to non-competition agreements:

[A]fter analyzing various cases submitted to this Commission, we have considered that said clauses do not necessarily contravene the provisions of the Federal Antitrust Law. In general terms, we may conclude that non-competition agreements are valid from an antitrust perspective, provided that they are limited with regard to the person subject to the obligation, the spatial territory to which the provisions apply, the products or services to which they refer and the time period during which the obligation will be valid.

These elements shall be analyzed on a case by case basis, taking into consideration the structure and the competitors involved in each market.

Said Commission analyzes in detail such non-competition clauses having more than a five-year duration, or having a purpose other than transferring channels of distribution or similar elements, because such type of clauses may cover or imply restrictions to competition. The Commission examines the justification or appropriateness of the clause case by case.

Because non-competition clauses contradict free competition, which could violate Article 28 of the Federal Constitution and Article 10 of the Federal Law of Competition, the Federal Commission of Competition established the criteria quoted above for non-competition clauses, limiting their scope to ensure fair competition. In order to be enforceable in Mexico, a non-competition clause must specify the services to which it will be applied, it must be limited to the territory of the franchise agreement and to the franchisee, and it must extend for only a limited time period after termination or expiration of the agreement.

F. Relationship Laws

The franchisor-franchisee relationship is governed by Article 142 BIS of the IPL and by the commercial and civil laws of general applicability (i.e. Commerce Code and the Federal Civil Code). Under Mexican law, franchisors and franchisees are free to contract on a number of issues as a result of the principle of contractual freedom provided in Article 78 of the Commerce Code, as long as the parties comply with the provisions of the IPL on franchising matters and the general principles of commercial contracts and do not agree on any stipulations that violate public order law or moral standards. Under such principle, franchise agreements in Mexico may include typical provisions, such as termination rights, rescission rights, conventional penalties (similar to the concept of liquidated damages under the laws of the United States), non-competition covenants, non-solicitation covenants, joint obligations or parent company guarantees, alternative dispute resolution mechanisms, etc.

1. Default & Termination

Notwithstanding such general principle, Article 142 Bis 3 of the IPL provides that neither a franchisor nor a franchisee may unilaterally terminate or rescind the agreement, unless they
have agreed to an unlimited term for the agreement, or there is a “just cause” to terminate or rescind the agreement. In order for the franchisee or the franchisor to be able to terminate the agreement prior to its expiration, the rights and obligations of the parties must be spelled out in the agreement and the termination procedures must also be set forth in the agreement, including the obligation for payment of liquidated damages or other termination payment or indemnification. Article 142 Bis 3 also provides that in the event of a violation of the provisions established in such Article, which is understood to refer to the lack of compliance with the required termination procedures, the early termination of the agreement by either the franchisor or the franchisee will result in the payment of the conventional penalties agreed upon by the parties in the agreement, or in the payment of indemnification for any damages or losses caused by such early termination. It is local counsel's opinion that Article 142 Bis 3, due to its lack of clarity, should be revised by the Mexican Congress.

According to Mexican law, any party to a bilateral agreement, such as a franchise agreement, is entitled to rescind (cancel) such agreement in the event of a default by the other party. Mexican law imposes a slight but very important condition in connection with such right. Such condition consists of a requirement that the agreement expressly include the right of a party to rescind (cancel) the agreement in the event of any default by the other party by means of a simple notice given to the defaulting party, without the need of obtaining a prior judicial, administrative or arbitral resolution.

The drafting of the provisions of the “express agreement to rescind (cancel) (pacto comisorio expreso) the contract” in the event of any default is extremely important due to the fact that the defaulting party will likely contest the determination of the default made by the non-defaulting party, as well as the right to rescind the contract by the non-defaulting party. In the event that such right to rescind the franchise agreement is not expressly contained in the agreement, then the non-defaulting party must request from the court or the arbitration panel having jurisdiction over the matter (as indicated in the franchise agreement), a declaration of the rescission of the agreement based on the default.

According to Mexican law, when a party breaches an agreement, the non-defaulting party is entitled to seek specific performance or the rescission of the agreement and, in both cases, the non-defaulting party has the right to claim payment of the damages and losses caused by the default, or if it was expressly agreed in the contract, to claim payment of the conventional penalties (for such breaches that the conventional penalties have been agreed upon).

Mexican law allows the parties to an agreement to stipulate one or more conventional penalties in the event a party breaches a specific provision of the contract or the contract as a whole. One of the specific remedies of a non-defaulting party due to a default of the other party in an agreement is to claim payment for damages and losses. Mexican law establishes that such damages and losses must be a direct and immediate consequence of the breach and the party who claims the indemnification must prove by written evidence the damages or losses actually incurred by such party that were caused directly by the breach of the other party, which in most cases is very difficult to do, especially due to the reluctance of Mexican courts to determine real amounts of damages and losses.

It is advisable for the parties entering into a franchise agreement to agree upon those provisions which, if breached, would be subject to conventional penalties. The amount to be agreed as a conventional penalty by the parties, however, cannot be higher than the total amount that the franchisee will be paying to the franchisor under the relevant franchise
agreement. If such amount is larger than the franchise royalties and fees, the conventional penalty could be considered null and void. The language of the conventional penalty should be very clear to avoid having a court or arbitral panel consider such conventional penalty as an overall cap of liability instead of a penalty for a specific breach.

2. Non-renewal

There is no law in Mexico that requires a franchisor to renew a franchise agreement.

G. Trademark Requirements and Licensing Considerations

1. Trademark Registration

Trademarks may be registered at the IMPI. Once a trademark application is filed, the IMPI issues a sticker receipt that accompanies the serial filing number of the application indicating that the application was filed on certain specific date.

It usually takes about 4 months to be informed of possible objections made by the IMPI to the application based on legal impediments or previously existing registered trademarks. Should there be no impediments, the IMPI authorizes the registration to issue. In Mexico there are no opposition proceedings. It is only possible for third parties to challenge a trademark once it becomes registered. If there are objections, then the applicant has up to 4 months to respond to the office action and wait for a final decision from the IMPI.

A franchise agreement may be granted if there is only a pending application to register the trademark to be licensed.

2. Registration of Licenses of Trademarks

While it is not mandatory to record franchise or license agreements in Mexico, such trademark license must be registered with the IMPI in order to be effective against third parties. Also, it is advisable to do so in order to evidence effective use and protect the trademark registrations granted by the license in the event a third party challenges the marks. Likewise, for import-export and tax purposes, in order to have an acknowledgment (office action) by the IMPI indicating that the franchisee/licensee is an authorized user, the agreement must be recorded at the IMPI. For recordation of the agreement, certain items must be included: indication of the trademark(s) licensed; any restrictions on the goods and services subject to the trademark licensed; indication of whether the licensee has the authority to file infringement actions against third parties. Both franchise and license agreements may be registered at the IMPI.

It is important to mention that provisions related to royalties and other economic and confidential information may be omitted. It is advisable to execute a summarized version of the franchise agreement, in Spanish or in a bilingual form, omitting the confidential information. Special powers of attorney for local counsel must be granted by the franchisee and the franchisor to complete such recordation if local counsel is not the attorney in fact for the franchisor’s trademark registrations.

The license registration process takes approximately 6 to 8 months.
3. Execution Formalities

An agreement executed in any foreign language is valid in Mexico. There are no restrictions concerning the language of the agreement, other than that for recording purposes at the IMPI, the document must be either bilingual or in Spanish.

There is no requirement that the franchise agreement be executed in the presence of a Notary Public. The franchise agreement does not have to be legalized or apostilled.

H. The Court System and Recent Court Decisions

1. Court System

The Mexican judiciary is a separate branch of the Mexican Government charged with the administration of justice by the Constitution. There are different types of courts depending on the subject matter of the dispute. The judiciary is independent of the legislative and executive branches and assures fair public trials. There is no connection to the IMPI, and the two institutions are fully independent bodies.

In cases concerning franchise controversies or disputes, where arbitration is not provided for in the parties’ agreement, the jurisdiction should be local court in the place the parties agreed upon in the franchise agreement. Generally, the local courts will make the initial ruling, but there will be a chance to file an appeal at a superior court and finally a constitutional appeal, an amparo at a federal court.

2. Recent Decisions

Although there are not a sufficient number of cases or resolutions in relation to franchise agreements to establish a clear precedent or criteria for Mexico, there is a recent landmark case on the enforcement of a non-competition clause dated February 2010.

The parties in this case were Italian Coffee, S.A. de C.V. (Franchisor coffee chain store) which accused its former franchisee, Mr. Ruben Fernández Valadéz, of infringing The Italian Coffee Company’s system after the termination of the franchise agreement as well as the violation of the non-competition clause set forth in the franchise agreement. The franchisor claimed the recognition and fulfillment by the franchisee of the obligations provided in the confidentiality clause, the non-competition clause and the obligation not to use the marks, interests, titles, recipes, etc. The franchisor provided the court with proof that the franchisee, through his wife (Susana Reynoso) and former employee (Margarita Gomez Diaz), had been operating a similar, if not identical, business to The Italian Coffee Company franchise under a different name. As a result, the court ruled that the non-competition obligation was violated and that the former franchisee, including his wife and former employee, were responsible for the payment of damages in favor of the franchisor. Following is a translation of the three main sections of the decision issued by the court:

Second. - We hereby recognize the obligation of confidentiality accepted by the defendant, RUBEN FERNANDEZ VALADEZ, by executing the settlement agreement dated January 22, 2007, on which this action is based with the plaintiff, accepting, among other things, to cease any disclosure to any third party, foreign or national, at any time, of the confidential information property of the plaintiff, as well as to abstain from conserving, copying, duplicating, recording
or reproducing in any other way the manuals and/or confidential information totally or partially, property of the plaintiff.

Third. - We hereby declare the obligation of non-compete that the defendant accepted through the execution of the settlement agreement with the plaintiff, dated January 22, 2007, which consists, among other things, of participating directly or indirectly, by means of capital stock of a company, entity, organization association, joint-venture, trust or in any other way, or by participation of kind in any business identical or similar to the one described in the FRANCHISE AGREEMENTS, nor possessing, managing, counseling or any type in the investment of establishment of goods that share similar characteristics....

Fourteenth. - The present resolution also applies with prejudice to the third parties called forth to this trial, SUSANA REYNOSO AYALA and MARGARITA GOMEZ DIAZ.

This may be an important precedent for franchisors in Mexico, guaranteeing protection of their franchise system before judicial courts, even after the agreement is terminated.
IX. Panama

A. Regulation of Offers and Sales of Franchises

1. Laws

The laws that apply to franchises in Panama are the ones that also regulate license agreements. The franchisor-franchisee relationship is governed by Chapter IV of the Law 35 of 1996 and by the commercial and civil laws of general applicability (i.e. Commerce Code and the Federal Civil Code). In the licensing laws, in Chapter IV Article 126 of the Law 35 of 1996, there is a brief definition of the term “franchise”:

A franchise exists when a trademark license of use is granted, along with technical knowledge or technical assistance, for a person to produce or sell goods or provide services, in a specific manner, with operative, commercial and administrative methods established by the holder of the mark, in order to preserve the quality, goodwill and image of the goods or services provided under the mark.

The owner of a trademark may by contract license the use of the mark, to one or more persons, for all or part of the goods or services covered by the trademark registration.

Both franchise agreements and “know-how” agreements are non-standard, atypical contracts, which by their nature are not regulated under Panama’s legal system. However, the fact that they are not regulated does not mean they are not valid or enforceable. This means that the parties are free to establish agreements and clauses to which they will be bound as long as they do not violate any law, morals or public order.

a. Disclosure Laws

There are no specific requirements pertaining to the disclosure of information in connection with franchise sales. There are no general civil law requirements in this regard.

b. Commercial Agency Laws

Currently, there is no commercial agency law in Panama that could affect franchising.

2. Government Agency Regulation

There is no government agency in Panama which regulates franchising.

B. Governing Law and Dispute Resolution

1. Governing Law

The parties are free to select another law for the contract different from the law of Panama.

2. Arbitration

Panama has ratified the New York Convention, and thus the parties can agree on arbitration for resolution of disputes.
3. Foreign Judgments

Foreign judgments are enforceable in Panama by Panama courts. The foreign judgment must be furnished to the Supreme Court of Justice and the Court must notify, within five (5) business days, both the defendant and the Attorney General’s Office. If there is pending evidence to be developed or if the defendant addresses other facts, the Supreme Court shall grant fifteen (15) days for such purposes. If the Supreme Court decides that the foreign judgment may be enforced, the Supreme Court will request the competent court in Panama to proceed with its enforcement. If the foreign judgment is not in compliance with certain requirements, the Supreme Court has the authority to deny its acceptance or enforcement.

4. Injunctive Relief

In Panama there is no injunctive relief. However, under Panama law, there are precautionary measures but these are only applicable to intellectual property rights.

C. Taxes

Panama has no treaty in effect with any foreign country for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and wealth, although current negotiations regarding double taxation treaties are being held with Barbados, Spain, Italy, France, Qatar, Belgium and México.

Pursuant to local Panama regulations, withholding taxes are imposed on payments of royalties as well as payment of other fees typically charged under a franchise agreement (marketing fund charges, technical services, and other fees for services) at a rate of 13.75% for 2010 and 12.50% for 2011 and subsequent years.

There is no prohibition against the use of “gross up” provisions in franchise agreements. The withholding rate is applied to the gross amount to be paid by the franchisee to the foreign franchisor as indicated on the invoice provided by the franchisor.

D. Foreign Exchange Controls

In Panama, laws or regulations restricting the franchisee’s ability to make payments to a foreign franchisor in the franchisor’s domestic currency do not exist.

E. Competition Laws

Although there is a Competition Law, it is not applicable to franchise agreements.

1. Prohibition on Common Franchisor Practices

In general, any restrictions, limitations and restrictions will be subject to the parties’ agreement.

2. Restrictive Covenants

In Panama, a franchisor may prevent a franchisee from engaging in a competing business during the term of the franchise and even beyond that term. There are no specific regulations or criteria of the Panama courts regarding covenants not to compete. However, if
the franchisee considers that such covenant, once the agreement has expired or is terminated, is affecting its personal rights based on the Panama Constitution, the franchisee may challenge the validity of such covenant in the competent courts of Panama.

F. Relationship Laws

The franchisor-franchisee relationship is governed by Chapter IV of Law 35 of 1996 and by the commercial and civil laws of general applicability (i.e. Commerce Code and the Federal Civil Code). Franchise agreements may include common provisions which are usually found in franchise agreements world-wide, such as termination for convenience, rescission, conventional penalties (similar to the concept of liquidated damages under the laws of the U.S.), non-compete, non-solicitation, joint obligations or parent company guarantees, alternative dispute resolution mechanisms, etc.

1. Default

The principles of good faith and protection of the parties’ contractual relationship should prevail, allowing the parties to cure, if at all possible and within mutually acceptable terms, any defaults. However, there is no obligation to provide a cure period in favor of the defaulting party. Either party in default is liable for any damages caused to the non-defaulting party.

2. Termination

In general, the parties’ termination rights are only subject to the terms of the franchise agreement.

3. Nonrenewal

There is no law requiring that a franchisor must renew a franchise agreement.

G. Trademark Requirements and Licensing Considerations

1. Trademark Registration

As in many other Latin American countries, the registration process for trademarks closely resembles the process in the U.S., with a key difference being that a declaration of use is not obligatory.

A franchise agreement can be granted even if there is no trademark application filed. However, for registration purposes of the franchise agreement, it is mandatory to have a trademark registration.

2. Registration of Licenses of Trademarks

Trademark license agreements must be recorded in the General Direction of Industrial Property Registration of Panama by legal counsel with appropriate powers of attorney. A certified copy or original of the license agreement must be presented. Generally, a separate license agreement is executed along with the franchise agreement for compliance with this obligation.
Each license agreement must include the following: (i) the names, nationalities, place of incorporation, the addresses of their principal place of business and identity numbers of both parties; (ii) the names of the mark(s) with a description, registration number and registration date; (iii) description of the goods and services protected by the mark(s); and (iv) the type and duration of the license. It is possible for the franchise agreement to be recorded as a license agreement; however, given the limited requirements for the trademark license agreement, it is common practice to execute a separate license that includes only the information that Panamanian law requires.

3. Execution Formalities

In order for the legal transactions to have full effect before third parties, they must be annotated or recorded in the respective trademark registrations in the General Direction of Industrial Property Registration of Panama. Such registration is of vital importance for franchise rights to be enforced not only between the signing parties, but also against third parties.

H. The Court System and Recent Court Decisions

1. Court System

Judicial authority rests with the Supreme Court, composed of nine magistrates and nine alternates, all appointed by the President (subject to approval by the Legislative Assembly) for 10-year terms. The Supreme Court magistrates appoint judges of the superior courts, who in turn appoint circuit court judges in their respective jurisdictions. There are 4 superior courts, 18 circuit courts (one civil and one criminal court for each province), and at least one municipal court in each district.

At the local level, two types of administrative judges, "corregidores" and "night" (or "police") judges hear minor civil and criminal cases involving sentences of less than one year. Appointed by the municipal mayors, these judges are similar to Justices of the Peace. Their proceedings are not subject to the Code of Criminal Procedure and defendants lack procedural safeguards afforded in the regular courts.

The Constitution guarantees a right to counsel for persons charged with crimes and requires the provision of public defenders for indigent criminal defendants. Trial by jury is afforded in some circumstances.

The 1996 amendment to the Constitution abolished the standing military and contains a provision for the temporary formation of a "special police force" to protect Panama's borders. The Judicial Technical Police perform criminal investigations in support of public prosecutors. The Constitution also provides for an independent judiciary; however, the judiciary is susceptible to corruption.

The legal system is based on the civil law system.

Panama accepts the compulsory jurisdiction of the International Court of Justice with reservation.
2. Recent Decisions

Due to the specific and atypical nature of franchise agreements in Panama, there are no relevant court decisions related to franchising.
X. Peru

A. Regulation of Offers and Sales of Franchises

1. Laws

a. Disclosure Laws

There are no specific laws or regulations in Peru that regulate franchise contracts, nor is there any law or regulation that requires pre-sale disclosure in the context of franchise contracts. Thus, franchise contracts are treated as “atypical contracts” that are subject to the general civil and commercial laws and regulations, as well as laws and regulations on competition, intellectual property and other related areas, including the following:

- Decision N° 291 Regime for the Common Treatment of Foreign Capitals and Trademarks, Patents, Licensing Agreements and Royalties of Commission of the Cartagena Agreement.
- Legislative Decree N° 662: Law approving Regime of Legal Stability to Foreign Investment.
- Supreme Decree N° 162-92-EF: Regulations of the Legislative Decree N° 662.
- Legislative Decree N° 807: Law on Faculties, Norms and Organization of the National Institute in Defense of the Competence and of Protection of the Intellectual Property (INDECOPI), as far as it corresponds.

b. Commercial Agency Laws

There is no specific designation of the franchisee as the agent of the franchisor in Peruvian legislation. The laws regulating the commercial agencies in Peru do not affect the legal relationships between the franchisor and franchisee in any specific way different from other forms of independent contractor relationship.

2. Government Agency

The entity in charge of regulation and registration of foreign franchises in Peru is the National Institute off Defense of the Competence and of Protection of the Intellectual Property – INDECOPI, more specifically, the Office of the Distinctive Marks – Area of the Register of Transfers of Foreign Technology. This Agency establishes the requirements for effecting a registration of a technology license or transfer: format of request, indication of the name of the owner of the trademark that will be the object of exploitation, respective payment check and other documents including charter of the company, copy of the contract for transfer of foreign technology, etc.
B. Governing Law and Dispute Resolution

1. Governing Law

Under Peruvian law, the parties are free to select the law that will govern their contract in cases of disputes, controversies or differences of interpretations. The only exceptions in the application of foreign law in Peru are in case its application is incompatible with the international public order or good customs.

2. Arbitration

Peruvian law permits the parties to include in the franchise agreement an arbitration clause. Peru ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards on July 7, 1988.

It is strongly recommended in Peru to resolve all conflicts through arbitration or other alternative dispute resolution methods, as the judicial system of Peru is not sufficiently efficient, and will cause significant delays.

3. Foreign Judgments

The Civil Code regulates recognition of foreign judgments in Peru. In civil matters, the foreign judgments are recognized in accordance with the relevant international agreement between Peru and the country that issued the judgment. If there is no such international agreement with the respective country, the foreign judgment will be enforced based on the principle of reciprocity. Consequently, if the judgment is issued in a country that does not recognize Peruvian judgments, it will have no legal force in Peru.

4. Injunctive Relief

Injunctive relief (Reparación judicial por mandato judicial) is available in Peru, either through the local courts or INDECOPI, for precautionary measures to protect intellectual property rights.

C. Taxes

Franchisors that reside or are domiciled in Peru are subject to a corporate income tax of 30% (on their net income). Foreign franchisors are subject to a non-resident withholding tax of 30% (on the gross revenue received from the franchisee in Peru). There is no exemption available for the withholding tax.

Additionally, royalties paid by the franchisee to either a domestic franchisor or a foreign franchisor will be subject to a 19% VAT.

D. Foreign Exchange Controls

Peruvian law does not restrict the payment by Peruvian franchisees to foreign franchisors in foreign currencies. Based on (a) Article 4 of the Decision Nº 291 Regime for the Common Treatment of Foreign Capitals and Trademarks, Patents, Licensing Agreements and Royalties of Commission of the Cartagena Agreement, (b) Article 7 of the Legislative Decree Nº 662 Law approving Regime of Legal Stability to Foreign Investment, and (c) Article 5 of the
Supreme Decree Nº 162-92-EF Regulations of the Legislative Decree Nº 662, royalties can be paid in a freely convertible currency without any authorization of the central government or public decentralized organisms, regional governments or municipal governments. The condition is that their investment must be registered in Peru and must not affect the corresponding tax obligations.

E. Competition Laws

In Peru, the key legislation on unfair competition is Legislative Decree Nº 1044 Law of Repression of Unfair Competition. The agencies chiefly responsible for enforcing this law are the Commission of the Supervision of the Disloyal Competition of INDECOPI, and its Chamber of the Defense of Competition. The agency can initiate investigations on its own or based on consumer complaints.

Article 14 of Decision Nº 291 Regime for the Common Treatment of Foreign Capitals and Trademarks, Patents, Licensing Agreements and Royalties of Commission of the Cartagena Agreement provides that for registration of the contracts for the transfer of foreign technologies, trademarks or patents, the following provisions are not allowed:

- Clauses where the licensee is required to acquire from one designated source the goods of capital, intermediate products, prime materials or other technologies or to use permanently personnel appointed by the licensor;
- Clauses through which the licensor fixes prices of sales of the products by the licensee;
- Clauses that prohibit use of competitors’ technologies;
- Clauses that establish an option to purchase, in total or partially, in favor of the provider of technology;
- Clauses that obligate the buyer of the technology to transfer to the provider, the inventions or improvements obtained through use of the mentioned technology; and
- Clauses that obligate the licensee to pay royalties to the owners of patents or trademarks which are not used or have expired.

In addition, Chapter III of Title III of the Legislative Decree Nº 1034, which approved the Repression of Anticompetitive Conduct, covers “collusions” in the market, such as: to establish, impose or suggest contracts of exclusive distribution or sales, unjustified non-competition and similar clauses, sharing of clients, price fixing, and unequal conditions for equal performances. However, for such a “collusion” to exist in a franchise agreement (which is a form of vertical relationship), then at least one party must have a dominant position in the relevant market.

F. Relationship Laws

In Peru, there are no specific regulations regarding the franchisor-franchisee relationship. Rather, the relationship is regulated by the norms of the Civil Code, which regulates all contracts in general, giving preeminence to the will and intention of the parties (Pacta Sunt Servanda).
1. **Defaults**

The Civil Code does not require any mandatory cure period. It provides for compensation for damages caused by the failure to perform obligations contained in the contract, or any partial, faulty or delayed performance.

2. **Termination**

The Civil Code allows termination in situations including: failure to perform, impossibility to perform, or otherwise in accordance with the contract. If a contract is found to be of an indefinite term, either party may terminate the contract on 30 days’ written notice.

3. **Nonrenewal**

Peruvian legislation leaves the renewal of the contracts to agreement between the parties.

**G. Trademark Requirements and Licensing Considerations**

1. **Trademark Registration**

The Office of the Distinctive Marks at INDECOPI is in charge of trademark registrations in Peru. The following documents and information will be required in applying for a trademark registration:

- an application filled out with the required information;
- power of attorney forms and authorizations, if necessary;
- the trademark, as well as its reproduction in case it contains any graphical elements;
- specification of the products, services or economic activities it will refer to, as well as the class (classes) to which they belong;
- if appropriate, any claimed priority; and
- an application fee.

If the agency determines that the application is incomplete, 60 working days will be given to rectify the deficiency. Once a complete application is submitted, the Office of the Distinctive Marks at INDECOPI will have 15 days to carry out a formal evaluation. Once the review is completed, the application will be published, and any opposition will need to be filed within 30 working days thereafter. The trademark holder can license trademark rights as long as a trademark application is in process.

2. **Registration of Licenses of Trademarks**

Articles 161 and 162 of the Decision Nº 486 Common Regime of the Industrial Property provide that all licenses of transfer and use of trademarks must be registered before the competent national institution (that is, INDECOPI). Failure to register will not affect the
effectiveness of the license between the parties, but will render the license ineffective against third parties.

3. **Execution Formalities**

It is strongly recommended that all franchise agreements be in writing, and be converted into a public instrument (by giving a public notice by notary), or have the signatures rectified by the notary. Legalization is not required. Also, a local lawyer is not required for the process of registration. It can be carried out by a representative of the company, as long as he/she is properly authorized. A local representative is necessary for judicial procedures.

**H. The Court System and Recent Court Decisions**

1. **Court System**

The Peruvian court system consists of the following:

- The Supreme Court of Justice of the Republic;
- The Superior Courts of Justice in respective judicial districts;
- The Specialized and Mixed courts in the respective judicial districts;
- The Justice of Peace Courts in the respective cities or villages; and
- The Piece Courts.

The Supreme Court is the organ of cassation and in certain cases also an organ of first instance. The Superior Courts have the seat in the cities assigned by law. Their competence extends within the correspondent Judicial District. The Departments of the Superior Courts resolve in the second and the last instance except the cases determined by law. There is at least one Specialized or Mixed court in each Province. Its seat is in the capital of the Province and its competence is within the province, except the different disposition by law of the Executive Council of the Judicial Power.

The Justice of Peace Courts deal with the civil, criminal and labor cases in the districts which alone or joined reach the necessary demographical amount to comply with the requirements established by the Executive Council of the Judicial Power. They can also execute determined functions of notary.

The Judge of Piece is generally a judge of conciliation. Consequently, he is authorized to propose alternative solutions to the parties with the purpose of facilitating their conciliation, but he is prohibited from imposing an agreement.

2. **Recent Decisions**

There are no court decisions of importance regarding franchise agreements.
XI.  Venezuela

A.  Regulation of Offers and Sales of Franchises

1.  Laws

In Venezuela a franchise agreement is considered a “special” contract due to the fact that it is not governed by specific rules in a statute that sets forth the rights and obligations between the parties. Although there is no current legislation regarding franchises, this does not mean that franchise agreements are not enforceable. In general terms, the Civil Code, Commercial Code, Industrial Property Law, and Resolution No. SPPLC-038-99 issued by the Popular Ministry of Commerce, through the Superintendency for the Promotion and Protection of Free Competition, among others, may apply.

Even though there is no specific law as to franchises in Venezuela, the laws and guidelines applicable to franchise contracts and the franchise relationship include the following:

- The Venezuelan Civil Code.
- The Commercial Code.
- The Tax Code.
- The Organic Law of Labor.
- Guidelines for the Evaluation of Franchise Contracts.

It is important to mention that Article 10 of the Law for the Defense of People’s Access to Goods and Services expressly prohibits the following agreements or concerted practices:

- to fix prices and other terms of marketing or service;
- to limit production, distribution and technical or technological development of investments;
- to allocate markets, territorial areas, sectors or sources of supplies between competitors;
- to apply in commercial relations or to services unequal conditions for equivalent severance payment that place competitors in a situation of disadvantage before others; and
- to subordinate or to condition the acceptance of contracts to include supplementary severance payments that are not related to the object of such contracts.

According to Article 18(3) of the Law for the Defense of People’s Access to Goods and Services, franchise agreements must comply with the following:
the franchisee may freely obtain products subject to the franchise from other franchisees, even though those products were distributed through another network of authorized distributors;

- if the franchisor obliges the franchisee to provide a guarantee for the franchisor’s goods, this obligation will be extended to products supplied by any member of the franchised network, or other distributors that apply a similar guarantee in the national market; and

- the franchisee should be obliged to indicate their capacity as an independent trader.

In the Resolution No. SPPLC-038-99 dated July 9, 1999, under which Guidelines for Evaluation of Franchise Contracts were issued (the “Guidelines”), certain restrictions on competition are expressly permitted, but the following types of restriction are expressly excluded from this authorization:

- Companies producing goods or providing services that are identical, or considered similar by the user because of their properties, price and use, to those provided under franchise agreements relating to such products or services.

- The franchisee is prevented from sourcing equivalent products to those offered by the franchisor.

- The franchisee is obliged to sell, or use in connection with the provision of services, products manufactured by the franchisor or others designated by it, where the franchisor refuses, on grounds other than the protection of know-how of the franchisor or the maintenance of common identity and prestige of the franchised network, to consider others proposed by the franchisee as licensed manufacturers.

- The franchisee is prevented from continuing to use the know-how granted after the expiration or termination of the contract, when such know-how has become generally known or easily accessible other than through the franchisee’s violation of its confidentiality obligations.

- Direct or indirect restrictions are imposed on the franchisee in setting the selling prices of goods or services covered by the franchise, without prejudice to the franchisor recommending these prices.

- The franchisee is prohibited from challenging the validity of industrial property rights or intellectual property forming part of the franchise, without prejudice to the franchisor terminating the agreement under such circumstances.

- The franchisee is obliged not to provide, within the domestic market, products or services covered by the franchise to final users because of their geographic location.

  a. Disclosure Laws

There is no specific law that regulates disclosure of information prior to the offer or sale of a franchise.
VENEZUELA

b. Commercial Agency Laws

In Venezuela there are no laws that define or regulate distributors or commercial agents.

2. Government Agency Regulation

There are no government agencies regulating the offer and sale of franchises in Venezuela. However, when a foreign franchisor is a party to a franchise agreement with a Venezuelan entity, the foreign franchisor must apply for registration before the Superintendence of Foreign Investments, a private institution, regulated by the Venezuelan Chamber of Commerce. If the agreement is not registered, the franchisee will not be able to process the payment of royalties abroad; please see Section D below (Foreign Exchange Controls).

B. Governing Law and Dispute Resolution

1. Governing Law

Under Venezuelan law, the parties are free to select the governing law of a franchise agreement.

2. Arbitration

Venezuela ratified the New York Convention in 1994. The parties to a franchise agreement may choose that any disputes will be resolved by arbitration, and they may select another country for the seat of arbitration proceedings.

Article 48 of the Commercial Arbitration Law provides that an arbitral resolution, notwithstanding its country of origin, must be recognized by the Venezuelan courts as obligatory and not subject to appeal. After filing a written brief before the lower courts, without need of exequatur, and pursuant to the provisions of the Code of Civil Procedure for the execution of sentences, the award may be enforced.

3. Foreign Judgments

Foreign judgments are enforceable via exequatur from the corresponding authority. In order to enforce a foreign judgment in Venezuela, the following requirements must be met:

- the judgment must be of civil or commercial nature or any other relationship related to private law;
- the judgment must be definitive, pursuant to the applicable law, with no pending appeals;
- the judgment must not affect an interest in real estate located in Venezuela;
- the foreign judge or corresponding authority has jurisdiction and the capacity to resolve the matter in accordance with the general principles found in Venezuelan law;
- the defendant was duly notified with sufficient time to appear before the court and due process of law was guaranteed; and
• the judgment does not conflict with a previous judgment in, or a case under appeal before, Venezuelan courts, if such case involved the same matter and parties and was initiated before the foreign judgment was issued.

4. Injunctive Relief

In Venezuela, there is no injunctive relief.

C. Taxes

Venezuela has double taxation treaties in effect with various countries, including the United States (which was signed on January 5, 2000). Pursuant to such treaty, the tax withholding rate for payments of royalties as well as other fees typically charged under a franchise agreement (marketing fund charges, technical services, and other fees for services) is 10%.

D. Foreign Exchange Controls

Recently, by Presidential Decree, the Central Bank of Venezuela, which is controlled by the Government, has stopped all authorizations for monies payable abroad. In other words, it is not now possible for franchisees to pay royalties to franchisors located outside Venezuela. The underlying reason for this restriction is apparently Venezuela's current deficit in foreign reserves and its dependency on imports.

The currency in Venezuela, the Bolivar, is not accepted outside Venezuela. These policies have created a “black market” for U.S. dollars in Venezuela, since it is not possible for the people of Venezuela to possess or pay in U.S. dollars. Furthermore, the Criminal Code establishes as a felony the sale or exchange of U.S. dollars within the Venezuelan territory. This is the toughest exchange control regime ever seen in Latin America.

It is of critical importance to franchisors to determine the best way to deal with this exchange control restriction, since franchisees will be in default by not paying royalties as agreed in the contract. It is important to mention that franchisors can have a bank account in Venezuela in order to receive payments from franchisees in Bolivars, but that all monies in such accounts must remain in Venezuela.

E. Competition Laws

There are two important laws in relation to competition that apply to franchises in Venezuela: (a) Law to Promote and Protect the Exercise of Free Competition; and (b) Law for the Defense of People’s Access to Goods and Services. Both laws are enforced through the Venezuelan courts.

1. Prohibition on Common Franchisor Practices

Other than discussed above, there are no specific Laws in Venezuela that address a prohibition on common franchisor practices. In general, limitations or restrictions will be subject to the parties’ agreement.
2. **Restrictive Covenants**

Parties may be bound to exclusivity and non-compete provisions to the extent that they sign the agreement by giving their consent.

**F. Relationship Laws**

As mentioned above, there are no laws in Venezuela that apply specifically to the franchisor-franchisee relationship. A franchise agreement is considered as a non-typical commercial agreement.

A franchise agreement could also be subject to the general rules of contracts contained in the Commerce and Civil Codes (articles 1160 and 1167).

The principle of freedom of contract applies to franchise relationships. Each of the franchisor and franchisee will be obligated in the manner and under the terms voluntarily agreed to by them, without the need to observe any formalities or requirements in order for the franchise agreement to be considered valid under Venezuelan law.

1. **Defaults**

Any right to cure any event of default provided by the parties will be subject only to the parties’ agreement. There is no interference by any law or by any competent authority in Venezuela.

2. **Termination**

In general, agreements in Venezuela may be terminated pursuant to the agreement of the parties. In other words, the termination of a franchise agreement is possible under the circumstances agreed by the parties and subject to terms and conditions agreed by them.

3. **Nonrenewal**

The nonrenewal of any contract in Venezuela will be subject to the parties’ terms and conditions agreed among them.

**G. Trademark Requirements and Licensing Considerations**

1. **Trademark Registration**

Trademark applications must be submitted to the Venezuelan Trademark Office, which is part of the Venezuelan Chamber of Commerce.

When an application is filed, the Trademark Office issues a receipt that accompanies the application indicating that the application was filed. Such receipt contains a filing date and serial number.

It takes about six (6) to twelve (12) months to be informed of possible objections made *ex-officio* by the Trademark Office to the application based on existing registered trademarks or notoriety issues. Should there be no objection, the Registry authorizes an announcement to be published for 60 consecutive days, at the applicant’s cost in the Official Gazette, giving public notice of the application. The announcement gives a term of 60 days from the date of
publication for filing any opposition to the application: In the case of oppositions, the matter is decided by the Trademark Office within 18 to 36 months (it may take longer in certain cases).

It takes between 8 and 12 months after the filing date to complete the registration process, provided no objections are made *ex officio* by the Registry, and no oppositions filed against the application. Upon registration, the Trademark Office will issue a registration certificate.

A franchise agreement may be executed before the licensed trademark has been registered.

2. **Registration of Licenses of Trademarks**

It is not mandatory to record licenses of trademarks in Venezuela; however, it is advisable to do so, particularly if the franchisor is interested in letting third parties know the extent and limitations under which the franchise may operate and trademarks be used. Thus, registration of the license of use of the trademarks gives publicity to the parties’ arrangement not only between them, but also vis-à-vis third parties, particularly if a local authority needs to be involved as a result of a dispute between the parties. The franchisee benefits from the license registration inasmuch as its right to use the mark will be recognized by the Venezuelan intellectual property authorities.

The license registration process takes approximately one (1) to two (2) months.

If the trademark license is not registered, but trademarks are registered and are actively operating in the market, abandonment cannot be claimed. On one hand the franchisor has a number of documents (including the franchise agreement) to prove the terms of such trademark use. As to third parties, lack of publicity of a franchise arrangement is not *per se* a cause of abandonment of the corresponding trademarks, much less if such trademarks are notorious and, in fact, actively operated in the market.

3. **Execution Formalities**

If recordation is desired, a trademark license of use agreement should be executed separately from the franchise agreement since the Venezuelan Trademark Office will not record a franchise agreement.

The license agreement should be drafted in Spanish, but it can be executed as a bilingual document and registered in such format. Should the document be executed abroad, notary formalities, along with apostille, would be required.

A power of attorney should be issued by both the franchisor and franchisee, in favor of the franchisor’s counsel, to proceed with recordation of the document.

The license should specify the following:

- Information about the corporate identity of the franchisor and the franchisee.
- Complete information about the trademark, including the licensed trademark registration and/or application information.
- Type of license, term and territory to be covered.
- Indication of any exclusivity issues affecting the license in connection with the territory.
- Limitations to the license, if any.

If the franchisor desires to reserve the right to cancel the license prior to the end of its term, such condition should appear in the license agreement. Cancellation can be requested by the franchisor by means of a written request filed with the Venezuelan Trademark Office.

H. The Court System and Recent Court Decisions

1. Court System

The parties, if they choose Venezuelan jurisdiction, may file claims before the Venezuelan courts. If they choose arbitration in Venezuela, the petition must be filed before the Caracas Chamber of Commerce, home of the Arbitration Tribunal.

2. Recent Decisions

No judicial decisions were provided by local counsel. However, the serious impact of the foreign exchange controls described in Section D above should be seriously considered by prospective franchisors considering entry into the Venezuelan market.
## LIST OF LOCAL CONTRIBUTORS

### ARGENTINA

Guillermo J. H. Mizraji  
Attorney-at-law  
Estudio Mizraji & Dabah  

Av. de Mayo 1130, Piso 3º "E", (1085)  
Buenos Aires. República Argentina  
Tel./Fax: (54-11) 4381-5191/4371; 4383-4399; 4814-4268  
Email: gmizraji@estudiomd.com; estudio@estudiomd.com  
www.estudiomd.com

### HONDURAS

Dr. Roberto Zacarías Jr., Esq.  
Zacarias & Asociados  

Iaza Azul, Segunda Piso  
15-16 Ave. 7a. Calle, N.O.  
1/2 Cuadra al Sur Hotel Los Andes  
Barrio Los Andes  
San Pedro, Sula  
Honduras  
Tel.: (504) 557-1161  
Fax: (504) 557-1137  
Email: rzacarias@zaalaw.com  
www.zaalaw.com

### CHILE

Juan Alberto Díaz Wiechers  
Abogado  
DíazWiechers, Propiedad Intelectual  
Vitacura 2909 Of. 902  
Las Condes  
Santiago, Chile  
Tel.: (56-2) 2343982  
Fax: (56-2) 2340290  
Cell: (56-9) 84499531  
Email: juanalberto@diazwiechers.com  
www.diazwiechers.com

### MEXICO

Pablo Hooper  
Gonzalez Calvillo, S.C.  

Montes Urales No. 632 Piso 3  
Lomas de Chapultepec, 11000  
Mexico  
Tel.: (5255) 5202 7622  
Fax: (5255) 5520 7671  
Email: phooper@gcsc.com.mx  
www.gscs.com.mx

### COLOMBIA

Eduardo Zuleta J.  
Gómez-Pinzón Zuleta Abogados S.A.  

Calle 67 No. 7-35 Oficina 1204  
Bogotá  
Colombia  
Tel.: (571) 319 2900 Ext. 928  
Fax: (571) 321 0295  
Email: ezuleta@gpzlegal.com  
www.gpzlegal.com

### PANAMA

Miguel A. De Puy III  
De Puy & Asociados  

Ocean Business Plaza  
Mezanie Floor, Suite 318  
Aquilino De La Guardia Ave., 47th Street  
Urbanización Marbella  
P.O. Box 0831-01852  
REP. OF PANAMA  
Tel: (507) 340-0258  
Fax: (507) 340-0250  
Email: mdp@depuylaw.com  
www.depuylaw.com
<table>
<thead>
<tr>
<th>Country</th>
<th>Name</th>
<th>Address</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>COSTA RICA</td>
<td>Carlos M. Valverde</td>
<td>Aptdo. 5173-1000</td>
<td>Tel.: +(506) 2256-5555, ext. 739</td>
</tr>
<tr>
<td></td>
<td>Facio &amp; Cañas</td>
<td>San José, Costa Rica</td>
<td>Fax: +(506) 2233-9091</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Email: <a href="mailto:cvalverde@fayca.com">cvalverde@fayca.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><a href="http://www.fayca.com">http://www.fayca.com</a></td>
</tr>
<tr>
<td>PERU</td>
<td>Raúl Lozano Merino</td>
<td>Jr. Junín 165</td>
<td>Tel.: (511) 444-7903 447-3853 447-5414</td>
</tr>
<tr>
<td></td>
<td>Socio, Peña, Lozano, Faura &amp; Abogados</td>
<td>Miraflores, Lima 19</td>
<td>Fax: 444-3061;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Perú</td>
<td>Cell: (511) 99142-8911</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Netel: (511) 401*8657</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><a href="http://www.plf-abogados.com">www.plf-abogados.com</a></td>
</tr>
<tr>
<td>EL SALVADOR</td>
<td>Gladys Marina Chavez</td>
<td>KM 12.8 calle Planes de Renderos a</td>
<td>Tel.: (503) 77863215; (503) 25319597; (503) 21013186</td>
</tr>
<tr>
<td></td>
<td>Dr. Rogelio Alfredo Chávez, Gladys Marina Chávez y Lucía Borjas Chávez.</td>
<td>Panchimalco (Albaclara), El Salvador, C.A.</td>
<td>Email: <a href="mailto:gladys_marina@hotmail.com">gladys_marina@hotmail.com</a>; <a href="mailto:gladysmarinachavez@gmail.com">gladysmarinachavez@gmail.com</a>;</td>
</tr>
<tr>
<td>VENEZUELA</td>
<td>Enrique Cheang V.</td>
<td>Calle La Iglesia, Edificio Centro Solano Plaza I</td>
<td>Tel.: (58 212 ) 761 7674 Master</td>
</tr>
<tr>
<td></td>
<td>E C V &amp; ASOCIADOS</td>
<td>Piso 4, Oficina 4-A, Urbanización Sabana Grande</td>
<td>Fax: ( 58 212 ) 761 7928</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Caracas 1050</td>
<td>Email: <a href="mailto:registros@ecv.com.ve">registros@ecv.com.ve</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td>República Bolivariana de Venezuela</td>
<td><a href="http://www.ecv.com.ve">www.ecv.com.ve</a></td>
</tr>
</tbody>
</table>
PABLO HOOPER

Pablo Hooper is a Partner of Gonzalez Calvillo, S.C. Law Firm in Mexico City. He received his law degree from the Universidad Panamericana (Mexico City) in 1998 and has obtained several postgraduate degrees in Intellectual Property Law, Licensing, Contracts and Entertainment Law from the Franklin Pierce Law Center (Concord New Hampshire), Escuela Libre de Derecho (Mexico City), Universidad Panamericana (Mexico City), and the Centro de Extensão Universitaria (São Paulo, Brazil).

He has an extensive experience in rendering Intellectual Property advice to domestic and foreign companies and individuals. For over 15 years he has led the Firm’s Intellectual Property Department, providing expert counsel in areas including licensing, franchising, trademarks, entertainment law, and litigation within those areas. He has assisted and discussed with the Congress of Mexico (Camara de Diputados) with several amendments to trademark and franchise regulations in Mexico. On year 2005, he was elected as one of the most experienced Intellectual Property Lawyer in Latin America.

Further, Pablo Hooper has given lectures, served as speaker and moderator in conferences organized by the University of Texas, TEC Monterrey, Universidad Panamericana, Franchise Show in Mexico, the International Franchise Association and the International Bar Association, among others. He has participated in several courses and seminars around the world related with trademarks, copyrights, patents, licensing and entertainment law. Pablo Hooper has also published various articles in regard to licensing and franchising matters published by US Editors.

Additionally, Pablo Hooper is an active member of the faculties of the Universidad Panamericana and of the Escuela Libre de Derecho; being the most prestigious Law Schools in Mexico.

Pablo Hooper is the representative of Gonzalez Calvillo, S.C. before the International Trademark Association, is member of the International Franchise Association and member of the Steering Committee at the Franchise Forum of the American Bar Association.

JANE W. LAFRANCHI

Ms. LaFranchi is Vice President and Senior Counsel at Marriott International, Inc. in the Brand and Franchise Transactions practice group which handles domestic and international franchise-related matters for nine lodging brands and over 2000 franchised hotels. Ms. LaFranchi joined Marriott in 2005 and currently manages most of the development projects for the group. Previously, she was a partner in Strasburger & Price, LLP (Mexico City and Washington, DC). Ms. LaFranchi received a J.D. with honors from the University of Texas School of Law and a B.A. with highest honors from the University of Texas.

Ms. LaFranchi was a founding member of the Steering Committee for the International Franchise and Distribution Division of the ABA Forum on Franchising and served as a Regional Editor for the ABA’s publication on International Franchise Sales Laws. She is a frequent speaker on international franchise and compliance issues.
ERIK B. WULFF

Mr. Wulff has a broad-based practice in global brand expansion for consumer products and services companies. He has extensive experience in all aspects of representing clients in expanding their brands internationally and domestically through various collaborative forms, such as franchising, licensing, distribution, acquisition and joint venture arrangements. Mr. Wulff is a former member of the board of directors of a New York stock exchange-listed company and, as president of its international division, was instrumental in developing its business abroad.

Mr. Wulff has been listed in Who's Who Legal: The International Who’s Who of Business Lawyers and as a Franchise Times Legal Eagle for many years. In 2010, Chambers Global listed him as a leading lawyer in international franchising, noting that clients praise him as "super smart, capable of great things and a guy to look out for." Also in 2010, Chambers USA recognized him for his practice in the US, commenting that clients regard him as "one of the leading international franchise lawyers in the country."

Mr. Wulff is active in the ABA's Section of International Law, currently serving as co-chair of the India committee, chair of the ILEX committee (including ILEX India, ILEX South America and ILEX New Zealand/Australia), and member of the Task Force on the International Criminal Court. He formerly served as co-chair of the spring meeting in Washington, DC (2005) and as chair of the International Commercial Transactions, Franchising and Distribution Committee. He also is active in the ABA Forum on Franchising and is a former member of its Governing Committee (1988-1991) and a former associate editor of the ABA Franchise Law Journal.