COUNTRY REPORT
CHILE

Franchising

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1. LEGAL SOURCES.

What are the rules governing commercial franchising agreements (if any) in your country?

As opposed to the United States, Europe and certain countries in Latin America (e.g., Brazil), Chile does not have a franchise law and, in consequence, franchise agreements and the franchisor-franchisee relationship are governed by the general principles on contract law, as provided for in Chile's civil and commercial codes. Also, the industry on which the franchised business operates may make applicable certain local regulations, as the case would be with the development of a foreign restaurant brand, the outlets of which must operate in full compliance with the provisions set out by the Chilean Regulation on Food Products (Decree N° 977 of the Chilean Ministry of Health). And since there is no franchise law in Chile, no regulatory authority is responsible for enforcing franchising-related laws and requirements.

Likewise, court precedents had become relevant in areas where the execution of franchise agreements (to include termination thereof) and the day-to-day course of the franchising business fall within the scope of local laws such as contract law, labor law, competition law, privacy and data protection law, among others.

2. NOTION OF FRANCHISING CONTRACT.

2.1 General notion of franchise contracts.

Which agreements are normally qualified as franchising agreements in your country?

Chilean laws and regulations neither establish a definition of franchise agreement nor they list the agreements qualified as a franchising agreement. As to case law, by a 2023 decision Chile's Supreme Court (Docket No. 69120-2023) stated "By the franchise agreement, a company, the franchisor, cedes to other [company], the franchisee, the right to exploit a determined system to commercialize certain products and/or services, in exchange of a monetary compensation".

Chile's Trademark Office provides -for reference and instructive purpose only- a definition of franchise agreement by stating "… A commercial agreement whereby the reputation, technical information and knowledge of one party is combined with the investment of the other party with the aim of selling goods or services or the rendering of services directly to the consumer. The establishment where such goods or services are commercialized will normally have a registered trademark, a service mark or a business name …" (Para Informarse (inapi.cl).

The Trademark Office expands on the franchise topic by elaborating on the features thereof *"There is a license whereby the franchisee is allowed to use a trademark registered by the franchisor as well as the use of the system developed by the franchisor for the exploitation of certain business in exchange of a consideration. An ongoing interactive relationship exists that encompasses multiple sales of the franchised product during a term in which the franchisor provides franchisee with continuous assistance to the establishment, maintenance and promotion of the place where the franchise system is exploited, for example, a fast-food restaurant. Additionally, franchisor updates the information in so far it develops new techniques for the better operation of the site. On its part, the franchisee shall continuously pay franchisor for the right to use the franchise system. Franchisor is vested with the right to determine how the business shall operate, for example, on matter of quality control, system protection, operative details, among other."* Para Informarse (inapi.cl).

2.2 Agreements which are covered by special rules on pre-contractual disclosure.

Which are the agreements to which special rules on pre-contractual disclosure (if any) apply?

There are no special requirements to be met prior the offer and/or sale of a franchise, as there is no specific law or regulation that subjects a franchisor to general or formal pre-contract disclosure requirements. However, the general rules and principles of good faith governed by the Chilean Civil Code apply, which require the parties to disclose to each other all matters relating to the future agreement that will be material to the other party's final decision to execute the agreement. Moreover, despite the lack of any legal provision setting forth the specific time when and procedure under which disclosure is to be carried out, general provisions of the Chilean Civil Code rules that any disclosure of material information must be given to the other party in timely fashion and before a decision is made as to entering into the agreement.

2.3 Distinctive criteria with respect to employment contracts.

According to the law of your country, in what situations could a franchisee be considered as an employee of the franchisor?

In Chile, more than franchisee being regarded as an employee of the franchisor, the issue at stake is whether franchisor could be considered joint and severally liable to franchisee's employees on franchisee's labor and social security obligations to the latter employees, which is a matter yet to be decided by local courts as they have returned conflicting decisions (court precedents are not mandatory in Chile), which are likely to continue. Consequently, in the meantime franchisors shall try and minimize this risk by refraining from entering into a continuous, day-to-day direct relationship with franchisee's employees entailing a permanent and direct oversight and control of the means and ways in which franchisee's employees performs as such. Moreover, it is critical that franchisor refrain from exerting permanent and continuous authority and control on franchisee employees.

2.4 Distinctive criteria with respect to distributorship contracts.

According to the law of your country, how are franchising contracts

distinguished from distributorship contracts?

Chilean laws and regulations do not provide a definition of distribution contracts or of franchise agreements. Note, however, that a local distributor would use its own brand and distinctive signs while franchisee would use those of franchisor. Also, distributor is transferred no know-how whatsoever while transfer thereof to franchisee is of the essence of the franchise agreement. The distributor is under no obligation to follow and meet a set of instructions from the manufacturer while franchisee is obliged to abide to details instructions from franchisor on how to conduct the business, these instructions usually contained in the franchisor's manual. Distributor pays for the goods it purchases from manufacturer only while franchisee pays franchisor royalties, entry fees, training fees, advertisement fees, among others.

2.5 Possible application of rules on commercial agency.

Is there a risk of application of the rules or case-law principles provided for commercial agents also to franchisees?

The risk of having the commercial agency laws set for in the Chilean commercial code is minor as while both franchisee and agent would commercialize good and/or services using the brands, signs and names of the franchisor or manufacturer, the commercial agent acts and conducts business on behalf of and at the risk of manufacturer while franchisee acts and conducts business at its own risk and representing no other but itself.

Can you provide details of the relevant circumstances and application by case-law?

N/A

Is there anything that can be done to help mitigate this risk?

N/A

2.6 Possible reference to other contracts with respect to the sale of goods (for distribution franchising contracts).

Is it possible to include in the franchising contract rules whereby the franchisor puts the contractual products (which remain his property until they are sold to the end user) at the franchisee's disposal, and the franchisee sells the goods for the account of the franchisor (like a commission agent)? If so, does this modify the nature of the franchising agreement?

Yes, as Chilean contract laws recognize the principle of freedom of will of the parties to an agreement. The foregoing principle is expressly recognized by article 1545 of Chile's civil code by stating that *"Any legally executed contract is a law to the parties thereof and it cannot be voided other than by mutual consent* [of the parties] *or by a legal cause.".* The foregoing provision by itself would not modify the nature of the franchise agreement, however, it could contribute to the change in the nature of the agreement provided both franchisor's and franchise's conduct under the agreement is that of a principal-agent relationship.

2.7 Requirements concerning the performance of the franchise activity.

Is there any condition required by the laws of your country for being allowed to perform the franchising activity (e.g. citizenship)?

No, there are not conditions required by Chilean laws to be allowed to perform the franchising activity.

Are there any registration requirements or other formalities required as a pre-condition to establish and/or manage a franchise system in your jurisdiction?

Local laws and regulations provide no registration or notarisation requirements to establish and/or manage a franchise system.

3. PRE-CONTRACTUAL DISCLOSURE OBLIGATIONS.

3.1 Rules on disclosure in general.

*Which rules govern precontractual disclosure obligations in your country?***3.2 The rules contained in the specific statute (if any) on disclosure.**

Which information is to be provided to the prospective franchisee before signing the contract?

There is no specific law or regulation that subjects a franchisor to general formal disclosure requirements. However, the general provisions on good faith in the Chilean Civil Code require the parties to disclose to each other all matters related to the future agreement that will be material to the other party's final decision to execute the agreement. Moreover, despite the lack of any legal provision setting forth the specific time when and procedure under which disclosure is to be carried out, general provisions of the Chilean Civil Code rules that any disclosure of material information must be given to the other party in timely fashion and before a decision is made as to entering into the agreement.

How often must the disclosures be updated?

N/A

3.3 Consequences of the non-respect of the rules regarding pre-contractual disclosure.

What are the consequences of the non-observance of the rules on pre-contractual disclosure?

N/A

3.4 Choice of law and mandatory rules on disclosure.

Are the rules on disclosure to be observed in any case, even if the parties have chosen to submit the franchising contract to a law other than the law of your country?

As mentioned above, there are no legal provision or rules setting forth the specific time when and procedure under which disclosure is to be carried out, however, general provisions of the Chilean Civil Code rules provide that any disclosure of material information must be given to the other party in a timely fashion and before a decision is made as to entering into the agreement.

3.5 Possible translation into the local language.

Is there a requirement for disclosure documents to be translated into the local language?

N/A.

4. OBLIGATION OF THE FRANCHISOR TO TEST THE BUSINESS FORMULA.

Is it necessary that the franchising formula has been tested before proposing it to prospective franchisees?

No, it is not necessary to test the franchising formula before proposing it to the prospective franchisees.

5. FORMALITIES REGARDING THE FRANCHISING CONTRACT AND ITS MODIFICATIONS.

5.1 Formalities required by law.

Is any formality (written form, notarisation, registration, etc.) required for the validity of a franchise contract in your country?

If so, what are the consequences of the non-observance of the above formalities?

Written form.

There are no legally mandatory formal contractual requirements to create a valid and binding franchise agreement. There are no registration or notarisation requirements, and the parties can choose the language of the agreement.

Registration (where applicable).

N/A

5.2 Contractual requirement of written form for modifications.

In case the contract requires the use of writing for possible future amendments, what are the consequences of non-observance?

The main consequence of amending the franchise agreement by, for example, a change in the way the parties discharge their obligations under the agreement, as opposed to signing and executing a written amendment document, would be the tacit amendment of such agreement effected by a change in the conduct of the parties that extends in time and is not challenged by franchisor or franchisee, as the case may be.

Should the tacit amendment of the franchise agreement be challenged before a local court or arbitrator, the court or arbitrator would allow the parties to prove such amendment through the circumstances of fact, like a continuative conduct.

For example, if the agreement provides for franchisee to purchase only from suppliers approved and chosen by franchisor and franchisee departs from this provision to start being supplied by third-party suppliers lacking franchisor's approval, the franchise agreement would be tacitly amended provided franchisor makes no objection to it throughout the currency of the agreement.

And in case the tacit amendment needs to be proved in court or before an arbitrator, evidence such as (i) third-party suppliers' invoices issued throughout an extended period of time; (ii) written notice to franchisor informing about the third-party suppliers or any correspondence between franchisee and franchisor dealing with the non-approved suppliers; (iii) franchisor's lack of any challenge - in or out of court- to franchisee's conduct would likely be accepted as proof of franchisor's consent to the amendment of the exclusive supplier provision in the franchise agreement.

5.3 Specific acceptance of onerous conditions contained in non-negotiated contracts.

In that the true nature of a franchisor-franchisee relationship is not that of a provider-consumer one, it would be legal to issue a franchise agreement on a non-negotiable, "take it or leave it" basis. Local consumer protection laws set forth certain rules applicable to non-negotiable agreements which, in general, provides that certain matters in these "take it or leave it" agreements shall not be left to the unilateral decision and discretion of provider. The foregoing would not be the case in a franchisor-franchisee relationship were a local court would likely regard both parties as being in equal or similar commercial conditions and, as a consequence thereof, franchisee would not require the legal protection consumer laws provides to the weaker party, namely, the consumer. Note,

however, that franchisee would still be able to claim that franchisor behaved negligently in imposing a non-negotiable agreement on the former, but the burden of proof on franchisee would likely turn proving his case a cumbersome task.

5.4 Form requirements and applicable law.

How is the law governing the form of the franchising contract to be determined under the law of your country?

Chilean laws and regulations provide no formal requirements for the execution of franchise agreement. Besides, Chile's contract law set forth (article 1545 of Chile's civil code) the principle of freedom of will of the parties to an agreement. Consequently, franchisor and franchisee free to agree on the form under which they would execute the franchise agreement. Note, however, that executing a written franchise agreement signed by both parties is customary.

6. OTHER PROVISIONS WHICH MAY HAVE AN IMPACT ON FRANCHISING.

6.1 Antitrust rules.

Are there any antitrust rules which should be taken into consideration when drafting (or carrying out) a franchising contract?

Chile's Competition Law (Decree Law 211 of 1974, as amended) has been in force since 1974. The only restriction that is generally applicable to franchising relates to exclusive or designated supplier provisions, which are permitted provided that they are linked to the necessity of maintaining the quality of the system. The franchisor's imposition of resale prices on the franchisee under a penalty is also contrary to the Chilean Competition Law. Additionally, Chilean Competition Law do not set a maximum permitted term for franchise agreements and/or for related product supply agreements.

The only obligations that the franchisor must observe are those provided for in the franchise agreements under which the outlets located in adjoining areas or streets operate (for example, territorial exclusivity). However, if a franchise agreement does not expressly grant territorial exclusivity to a franchisee, the franchisee can claim that the franchisor's actions reasonably led it to believe in good faith that it had been granted territorial exclusivity in any of the following circumstances:

• The franchisor informally conveyed to the franchisee that it was granted some sort of territorial exclusivity.

• The franchisor and franchisee discussed about the territorial exclusivity of the franchisee.

• The franchisor and franchisee exchanged correspondence from which a grant of territorial exclusivity can be implied.

The circumstances above can be evidenced by the exchange of e-mails and/or other documentation. In such a case, the franchisee can claim that the franchisor's actions resulted in a tacit amendment of the franchise agreement. It can therefore issue proceedings against the franchisor if the franchisor executed a franchise agreement with another franchisee for the opening of outlets within the alleged franchisee's exclusive territory.

Post-termination non-compete covenants have been held to violate the constitutional right to work and are unenforceable, unless the franchisee is compensated for renouncing its right to work. Few franchisors actually compensate franchisees in relation to post-termination covenants. Instead, they include non-compete post-termination covenants merely for deterrence purposes, as their inclusion does not void or otherwise affect the remaining provisions of the franchise agreement.

6.2 Good faith.

Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

The general provisions on contracts in the Chilean Civil Code are applicable to franchise agreements. There is a general obligation for the franchisor and franchisee to behave in good faith and to act fairly. More specifically, contracts must be implemented in good faith and, consequently, the parties are not only bound by what is expressly provided in the contract, but also to all matters stemming precisely from the nature of the obligation contained in the contract or to what stems from the obligation in application of the law or customs (article 1546, Chilean Civil Code).

6.3 Consumer protection.

Does any law provision treat franchisees as consumers for the purposes of consumer protection or other legislation?

No.

6.4 Possible other rules.

Which other rules of general nature should be considered when dealing with franchising?

The signing, execution, discharge and implementation of a franchisor-franchisee relationship is protected by Chile's constitution as it recognizes and protects the freedom of conducting a business activity and the right to private property and protection thereof.

Item 21 of article 19 of Chile's constitution establish the freedom of conducting a business activity by warranting people "*The right to develop any business activity not contrary to morality, public order or national security, abiding to the legal provisions that regulates it*.".

Item 24 of article 19 of Chile's constitution warranties "*Property right in its diverse types on any kind of tangible or intangible property.*".

Item 25 of article 19 (paragraphs 3 and 4) of the Chilean constitution provide that "It is also warrantied the industrial property over patents, trademarks, models, technological processes and other analogue creations, for the duration established by the law."

Article 1437 of Chile's civil code provides "*The obligations arise from the concurrence of two or more individual's will, as in contracts and agreements …*".

Article 1438 of Chile's civil code provides "*Contract or agreement is an act whereby a party undertakes the obligation toward other to give, do or not something. Each party could be one or many persons*.".

Article 1445 of Chile's civil code provides "*Any legally executed contract is a law to the parties and it cannot be invalidated but for mutual consent or for legal causes*.".

Article 96 of Chile's commercial code provides "*The provisions of the Civil Code relative to the obligations and contracts in general are applicable to mercantile businesses, but for the amendments sent forth in this Code*.".

7. THE FRANCHISEE'S OBLIGATION NOT TO COMPETE.

7.1 Non-competition during the contract.

If there is no contractual provision prohibiting the franchisee to sell competing goods or to engage with competing franchising networks, does it mean that the franchisee is free to act for competitors of the franchisor?

Yes, the franchisee would be free to sell competing goods or engage with competing franchising networks if the franchise agreement lacks a non-compete provision. Note, however, that if during the currency of the agreement, for example, (i) the franchisee conducted business and behaved as it is bound to a non-compete provision; (ii) during the pre-contract negotiations and throughout the performance of the agreement the parties exchanged correspondence exhibit their consent to the enforcement of a non-compete provision on the franchisee, and all of the foregoing could be evidenced by exchange of emails and other pieces of evidence, then the franchisor may claim that it was reasonably lead to believe that franchisee was bound by a prohibition not to sell competing goods or to engage with competing franchising networks and institute damage proceedings against franchisee.

To what extent are contractual non-competition clauses admissible?

There are no statutory limitations on the franchisor's ability to impose non-compete obligations during the term of the agreement.

Is it possible to extend the franchisee's non-competition obligation to non-competing goods?

Yes. Chile's law on contracts recognizes the principle of the parties' freedom of will to consent on the provisions of a given contract and, in consequence, the franchisee's non-competition obligation to non-competing goods if so agreed by franchisor and franchisee. Note, however, that franchisee may try to challenge the enforceability of such non-compete obligation on grounds that it violates franchisee's constitutional right to work, an argument that local courts have upheld when deciding on post-term non-compete provisions in cases where franchisee has not been compensated by franchisor for relinquishing its right to work.

7.2 Post-contractual non-competition obligation.

Is it possible to agree with the franchisee an undertaking not to compete in the period after contract termination? If so, is this obligation subject to specific conditions (i.e. time limit, territorial extension, etc.)?

As to post-termination non-compete provisions, they are enforceable only if the following requirements are met: (i) the party bound by the clause is reasonably compensated; and, (ii) the clause is limited to a specific, reasonable and short time period (2-3 years).

Local laws and provisions do not determine what is to be regarded as a reasonable compensation or reasonable term for these clauses to last, making this a matter to be determined on a case-by-case basis.

Few franchisors actually compensate franchisees in relation to post-termination covenants. Instead, they include non-compete post-termination covenants merely for deterrence purposes, as their inclusion does not void or otherwise affect the remaining provisions of the franchise agreement.

8. EXCLUSIVITY.

8.1 Rights of the franchisee in the absence of contractual rules on exclusivity.

If there is no written contract or if the contract does not state anything about the franchisee's exclusivity, does it mean that the franchisor is free to appoint other franchisees and to sell the products or services in competition with the franchisee?

If a franchise agreement does not expressly grant exclusivity to a franchisee, the franchisee can claim that the franchisor's actions reasonably led it to believe in good faith that it had been granted exclusivity in any of the following circumstances:

• The franchisor informally conveyed to the franchisee that it was granted some sort of exclusivity.

• The franchisor and franchisee discussed about the exclusivity of the franchisee.

• The franchisor and franchisee exchanged correspondence from which a grant of exclusivity can be implied.

The circumstances above can be evidenced by the exchange of e-mails and/or other documentation. In such a case, the franchisee can claim that the franchisor's actions resulted in a tacit amendment of the franchise agreement.

8.2 What is actually covered by exclusivity clauses?

What are the franchisor's obligations under a clause granting a territorial exclusivity to the franchisee?

Franchisor's obligation and the scope thereof would depend on how the territorial exclusivity provision is structured in the franchise agreement. However, the following obligations to be discharged by franchisor would be acceptable:

- The obligation not to enter into a franchisor-franchisee relationship with third-parties to operate the system within the territory covered by the territorial exclusivity provision in force.
- Franchisor shall not operate the franchise system at and/or commercialize franchisor's products/services in the territory covered by the territorial exclusivity provision in force.
- Franchisor shall honor the exclusivity granted to franchisee by observing the territorial boundaries established in the franchise agreement avoiding actions or deeds economically detrimental to the franchisee.

9. RESPONSIBILITY OF THE FRANCHISOR FOR ACTS OF THE FRANCHISEE.

Under which circumstances the franchisor may be held responsible for acts of the franchisee? In which cases customers or employees of the franchisee may have a direct action against the franchisor?

Given that there is no Chilean law that expressly sets out the circumstances under which the franchisor may be held responsible for acts of the franchisee and considering further that customer is not a party to the franchise agreement, the latter would need to support his/her claim on the general rules of torts law (Articles 2314, 2320 et seq. of Chile's Civil Code) by providing proof of **(i)** franchisor's negligence or intent; **(ii)** causation; **(iii)** damages; and, **(iv)** existence of a subordination and dependence relationship between franchisor and franchisee.

The above-mentioned was recently confirmed by a decision returned by Chile's Supreme Court ("SC") dated 04 August 2023 (Docket No. 39.863-2022) wherein the SC held the franchisor responsible for the actions of its franchisee as a result of franchisor's lack of supervision of franchisee's business activities.

The case involved a reputed Chilean real estate brokerage franchisor whose franchisee embezzled sums a client had transferred the latter to make payment of the purchase price. The seller instituted damage, tort law proceedings against the franchisor. The SC confirmed the lower court decision and that of the court of appeals upholding the lower court's sentence which stated that the provisions of the franchise agreement confirmed franchisor's liability to claimant as the latter had undertaken the obligation to control and supervise franchisee's operation in respect to franchisee use of the franchisor image, franchisee rendering of services, hiring, publicity and all other aspects dealing with the adequate operation of the brand and to this purpose franchisor was vested with ample powers.

The SC stated that franchisor had acted negligently by breaching its contractual duty to supervise and oversee franchisee's brokerage operation and, in consequence, the cause-effect connection between franchisor's negligent actions and claimant's damages had been proved.

It is worth underlining that the SC gave special relevance to the provisions of the franchise agreement in assessing and determining the real and effective scope of control franchisor exerted on franchisees.

As to employees of the franchisee, Local courts have been called to decide on whether the franchisor can be regarded as a co-employer (along with the franchisee) of the franchisee's employees, or be at least secondarily liable to the franchisee's employees for the franchisee's failure to meet its labor and social security obligations. Court decisions on this issue have been confusing, as the Supreme Court issued contradictory decisions (precedents are not binding in Chile). To minimise the risk of being regarded as a co-employer or as secondarily liable, the franchisor should refrain from entering into a continuous, day-to-day direct relationship with the franchisee's employees involving a permanent and direct oversight and control of the means and ways in which these employees perform. In other words, if the franchisee's employees cannot show that the franchisor exerted permanent and continuous authority and control over them, the risk of the franchisor being regarded by a court as co-employer of, or secondarily liable to, the franchisee's employees will be reduced.

10. FRANCHISOR'S CONTROL OVER THE FRANCHISEE'S ACTIVITY.

10.1 General limitations.

Are there any rules of case law principles limiting the franchisor's right to impose a specific conduct upon the franchisee?

No, there are no rules of case law principles limiting the franchisor's right to impose a specific conduct upon the franchisee.

10.2 Obligation to sell from the franchised outlet.

Would the franchisee's obligation to sell only from the franchised outlet be lawful under the law of your country?

N/A

10.3 Prohibition to change the place of the outlet.

Would a prohibition to change the place of the outlet without the franchisor's approval be valid under your law?

Yes.

10.4 Use of Internet.

Is the franchisor free, under the law of your country, to sell through the Internet in competition with his franchisees?

Yes.

Is the franchisor entitled, under the law of your country, to prohibit the franchisee to sell through Internet (or otherwise limit his right to promote his business through the Internet)?

A franchisor can prevent a franchisee from having its own website presence, from promoting its business on the internet or from engaging in e-commerce. Additionally, foreign franchisors usually register the .cl brand-related domain name before signing and executing franchise agreements.

10.5 Limitations as to the customers to whom the franchisee may sell.

Are possible limitations as to the customers to whom the franchisee may sell lawful under the law of your country?

Yes.

10.6 Resale prices.

Would a clause which obliges franchisees to respect certain resale prices of the products supplied by the franchisor be lawful under the law of your country?

Franchisor's imposition of resale prices on the franchisee under a penalty is also contrary to Chilean Competition Law.

11. INTELLECTUAL PROPERTY AND CONFIDENTIALITY.

11.1 Use of the trademarks and symbols during the contract.

Would a use of the franchisor's trademarks which does not conform to the franchisor's indications be a substantial breach, justifying contract termination?

There is no local law or regulation addressing this matter and, in consequence, justification of contract termination would depend on the merits of the particular case. Note, however, that the case justifying termination shall at least encompass the following features: **(i)** the franchise agreement shall include a robust provision on trademarks and the permitted use thereof by franchisee; **(ii)** the franchise agreement shall include a provision whereby franchisor and franchisee acknowledge and agree that the trademarks provision is a clause of the essence of the agreement; **(iii)** the franchise agreement shall expressly provide that the breach of the trademarks provision and the ill-use thereof is regarded a material breach; **(iv)** the franchise agreement shall include an early termination provision stating that franchisor is vested with the right to early terminate the agreement in the event of a material breach of the franchisee effected by written notice from franchisor without the need of a court or arbitrator order or involvement whatsoever; and **(v)** the franchise agreement should provide for a curing period within which franchisee cures the contract breach by start using the trademarks in compliance with the trademarks provision (early termination would take place if and after the curing deadline ran with franchisee not changing its ill-use of the trademarks).

11.2 Obligation to cease using trademarks after contract termination.

Are clauses which require the franchisee to remove and cease using the franchisor's trademarks, after contract termination enforceable in your country?

Yes, provided the franchisor's trademarks are duly registered in Chile in their or their affiliate's name.

11.3 Domain names.

Are there any limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement?

No, provided this is expressly included as a franchisee obligation in the franchise agreement. If not, a revocation action could be filed, but it would be necessary to prove the registrant's bad faith.

In the absence of a contractual provision regulating domain names, is the franchisor entitled to claim the transfer of possible domain names registered by the franchisee/master, which include the franchisor's trademark, in your jurisdiction?

Although not specifically established by law or other legal texts, the franchisor would be entitled to claim the transfer of domain names registered by the franchisee/master that include the franchisor's trademark. If the franchisee does not comply, the franchisor could initiate a revocation action, governed by rules quite similar to the UDRP.

11.4 Confidentiality.

Is the franchisee obliged to treat the information received from the franchisor as confidential?

Yes, particularly when it deals with know How & Trade Secrets as no registration in any public office or registry is required to gain protection to trade secrets by local law. Moreover, trade secrets are protected by copyright on their mere creation as long as they remain confidential. Legal protection of trade secrets requires meeting the following requirements: (i) the information must be secret and non-accessible by third parties; (ii) the information must have commercial value; and, (iii) information must be reasonably protected by trade secret owner.

The misuse of trade secrets and other proprietary information by individuals or legal entities is punished with up to three years in prison and to a per-violation fine (section 284, Chilean Penal Code). While this provision remains relatively untested, a franchisor should be able to bring a civil injunctive relief action and/or an action for damages in a Chilean court in connection with any criminal proceedings against the infringer. However, enforcement of trade secret restrictions may be very difficult in a Chilean court that is inexperienced in these matters.

The latest amendment of Chilean law 19,039 on Industrial Property includes provisions on trade secrets (articles 86, 87 and 88) that regards as a violation of trade secrets the illegitimate acquisition, disclosure or exploitation thereof, provided that the illegitimate act entailed (i) an intent to make a profit (even if such profit benefits a third party; and, (ii) a damage to the trade secret owner.

Legal protection of trade secrets is indefinite provided they remain secret and confidential.

12. TERM AND TERMINATION OF THE CONTRACT.

12.1 Contract for a fixed period or for an indefinite period.

Is it possible to choose between a contract for a fixed term and a contract for an indefinite period? What are the main differences?

Chilean contract law allows the parties to choose and agree on either a fixed term agreement or one for an indefinite duration. Note, however, that franchise agreements are typically agreed for a fixed term.

12.2 Contract for a fixed period (without automatic renewal clause) which continues to be performed after its expiry.

What happens, under your law, if a contract concluded for a fixed term (and not containing a clause for automatic renewal) continues to be performed after its term?

The consequences of continuing the performance of a franchise agreement after expiration thereof would depend on how franchisor and franchisee discharges their obligations following termination of the agreement. Should the parties performance abides to the provisions of the expired agreement, it would likely be regarded as a continuation of the same agreement but for an indefinite duration. In other words, this is something to be determined on a case-by-case basis.

12.3 Termination notice (contract for an indefinite period).

Does the legislation of your country require a minimum period of notice for the parties to terminate a franchise contract made for an indefinite term?

If so, is such period mandatory? For both parties?

If no period of notice is required by law, will it be fixed by the courts?

In the latter case, will the courts intervene only if no period of notice has been agreed contractually? Or will the courts establish a reasonable period if the period agreed in the contract is considered too short?

Chilean laws and regulations do not provide for a minimum period of notice for the parties to terminate a franchise agreement, regardless if such agreement is for an indefinite term or a fixed one. Courts would not intervene to fix the period of notice if not provided in the franchise agreement, however, courts would likely decide on whether the termination notice was delivered within a reasonable time in advance when deciding, por example, damage proceedings instituted by the terminated party (almost always the franchisee).

12.4 Form of the notice of termination and effectiveness.

Is there a form (e.g. registered letter) that must be respected for the termination notice to be effective?

Chilean contract law does not provide for a particular form of notice to be effected and, in consequence, it is for the parties to the franchise agreement to agree on the form of termination notice. Note, however, that the most common for of termination notice is a written letter delivered by certified mail to the other party.

Is the termination considered to have been validly given when it is sent or when it is received?

Validity and enforceability of a termination notice will depend on whether it is compliant with what the franchise agreement provides as to termination thereof. Consequently, a termination notice would be regarded as validly given when it is sent or received depending on what the franchise agreement provides in this regard. Typically, local termination provisions state that the termination notice shall be sent within a fixed time in advance of termination date and, in such cases the validity and enforceability of the termination notice would be contingent to the date it was sent.

If the addressee is a company, is there a specific person to whom the notification must be made in order to be effective?

The termination notice shall be sent to the individuals and to the addresses stated in the franchise agreement's notices provision. Should the franchise agreement provide no notices clause, it would be advisable to send the notice to the attention both of the company's general manager as well as of the company's general counsel.

In case the form imposed by law or prescribed in the contract has not been respected, what are the consequences?

In the event the form of termination notice is not observed by the terminating party, there would likely be a discrepancy as to whether the form the termination notice had the ability to terminate the franchise agreement, which would need to be determined on a case-by-case basis by a court ruling.

12.5 Earlier termination.

Which reasons can normally justify earlier termination by the franchisee and/or by the franchisor?

Franchisor or franchisee can terminate a franchise agreement prior to expiry in the event of a material breach of contract on the part of franchisor or franchisee, as the case may be.

Can a party terminate the contract for a breach which such party has tolerated in the past without complaining?

A party to the franchise agreement can terminate the contract for a breach such party has tolerated in the past without complaining. Franchise agreements would typically include a waiver clause addressing the foregoing situation. Note, however, that it is likely that if the terminated party institutes proceedings against the terminating one, the former most likely raise the argument of terminating party's past tolerance of same breaches without complaint.

If the answer is no, would the result be different if the contract contains a «waiver clause» (e.g. a clause saying that «Any waiver on the part of either party hereto of any right or interest shall not imply the waiver of any other right or interest, or any subsequent waiver»)?

N/A

12.6 Unjustified earlier termination.

What is the effect of an unlawful earlier termination of a franchising contract under the law of your country?

Chilean contract law, the local civil code in particular, provides that the non-breaching party may opt to demand the specific performance of the breached franchise agreement or to request the court to rule the termination of the franchise agreement, along with a damage claim which the law makes available regardless of the option made by the non-breaching party.

12.7 Compensation for unjustified earlier termination.

Please, explain if there are legal rules (or principles established by case law) for calculating the amount of compensation for unjustified earlier termination.

Regarding the kind of damages franchisee or franchisor may (or may not) claim compensation, they include (or not include):

- **Actual damage** – e.g. inventory that cannot be sold due to the termination of the franchise agreement.
- **Loss of profit** – e.g. the sales franchisee will not be able to make due to the termination of the agreement.
- **Business/commercial damage** – e.g. the impact in franchisee's business reputation resulting from losing the operation of the franchise system. Also, good will of the franchisor's brands franchisee built in the Chilean marketplace throughout the years franchisee operated the franchise system.
- **Punitive damages** – not available as Chilean laws do not recognize it as an item of redress in these kinds of disputes.
- **Treble damages** – same as with punitive damages.
- **Consequential damages** – only if defendant would expressly agree in writing to compensate consequential damages.

12.8 Possible other cases of illicit termination by the franchisor.

Are there other types of protection of the franchisee provided either by law or by case-law in your country protecting the franchisee at the end of the contractual relationship?

Under local law, there is no mandatory compensation payable to a terminated party (including a franchisee) if termination is effected on expiry of the agreement, whether or not there has been a breach on the part of the franchisee.

However, the franchisee can claim that it was reasonably led to believe in good faith that the agreement would be extended, resulting in expenses and business expectations for which compensation is due if, for example, any of the following occurred during the term of the agreement:

- The parties entered into early and informal negotiations aimed at extending the term of the agreement or at introducing changes that would apply beyond the contractually stipulated termination date.
- The parties discussed the possibility of a market research to determine sales forecast covering a period beyond the termination date.
- The parties exchanged correspondence regarding actions or events to take place beyond the termination date.

Are Courts in your countries entitled to apply the principle of good faith and fair dealing, challenging the franchisor's termination of the contract and possibly granting damages to the franchisee?

Yes, as the principle of good faith is expressly provides by Chilean contract law, particularly by article 1546 of the civil code that provides "*Contracts shall be discharged in good faith and, in consequence, they not only oblige to what they expressly provide, but to all elements stemming precisely from the nature of the obligation or the elements belonging to the obligation by the law or by custom*.".

If so, under which circumstances and how do they assess and calculate damages?

Answer to question 12.7 applies here.

Is there a notion of "abuse of law or "abuse of economic dependence" in your jurisdiction?

The "abuse of law" (in Spanish *"abuso del derecho"*) is a law principle recognized by several Chilean bodies of law, such as:

- Article 100 of the Commercial Code that makes offeror liable to offeree for damages resulting from the timely withdrawal of the offer.
- Article 489 of the Civil Procedure Code makes plaintiff responsible for the damages caused by his/her lawsuit when withdrawn shortly after submitting it to the court.
- Article 2110 of the Civil Code on the invalidity of a partner's withdrawal from a partnership effected in bad faith or untimely.

Chilean courts have recognized the "abuse of law" since the early 20th century to these days. In a 2024 decision, the Supreme Court ruled that "… the exercise of a right shall be limited by the satisfaction of a serious and legitimate interest and it shall not cause damage or injury to others …".

Does it apply to franchising contracts? If yes, under which circumstances and how do they assess and calculate damages?

Answer to question 12.7 applies here.

13. GOODWILL COMPENSATION (INDEMNITY).

Does the law or jurisprudence of your country recognise a goodwill compensation to the franchisee?

Chilean law and precedents have not recognized goodwill as an item to be compensated *per se* in case of termination of a franchise agreement. Moreover, local

law on contracts do not provide for any indemnity or compensation payment if the franchise agreement or any other kind of contract is terminated lawfully.

Goodwill compensation would likely be an item the terminated party factors-in as part of its damage petition when claiming that the contract was early terminated or not extended in breach of contract provisions. Local courts or arbitration panels would decide these disputes on a case-by-case basis taking relevance the good faith law principles.

14. LIMITATION OF ACTION.

Does your legislation provide limitation periods (or similar systems) for the exercise of the rights of the parties under a franchise agreement and which is their duration?

Ther is not special statute of limitations applicable to the lack of exercise of a right or legal action by franchisor or franchisee, being subject to the general rules set out both by the Chilean Civil Code (5 years) and the Chilean Commercial Code (4 years).

Can the limitation periods be contractually modified according to your law?

No. Article 2494 of the Chilean Civil Code provides *"The limitation period could be expressly or tacitly waived, but only once the limitation period has run."*.

15. APPLICABLE LAW.

15.1 Legal sources.

What are the rules of your legal system concerning applicable law to franchising contracts?

The choice of law is acceptable in Chile and, in consequence, a contract provision stating that the substantive law of an agreement to be discharged in Chile is, for example, Italian law, would be valid and enforceable. Note, however, that the Chilean civil code provides (article 16 final paragraph) that "the effects of agreements executed in a foreign *country to be discharged in Chile, shall be subject to Chilean laws*.".

15.2 Applicable law in the absence of choice.

If there is no choice of law by the parties, which criteria are used by the courts of your country for determining the applicable law in case of a franchising contract with a foreign counterpart?

Answer to question 15.1 applies here.

15.3 Effectiveness of a choice of law excluding the law of the franchisee's country.

Is it possible to submit the contract with a franchisee belonging to your country to the law of a foreign country?

Answer to question 15.1 applies here.

16. JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS.

16.1 Legal sources.

What are the rules of your legal system concerning jurisdiction as well as recognition and enforcement of foreign decisions?

The recognition of foreign decisions is ruled by Chile Civil Procedure Code ("CPC").

The CPC sets out the following rules:

- Foreign decisions shall have in Chile the same force granted by the respective treaty and to their enforcement the shall follow the proceedings set forth by Chilean law provided such laws are not amended by the pertinent treaty (Article 242).
- In the event there is not agreement in force with the country where the decision was issued, such decisions shall have same force as Chilean decision are given by the other country (Article 243 – principle of reciprocity).
- In case the decision originates at a country where Chilean decisions are not enforceable, the foreign decision shall not be enforceable in Chile (Article 244 – principle of reciprocity)
- Should the above-mentioned rules be not applicable, decisions issued by foreign courts shall have the same force as if they had been issued in Chile provided the meet the following requisites (Article 245):
    - That such decision contains no feature contrary to Chilean laws, although local procedural laws would not be taken into account.
    - That such decision is not contrary to national jurisdiction.
    - That the defendant has duly served process.
    - That the decision be final and not subject to recourse in the issuing country.
- The foreign decision (apostilled copy) shall be submitted to Chile's Supreme Court (Article 247 – Letters Rogatory proceedings).
- The recognition petition submitted to the Supreme Court shall be served on the defendant and granted a term (same as the term to answer complaints filed with local courts) to be heard (Article 248).
- The Supreme Court's Prosecutor shall report to the Court on the recognition petition (Article 248).
- Once defendant is heard (or in default of defendant) and Prosecutor submits its report, the Supreme Court shall decide whether the foreign decision shall be enforced (Article 248). Note, however, that the Supreme Court has the authority to establish a term for submission of evidence prior to returning a decision.
- Should the Supreme Court rules that the decision is enforceable in Chile, the case dossier is sent to a lower court for execution (Article 251). The non-enforcing party may raise defenses at any stage the enforcement process at the lower court.

16.2 Jurisdiction without a choice of jurisdiction clause.

If there is no valid jurisdiction clause, is a franchisee of your country entitled, under the procedural rules of your country to bring a claim before his courts against a foreign franchisor?

Yes, as per application of a Chilean civil code provision (final paragraph of article 16) stating that "*the effects of agreements executed in a foreign country to be discharged in Chile, shall be subject to Chilean laws*.". Additionally, both the Chilean Constitution and Chile's Code on Organizing of Courts (In Spanish *"Codigo Orgánico de Tribunales"*) recognizes the *Principle of Inexcusability* which basically obliges local courts to rule on the matters or disputes brought to their decision even in cases there is no law applicable to such matter or dispute.

Article 76 (second paragraph) of Chile's Constitution and Article 10 of the local Code on Courts Structuring provide (second paragraph) *"Claimed their* [courts] *involvement in a legal manner and on businesses under their jurisdiction, they*

shall not excuse exercising their authority not even if there is a lack of law that resolved the dispute brought to their decision.".

If there is no valid jurisdiction clause, is a franchisor of your country entitled, under the procedural rules of your country to bring a claim before his courts against a foreign franchisee?

Yes, as per application of a Chilean civil code provision (final paragraph of article 16) stating that "*the effects of agreements executed in a foreign country to be discharged in Chile, shall be subject to Chilean laws*.". Additionally, both the Chilean Constitution and Chile's Code on Organizing of Courts (In Spanish *"Codigo Orgánico de Tribunales"*) recognizes the *Principle of Inexcusability* which basically obliges local courts to rule on the matters or disputes brought to their decision even in cases there is no law applicable to such matter or dispute.

Article 76 (second paragraph) of Chile's Constitution and Article 10 of the local Code on Courts Structuring provide (second paragraph) *"Claimed their* [courts] *involvement in a legal manner and on businesses under their jurisdiction, they shall not excuse exercising their authority not even if there is a lack of law that resolved the dispute brought to their decision.".*

16.3 Effectiveness of a jurisdiction clause in favour of foreign courts.

Do judges of your country have exclusive jurisdiction to settle disputes concerning franchisees, who carry out their activity between the boundaries of your country?

In Chile, the parties to a franchise agreement are free to choose the forum where to bring their disputes for review and decision thereof. In consequence, they may opt for resolving their conflicts before a local or foreign court or by submitting the dispute to local or foreign arbitration. Mediation is not mandatory.

Would a clause included in a contract between a foreign franchisor and a franchisee of your country under which a foreign court has jurisdiction on disputes arising out of the contract be valid and effective in your country? Would the answer change if the franchisee is an individual?

Yes, regardless of whether franchisee is a legal entity of an individual.

16.4 Recognition - enforcement.

Is it possible to recognise and enforce a foreign judgment against citizens of your country?

Yes, it is possible to recognize and enforce a foreign judgement against a citizen of Chile.

If enforcement is possible, how long does the proceeding take?

It could take upwards to two years or more to enforce a foreign judgement in Chile.

17. ARBITRATION.

17.1 Legal sources.

Is your country part of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)?

Yes.

Are there other rules applicable to international arbitration provided by the law or jurisprudence of your country?

Once a foreign award is obtained, all orders, correspondence, evidence and other materials in the arbitration case will have to be translated into Spanish and

submitted to the Chilean Supreme Court, which will assign an officer of the court to review all the procedural formalities of the award and determine preliminarily if the award is suitable for enforcement in Chile (exequatur proceedings). If the award passes the Supreme Court officer's review, the Supreme Court itself will review the award and, if satisfied that the award meets all the pertinent requirements under Chilean law and international conventions to which Chile is a signatory, issue an order for enforcement by the competent lower court. The non-enforcing party may raise defenses at any stage during the recognition process which will of course delay or hinder enforcement.

17.2 Arbitrability.

Are franchising contracts considered a subject matter capable of settlement by arbitration, according to your legislation?

If so, does this apply to all franchise agreements or only to certain situations (e.g. franchisees who are not individuals)?

In Chile, the parties to a franchise agreement are free to choose the forum where to bring their disputes for review and decision thereof. In consequence, they may opt for resolving their conflicts before a local or arbitration panel.

17.3 Arbitration clauses.

Would an arbitration clause providing for arbitration abroad, included in a franchising agreement be valid and effective in your country?

Yes, as the parties to a franchise agreement are free to choose the forum where to bring their disputes for review and decision thereof. In consequence, they may opt for resolving their conflicts before a local or foreign court or by submitting the dispute to local or foreign arbitration.

Would the courts of your country refuse jurisdiction with respect to a franchising contract providing for such a clause?

Yes, this has been confirmed by numerous Chilean courts' precedents.

17.4 Recognition of foreign awards.

Would a foreign arbitration award dealing with a franchising agreement be recognised by the courts of your country?

Answer to question 17.1 applies here.

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