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Contributing Editor:
Iain Bowler
Freeths LLP

glg Global Legal Group

Introductory Chapter

Industry Chapters

Q&A Chapters

Chile


Fernando García


José Pardo


Javiera Avilés


Ricardo Padilla

Carey

1 Relevant Legislation and Rules Governing Franchise Transactions

1.1 What is the legal definition of a franchise?

"Franchise" is not defined under Chilean law and there is no clear definition under case law.

However, the Franchise Committee of the Santiago Chamber of Commerce ("CCS") (the only association related to franchise that currently exists in Chile) defines a franchise on its website as "a form of distribution or marketing of a particular product or service, based on a contract involving two parties: the Franchisor or Franchiser, who is the owner of the brand and Know How and is obliged to assign the use of the brand, transfer the Know How through training and operation manuals, provide permanent assistance, control and innovate; and the Franchisee, who must comply with quality and operation standards, comply with a training program, make good use of the brand, pay an initial fee (Franchise Fee) and pay monthly fees for services (Royalty) and corporate advertising".

1.2 What laws regulate the offer and sale of franchises?

There is no specific legislation that regulates franchising agreements in Chile. General Chilean contract, intellectual property, real estate, tax and competition laws apply to franchising.

1.3 If a franchisor is proposing to appoint only one franchisee/licensee in your jurisdiction, will this person be treated as a "franchisee" for purposes of any franchise disclosure or registration laws?

Due to the lack of specific legislation for franchising in Chile, there are no consequences in cases where a franchisor is proposing to appoint only one franchisee/licensee in our country.

1.4 Are there any registration requirements relating to the franchise system?

There are no franchise registration requirements in Chile, given that there is no specific legislation for this matter in Chile.

1.5 Are there mandatory pre-sale disclosure obligations?

No, there are no such obligations.

1.6 Do pre-sale disclosure obligations apply to sales to sub-franchisees? Who is required to make the necessary disclosures?

There are no such obligations in Chile.

1.7 Is the format of disclosures prescribed by law or other regulation, and how often must disclosures be updated? Is there an obligation to make continuing disclosure to existing franchisees?

Due to the lack of specific legislation for franchising in Chile, there are no such obligations.

1.8 What are the consequences of not complying with mandatory pre-sale disclosure obligations?

Since there are no specific obligations, no consequences arise in the event of noncompliance.

1.9 Are there any other requirements that must be met before a franchise may be offered or sold?

There are no specific laws governing the offer for sale or purchase of a franchise in Chile.

1.10 Is membership of any national franchise association mandatory or commercially advisable?

Between 2005 and 2010 there was the Chilean Chamber of Franchises, a trade association aimed at promoting this business model, which closed in 2010 because most of the companies engaged in franchise consulting in Chile had ceased their activities.

Since 2020, there has been a Franchise Committee that is part of the CCS, whose objective is to promote the growth and diffusion of this business model. Only franchisors or master franchisees in Chile who are members of the CCS can join this committee (franchisees can only act as members

in exceptional circumstances). It is not mandatory to be a member of the CCS, and consequently it is not mandatory to be a member of the Franchising Committee ("FC") of the CCS.

1.11 Does membership of a national franchise association impose any additional obligations on franchisors?

According to the statute that regulates the FC of the CSS, the members of such committee must comply with certain obligations, which can be summarised as follows:

1. To participate in the activities of the FC and to fulfil their economic obligations in relation to the payment of the FC membership.
2. To respect and comply with the Code of Good Practices for the FC.
3. To submit to the sanctioning procedure established by the CSS in case of any infraction of the Code of Good Practices or of the FC statute.

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

There is no legal requirement for franchise documents to be in Spanish.

2 Business Organisations Through Which a Franchised Business Can be Carried On

2.1 Are there any foreign investment laws that impose restrictions on non-nationals in respect of the ownership or control of a business in your jurisdiction?

There are no laws specifically focused on foreign investment that impose restrictions on non-Chilean nationals regarding their ownership or control of entities incorporated in Chile.

Notwithstanding the foregoing, there are certain restrictions for foreigners to acquire certain specific types of property for reasons of national security. In effect, by virtue of Decree Law No. 1,939, nationals of countries bordering Chile are prohibited from acquiring real estate located totally or partially in border areas. This prohibition extends to companies whose (i) principal place of business is in the country bordering the property to be acquired, (ii) capital is owned in 40% or more by nationals of the bordering country in question, and (iii) effective control is in the hands of nationals of the respective bordering country.

In addition, in labour matters, the labour code prohibits companies with more than 25 workers from having more than 15% of their employees be foreign workers. For these purposes, the total number of workers is considered even if they work in different offices along the Chilean territory, and employers who are technical specialists (workers who provide services that are the result of the application of a knowledge or technique that requires a significant level of specialisation or study) are not counted.

2.2 What forms of business entity are typically used by franchisors?

Most of the franchises operating in Chile are subscribed directly between the foreign franchisor company and the franchisee incorporated in Chile, so the type of business entity of the franchisor is subject to the legislation of its country of origin.

In those cases where the franchisor is incorporated in Chile, it generally corresponds to either a limited liability company, a corporation or a joint stock company. The choice between these three types of business entities will generally depend on the structure that presents the best tax advantages, considering the size and type of business to be developed.

2.3 Are there any registration requirements or other formalities applicable to a new business entity as a pre-condition to being able to trade in your jurisdiction?

The only mandatory registration for a new entity to start doing business is to obtain a Chilean Tax ID from the Chilean Internal Revenue Service (*Servicio de Impuestos Internos* ("SII")). There may also be some additional requirements that must be met for a business to start operating if the business is carried out in a specific location (for example, a municipal business licence must be obtained in the area where the physical business premises are located) or if the type of business is subject to a special regulation (for example, the need to have authorisation from the sanitary authority to produce and sell food).

3 Competition Law

3.1 Provide an overview of the competition laws that apply to the offer and sale of franchises.

In Chile, the competition regulations are envisaged mainly in Decree Law No. 211 ("DL 211"). The DL 211 is applicable to all deeds, acts or agreements. Therefore, the offer and sale of franchises are not exempted from the application of the DL 211.

Under the DL 211, franchise agreements must comply with principles designed to prevent practices that significantly hinder competition. Article 3 of the DL 211 prohibits practices that restrict competition, such as monopolistic practices or collusive behaviour, and applies to franchise agreements that have effect within Chile. These agreements must be evaluated to ensure they do not create anticompetitive effects or unfair market conditions.

The Chilean Competition Court (*Tribunal de Defensa de la Libre Competencia* ("TDLC")) has established that franchise agreements may pose competitive risks in specific circumstances, particularly when: (i) the franchisor holds a relevant or dominant position in the market in which the agreement is set; and (ii) the contractual provisions generate exploitative or exclusionary effects in that market (TDLC Resolution No. 15/2006, Non-Contentious Case Docket No. NC 109-05).

For international franchise agreements that affect Chile, compliance with the DL 211 is mandatory, in addition to any applicable international competition laws.

3.2 Is there a maximum permitted term for a franchise agreement?

There is no maximum permitted term for a franchise agreement under Chilean law. However, under Article 3 of the DL 211, any agreement, including franchise agreements, must be assessed to ensure it does not create conditions that could impede, restrict or thwart competition, and is not likely to produce such effects. This assessment is based on the

provisions of the agreement and its impact on market competition, which varies from franchise to franchise.

3.3 Is there a maximum permitted term for any related product supply agreement?

There is no maximum permitted term. However, the enforceability of such agreements is subject to scrutiny based on their effects on competition. The TDLC has examined the competitive effects of franchise agreements, including supply agreements. For example, the TDLC has recognised that competitive risks arise when a franchisor has a dominant market position or when contractual provisions lead to exploitative or exclusionary effects (TDLC Resolution No. 15/2006, Non-Contentious Case Docket No. NC 109-05).

3.4 Are there restrictions on the ability of the franchisor to impose minimum resale prices?

There are no specific restrictions relating to franchise agreements, but it is not impossible for the competition authorities to apply general rules. In Chile, price suggestions by the franchisor are lawful if there is no pressure or incentive for the franchisee to comply with the suggested prices. If the franchisor enforces or incentivises adherence to these prices, it could be considered price fixing, which is a violation of competition law.

The National Economic Prosecutor's Bureau (*Fiscalía Nacional Económica* ("FNE")) has emphasised that resale price maintenance ("RPM") is particularly sensitive from a competition law perspective because it can lead to prices being artificially elevated above a certain threshold. Minimum resale prices are especially scrutinised as they can restrict intra-brand competition by preventing retailers from competing on price.

While price suggestions are permissible under certain conditions, any form of pressure or incentive to adhere to these prices can lead to serious competition law concerns, especially if the franchisor holds a dominant market position.

3.5 Encroachment – are there any minimum obligations that a franchisor must observe when offering franchises in adjoining territories?

In Chile, there are no specific regulations under the DL 211 that address franchises in adjoining territories. However, general principles of competition law can be relevant. Franchise agreements are voluntary contracts between parties, but once established, the franchisee often becomes economically dependent on the franchisor. This dependency can lead to potential abuses, especially if the franchisor holds a dominant position in the market. In such cases, the franchisor might impose contractual conditions that could be deemed abusive to the franchisees.

It is important to clearly define territorial boundaries and contractual conditions in franchise agreements to protect both franchisees and competition in the market.

3.6 Are in-term and post-term non-compete and non-solicitation of customers covenants enforceable?

In Chile, non-compete obligations during the term of a franchise agreement are generally enforceable as long as they are reasonable, and can remain in effect throughout the term of the franchise agreement. These restrictions should be limited to the core business of the company and should not exceed the geographical area necessary for the effectiveness of the business. If the franchisee operates from premises owned or leased by the franchisor, the non-compete obligation may extend for as long as the franchisee occupies those premises.

The TDLC has indicated that a franchise agreement involves the transfer of a successful commercial model, which includes the use of a prestigious brand and its distinctive signs, provision of services, sales equipment, and the full range of products offered by the franchisor.

However, post-term non-compete and non-solicitation clauses are subject to stricter scrutiny. After the termination of the franchise agreement, these clauses must comply with certain restrictions. In general, post-term non-compete obligations should be limited to a period of up to two years. An extension to three years may only be permitted in cases involving the transfer of know-how. In the context of franchises, the enforceable post-term duration should ideally not exceed two years, reflecting a conservative approach to avoid undue restrictions of competition. In the context of merger control investigations, the FNE has recently adopted a stricter stance in reviewing these clauses to ensure that they do not unduly restrict competition or have anti-competitive effects. Non-compete obligations that exceed the permitted duration or impose excessive restrictions may be considered unenforceable.

4 Protecting the Brand and Other Intellectual Property

4.1 How are trade marks protected?

Chilean law No 19,039 on Industrial Property ("IPL") regulates the existence, scope and exercise of industrial property rights, which include trademarks. The Chilean patent and trademark office, officially known as the National Institute of Industrial Property ("INAPI"), is the technical and legal entity responsible for the administration and servicing of industrial property services.

A Chilean trademark registration lasts for 10 years (from the date of the registration) and can be renewed for further periods of 10 years, subject to the payment of renewal fees.

To obtain a registration for a trademark is not mandatory for its use in economic activities.

A registered trademark confers its owner the exclusive and excluding right to use it in economic trade in the manner it has been granted, and to distinguish products and/or services included in the registration. If used in commerce, the trademarks must bear the words "*Marca Registrada*" (Registered Trademark), the initials "M.R." or the letter "R" inside a circle. Non-compliance with this requirement does not affect the validity of the registered trademark but prevents its owner from filing criminal actions granted by the law for trademark infringements.

Accordingly, the owner of a registered trademark may prevent any third party from using in the market, without its consent, identical or similar trademarks for products and/or services that are identical or similar to those for which the registration has been granted, where such use by a third party would induce error or confusion.

Consequently, for purposes of any trademark licence contained in the franchising agreement, please note that it will be necessary to register with the INAPI the trademarks that will be licensed in Chile.

Please be advised that it is possible to license a registered or an applied (non-registered) trademark. Naturally, the risk involved in the latter is that ultimately the trademark could be rejected.

4.2 Are know-how, trade secrets and other business-critical confidential information (e.g. the Operations Manual) protected by local law?

In Chile there is no legal recognition of the concept of "know-how", so that the most effective way to protect it consists of measures to safeguard secrecy and confidential information, which are expressly regulated and protected by law.

In fact, the IPL defines a trade secret as "any undisclosed information which a person possesses under his control and which may be used in any productive, industrial or commercial activity, provided that such information meets the following copulative requirements: (a) it is secret in the sense of not being, as a whole or in the precise configuration and assemblage of its components, generally known or readily accessible to persons within the circles in which such information is normally used, (b) has a commercial value because it is secret, and (c) has been the subject of reasonable measures taken by its legitimate holder to keep it secret".

Although the legal protection of trade secrets operates automatically, without the need for formalities (such as registration), it is highly advisable to include confidentiality clauses in contracts involving information intended to be protected as a trade secret, as it will help considerably to keep the respective information secret.

Confidentiality obligations should be extended to all contractual links maintained by the counterparty with persons and/or companies with which there is an exchange of all or part of the information covered (such as workers, service providers, companies related to the counterparty, etc.).

In addition, special consideration should also be given to contractual clauses that reinforce the protection of other intellectual assets linked to know-how, such as operating manuals, computer programs especially designed to control processes linked to the provision of a service or quality controls, procedure patents, and technical training and support contracts.

Finally, it is very important that the franchise agreement contemplates the protocol or measures to be followed in the event that any secret, confidential information and/or know-how is improperly disclosed; for example, to inform the counterparty as soon as such disclosure becomes known and to take all measures to avoid further damages to the affected party.

4.3 Is copyright (in the Operations Manual or in proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement) protected by local law?

Chilean Law No. 17,336 on Intellectual Property ("CCL") provides copyright protection in Chile. A piece of work that can be considered "original" (in the sense that it is distinguishable from other works of the same genre) will receive automatic copyright protection, without the need for any registration or formality.

Copyright protection will have a different duration depending on the type of work and whether the creator is known, but in most cases, protection lasts 70 years from the death of the author. This term is applicable, among others, to "literary works", a category that would include both an operating manual and a software.

Notwithstanding the fact that copyright protection is not subject to any formality or mandatory registration, it is possible to register works before the intellectual rights department ("DDI"). Such registration grants a presumption of ownership for the person who has the work registered in its name, and also facilitates the identification of the work in contractual matters, since the registration assigns a unique identification number to the registered work.

Additionally, due to the difficulties that may arise in proving software infringement, it is advisable to establish specific restrictions in the use, copying and dissemination of any software. Practical measures should also be considered, such as limiting access to source code.

5 Liability

5.1 What remedies can be enforced against a franchisor for failing to comply with mandatory disclosure obligations? Is a franchisee entitled to rescind the franchise agreement and/or claim damages?

There are no mandatory disclosure requirements for franchise agreements in Chile. There is also no legal requirement for contracting parties to volunteer information.

Nevertheless, the negotiation process for any contract must be conducted in good faith, and therefore, a franchisee may bring a claim against a franchisor that has made untrue statements of fact that led the franchisee to enter into the franchise agreement and suffer a loss, based on breach of duty to negotiate in good faith.

In the face of such conduct, the franchisee could claim, as non-contractual damages, the damages suffered as a direct consequence of the franchisor's bad faith behaviour. In addition, the franchisor could claim the nullity of the contract, based on the fact that the consent given by the franchisee to enter into the franchise contract is vitiated due to having contracted under a false representation of the reality derived from the omitted or falsified information by the franchisor.

5.2 In the case of sub-franchising, how is liability for disclosure non-compliance or for pre-contractual misrepresentation allocated between franchisor and master franchisee? If the franchisor takes an indemnity from the master franchisee in the Master Franchise Agreement, are there any limitations on such an indemnity being enforceable against the master franchisee?

As stated before, there are no mandatory disclosure requirements for franchise agreements in Chile, and therefore, there is also no legal requirement for contracting parties to volunteer information.

Given that the sub-franchise agreement is made between the master franchisee and sub-franchisee, any liability for not negotiating in good faith in the provision of information would be borne by the master franchisee (since the master franchisee was the one negotiating a contract with the sub-franchisee, and therefore, the one who was obligated to provide truthful information).

Notwithstanding the above, considering that the liability for breach of the duty of good faith in a negotiation is non-contractual, it is possible that, if within the framework of the negotiation the franchisor delivers false information directly to the sub-franchisee, it could eventually be liable for the damages caused by such conduct.

In principle, there would be no impediments or limitations to enforce an indemnity against the master franchisee, however, it should be borne in mind that in Chile it is prohibited to condone future fraud in contractual matters, so that the indemnity clause could not extend to the duty to indemnify the franchisor for circumstances arising from its own fraud.

5.3 Can a franchisor successfully avoid liability for pre-contractual misrepresentation by including a disclaimer in the franchise agreement?

The use of "entire agreement" and "non-reliance" clauses in franchise agreements could reduce the risk of the franchisee claiming that they did not receive the information necessary to take the decision to contract, or that such information was incorrect/misleading.

Notwithstanding the above, in Chile it is forbidden to waive unknown facts or circumstances by an overly broad disclaimer, which seeks to exclude any liability related to the provision of information. Thus, this type of clause could be considered "unreasonable" by the courts, and therefore devoid of any effect.

5.4 Does local law permit class actions to be brought by a number of aggrieved franchisees and, if so, are class action waiver clauses enforceable?

In Chile, class actions are only contemplated in favour of consumers, for purposes of bringing actions for infringement of the rights conferred to them by Law No. 19,496 on the protection of consumers' rights.

Given the foregoing, in principle, franchisees could not exercise class actions against a franchisor, since they do not fall into the category of consumer with respect to the franchisor, given that the franchisor-franchisee relationship is a business-to-business relationship.

Nevertheless, in Chile, "smaller companies" (those whose annual sales do not exceed 100,000 "*Unidades de Fomento*" – around USD 4,000,000) may be considered "consumers" towards their suppliers, being able, among other things, to exercise class actions against them. Thus, in the case of several franchisees that qualify as "smaller companies", it could be argued that they would be entitled to bring class actions against their franchisor. It should be borne in mind, in any case, that so far there are no precedents in Chile of class actions brought by smaller companies against their suppliers, and that in addition, given the nature of the franchise contract, it is debatable whether the franchisor has the character of a supplier with respect to the franchisee.

6 Governing Law

6.1 Is there a requirement for franchise documents to be governed by local law? If not, is there any generally accepted norm relating to choice of governing law, if it is not local law?

There is no legal requirement for franchise agreements to be governed, necessarily, by Chilean law. Chilean Law, based on the principle of parties' autonomy, allows them to freely agree on the terms established in the franchise documents. However, it is common for such agreements to agree on the legislation that best suits the franchisor. In some cases, franchise agreements in Chile have been subject to the law of various states of the US, the UK and European regulations.

6.2 Do the local courts provide a remedy, or will they enforce orders granted by other countries' courts, for interlocutory relief (injunction) against a franchisee to prevent damage to the brand or misuse of business-critical confidential information?

Chilean courts will enforce judgments issued in courts of foreign jurisdictions. However, given the procedural regulation of our system, it is questionable whether interim measures or injunctions can be enforced, given that what is recognised by the courts in Chile is only a final judgment or arbitral award.

Notwithstanding the above, depending on the circumstances, a franchisor may enforce its legal rights over trademarks and trade secrets against the franchisee with no need to invoke the franchise agreement as the source of its rights, but using the law as its direct source of its rights (non-contractual liability).

6.3 Is arbitration recognised as a viable means of dispute resolution and is your country a signatory to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Do businesses that accept arbitration as a form of dispute resolution procedure generally favour any particular set of arbitral rules?

Arbitration is a common and widely recognised forum for resolving disputes in Chile. Chile is a signatory to the New York Convention, therefore arbitral awards are internationally enforceable in Chile. There are many arbitration rules recognised in the country. Those frequently used in relation to Chile include the International Court of Arbitration of the International Chamber of Commerce ("ICC") and the Arbitration and Mediation Centre (*Centro de Arbitraje y Mediación* ("CAM")) of the CCS.

7 Real Estate

7.1 Generally speaking, is there a typical length of term for a commercial property lease?

No. The lease term in commercial property leases varies and may depend on several factors, such as: (a) the type of property and the lessee's line of business; (b) the lessor's title over the property and its financing structure (e.g., public concessions may limit the maximum term of any lease/sublease; finance leases may restrict the term of subleases); or (c) the rent scheme (fixed/turnover rent) and the parties' ability to agree on rent increases or a long-term rent scheme.

7.2 Is the concept of an option/conditional lease assignment over the lease (under which a franchisor has the right to step into the franchisee/tenant's shoes under the lease, or direct that a third party (often a replacement franchisee) may do so upon the failure of the original tenant or the termination of the franchise agreement) understood and enforceable?

Although the concept is generally understood, including step-in rights and/or conditional assignment provisions is uncommon; those type of provisions can be negotiated on

a case-by-case basis. Enforceability of such provisions will depend on how the step-in rights/conditional assignment is structured and will typically require the franchisor to be a party to the lease or to sign a separate conditional assignment agreement, where the franchisor may be required to agree to comply with outstanding obligations and/or cure past breaches of the franchisee under the lease agreement.

7.3 Are there any restrictions on non-national entities holding any interest in real estate, or being able to sub-lease property?

Yes. Nationals of bordering countries (Argentina, Bolivia and Peru) are prevented from owning real property, acquiring any real right (usufructs, easements, etc.), or holding interest (*posesión o tenencia*) in any real estate located, either totally or partially, in zones declared as "border zones" (*zonas fronterizas*) of the country, unless they obtain a special authorisation granted by the President of the Republic. The same restriction applies to companies that have their main office in any of Chile's bordering countries, or that are owned in more than 40% or controlled by nationals of such countries.

There are no restrictions applicable to other areas of the country. However, in practice, landlords usually impose additional restrictions or requirements to lease to non-national entities, such as providing additional securities to guarantee compliance with the lease agreement, appointing a national representative for litigation purposes, etc. In addition, for tax purposes, the lessee will need to obtain a Chilean Tax ID, for which the foreign company must have a domicile and a legal representative in Chile.

7.4 Give a general overview of the commercial real estate market. To what extent has the real estate market been affected by the Coronavirus pandemic? Specifically, can a tenant expect to secure an initial rent free period when entering into a new lease (and if so, for how long, generally), or are landlords demanding "key money" (a premium for a lease in a flagship location)?

During the Coronavirus pandemic, the real estate market slowed down and vacancy rates increased, particularly for office spaces.

The Coronavirus pandemic also caused additional provisions to be added to new leases, such as an express relief clause if the lessee is prevented from using the property for a long-term period.

Lessees may still expect to negotiate a rent-free period at the beginning of the lease, especially with major landlords. The length of such a term varies, although it is typically related to the time reasonably needed to complete fit-out works in the property. "Key-money" is not generally demanded, but it remains a commercial issue to be negotiated on a case-by-case basis.

8 Online Trading

8.1 If an online order for products or request for services is received from a potential customer located outside the franchisee's exclusive territory, can the franchise agreement impose a binding requirement for the request to be re-directed to the franchisee for the territory from which the sales request originated?

There is no legal regulation preventing the franchisor from establishing a prohibition of this type, which essentially prohibits "passive sales" (where the customer is located outside the franchisee's allocated territory but has nevertheless approached the franchisee directly).

However, this type of restriction may have an anticompetitive effect, and should therefore be analysed in light of the rules and criteria applied in matters of free competition. In this regard, it should be noted that the FNE – the antitrust authority – closely follows the criteria contained in the European Commission's Vertical Restraints Guide, according to which the prohibition of passive sales affects free competition, so that the establishment of restrictions of this type, although not expressly prohibited in Chile, could lead to sanctions by the antitrust authority, especially if the parties have a significant market share (over 30%).

8.2 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?

There are no limitations in this regard. Nevertheless, obligations intended to apply after termination of the franchise agreement should be expressly stated to "survive" the franchise agreement from the time it ends.

9 Termination

9.1 Are there any mandatory local laws that might override the termination rights one might typically expect to see in a franchise agreement?

Given that franchises are not specifically regulated in Chile, there are no mandatory local laws that could affect termination rights set out in the franchise agreement.

Regardless of the above, termination rights, being rights held under a contract, must be exercised in good faith, so that an abusive exercise of such right could eventually be considered unreasonable and give rise to compensation for the damages caused by said abusive practice. An example of this could be the sudden termination of the contract without prior notice, as explained in question 9.2 below.

9.2 Are there local rules that impose a minimum notice period that must be given to bring a business relationship that has existed for a number of years to an end, which will apply irrespective of the length of the notice period set out in the franchise agreement?

Chilean law does not impose a minimum notice period to end a business relationship, however, Chilean case law has consistently ruled that it is possible to unilaterally terminate a contract that has been developed over a long period of time, provided that such termination is exercised in a reasonable manner (i.e., in a way that does not cause unnecessary detriment to the other party, or is not exercised after having shown intent to continue the contract).

In this regard, Chilean courts have indicated that 60–90 days' prior notice would be a reasonable term to exercise this prerogative. The lack of reasonable prior notice to terminate the contract does not necessarily imply that the contract will remain in force, but it will be a reason to hold the party who suddenly terminated the contract liable for the damages that such termination may have caused to the other party.

10 Joint Employer Risk and Vicarious Liability

10.1 Is there a risk that a franchisor may be regarded as a joint employer with the franchisee in respect of the franchisee's employees? If so, can anything be done to mitigate this risk?

The prevailing case law in Chile has ruled that the regulations relating to the subcontracting regime, established in Article 183-A and following of the Labor Code, would be applicable to franchise agreements, so that the clauses tending to establish the complete independence between franchisor and franchisee have no effect on labour matters. The aforementioned rules render the principal company (the franchisor) jointly and severally liable for the labour obligations not fulfilled by the subcontracting company (the franchisee).

Chilean legislation contemplates the possibility that such liability of the principal company may be mitigated, going from joint and several to subsidiary (i.e., the employee must first pursue payment of the unfulfilled obligations against the subcontractor, and only if payment is not obtained may the employee proceed against the principal company). In order for the principal company's liability to change from joint and several to subsidiary, the principal company must have paid its so-called "information" and "retention" rights over the franchisee. The information right allows the principal company to request reports from the subcontracting company on the fulfilment of its obligations with respect to its employees. The retention right allows the main company to withhold, from the payments to be made to the subcontractor, the latter's unfulfilled obligations towards its own employees and to pay by subrogation.

However, the jurisprudence observed in this matter has held that given the way in which the services are paid in this type of contract, it is not possible for the franchisor to exercise the right of retention, since there would be no amount that the franchisor could withhold (since it is the franchisee who pays the franchisor, and not the other way around), and therefore the franchisor is jointly and severally liable for the labour and social security obligations of the franchisee's employees.

Considering the above, it is highly advisable to establish and exercise the right to information and to consider the franchisee's failure to comply with its labour obligations as a serious cause for breach of the franchise agreement.

10.2 Is there a risk that a franchisor may be held to be vicariously liable for the acts or omissions of a franchisee's employees in the performance of the franchisee's franchised business? If so, can anything be done to mitigate this risk?

In order for an employer to be liable for the acts of its employees, such acts must have been carried out by the employee in the performance of their duties, when the employee is within the employer's sphere of control or supervision.

In this sense, the franchisor generally does not exercise direct control over the employees of the franchisor, who independently hires and directs its employees. In addition, franchise agreements generally contain a clause expressly stating that there is no relationship of partnership, agency or employment between the franchisor and franchisee, all of which may reduce the likelihood of potential liability.

Nevertheless, some factor may contribute to a risk of vicarious liability, such as (i) the degree of control the franchisor exercises over the franchisee's operations, and (ii) whether the franchisor and franchisee have a common ownership or are related companies.

11 Currency Controls and Taxation

11.1 Are there any restrictions (for example exchange control restrictions) on the payment of royalties to an overseas franchisor?

No, there are no such restrictions from a tax perspective. However, it should be noted that, in case of royalties paid to related entities, the royalty should be in line with fair market values in accordance with transfer pricing rules. This suggests that the royalty paid between the affiliated entities should be similar to what independent third parties would have charged each other under similar conditions and circumstances.

11.2 Are there any mandatory withholding tax requirements applicable to the payment of royalties under a trade mark licence or in respect of the transfer of technology? Can any withholding tax be avoided by structuring payments due from the franchisee to the franchisor as a management services fee rather than a royalty for the use of a trade mark or technology?

Royalties and other payments for the use, right to use or exploitation of trademarks, patents or similar transactions are generally subject to a 30% withholding tax. However, this rate is reduced to 15% for patent of inventions, utility models, industrial designs and drawings, and computer programs, among others.

Exceptionally, no withholding tax applies if royalties are paid for the use of or right to use standard computer programs, which are those where the transferred rights are limited to enabling their use, without permitting commercial exploitation, reproduction or modification for any purpose other than usage.

Additionally, it should be noted that Chile has an extensive network of double taxation treaties that may further reduce the applicable withholding tax rate.

Under Chilean domestic law, fees for services rendered from abroad (such as management services) are also subject to withholding taxes in Chile, although double taxation treaties may offer exemptions.

In this regard, it should be born in mind that Chilean legislation applies a substance-over-form principle, requiring a case-by-case analysis to determine whether a payment qualifies as a management service fee or a royalty fee, based on the relevant functions, rights, obligations and factual pattern.

11.3 Are there any requirements for financial transactions, including the payment of franchise fees or royalties, to be conducted in local currency?

No, there are no requirements from a tax perspective.

12 Commercial Agency

12.1 Is there a risk that a franchisee might be treated as the franchisor's commercial agent? If so, is there anything that can be done to help mitigate this risk?

In Chile the commercial agent is not expressly regulated in the legislation, so that there are no precise and clear requirements to determine what constitutes a commercial agency.

Notwithstanding the foregoing, Chilean doctrine agrees that the rules that regulate the commercial commission and mandate contracts would be applicable to the commercial agency contract in a supplementary manner. According to these rules, a commercial agency is characterised by the fact that the agent manages the business of a third party in a given territory on behalf of the latter, and on the account and risk of said third party, in exchange for a commission or fee, which generally corresponds to a percentage of the sales that the agent manages to achieve for the third party that they represent in their designated territory.

Consequently, in principle, there should not be a high risk that a franchisee may be considered a commercial agent of the franchisor, since the franchisee carries out an independent business at its own risk. Notwithstanding the foregoing, the risk could be greater if the franchise agreement includes powers to represent or act for the account and risk of the franchisor in the territory where the franchise operates. Therefore, a franchise agreement should avoid granting such powers or obligations, and include a disclaimer stating that the agreement is not intended to constitute an agency or partnership relationship between the parties.

13 Good Faith and Fair Dealings

13.1 Is there any overriding requirement for a franchisor to deal with a franchisee in good faith and to act fairly in its dealings with franchisees according to some objective test of fairness and reasonableness?

In Chile, according to the provisions of the Civil Code, every contract must be executed in good faith. This implies that, even when acting in the exercise of legitimate rights acquired under the contract, such rights must be exercised in a reasonable manner, based on the terms of the contract and avoiding causing unnecessary damage to the other party.

As regards the fairness of the dealings, since the franchise contract is a business-to-business contract, it is understood that the principle of "equality between the parties" prevails, according to which each party protects its own interests and there is no need for the legal system to ensure that the dealings are objectively fair. Notwithstanding this, clauses that are notoriously asymmetrical may present problems when trying to enforce them in court, as will be seen in question 13.2 below.

13.2 Is there any limitation on a good faith obligation being unenforceable if it only applies from franchisee to franchisor, rather than being mutual?

In principle, freedom of contract and equality between the parties under a business-to-business contract (such as a franchise agreement) allow for obligations that are not necessarily mutual, which are perfectly valid and enforceable.

Nevertheless, if the franchise agreement imposes obligations only on the franchisee without the franchisee having correlative obligations of any kind, to the extent that the franchise would be exempt from liability, such asymmetrical obligations could be considered unreasonable and even contrary to law (in the event that the franchisee's future fraud is being excused) and declared unenforceable in court.

14 Ongoing Relationship Issues

14.1 Are there any specific laws regulating the relationship between franchisor and franchisee once the franchise agreement has been entered into?

No. However, general principles of law will apply, including the principle of good faith in the execution of contracts, to which we have already referred in question 13.1 above.

15 Franchise Renewal

15.1 What disclosure obligations apply in relation to a renewal of an existing franchise at the end of the franchise agreement term?

As stated in question 1.5, there are no mandatory disclosure obligations in Chile.

15.2 Is there any overriding right for a franchisee to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term irrespective of the wishes of the franchisor not to renew or extend?

There are no overriding rights for a franchisee to obtain the renewal of a franchise agreement at the end of the initial term, or any subsequent term. In order for the franchisee to have such a right, it would be necessary for it to have been established as part of the franchise agreement.

15.3 Is a franchisee that is refused a renewal or extension of its franchise agreement entitled to any compensation or damages as a result of the non-renewal or refusal to extend?

In principle, since the franchisee has no right to obtain the renewal or extension of the franchise agreement, the franchisee is not entitled to indemnification for the sole fact of the non-renewal or extension of the franchise agreement.

Notwithstanding the foregoing, in the event that the franchisor has engaged in acts or conduct implying that the franchise agreement will be renewed or extended, such acts or conduct generate a legitimate expectation that the agreement will be renewed and that the franchisor has invested time and/or resources in view of such renewal, the franchisor may be liable for damages caused as a result of the decision not to renew or extend the franchise agreement.

16 Franchise Migration

16.1 Is a franchisor entitled to impose restrictions on a franchisee's freedom to sell, transfer, assign or otherwise dispose of the franchised business?

There are no legal restrictions of this type and the principle of freedom of contract is therefore fully applicable in this matter,

so the franchise agreement can include an absolute prohibition on the franchisee's ability to transfer or assign the franchise to a third party, or otherwise, include an assignment clause whereby the franchisee transfers the franchise subject to the franchisor's prior written consent.

16.2 If a franchisee is in breach and the franchise agreement is terminated by the franchisor, will a "step-in" right in the franchise agreement (whereby the franchisor may take over the ownership and management of the franchised business) be recognised by local law, and are there any registration requirements or other formalities that must be complied with to ensure that such a right will be enforceable?

Since there are no limitations for the transfer and assignment of a franchise business, a "step-in" clause would be recognised and enforceable under Chilean law. Given that this is not a matter regulated by law, no formalities or registrations are necessary for this clause to be enforceable, beyond the requirements that the contract itself contemplates for its application.

In this sense, it should be noted that if the franchisee to be replaced by the step-in was leasing a real estate to a third party for the development of the franchise, the lease agreement should contemplate the possibility of the franchisor becoming a lessee upon exercising the step-in, or else, it will be necessary for the franchisor to sign a separate agreement with the real estate owner to take the position of lessee, where the franchisor may be required to agree to comply with outstanding obligations and/or cure past breaches of the franchisee under the lease agreement.

16.3 If the franchise agreement contains a power of attorney in favour of the franchisor under which it may complete all necessary formalities required to complete a franchise migration under pre-emption or "step-in" rights, will such a power of attorney be recognised by the courts in the jurisdiction and be treated as valid? Are there any registration or other formalities that must be complied with to ensure that such a power of attorney will be valid and effective?

Powers of attorney in general do not require registration or specific formalities to be effective, although it may be advisable that the power of attorney be recorded in a public deed or in a document signed before a notary to ensure that it is recognised in the various steps necessary to complete the migration of the franchise.

It should be noted that a power of attorney with the aforementioned powers would allow the migration of the franchise to be carried out entirely by the franchisor acting on its own behalf and on behalf of the franchisee, which would constitute a case of "self-contracting", in which only one party appears in the contract acting on behalf of both parties. Self-contracting is in principle allowed, however, its validity could be questioned in court in case the act of self-contracting is performed in the sole interest of the attending party, to the detriment of the other, which could be configured in this case if the franchisor is completing the transfer of the franchise to itself against the express will of the franchisee.

Additionally, the power of attorney is an act that as a general rule is always revocable by the principal, the irrevocability being a rather exceptional situation, so that a power of attorney of these characteristics could always be revoked by the franchisee who granted it. To avoid this, it would be necessary to stipulate that the power of attorney is irrevocable, which could increase the risk of the validity of the power of attorney being questioned, since an irrevocable power of attorney, which allows self-contracting even against the interest of the power of attorney, could be considered "unreasonable" by the courts.

17 Electronic Signatures and Document Retention

17.1 Are there any specific requirements for applying an electronic signature to a franchise agreement (rather than physically signing a "wet ink" version of the agreement), and are electronic signatures recognised as a valid way of creating a binding and enforceable agreement?

In Chile, electronic signatures are regulated by Law No. 19,799 on electronic documents and electronic signatures. This law distinguishes between two types of electronic signatures: simple electronic signature; and advanced electronic signature.

The Simple Electronic Signature ("FES") is defined as "any kind of sound, symbol or electronic process that allows the receiver of an electronic document to identify, at least formally, its author". Thus, for example, the name of a person at the end of an e-mail, an electronic drawing, a fingerprint or a scanned image of a handwritten signature are examples of simple electronic signatures.

For its part, the Advanced Electronic Signature ("FEA") is defined as an electronic signature that is "certified by an accredited provider and that has been created using means that the holder keeps under his exclusive control, so that it is linked only to him and to the data to which it refers, allowing the subsequent detection of any modification, verifying the identity of the holder and preventing him from not knowing the integrity of the document and its authorship". In other words, it is a signature mechanism operated by state-authorised providers, with which any natural person may contract, in exchange for a fee, to have access to the advanced electronic signature mechanism.

In most cases, both types of signatures can be used indistinctly to execute all kinds of acts and contracts, and therefore, it is possible to execute, by means of electronic signature, either simple electronic signature or advanced electronic signature, a franchise contract that has binding effects.

The difference between using a FES and a FEA lies in the value that each type of electronic signature has in a trial: a document signed with a simple electronic signature has the same value as an instrument signed on paper, while documents signed with an advanced electronic signature have the evidentiary value of a public instrument, which is greater than that of documents signed on paper.

17.2 If a signed/executed franchise agreement is stored electronically (either having been signed using e-signatures or a "wet ink" version having been scanned and saved as an electronic file), can the paper version of the agreement be destroyed?

The answer will depend on how the document was signed.

If the document was signed with an electronic signature (whether simple or advanced), the valid and binding document containing the consent of both parties is the digital document, and therefore any digital file or paper version of the same document is a simple copy that can be destroyed without any legal consequence.

On the contrary, if the document was signed on paper and then scanned, the digital version is only a copy and does not constitute the original document containing the signatures of both parties. In such a case, it may be advisable to keep the original paper document, because if either party alleges that the signature has been forged, it may be necessary to conduct an expert examination of the original paper version.

18 Current Developments

18.1 What is the biggest challenge franchising is facing in your jurisdiction and how are franchisors responding to that challenge?

Currently there are no proposals for new legislation, regulations or initiatives affecting franchising business directly. Nevertheless, there are several initiatives in discussion that should affect any business in general, and that may be especially relevant for the franchise business, considering that franchising is a business model where the franchisor's reputation and goodwill are especially relevant, since they are the assets used by the franchisee for the development of its own business.

In fact, legal initiatives have recently been approved that reinforce the obligations of companies regarding the treatment of personal data (amendments to Law No. 19,628) and the prevention of harassment and violence in the workplace (Law No. 21,643). These new regulations imply a series of new obligations that must be complied by companies operating in Chile, including businesses operated by franchisees, and whose non-compliance may have a relevant impact not only in terms of legal sanctions, but also from a reputational perspective, which could extend to the franchisor's brand, reputation and goodwill, since the franchisee is the franchisor's visible face in its respective territory of operation.

Given the above, franchisors should therefore be sure to take steps to ensure that franchisees adequately address these new legal obligations to avoid putting the franchisee's reputation and goodwill at risk, while also ensuring that such measures do not affect the franchisee's independence from the franchisor, to avoid increasing the risks that may arise in the event that such independence is diminished (see question 10.1 above).

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We would like to thank Diego Hormazábal, Adriana Peña and Tomás Jadresic for their help in writing this chapter.

Diego Hormazábal is an Associate at Carey. His practice focuses on advising clients on personal and corporate tax planning, local and international tax consulting, taxation of corporate restructuring, and reorganisations and tax litigation.

Adriana Peña is an Associate at Carey. Her practice focuses on the areas of antitrust, regulation, administrative law and litigation.

Tomás Jadresic is an Associate at Carey. His practice focuses mainly on civil and criminal litigation, specialising in intellectual and industrial rights infringements, unfair competition and patent litigation before ordinary and special courts. His practice also includes advising various clients on public tenders, direct deals procurement executed by State agencies, as well as in administrative litigation related to or derived from matters related to public contracting.

Fernando García is Counsel in Carey's Intellectual Property and Information Technology Group. His practice focuses on intellectual property, especially on invention patents, including strategies for protection mechanisms, administrative and contentious registration processes, nullity procedures for granted registrations, technology transfer projects, and trademark and patent infringement litigation.
With almost 30 years of experience, he has been recognised as a leading lawyer in Intellectual Property by several international publications, including *Chambers and Partners*, *The Legal 500*, *World Trademark Review* and *IAM Patent*, among others. In 2021 and 2023 he was named Lawyer of the Year in Advertising by *Best Lawyers*.
He is a member of the Patents Committee of the Inter-American Association of Intellectual Property (ASIPI), vice-president of Licensing Executives Society (LES) Chile and a member of the Chilean Intellectual Property Association (ACHIPI).

Carey
Isidora Goyenechea 2800, 43rd Floor
Las Condes, Santiago
Chile

Tel: +56 2 2928 2665
Email: fgarcia@carey.cl
LinkedIn: www.linkedin.com/in/fernando-garc%C3%ADa-onell-5a80ab68

José Pardo is a Partner at Carey and co-head of the firm's Antitrust and Regulated Markets Group. His main practice areas include antitrust, regulation, administrative law and litigation.
With over 12 years of experience, he has been recognised as a leading lawyer in Competition and Antitrust by several international publications such as *Chambers and Partners*, *The Legal 500*, *Who's Who Legal* and *Best Lawyers*, among others.
José graduated *summa cum laude* from Universidad de Chile's Law School and holds an LL.M. from the University of Chicago. He also has a Degree in Administrative Law from Universidad Católica de Chile.
From 2016–2017 he worked as a foreign associate at Freshfields Bruckhaus Deringer in Brussels.

Carey
Isidora Goyenechea 2800, 43rd Floor
Las Condes, Santiago
Chile

Tel: +56 2 2928 2482
Email: jpardo@carey.cl
LinkedIn: www.linkedin.com/in/jos%C3%A9-pardo-95748629/?original_

Javiera Avilés is an Associate at Carey and advises domestic and foreign clients on infrastructure, engineering and construction projects, mining and energy facilities, EPC, EPCM, BoP, BOT, BOOT, O&M contracts claim management, administration of projects, real estate development, land development and related legal litigation.

Carey
Isidora Goyenechea 2800, 43rd Floor
Las Condes, Santiago
Chile

Tel: +56 2 2928 2223
Email: javiles@carey.cl
LinkedIn: www.linkedin.com/in/jcaviless

Ricardo Padilla is a Senior Associate of the firm's dispute resolution group. His practice focuses on: complex civil, commercial and insolvency litigation; national and international commercial arbitrations; and judicial proceedings before the various jurisdictions of Chile. He specialises in construction disputes in the real estate, renewable energy and mining sectors. Likewise, he is highly experienced in contractual disputes of various kinds, as well as in non-contractual matters related to unfair competition.

Carey
Isidora Goyenechea 2800, 43rd Floor
Las Condes, Santiago
Chile

Tel: +56 2 2928 2213
Email: rpadilla@carey.cl
LinkedIn: www.linkedin.com/in/ricardo-padilla-parot-02769662/?originalSubdomain=cl

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