

FRANCHISE LAW IN CHILE: CURRENT ISSUES AND FUTURE OUTLOOK

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INTRODUCTION

Franchising in Latin America gained momentum in the late 1980s with an influx of franchising investment, primarily from the United States.¹ Foreign investment in franchising first swept through the largest economies in the region, Brazil and Mexico, before turning to Argentina and Chile.² In the decades that followed, the franchising industry diversified and consolidated across the region. More recently, with the emergence of middle-class consumers across the region, Latin America has attracted a new wave of franchising investment.³

The character and record of franchise law are well established in academic literature.⁴ An immensely popular practice with its origins in contract law, franchising has been wildly successful throughout developed economies.⁵ In the United States alone, franchising is responsible for \$700 billion worth of goods and services, approximately 8 million jobs, and adding \$400 billion to GDP.⁶ Some twenty-nine countries have en-

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1. William R. Long, *Doing Business: Latin America's New Retailers*, L. A. TIMES (November 30, 1993), http://articles.latimes.com/1993-11-30/news/wr-62354_1_master-franchise (last visited Nov. 9, 2013).

2. *Id.*

3. Taylor Barnes, *Franchising Boom in Latin America*, LATIN BUS. CHRON. (May 29, 2012), <http://www.latinbusinesschronicle.com/app/article.aspx?id=5688>; REUTERS, *Darden Announces Additional Franchise Deals In Latin America* (July 12, 2013), <http://www.reuters.com/article/2013/07/12/fl-darden-latin-amer-idUSnPNFL46284+1e0+PRN20130712>.

4. For historical accounts of franchising, see COLEMAN R. ROSENFELD, *THE LAW OF FRANCHISING* 1-8 (1970); Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503, 1506-07 (1990). For a thorough discussion of how franchising is defined, see Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. REV. 905, 908 (1994). For a treatment of franchise encroachment, see Robert W. Emerson, *Franchise Encroachment*, AM. BUS. L.J., 191 (2010).

5. See Robert W. Emerson & Uri Benoliel, *Can Franchisee Associations Serve as a Substitute for Franchisee Protection Laws?*, 118 PENN. ST. L. REV. 99, 100-101 (2013).

6. *Id.* at 101. See also IHS GLOBAL INSIGHT, *FRANCHISE BUSINESS ECONOMIC OUTLOOK: MAY 2012*, available at <http://emarket.franchise.org/BusinessOutlookReport2012.pdf>.

acted specific franchise legislation.⁷ Other countries, including Israel and Japan, prefer to leave the operation of franchises to their extant contract and property law.⁸ The business of franchising seems to thrive in either situation.

With an established middle-class and a stable investment framework, Chile offers a mature market for franchising. Franchising revenues in Chile are estimated at \$1.48 billion dollars per year.⁹ Though Chile does not have franchise-specific legislation, a variety of general commercial laws apply to franchise activities, including the Civil Code,¹⁰ Commercial Code,¹¹ Intellectual Property Law,¹² Industrial Property Law,¹³ and in some cases the Labor Code¹⁴ and the Consumer Protection Act.¹⁵ This article provides an overview of franchise law in Chile, identifying key legal issues and particular themes under the Chilean legal environment.

I. THE CHILEAN MARKET FOR FRANCHISING

A. THE ECONOMY OF CHILE

Chile has arguably the most advanced and stable economy in Latin America.¹⁶ As of 2012, Chile's gross domestic product was \$269.9 billion with a population of 17.46 million.¹⁷ Roughly a third of Chile's population—almost 6 million people—is concentrated in the metropolitan area of Santiago, the nation's capital.¹⁸ With per capita income of nearly \$15,000,¹⁹ the highest in Latin America, Chile was recently classified as a

7. MARK ABELL, MARCO HERO & R. SCOTT TOOP, INTERNATIONAL FRANCHISE ASSOCIATION, IFA 45TH ANNUAL LEGAL SYMPOSIUM: ADVANCED BEST PRACTICE FOR INTERNATIONAL REGULATORY COMPLIANCE (2012), available at <http://www.franchise.org/uploadedFiles/Advanced%20Intl%20Regulatory%20Compliance.pdf>.

8. Emerson & Benoliel, *supra* note 5, at 102.

9. NICOLE PINAUD VERDE-RAMO, MERCADO DE LAS FRANQUICIAS EN CHILE [FRANCHISE MARKETS IN CHILE] 28 (2012), available at <http://www.cnc.cl/downloadfile.aspx?CodSistema=20020129172812&CodContenido=20121016181042&CodArchivo=20121127130805>.

10. *See generally* Cód. Civ. (Civil Code of Chile).

11. *See generally* Cód. Com. (Commercial Code of Chile).

12. *See generally* Law No. 17.336, Octubre 2, 1970, DIARIO OFICIAL [D.O.] (Chile).

13. *See generally* Law No. 19.996, Marzo 11, 2005, DIARIO OFICIAL [D.O.] (Chile).

14. *See generally* Cód. Trab. (Labor Code of Chile).

15. *See generally* Law No. 19.496, Marzo 7, 1997, DIARIO OFICIAL [D.O.] (Chile).

16. *See Why Chile*, MINISTRY OF FIN., <http://www.hacienda.cl/english/investor-relations-office/why-chile.html> (last visited March 26, 2014) ("In international comparisons of competitiveness and economic freedom, Chile is at the forefront of Latin America, and despite its emerging status, ranks alongside the most developed economies in the world.")

17. *Data: Chile*, THE WORLD BANK, <http://data.worldbank.org/country/chile> (last visited Mar. 26, 2014).

18. *Chile Population 2014*, WORLD POPULATION REVIEW, <http://worldpopulationreview.com/countries/chile-population/> (last visited Mar. 26, 2014).

19. United Nations Development Programme, Human Development Report 144 (2013), available at http://hdr.undp.org/sites/default/files/reports/14/hdr2013_en_complete.pdf.

“high income” country by the World Bank.²⁰ Chile’s economy grew 5.6 percent in 2012 but cooled somewhat in 2013.²¹ The economy is on track to grow between 4.0 and 4.5 percent in 2013 and between 4.0 and 5.0 percent in 2014.²²

Though a relatively small economy, Chile offers a mature market with an appetite for international brands. Chile has a well-established and diversified financial system compared with other countries in Latin America.²³ Business regulation in Chile is stable and transparent. Chile consistently performs well in the World Bank’s international *Doing Business* report, ranking 34 out of 189 in the most recent rankings.²⁴ Excluding Chile, the average rank for Latin America is 76 out of 189.²⁵

B. THE FRANCHISING INDUSTRY IN CHILE

Franchising developed rapidly in Chile in the late 1980s after the arrival of United States fast-food icons like McDonald’s, Pizza Hut, and Kentucky Fried Chicken.²⁶ Domestic franchises expanded during this period as well.²⁷ Restaurants like Doggi’s and Lomitón established a market share for the first time while existing franchises such as Fuenzalida Propiedades (real estate services) and Farmacias Cruz Verde (retail pharmacy) consolidated their positions.²⁸ More recently, Chile was the first country in Latin America to open Gap retail locations.²⁹ Interest in the Chilean market for franchising remains strong today.³⁰

Chile’s franchise industry accounts for an estimated \$1.48 billion per year in revenues.³¹ Franchise revenues have tripled in just eight years.³² The franchise industry provides an estimated 31,000 jobs in Chile, repre-

20. *New Country Classifications*, THE WORLD BANK (July 2, 2013), <http://data.worldbank.org/news/new-country-classifications>.

21. *Update 1-Chile Economy to Grow 4.5 pct in 2013-Finance Minister*, REUTERS (Oct. 1, 2013, 10:49 AM), <http://www.reuters.com/article/2013/10/01/chile-economy-idUSL1N0HR0YV20131001>.

22. *Update 1-Chile Central Bank Cuts 2013 GDP View, 2014 Forecast Similar*, REUTERS (Sept. 4, 2013, 12:35 PM), <http://www.reuters.com/article/2013/09/04/chile-bank-forecasts-idUSL2N0H011520130904>.

23. See generally BANCO CENTRAL DE CHILE, FINANCIAL STABILITY REPORT: FIRST HALF 2013, available at http://www.bcentral.cl/eng/publications/policies/pdf/fsr_1_2013.pdf.

24. See WORLD BANK, DOING BUSINESS 2014: CHILE 5, available at <http://www.doingbusiness.org/~media/giawb/doing%20business/documents/profiles/country/CHL.pdf>. The World Bank’s *Doing Business In* report provides an aggregate ranking of countries based on regulations that apply to starting up and maintaining domestic enterprise, including small-to medium-size businesses.

25. *Id.* at 7.

26. VERDE-RAMO, *supra* note 9, at 5.

27. *Id.*

28. *Id.*

29. Press Release, Gap, Inc., Gap Inc. Expands in Latin America with First Stores in Chile (Oct. 12, 2011), available at http://gapinc.com/content/gapinc/html/media/pressrelease/2011/med_pr_Gap_Inc_Expands_in_Latin_America101211.html.

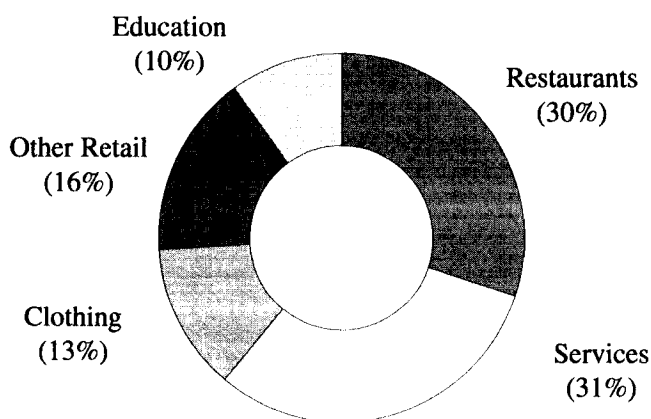
30. Beth Solomon, *Chile Keeps Warming to U.S. Franchising*, IFA FRANBLOG (Sep. 6, 2012), <http://www.ifafranblog.com/chile-keeps-warming-to-u-s-franchising-2/>.

31. VERDE-RAMO, *supra* note 9, at 2.

32. *Id.*

senting 24 percent growth in the last five years.³³ Startup costs for franchisees tend to be quite reasonable in Chile. In 60 percent of cases, the initial investment required to start a franchise business is less than \$100,000.³⁴ In more than 80 percent of cases, it takes less than \$200,000.³⁵ The payback period—the amount of time it takes to recover the initial investment in terms of profits or savings—averages just below two years for franchise investments in Chile.³⁶

Initially, the fast-food restaurant industry dominated franchise activity in Chile.³⁷ Currently, services and restaurants are the most active sectors with 60 percent of franchised trademarks.³⁸ Fast-food remains a key franchising industry but clothing, retail, and education have become increasingly important sectors in recent years.³⁹ Approximately 130 franchises are operating through 3,666 locations across Chile.⁴⁰ Figure 1 below illustrates the number of franchise trademarks by sector.⁴¹



II. FOREIGN INVESTMENT IN CHILE

A. THE CONSTITUTION AND FOREIGN INVESTMENT

Protection of foreign investment in Chile is rooted in constitutional provisions. Article 19 of the Chilean Constitution of 1980 guarantees numerous rights to “all persons”⁴²—thus including foreign persons—whereas the previous Constitution of 1925 provided guarantees only to

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 26–27.

37. *Id.* at 5; VERONICA PINTO, U.S. COMMERCIAL SERVICE, CHILE: FRANCHISE INDUSTRY BACKGROUND (2010), available at http://www.franchise.org/uploadedFiles/Franchise_Industry/International_Development/Country_Profiles/Chile_Franchising_2010.pdf.

38. VERDE-RAMO, *supra* note 9, at 2.

39. *Id.* at 19.

40. *Id.* at 16.

41. *Id.* at 19.

42. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19.

“inhabitants of the Republic.”⁴³ Under Chilean law, the concept of “person” extends to natural persons and legal entities.⁴⁴ To that end, section 2 of article 19 of the 1980 Constitution further provides that there shall be “no privileged persons or groups” or “arbitrary distinctions.”⁴⁵ Furthermore, article 57 of the Civil Code provides that “the law does not recognize differences between Chilean and foreigners in regards to the acquisition and exercise of the civil rights regulated by this code.”⁴⁶ These provisions establish a broad foundation for equality among Chileans and foreigners.⁴⁷

B. STATUTES AND FOREIGN INVESTMENT

Statutes provide additional protection and regulation of foreign investment.⁴⁸ Enacted in 1974, Decree Law No. 600 is known as the Foreign Investment (FDI) Statute and guarantees equal footing for foreign investors and local businesses.⁴⁹ The FDI Statute provides an optional mechanism for the entry of capital into Chile with flexible options for the deployment and remittance of foreign investment capital. As of 2011, nearly \$82 billion in capital entered Chile through the FDI Statute mechanism, representing 56.5 percent of foreign capital invested in Chile since 1974.⁵⁰

The Foreign Investment Committee (FIC) is the regulatory agency charged with processing foreign capital received under the FDI Statute.⁵¹ Investments entering Chile under the FDI Statute require FIC approval.⁵² Aside from certain industries deemed to be of national interest, whole ownership of investments by foreigners is permitted. Repatriation of capital and profits is also quite permissive, with few exceptions.⁵³

43. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE DE 1925, art. 10, available at <http://biblio.juridicas.unam.mx/libros/4/1641/10.pdf> (replaced by the current Constitution in 1980).

44. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, § 15.

45. *Id.* art. 19, § 2.

46. Cód. Civ. art. 57.

47. For a thorough review of constitutional protections of foreign investment in Chile, see Rodrigo Polanco Lazo, *Legal Framework of Foreign Investment in Chile*, 18 L. & BUS. REV. AMERICAS., 203, 203–209 (2012).

48. For complementary Chilean legislation on foreign investments, see Law No. 19.840, Noviembre 13, 2002, DIARIO OFICIAL [D.O.] (on Investment Platform); Law No. 18.840, Octubre 4, 1989, DIARIO OFICIAL [D.O.] (the Constitutional Organic Act of the Central Bank of Chile); Law No. 18.657, Septiembre 16, 1987, DIARIO OFICIAL [D.O.] (on Investment Funds of Foreign Capital).

49. See Law No. 600, Septiembre 3, 1993, DIARIO OFICIAL [D.O.] (Chile) (FDI Statute).

50. See *What is DL 600?*, FOREIGN INV. COMM., <http://www.ciechile.gob.cl/en/dl-600/que-es-el-dl600/>.

51. Lazo, *supra* note 47, at 210.

52. *Id.*

53. See Law No. 600, Septiembre 3, 1993, DIARIO OFICIAL [D.O.] (Chile) (FDI Statute); Law No. 18.840, Octubre 4, 1989, DIARIO OFICIAL [D.O.] art. 47 (the Constitutional Organic Act of the Central Bank of Chile). For summaries of these two laws, see *Legal Framework*, MINISTRY OF FIN., <http://www.hacienda.cl/english/investor-relations-office/incentives-for-foreign-investment/legal-framework.html> (last visited Mar. 27, 2014).

C. INTERNATIONAL TREATIES AND MULTILATERALISM

With one of the most open economies in the Americas, Chile has shown a strong commitment to multilateral economic integration. Chile was the first South American country to join the Organization for Economic Cooperation and Development.⁵⁴ Chile is also a founding member of the General Agreement on Tariffs and Trade (GATT).⁵⁵ In recent decades, Chile has pursued a policy of open trade through numerous bilateral, regional, and multilateral trade agreements.⁵⁶ Chile has signed over fifty bilateral investment treaties to date.⁵⁷ Additionally, Chile has twenty-five double taxation treaties in force.⁵⁸ Chile also recognizes and participates in multilateral efforts for investment dispute resolution mechanisms, including the International Centre for Settlement of Investment Disputes (ICSID or Washington Convention), the Inter-American Convention on International Commercial Arbitration, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁵⁹ Chile is a member of the Multilateral Investment Guarantee Agency (MIGA) as well.⁶⁰

III. FRANCHISE LAW IN CHILE

Like many countries, Chile does not have franchise-specific legislation. The legal dimensions of franchising activities in Chile are primarily defined by franchise agreements, the contract between the franchisor and the franchisee. Like all commercial contracts, franchise agreements in Chile are governed by the principle of the contractual autonomy of the parties. As article 1545 of the Civil Code sets forth, “[a]greements law-

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54. Press Release, OECD, Chile Invited to Become a Member of the OECD (Dec. 15, 2009), available at <http://www.oecd.org/general/chileinvitedtobecomeamemberoftheoecd.htm>.
55. Press Release, WTO, Fiftieth Anniversary of the Multilateral Trading System (1998), available at http://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm.
56. See *Why Chile*, MINISTRY OF FIN., <http://www.hacienda.cl/english/investor-relations-office/why-chile.html> (last visited March 26, 2014) (“Chile, one of the most open economies in the world, has signed more free trade agreements than any other nation.”).
57. United Nations Conference on Trade and Development, *Bilateral Investment Treaties Signed by Chile* (June 1, 2013), available at http://unctad.org/Sections/dite_pceb/docs/bits_chile.pdf.
58. *International Tax Conventions*, SERVICIO DE IMPUESTOS INTERNOS, <http://www.sii.cl/pagina/jurisprudencia/convenios.htm> (last visited Mar. 27, 2014).
59. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION (Nov. 1, 2013), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>; *Inter-American Commercial Arbitration Commission*, ORG. AM. STATES, <http://www.oas.org/juridico/english/Sigs/b-35.html> (last visited Mar. 27, 2014); *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last visited Mar. 27, 2014).
60. *MIGA Member Countries*, MULTILATERAL INVESTMENT GUARANTEE AGENCY, <http://www.miga.org/whoware/index.cfm?stid=1789> (last updated Dec. 17, 2013).

fully entered into are deemed to be law for the parties, and cannot be revoked but by mutual consent, or for legal causes.”⁶¹ However, a variety of general commercial laws apply to the franchise agreement and franchise activity, particularly intellectual property, taxes, and royalties.

A. INTELLECTUAL PROPERTY

A key factor in the legal environment for franchising is the role of intellectual property rights. More specifically, in order to mitigate infringement risks and to define the limits and outlines of the franchise agreement (such as purpose of the contract, rights and obligations of the parties, territory, duration, exclusivity) the franchisor must grant to the franchisee authorization for use of the intellectual property rights involved in the franchise. The franchisor’s authorization of use takes the legal form of a license.

As a general matter, Chilean law distinguishes between intellectual works and industrial works. Intellectual works are protected under Intellectual Property Law No. 17.336.⁶² Industrial works, including trademarks, patents, utility models, industrial designs and drawings, service inventions, integrated circuits, denominations of origin, and trade secrets, are protected under Industrial Property Law No. 19.039.⁶³

1. License to Use Intellectual Works Protected under Intellectual Property Law 17.336 (IP Law)

The IP Law protects an author’s rights arising from the creation of works in the literary, artistic, and scientific fields, whatever the medium of expression, and the corresponding rights provided for under law.⁶⁴ As a general rule, the author of a work is deemed to be the person who appears as such at the time of the work’s disclosure, or who appears as such in the Registry of Intellectual Property in Chile.⁶⁵ In the case of computer programs, however, Chilean law presumes the existence of work for hire, which means that intellectual property rights are vested in the natural person or the corporation whose employees or contractors have developed the software for the first party, unless otherwise provided by written agreement.⁶⁶ As a general rule, the protection provided by the IP Law lasts for the life of the author plus seventy years after the author’s death.⁶⁷ Article 3 provides a non-exclusive list of the different works protected under the IP law.⁶⁸ This list includes intellectual works such as

61. Cód. Civ. art. 1545.

62. See generally Law No. 17.336, Octubre 2, 1970, DIARIO OFICIAL [D.O.].

63. See generally Law No. 19.039, Enero 25, 1991, DIARIO OFICIAL [D.O.].

64. Law No. 17.336, art. 1.

65. *Id.* art. 8. For more information on the Registry of Intellectual Property in Chile, see *Departamento de Derechos Intelectuales*, DIRECCIÓN DE BIBLIOTECAS, ARCHIVOS Y MUSEOS, http://www.propiedadintelectual.cl/Vistas_Publicas/publicHome/homePublic.aspx?idInstitucion=75 (last visited Mar. 27, 2014).

66. *Id.* See also *infra* note 71.

67. Law No. 17.336 art. 10.

68. *Id.* art. 3.

books, leaflets, articles, audiovisual productions, drawings, software programs, and data compilations, among others.⁶⁹

a. Scope and Content of the License to Use

The IP Law grants two categories of rights to the author for the protected work: (i) a moral, inalienable right that is not subject to a statute of limitations;⁷⁰ and (ii) patrimonial or economic rights.⁷¹ The latter rights allow the author to make a financial profit on his work and these rights parallel the common law concept of copyright. Patrimonial rights can be freely used, licensed, or transferred by their owners.⁷² Articles 18 and 19 of the IP Law create a legal monopoly for specific uses of the protected work for the benefit of the author, who has exclusive rights to grant licenses on his work or to assign patrimonial rights to any third party.⁷³

Multiple licenses for the same work may coexist in different territories or in the same territory in the event the rights licensed are not exclusive. Likewise, an author may also grant different licenses for the same work and territory but covering different uses, such as reproduction, representation, adaptation, public communication, distribution, or publication.⁷⁴ As for the content of the license, article 20 of the IP Law stipulates that licenses, or authorizations of use, must provide for certain specific elements, such as the scope of the granted rights, the duration of the license, the royalties or terms of remuneration, the minimum or maximum number of authorized performances or copies—if limited—or the territories concerned.⁷⁵

b. Registration of Intellectual Property Rights

Intellectual property rights arise at the moment a work is created.⁷⁶ Registration is not required for the creation of intellectual property rights.⁷⁷ However, registration is recommended for the purposes of notice and proof. There is a presumption of authorship in favor of the person in whose name the work is registered.⁷⁸ Registered authors may be natural persons or companies, but companies must provide evidence of the assignment of the intellectual property rights (or the work for hire agreement) from the individual that actually created the work because

69. *Id.*

70. Article 14 of the IP Law establishes the existence of a moral right for the benefit of the author and his heirs. *Id.* art. 14.

71. Under the IP Law, patrimonial rights are exclusive, assignable, and temporary. *Id.* arts. 10, 17. Article 10 of the IP Law grants patrimonial rights to the author for seventy years during the author's lifetime or for life plus seventy years after the date of his death, depending on whether the author was a natural or artificial person. *Id.* art. 10.

72. *Id.* art. 17.

73. *Id.* arts. 18–19.

74. *Id.*

75. *Id.* art. 20.

76. *Id.* art. 1.

77. *See id.*

78. *Id.* art. 8.

the law assumes that only human beings are capable of creation.⁷⁹ The Registry of Intellectual Property in Chile is run by the Department of Intellectual Property Rights, which operates under the Direction of Libraries, Archives and Museums of Chile (DIBAM).⁸⁰

c. Practical Approaches to Franchise Agreements

In franchise agreements, a franchisor commonly provides to a franchisee various franchise manuals. These franchise manuals often detail instructions, systems, and processes related to the franchise including relationships with clients, dealings with third parties, marketing strategies, instructions on promotional materials, equipment, insurance, accounting directives, sales techniques, personnel training, or customer service. In other words, a franchisor frequently provides a franchisee with know-how, techniques, and instructions needed to operate the franchised business. Consequently, the information, material and intellectual works (designs, software programs, manuals, etc.) transferred to the franchisee should be recognized as licensed works. License agreements are not subject to any specific legal formalities or registration requirements.⁸¹

2. *License to Use Works Protected Under Industrial Property Law No. 19.996*

Industrial property rights are critical to franchising in Chile. Because one of the main objectives of the franchisor is to gain brand recognition and market share, a franchisor often authorizes a franchisee to use trademarks, trade names, designs, and models, all of which are protected under the Industrial Property Law.⁸² The Industrial Property Law also governs industrial property license agreements and patents.⁸³

As a general principle, a license agreement does not require prior governmental approval or registration to be effective. However, industrial property license agreements subject to Chilean law and involving industrial privileges registered in Chile (trademarks, patents, utility models, and industrial designs) must be made in writing, signed by the parties, and executed before a notary public.⁸⁴ If executed outside of Chile, these agreements must be legalized by the nearest Chilean Consul in order to be valid in Chile.⁸⁵ In addition, these license agreements, including franchise agreements, must be recorded before the Chilean National Institute of Industrial Property (INAPI) in order to be enforceable against

79. *Id.* arts. 5, 10–12, 72bis, 73.

80. See DIRECCIÓN DE BIBLIOTECAS, ARCHIVOS Y MUSEOS, www.dibam.cl (last visited Mar. 27, 2014).

81. Law No. 17.336 art. 20.

82. Law No. 19.996, Marzo 11, 2005, DIARIO OFICIAL [D.O.] art. 1.

83. *Id.*

84. *Id.* art. 14.

85. *Id.* art. 15.

third parties.⁸⁶

B. FRANCHISING TAXATION REGULATIONS

In a franchise agreement, the franchisee, as consideration, pays a certain amount of money to the franchisor. This payment may be structured as a fixed amount payable at the signature of the contract, as monthly or annual royalties, or as a combination of both. Whether the payment is a fixed amount or royalties, applicable taxes will vary depending on whether or not the franchisor is a resident company of Chile.

1. Corporate Taxation of Chilean Resident Companies

A foreign franchisor may opt to create a Chilean business organization as a corporation, a limited liability company, or a branch. In this case, the local entity is liable for a 20 percent corporate tax according to the Income Tax Law (ITL).⁸⁷ Therefore, all amounts paid by the franchisee to the franchisor would be taxed up to 20 percent.

2. Taxation of Royalties Transferred Abroad

If the franchisor is not a resident Chilean entity, amounts paid upon execution of the franchising agreement or paid in royalties are subject to a withholding tax when transferred outside of Chile.⁸⁸ Whether or not franchisors are residents of double taxation treaty jurisdictions will also affect tax liabilities.

a. Franchisor is a Resident of a Double Taxation Treaty Jurisdiction

When the country of residence of the franchisor has signed a double taxation treaty with Chile, applicable tax liabilities are determined by the provisions of the treaty in question. Chile currently has double taxation treaties in force with the following twenty-five countries: Australia, Belgium, Brazil, Canada, Colombia, Korea, Croatia, Denmark, Ecuador, Spain, France, Ireland, Malaysia, Mexico, Norway, New Zealand, Paraguay, Peru, Poland, Portugal, Russia, Sweden, Switzerland, Thailand, and the United Kingdom.⁸⁹ Chilean tax law provides that royalty payments subject to a 10 percent withholding tax are exempted from value added tax (VAT).⁹⁰ However, this VAT exemption will not apply when payments are ultimately exempt from withholding by taxation treaty or other domestic relief.⁹¹

86. INSTITUTO NACIONAL DE PROPIEDAD INDUSTRIAL, DIRECTRICES DE PROCEDIMIENTO DE REGISTRO MARCAS COMERCIALES 127 (2010).

87. Law No. 824, Diciembre 31, 1974, DIARIO OFICIAL [D.O.] art 20 (law on income tax).

88. *Id.* tit. IV.

89. *International Tax Conventions*, *supra* note 58.

90. Law No. 825, Diciembre 27, 1974, DIARIO OFICIAL [D.O.] art. 12(E)(7).

91. *Chile-Recent VAT Exemption Changes for Services Supplied from Chile*, KPMG (Dec. 12, 2013), <http://www.kpmg.com/global/en/issuesandinsights/articlespublications/global-indirect-tax-brief/pages/chile-recent-vat-exemption-changes.aspx>.

b. Franchisor Is Not a Resident of a Double Taxation Treaty Jurisdiction

If not a resident of a double taxation treaty country, the franchisor will be subject to withholding taxes on payments received from a Chilean franchisee. Under Chilean tax law, the general withholding tax rate is 35 percent.⁹² However, Article 59 of the ITL provides that the royalty payment should be subject to a 30 percent withholding tax over the gross amount transferred abroad.⁹³ At the same time, under Article 59, professional or technical services are subject to a reduced 15 percent withholding tax rate.⁹⁴ Transferred amounts are exempted from VAT.⁹⁵

C. IMPACT OF THE CHILEAN LABOR REGULATION ON FRANCHISE AGREEMENTS

Under Chilean labor law, a company may be held liable for subcontractors' labor obligations.⁹⁶ In 2008, the Supreme Court of Chile considered a case on this subject.⁹⁷ In this case, seven terminated employees brought employment claims against the subsidiary franchisee as well as the parent franchisor.⁹⁸ The Supreme Court determined that a franchisor can be held liable for the labor obligations of a subsidiary franchisee—including salaries, retirement contributions, and social security contributions—but is not liable for obligations related to the termination of an employment contract.⁹⁹ The Supreme Court based its decision on a broad interpretation of Article 64 of the Labor Code.¹⁰⁰ In doing so, the Supreme Court justified its finding by recalling that the franchise arrangements allowed the franchisor to gain profitable and effective distribution networks without significant costs or investments.¹⁰¹

D. CONSUMER PROTECTION ACT

The Consumer Protection Act (the CPA) regulates the relationship between consumers and providers.¹⁰² The CPA defines consumers as all natural persons or legal entities who, by virtue of any legal act, acquire use or enjoy as final users, goods, or services.¹⁰³ Providers are defined as persons who produce, manufacture, import, distribute, or commercialize goods or services for consumers on a regular basis for a price or fee.¹⁰⁴

92. Law No. 824, Diciembre 31, 1974, DIARIO OFICIAL [D.O.] art 58.

93. *Id.* art. 59.

94. *Id.*

95. Law No. 825, Diciembre 27, 1974, DIARIO OFICIAL [D.O.] art. 12(E)(7).

96. CÓD. TRAB., art. 183-B.

97. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 25 Septiembre 2008, "Ortiz c. Comercial Proventa SA y Movistar SA," Rol de la causa: 4.012-2008, contrato.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Law No. 19.496, Febrero 7, 1997, DIARIO OFICIAL [D.O.] (Chile).

103. *Id.* art. 1.

104. *Id.*

The CPA, therefore, may be directly applicable to a franchisor in two scenarios:

1. *Micro or Small Businesses Franchisees*

If the franchisee qualifies as a micro or small business, the CPA considers the franchisee as a “consumer” and the franchisor as a “supplier.”¹⁰⁵ A recent modification to the CPA has defined micro, small, and medium-sized businesses on the basis of sales revenues.¹⁰⁶ Various provisions in the CPA benefit micro and small-sized businesses (MSBs) vis-à-vis suppliers.¹⁰⁷ A company may be considered an MSB depending on its annual sales and service revenues after VAT and excise taxes.

- Micro business: Annual sales of UF 2,400 or less (approximately \$100,000);
- Small business: Annual sales between UF 2,401 and 25,000 (approximately \$100,000 and \$1,050,000).¹⁰⁸

In other words, MSBs are considered “consumers” vis-à-vis suppliers. Consequently, franchisors should consider issues arising under the CPA in relations with MSB franchisees, including mass contracting, remote contracting, warranties, advertising, and information provided to MSBs.

2. *Non-MSB Franchisees*

If the franchisee is not an MSB, the CPA applies to the franchisor as a manufacturer or producer of the goods or services sold or provided in Chile. Under the CPA and as a matter of public policy, a customer may claim damages directly against the manufacturer or importer (or a franchisor, as the case may be) in case a seller ceases to exist due to bankruptcy, business termination, or other similar cause.¹⁰⁹ In cases of defective or non-conforming products, consumers have rights to request from the franchisor, in its position of manufacturer or importer, repair or replacement in addition to the indemnification for any damages that might have been caused.¹¹⁰ These rights cannot be waived in advance by the consumers.¹¹¹

105. Law No. 20.416, Febrero 3, 2010, DIARIO OFICIAL [D.O.] (Chile) art. 9; Law No 19.496 art. 1.

106. Law No. 20.416 art. 9.

107. *Id.*

108. *Id.* art.2.

109. Law No. 19.496, Febrero 7, 1997, DIARIO OFICIAL [D.O.] (Chile) art. 21.

110. *Id.* arts. 21–22.

111. *Id.* art. 4.