

Franchise

In 25 jurisdictions worldwide

Contributing editor
Philip F Zeidman



2016

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Franchise 2016

Contributing editor
Philip F Zeidman
DLA Piper LLP (US)

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@lbresearch.com

Adam Sargent
adam.sargent@lbresearch.com

Dan White
dan.white@lbresearch.com



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Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

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Argentina

Diego César Bunge

Estudio Bunge – Bunge, Smith & Luchía Puig Abogados

Overview

1 What forms of business entities are relevant to the typical franchisor?

Depending of the choice made by the franchisor on account of tax planning aspects, the most relevant business entities' structures are the Limited Liability Company (SRL) or the corporation (SA).

2 What laws and agencies govern the formation of business entities?

As Argentina is a Federal Republic with 24 local jurisdictions (23 provinces plus the Autonomous City of Buenos Aires), as well as a federal jurisdiction, there are options as to place of incorporation among said jurisdictions.

An applicable substantive law to the formation of companies is the Commercial Companies Law, as amended by the Civil and Commercial Code (entering into force as from 1 August 2015).

If the business entity is to be registered at the federal jurisdiction level, the agency with which to register is the Companies Control Agency (IGJ). Other jurisdictions should be registered with the corresponding Public Registry of Commerce.

3 Provide an overview of the requirements for forming and maintaining a business entity.

To form a business entity (ie, an SRL or an SA) two or more founding partners or shareholders have to participate in executing the charter and by-laws. There are minimum capital contribution commitments required for SAs. In the federal district there are abridged formation procedures in place that can accelerate time periods to obtain the corresponding authorisation from the IGJ.

Other than obtaining the approval of the corporate charter and by-laws – thus becoming a duly formed legal entity in Argentina – it must be borne in mind that to become operational, the company to be formed also has to request and obtain registration from the Federal Tax Collection Agency for federal tax and social security contributions. It also has to obtain the corresponding registration number as a registered employer (for Employment Contracts Law purposes).

4 What restrictions apply to foreign business entities and foreign investment?

To become partners of shareholders in a local SRL or SA, foreign business entities (partnerships or corporations) must register the corresponding by-laws of the foreign legal entity with the IGJ. Further, they must also show evidence to the IGJ of the ultimate control holders or beneficiaries of the foreign legal entity.

There are no specific legal foreign investment restrictions on engaging in a franchise business in Argentina.

5 Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

For Argentine federal income tax purposes, royalty payments corresponding to franchise agreements duly registered with the National Technology Institute (INPI) shall have a 21 per cent or a 26,5823 per cent withholding, the latter being the case when applying a grossing-up for the calculation of the final tax payable. The first rate applies if the technology transferred

through the franchise agreement does not involve patents or trademarks. Should the franchise involve the licence of the corresponding rates being increased, a 28 per cent or 38.8889 per cent income tax withholding will apply, in the latter case on account of applying a grossing-up for calculating the final tax to be paid. Should the franchise in question involve technology or know-how covered by patents or trademarks with technology not covered, then the higher of the above-mentioned rates shall be applicable.

Further, when executed in a bilateral text the franchise agreement shall bear stamp tax at a rate that shall vary depending on which of the 24 local (provincial + autonomous city of Buenos Aires) jurisdictions is the one in which the agreement has been executed or has had an effect.

6 Are there any relevant labour and employment considerations for typical franchisors? What is the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor? What can be done to reduce this risk?

The new Civil and Commercial Code, entering into force as from 1 August 2015, establishes that the franchisor shall not be responsible for the legal obligations of the franchisee unless there is a stipulation to the contrary. As to labour-law related liability, the Code states that franchisor and franchisee are independent parties, there being no employment relationship between them. Furthermore, it states that employees of the franchisee do not have an employment relationship with the franchisor except where it is determined in a given case that there has been employment (labour law) fraud. In the case of employment fraud the franchisor shall be considered jointly and severally liable for the franchisees' employees employment law obligations. In such a scenario the franchisor can be considered to be subject to substantial fines, it being deemed that the employment contracts at stake have not been properly registered, and are thus in infringement of public policy labour law statutes.

7 How are trademarks and know-how protected?

Trademarks duly registered in Argentina in the name of the franchisor, or duly licensed to the franchisor so that the franchisor is entitled to sublicense to a franchisee, have proper trademark protection.

Know-how, insofar as it is categorised by the parties to the franchise agreement as confidential information, shall have protection granted by the GATT/ADPIC Agreements.

8 What are the relevant aspects of the real estate market and real estate law?

From the perspective of ability and availability of access to well-located real estate venues for franchisors and franchisees, it can be asserted that there are no legal restrictions. That is the case regardless of the franchisors or franchisees being domestic or foreign. In that regard real estate transactions (purchase, rent) are commonly utilised for this sort of long-term contract. Lately leasing, sale and leaseback transactions are also being used.

There are restrictions on foreigners entering into long-term relationships that involve purchasing or taking control of non-urban real estate for agribusiness purposes, or even for urban development.

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

The new Civil and Commercial Code brings a definition of a franchise in the following terms:

... There is commercial franchise when one party, called franchisor, grants to another party, called franchisee, the right to use a proven system, destined to market certain goods or services under the commercial name, emblem or trademark of franchisor, who shall provide a combination of technical knowledge and the continuous supply of technical or commercial assistance, against a direct or indirect consideration of franchisee...

10 Which laws and government agencies regulate the offer and sale of franchises?

Other than the Civil and Commercial Code there are no specific laws regulating offer and sale of franchises.

There are no specific governmental agencies at the federal or provincial levels in Argentina regulating the offer and sale of franchises.

11 Describe the relevant requirements of these laws and agencies.

The Civil and Commercial Code regulates the franchise agreement as a special type of long-term contract, with certain specific obligations placed as an obligation on the franchisor at the moment of negotiating and consequently executing the franchise contract. There are also certain provisions protecting franchisees from franchisors' decisions throughout the duration of the franchise agreement.

12 What are the exemptions and exclusions from any franchise laws and regulations?

The Civil and Commercial Code does not carry exemptions or exclusions.

13 Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

The Civil and Commercial Code establishes a number of requirements to be met by the franchisor ex ante or during negotiation of the franchise agreements so that the franchisor is entitled, pursuant to Argentine substantive law, to offer franchises:

- the franchisor must be the exclusive title holder of the intellectual property rights, trademarks, commercial names, copyrights and other rights encompassed under the franchise system. Alternatively, the franchisor shall have the right of use and transfer to the franchisee in the terms determined in the franchise agreement;
- the franchisor cannot have a direct or indirect control over the stock or participation holding in the franchisee's business; and
- the franchisor must provide any future franchisee, prior to the execution of the franchise contract under negotiation, with two years of background information concerning the technical and financial evolution of similar units of products or services to the ones to be offered under the franchise.

Unless there is an express agreement to the contrary (ie, limiting or waiving the obligation), franchises are exclusive for both parties. Thus the franchisor shall not be able to authorise another franchise unit in the territory, unless the franchisee authorises it.

14 Are there any laws, regulations or government policies that restrict the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers?

There are no mandatory government policies specifically applicable to a franchisee's recruitment by franchisors, or the franchisor's selection of the franchisee's suppliers other than the general anti-discrimination statutes that would become applicable should the selection breach the religious, sex, gender, belief or other constitutionally protected rights of the eventual franchisees.

The Civil and Commercial Code, for its part, considers that certain clauses of a franchise agreement will be considered null and void and, thus, unenforceable as regards franchisees in Argentina: firstly, even if the franchisor has reserved for himself or herself the selection and appointment of the franchisee's suppliers, if the franchisee decides to purchase the

merchandise in question from other franchisees within the country, such purchases shall not be forbidden as long as they meet the quality and other characteristics determined in the franchise. In the same sense, the franchisor may forbid the franchisee from establishing non-economic links with other franchisees.

15 What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?

The compliance procedure for pre-contractual disclosure in Argentina is generally regulated in the Civil and Commercial Code under the principle of good faith, which imposes standards of conduct both on franchisors and franchisees as to their respective obligation to inform themselves.

In particular for franchise agreements, as mentioned in question 13, the franchisor must provide any future franchisee, prior to the execution of the franchise contract under negotiation, with two years of background information concerning the technical and financial evolution of similar units of products or services as the ones to be offered under the franchise. This is because, regardless of the liability that might be generated as regards third parties, the franchisor is liable towards the franchisor for defects in the design of the system comprised in the franchise, which might cause proven damages to the franchisee not related to grave negligence or malice of franchisee.

16 In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

The Civil and Commercial Code has an express provision determining that if there are sub-franchises, the principles established therein shall be applicable to the relationship between franchisee and sub-franchisees. Thus, the disclosure obligations imposed on the franchisor are applicable to the franchisee in a sub-franchise situation.

17 What information must the disclosure document contain?

Other than what is described under questions 13 and 15, the franchisor must communicate to the franchisee the contracted technical knowledge, even if not patented, derived from the experience of the franchisor and proven by him as adequate to ensure the running of the franchise as informed or advertised.

Also, the franchisor must supply the franchisee with an operational manual with the specifications pertinent to the development of the activity foreseen in the contract.

18 Is there any obligation for continuing disclosure?

The franchisor must provide technical assistance to the franchisee for the smooth running of the franchise throughout the term of the contract.

19 How do the relevant government agencies enforce the disclosure requirements?

There are no specific or specialised government agencies assigned to enforce disclosure requirements of franchise agreements.

20 What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?

Failure to meet disclosure requirements by the franchisor as described in questions 13, 15 and 18 shall constitute a grave and basic breach of the corresponding franchise agreement.

The franchisee can file an action claiming specific performance plus damages, or else cancel the contract citing the franchisor's fault and claim the pertaining damages.

Since the new Civil and Commercial Code has established an across-the-board reform of the civil liability regime, unifying the tort and contractual liabilities, in the case of an imputable breach of contract the breaching party shall also be liable as regards the aggrieved party for the impact of the breach on aggrieved party's image as well as the life project – if the aggrieved party is a natural person. Subject to satisfactory evidence, under Argentine law it is deemed that any natural person has a life project to be

achieved throughout his or her life. Said life project can be totally frustrated, or hampered, as a consequence of an imputable contractual breach.

21 In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

The new Civil and Commercial Code, entering into force on 1 August 2015, establishes that the franchisor shall not be responsible for the legal obligations of the franchisee unless there be a stipulation to the contrary. The right to the clientele belongs to the franchisor. The franchisee and sub-franchisees cannot move the location of the venues without the agreement of the franchisor. The franchisor is not responsible as regards the franchisee – or sub-franchisees in its case – for the profitability of the system comprised in the franchise. The franchisor shall be liable as regards the franchisee, and possible sub-franchisees, in the case of a defect of design in the franchise system.

22 In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

As stated, both the culpa in contrahendo principle and principle of good faith for the negotiation, execution and performance of contracts are general principles applicable to franchise agreements ruled by Argentine substantive law. Moreover, the Civil and Commercial Code brings specific obligations on potential franchisors to meet the requirements of the above-mentioned principles of civil law. Those requirements are described under questions 13, 15 and 18.

23 Other than franchise-specific rules on what disclosures a franchisor should make to a potential franchisee or a franchisee should make to a sub-franchisee regarding predecessors, litigation, trademarks, fees etc, are there any general rules on pre-sale disclosure that might apply to such transactions?

There are no general rules on pre-sale disclosure that apply to franchise transactions other than what is described under questions 13, 15, 18 and 22.

24 What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under franchise sales disclosure laws?

Under Argentine substantive law there are no franchise sales disclosure laws other than what is provided by the Civil and Commercial Code. Pursuant to doctrine and case law, under Argentine substantive law should there be a fraudulent or deceptive practice in connection with the offer and sale of franchises, such conduct shall very probably be categorised as an abuse of rights, abuse of dominant position or a direct fraud committed by the franchisor to the prejudice of the franchisee.

Legal restrictions on the terms of franchise contracts and the relationship between parties in a franchise relationship

25 Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

The Civil and Commercial Code provides rules that shall be applicable to the ongoing relationship between the franchisor and the franchisee from the moment the franchise agreement comes into effect. These rules are specifically introduced in the chapter pertaining to regulating franchise agreements or those applicable to being an integral part of the general regulation of contracts in the Civil and Commercial Code. The cited regulations can be of a mandatory nature (ie, non-disposable by the parties), or of subsidiary applicability to the will of the parties (ie, disposable by the will of the parties to the contrary).

26 Do other laws affect the franchise relationship?

Depending on the particular trade, activity or economic sector related to the franchise agreement ruled by Argentine substantive law, other laws

can affect the franchise relationship. Worth mentioning without entering into any specifics are the Antitrust Law, Consumer Protection Laws (also recently reformed partially by the Civil and Commercial Code), Labour and Employment legislation, regulation of publicity, federal, provincial and municipal tax agencies or boards and price controls.

27 Do other government or trade association policies affect the franchise relationship?

The franchise relationship entered into pursuant to applicable Civil and Commercial Code rules should not be affected by other government or trade association policies.

28 In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

The Civil and Commercial Code brings specific rules under which circumstances a franchisor or franchisee may terminate a franchise relationship.

Firstly, it establishes a general minimum term of duration for franchise agreements of four years. A shorter duration period can be agreed in special situations, such as for fairs or congresses, or activities undertaken at venues or developments with a shorter duration. Upon expiration, there being no notice from any of the parties to the contrary, the franchise agreement shall be extended tacitly for successive one-year terms. Said prior notice has to be given with an anticipation of 30 days. Upon the second extension the franchise agreement becomes an indefinite term agreement.

The Civil and Commercial Code lays out the legal restrictions on the franchisor's ability to terminate a franchise agreement, to wit:

- the franchise agreement shall not be able to be unilaterally terminated by franchisor or franchisee during its originally established term of duration; and
- agreements carrying a duration term of less than three years (which have to have a special reason to justify such shorter duration term, as described in the first paragraph of this question, elapse at a stipulated expiration date, without the need for giving any prior notice).

Other than in bullet point 2, regardless of the duration term, the party that decides to unilaterally terminate the franchise agreement at expiration date or expiration of any of the extensions thereof must grant the counterpart a notice with an anticipation of one month per year of duration of the contract, with a cap of six months, counting from entry into force until expiration date. If a franchise contract is entered into for an indefinite period of time, notice must be given in such a way that anticipated unilateral termination occurs no sooner than the start of the third year of duration of the franchise agreement counted from the date of entry into force. These notices do not need just cause.

Other than the above, the franchisor and franchisee can terminate the franchise agreement with cause on account of a counterparty's grave and essential breach, with the consequent right to claim damages, as described above.

29 In what circumstances may a franchisee terminate a franchise relationship?

The same reasons and ways described in question 28.

30 May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

A franchisor may refuse to renew the franchise agreement with a franchisee, as a general principle, inasmuch as the franchise agreement has been entered into pursuant to the rules determined in the Civil and Commercial Code outlined above, particularly respecting the minimum term and prior notice, and that at the moment of non-renewal the franchisor must not be in breach of his or her contractual obligations.

31 May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchise entity?

A franchisee may not assign its contractual standing nor the rights stemming from the franchise agreement during the term of its duration. The assignment of rights to collect royalty payments or fees deriving from a franchise agreement is excluded from prohibition. This restriction does not apply to wholesale franchises where the franchisee sub-franchises. In

said cases, the franchisee must have the authorisation of the franchisor to grant sub-franchises, which shall be granted pursuant to the terms prevailing between franchisor and franchisee.

32 Are there laws or regulations affecting the nature, amount or payment of fees?

There are no specific laws or regulations affecting the nature or amount of royalties.

There are criteria, established at the INPI, to accept registration of contracts that involve cross-border payments as there is intellectual property contained in the respective franchise. Such criteria include parameters on the prices agreed upon by the parties thereto, as well as on the payment terms (ie, initial franchise fees, amount of royalties, etc) where there are income tax benefits in the sense of said payments being taxed at a lower rate than dividends. In addition, contracts duly cleared by INPI must access the necessary foreign currency for international payment through the exchange control market which is regulated by the Argentine Central Bank.

33 Are there restrictions on the amount of interest that can be charged on overdue payments?

The limit on the permitted amount charged as interest on overdue payments has traditionally been established under Argentine substantive law, as contractual provisions that infringe upon Argentine public policy on account of these interest rates, which are considered to be excessive. When said interest rates are categorised as contrary to the ‘moral and healthy conduct’ of those ruled by Argentine substantive law. In such cases the interest rate is lowered in court to what is deemed to be compatible with the aforesaid standards.

34 Are there laws or regulations restricting a franchisee’s ability to make payments to a foreign franchisor in the franchisor’s domestic currency?

Under Argentine law, a franchisor can stipulate that payments to a franchisor be made in the franchisor’s domestic currency. This is particularly so in international franchises, where the franchisee has to pay the franchisor, effecting a cross-border transfer of funds through official banking channels.

35 Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants (in accordance with GATT/ADPIC provisions) are enforceable during the term and said obligation may subsist beyond the expiration date in accordance to what has been agreed by the parties.

Non-compete covenants assumed by franchisee are enforceable for a maximum term of one year as from the date of expiration of the franchise agreement and within a reasonable territory in accordance with applicable circumstances.

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

There is a general legal obligation on parties to deal with each other in good faith. In franchise agreements ruled by Argentine substantive law, franchisors must show that their conduct in regard to franchisees follows business best practices and that there has not been any abuse of right or abuse of dominant position in the negotiation, execution and performance of the franchise agreement.

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

Franchisees are not deemed to be consumers under the Argentine Consumer Protection statute or the Civil and Commercial Code, inasmuch as the franchise agreement is the framework under which the franchisee’s turnover is partially or totally undertaken. Franchisees are considered to be independent contracting parties to franchisors and cooperate with franchisors in the pursuance of a franchisor’s business strategy.

Consumer protection legislation affects franchise agreements inasmuch the Argentine Public Policy Consumer Protection Statute imposes joint and several liability upon all participating parties as regards aggrieved consumers in the marketing chain between producer and end-consumer.

38 Must disclosure documents and franchise agreements be in the language of your country?

It is not mandatory. The language can be that of the franchisor. It is established, however, that should the franchise documentation have to be filed before the Argentine courts the contractual documentation has to be translated into Spanish by locally sworn public translators.

39 What restrictions are there on provisions in franchise contracts?

If the franchise agreement establishes that the supply of goods and services that relate as inputs to the actual final product or service to be sold by franchisee to third parties is to be made by the franchisor or by a third party related to him or her, then the franchisor has an obligation to assure said supply in adequate quantities and at reasonable prices, in accordance with commercial usage, domestic or international in accordance with the case at hand.

Other provisions usually included in international franchise agreements are normally utilised in Argentina. As of the entry into force of the Civil and Commercial Code, said clauses will be tested against the newly established restrictions mentioned above.

40 Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

The Civil and Commercial Code categorically establishes that franchise contracts per se are not to be considered a pact that limits, restricts or distorts competition. Price discrimination clauses as well as abuse of dominant positions are illegal conducts sanctioned by the Antitrust Statute.

ESTUDIO BUNGE
BUNGE, SMITH & LUCHÍA PUIG
ABOGADOS 1958

Diego César Bunge

dcbunge@bunge.com.ar

Av. Córdoba 991, 6to Piso

Tel: +54 11 5281 6000 / +54 11 5281 6003

C1054AAI

Fax: +54 11 5281 6006

Buenos Aires

www.estudiobunge.com

Argentina

41 Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

Argentina, as a federal republic, has 24 provincial jurisdictions (23 provinces plus the Autonomous City of Buenos Aires), as well as the federal jurisdiction, which mostly concentrates in the Federal District (which coincides with the Autonomous City of Buenos Aires though they are separate jurisdictions). Most franchise agreements that have the Federal District of Argentina as an established venue submit matters pertaining to franchise agreements to the jurisdiction of the ordinary commercial courts, which have a long-established experience and expertise in handling commercial disputes such as those deriving from franchise agreements. This is particularly so when foreign franchisors are involved.

42 Describe the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction.

Many international franchise agreements submit matters to international arbitration (ICC, AAA) coupled with resorting to the local judiciary (Commercial Courts of the Federal District) for injunctions or for enforcement measures during arbitration. The Permanent Arbitration Court of the Buenos Aires Stock Exchange also has long-established experience in handling franchise agreement disputes.

Update and trends

Argentina sanctioned a new Civil and Commercial Code (by Law No. 26.994) entering into force as from 1 August 2015. The new Civil and Commercial Code brings in a specific section regulating franchise agreements. This is an absolute novelty, as to regulation of franchise agreements under Argentine substantive law, since in the past franchise rules were mostly patterned as determined by doctrine and case law. This chapter has been drafted taking into consideration the new regulations.

43 In what respects, if at all, are foreign franchisors treated differently from domestic franchisors?

Legally foreign franchisors are not treated differently from local franchisors. There are different requirements in respect of company formation and making cross-border payments to foreign beneficiaries (franchisors), as described above.

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