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Latin America and the Caribbean

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Latin America and the Caribbean

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I. Argentina: A New Civil and Commercial Code

Argentina adopted a new Civil and Commercial Code in September 2014.¹ Law Number 26,994 will enter into effect on January 1, 2016. Among numerous amendments that will affect everyday life of the Argentine society, the new Civil and Commercial Code introduces and specifically regulates certain sale intermediaries' contracts such as those dealing with franchise, agency, and concessions.

Under the law of Argentina (as in many other civil law countries), an agent includes a distributor who buys and resells good on behalf of a third party. There has been a consensus among academics and many practitioners on the idea that these types of long term relationships—particularly those which involve a high volume of sales, investments and operations carried over long periods of time—require more thorough protection of the agent and more specific regulation than had previously existed, especially because those relationships often result in a “vertical relationship that implies the prevalence of one of the parties—the producer—who imposes on the other the commercialization conditions through a boilerplate contract.”²

Under the law of Argentina, an agent is a person or entity who independently promotes businesses on behalf of a third party. Among the most significant regulations regarding agency contracts, the Code establishes that an agent is entitled to exclusivity: (a) in the businesses; (b) for the geographical zones; or (c) regarding persons specified in the contract. Moreover, the idea that the agent is neither a representative of the producer nor someone who assumes the risk of the operations he performs under the latter's name is reinforced and specifically regulated.

Another important aspect is the specific treatment of sudden termination, establishing that prior notice is mandatory and must be of one month per year of existence of the agency contract. Absence of prior notice of termination generates the obligation to pay compensation to the agent comprising the profit that the agent could have made during the prior notice period. Moreover, upon termination of the contract the agent is entitled

* Adrián Lucio Furman authored the section on Argentina. Lidia Ferranti and Alexandre L. Ribeiro do Valle authored the section on Brazil.

1. Law No. 26994, Oct. 8, 2014, [32985] B.O. 10 (Arg.).

2. Mauricio Boretto, *Los llamados “contratos de distribución” en el Código Civil y Comercial*, L. L. (Nov. 6, 2014), ADLA No. 32 (Dec. 2014).

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to receive compensation based on the new customers he obtained or the increased volume of sales attributable to his efforts. However, the law does not prescribe specific guidelines for determining these amounts. Still, however, the possibility of including reasonable “non-compete” clauses applicable to the agent after the contract’s termination is allowed and specifically regulated.

Regarding concession contracts (defined by the Code as those contracts where a party puts its business structure and organization in order to market goods provided by a producer, providing services, spare parts and accessories if also agreed), the Code establishes that the minimum agreeable term must be of four years, unless the producer provides the concessionary with sufficient facilities to perform the business. On those cases, the minimum term can be reduced to two years. Regarding sudden termination, the rules described above applicable to agents also apply.

Franchise agreements also receive a special chapter in the Code. Franchise agreements generally include any agreement that grants a person the right to use (directly or indirectly) trademarks, know how, brands, and names belonging to the franchisor, as long as there is a separate payment from the franchisee for the trademark license. Among the most important regulatory aspects is a four-year minimum term requirement (with exceptions for certain situations such as fairs or other short-term events). The Code also establishes that the franchise is exclusive for both parties, but it allows the parties to limit or exclude the exclusivity in their respective contract. A prohibition for the franchisee to assign the contract to third parties is also permitted (excepting monetary obligations, which can be assigned), with the exception of those contracts where sub franchising is permitted. A prior notice of one month per year of existence of the contract must be also given to terminate the contract, with a maximum of six months.

The specific regulation of these types of contracts under the new Civil and Commercial Code now clarifies the respective rights and obligations of the parties. Moreover, upon preliminary review, it can be noted that most of the regulations are in line with Argentine case law and experts’ opinions. However, the real and long lasting effects of these novel dispositions are yet to be experienced, considering that the Code will be valid and in full effect as from January 1, 2016, and case law regarding related conflicts will be produced years from now.

II. Brazil: A New Law to Regulate the Internet and Electronic Commerce

In April 2014, the Brazilian government approved a new law providing for a civil rights-based framework for the Internet.³ This Act establishes principles, guarantees, rights and duties relating to the use of the Internet in Brazil and determines performance guidelines for the nation, states, Federal District, and municipalities. The Law will regulate actions taken on the Internet, stating rights and duties for Internet users and for those that distribute content.

3. Lei No. 12.965, de 23 de Abril de 2014, Diário Oficial da União [D.O.U.] de 24.04.2014 (Braz.).

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A. NEUTRALITY

Brazil is one of the few countries to address neutrality as a rule. This provision prohibits discrimination by Internet providers in certain services, protecting users by not allowing service providers to decrease the speed of the user's connection based on economic interests.⁴ Furthermore, the information passed to the users must be precise and clear.

B. SECURITY

The new law requires that records of users' connections can be kept for a period of one year, and only under total secrecy. The information retained may contain only the IP address, date, and hour of the initial and final connections. The law also requires anonymity, so that one cannot store information about individual users except as stated in the previous sentence. There is the possibility that an interested party may request a court order to use the information as evidence in a lawsuit.⁵

C. MARKETING

For those who buy Internet services, the trend is toward improving the quality of the connection following the principle of neutrality. The new law will cause companies to create new digital marketing strategies to promote their products and services. Those who sell services must pay more attention to protecting all information about users in a way that respects their privacy and personal data.

D. REMOVAL OF CONTENTS AND RESPONSIBILITY

Where objectionable material is posted on the internet, the law provides that content can only be removed by court order and that the provider will not be held liable for reprehensible content posted by users. However, there are exceptions. Content must be removed without requiring a court order when there is a violation of any criminal law, for example, pedophilia, racism (hate speech), or violence. The rule is that the contents cannot be removed without a court order except where the content directly violates any criminal law.

4. *Id.* art. 9.

5. *Id.* art. 10.

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