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FRANCHISING IN ARGENTINA: CHALLENGES FOR THE FOREIGN FRANCHISOR

*Gustavo M. Papeschi**

I. INTRODUCTION: FOCUS AND SCOPE OF THIS ARTICLE

THIS article discusses many of the *challenges* that a foreign franchisor may encounter while trying to export its business to Argentina under a franchising structure. It focuses on those topics in which the Argentine legal system presently differs most from U.S. law. Nonetheless, these references to U.S. law should only be regarded as academic, given that this article's conclusions and general perspectives about the current Argentine legal system should be useful to any foreign investor.

Even though many of the topics affecting a franchising investment are similarly regulated by both the Argentine and U.S. laws,¹ significant differences exist. Whether they are rooted in the very legal foundation of the Argentine legal system or they are the product of incidental circumstances, those differences may substantially affect a foreign franchisor. In that sense, this article seeks to cover topics such as the particularities of the contractual system affecting the franchisor business, labor liabilities of the franchisor or sub-franchisor, currency issues, value added tax, and tax withholdings. In addition, it also discusses a proposed new Civil and Commercial Code (the "*New Code*") currently being discussed by the National Congress.² This New Code includes several provisions affecting the franchising business.

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1. Although this may sound like an overstatement, given the many differences between the legal systems, note that both legislations share the basic constitutional principles, values, and aspirations. *See generally* U.S. CONST.; CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).
2. It is unclear whether the new Civil Code will be passed. Therefore, this article will only refer to it when addressing the particular issues that will be affected if enacted. Marval O'Farrell & Mairal, Argentina: Bill to Reform the Civil and Commercial Codes, MONDAQ (Dec. 12, 2012), <http://mondaq.com/x/210766/Constitutional+Administrative+Law/Bill+To+Reform+The+Civil+And+Commercial+Codes>.

As a consequence, this article should not be regarded as a comprehensive guide to doing business in Argentina (not even for the franchising business specifically) because many legal issues are discussed indirectly and briefly (if discussed at all).

II. LEGAL BASIS OF FRANCHISING IN ARGENTINA: CONTRACTS

A. AMBIGUITY OF THE TERM IN ITS SPANISH TRANSLATION

Although the term *franquicia* is the proper Spanish translation for “franchise,” the term may have several other meanings in everyday speech.³ As a consequence, most businessmen, lawyers, and scholars use the English term *franchising* to refer to this contract. However, as no express legal regulation currently exists for the franchising business, there is no major legal consequence in using one term or the other.⁴

The New Code, on the other hand, defines franchising as the contract by means of which a party (franchisor) grants another party (franchisee) the right to use a proven system, addressed to commercialize certain goods or services under the franchisor’s commercial name, logo or mark, which will provide the technical knowledge, as well as the continuous technical or commercial assistance for a direct or indirect consideration paid by the franchisee.⁵

B. CONTRACTUAL LEGISLATION: ARGENTINE CIVIL CODE AND COMMERCIAL CODE

Contractual law in Argentina is governed by both the Civil Code and the Commercial Code (hereinafter referred as “Civil Code” and “Commercial Code”).⁶ Although these bodies of law have been amended several times throughout their existence, the original underlying texts date back to the late 19th century.⁷ The Civil Code provides general rules

3. (i) The most common alternate meaning of *franquicia* relates to an insurance policy: is the equivalent of the U.S. insurance’s *deductible*, meaning that the insurer would only be liable for any damage in excess of that certain amount; (ii) another common meaning for the term is related to customs duties: *franquicia* is the maximum amount of value that a person may import to the country without paying any custom duties; (iii) in consonance with the translations referred to above, the term is also generally used to describe any type of exemption; (iv) finally, it refers to a franchising business: however, it is rarely used in that sense, to the extent that, if someone is talking about a *franquicia*, he or she should immediately add a reference to known franchising businesses to clarify the meaning of the term. *Franquicia*, *DICCIONARIO DE LA REAL ACADEMIA ESPAÑOLA*, <http://lema.rae.es/drae/?val=Franquicia> (last visited Feb. 20, 2014).

4. See generally Cód. Civ.; Cód. Com.

5. *CÓDIGO CIVIL Y COMERCIO* [Cód. Civ. y Com.] [UNIFIED CIVIL AND COMMERCIAL CODE DRAFT] art. 1512 (2012) (Arg.).

6. See generally *CÓDIGO DE COMERCIO* [Cód. Com.] [COMMERCIAL CODE] (Arg.); *CÓDIGO CIVIL* [Cód. Civ.] [CIVIL CODE] (Arg.). The New Civil Code unifies the Civil and Commercial Code into one body of law.

7. Law No. 340, Sep. 25, 1869, [1863/69] R.N. 513 (Arg.); Law No. 2637, Oct. 5, 1889, [II] R.N. 795 (Arg.).

applying to all contracts, while the Commercial Code provides specific rules for those contracts entered by merchants.⁸ Practicing lawyers usually consider the Civil Code the main body of law and only refer to the Commercial Code in very specific occasions (i.e., rules of interpretation of contracts).⁹

These two bodies of law (as amended from time to time) set forth the basic provisions regarding the general theory of contracts (capacity rules,¹⁰ formalities,¹¹ evidence,¹² voidance and validity,¹³ etcetera) and also provide special regulations for specific contracts (such as sale of goods,¹⁴ assignment of rights,¹⁵ agency,¹⁶ etcetera).

In addition to both the Commercial and Civil Codes, many other federal laws also impact contractual relationships, either by providing certain general rules for particular types of contracts (i.e., the Consumer Defense Act,¹⁷ which sets forth several rules for contracts executed between merchants and consumers), or by providing special regulation for specific contracts (i.e., the Urban Rent Agreements Act,¹⁸ which provides special rules for the lease of real property located within urban areas).

C. LACK OF LEGAL REGULATION: FREEDOM OF CONTRACT

Neither the Civil Code, nor the Commercial Code, nor any special law provide special rules for the franchising contract.¹⁹ Consequently, Argentine law does not expressly define the term *franchising* or any other term that reflects the nature of this contract.

Nonetheless, the absence of special regulation is not an obstacle for the execution and enforceability of these types of contracts.²⁰ Contractual parties have complete freedom to agree upon any desired terms, and there are very few mandatory provisions regarding the content of the agreement.²¹ In fact, other than the general prohibition of illegal content, most mandatory restrictions refer to contracts involving minors and family issues, and thus are unlikely to affect any business contract.²²

Even if there are no obstacles preventing the legality and enforceability of a franchising agreement in Argentina, some issues should be taken into account, as they might affect the contractual outcome.

8. *See generally* Cód. COM.; Cód. CIV.

9. Cód. COM. arts. 217–18.

10. Cód. CIV. arts. 1160–66.

11. *Id.* arts. 1180–89.

12. *Id.* arts. 1190–94.

13. *Id.* arts. 1037–65.

14. *Id.* arts. 1323–1433.

15. *Id.* arts. 1434–84.

16. *Id.* arts. 1869–1985.

17. Law No. 24240, Oct. 15, 1993, 27744 B.O. 34 (Arg.).

18. Law No. 23091, Oct. 16, 1984, 25531 B.O. 1 (Arg.).

19. *See generally* Cód. CIV.; Cód. COM.

20. Cód. CIV. arts. 1143, 1197.

21. *See generally* Cód. CIV.; Cód. COM.

22. Cód. CIV. arts. 953, 1275.

The franchising agreement is considered an “untypical”²³ contract because no special regulation exists for it. As a consequence, in the event of a conflict and in the absence of specific contractual provisions, there are no clear default rules for this contract (other than general rules applicable to all contracts).²⁴

Two issues may arise:

- (i) It is difficult for lawyers to precisely predict which set of regulations would eventually apply in a future ruling. A court may decide that default rules provided for other contracts apply (i.e., default rules set forth for the sales of goods contract or the assignment of rights contract).²⁵ However, because the franchise agreement is not one of those contracts, those “artificially” applied rules might not reflect the real intention of the parties.
- (ii) As explained further below, Argentine law provides that the exercise of a right or the fulfillment of a duty may not be done in an abusive manner (called “*abuse of right*”).²⁶ In short, this principle has been used by the courts to solve legal conflicts using concepts of fairness or equity, instead of hard legal principles. Lack of contractual provisions may trigger this principle most easily and, therefore, cause unexpected results.

These risks should be taken into special account when drafting the franchising agreement or any incidental agreement. In order to avoid or minimize these risks, the agreements should be drafted thoroughly and, to the extent possible, provide a contractual solution for all foreseeable conflicts.

D. THE FRANCHISING AGREEMENT IN THE NEW CODE

Contrary to the current legal scenario, the New Code specifically recognizes the franchising agreement and regulates it in thirteen articles²⁷ (in addition to containing several cross-references to other provisions of this new body of law).

The new regulation includes many provisions reflecting trends from foreign legislation. In addition to including a few default rules, it also sets

23. Maure, Martín José, *Reflexiones sobre la Responsabilidad del Franquiciante frente a Terceros Dependientes del Franquiciado*, DT2011 Aug. 1969. Under Argentine Contractual law there are two types of contracts: typical and untypical contracts. *Typical* contracts are those that have a special default regulation under the Civil or Commercial Codes, or under any special law. On the other hand, *untypical* contracts are those that are not specially regulated. Cód. Civ. art 1143. Although both types of contracts are fully enforceable, typical contracts are complemented by legal default rules if any conflict arises between the parties. That is not the case for untypical contracts, where no specific regulation exists for untypical contracts. Although case law and scholar opinions may provide some defaults rules, they are not considered mandatory authority.

24. *Id.*

25. Cód. Civ. arts. 1323–1433; 1434–84.

26. *Id.* art. 1071.

27. Cód. Civ. y Com. arts. 1512–24 (2012 Draft).

forth some mandatory provisions, such as prohibiting the franchisor from owning any corporate interest in the franchisee entity,²⁸ requiring a minimal contract term (except for special circumstances),²⁹ requiring a prior disclosure procedure with regards to the evolution of other franchise units in the country or abroad,³⁰ and term and termination provisions,³¹ among others. It also expressly declares that a franchising relationship shall not be considered, by itself, as an antitrust action.³² Finally, it clearly provides that, from a labor standpoint, the parties are independent and the franchisor is not liable for the franchisee's labor related commitments.³³

E. *ABUSO DEL DERECHO* DOCTRINE

1. *Introduction*

The *abuso del derecho* doctrine (which can roughly be translated as *abuse of right*) is a very important general principle in civil law systems and it is commonly applied in Argentine courts. Any foreign attorney advising on investments in Argentina (or in any other civil law country) should be familiar with its essential elements.

It may be best described as a general principle intended to prevent the exercise of a legally granted right in a manner that does not reflect a certain degree of fairness in accordance with the *ratio legis* of a particular legal provision.³⁴ In other words, it may be considered a kind of *equity* principle to help reduce the harshness of written law or legal formalities.

Although there are some comparable legal provisions under U.S. law (i.e. the avoidability doctrine³⁵ and the unconscionable contract),³⁶ this doctrine goes far beyond those. To the contrary, this doctrine is one of the very foundations of the legal system and serves as a guide to all legal relationships.³⁷

Although most Argentine lawyers would praise this principle and consider it part of the very foundation of the Argentine law, they would equally consider it a double-edged sword. Given that there are no definitive guidelines for its application, it is difficult to precisely foresee how it may be applied by a judge and to what extent it could affect any contrac-

28. *Id.* art. 1512.

29. *Id.*

30. *Id.* art. 1514(a).

31. *Id.* arts. 1512, 1516, 1522.

32. *See id.*

33. *Id.* art. 1520(b).

34. *See* Cód. Civ. art. 1071.

35. RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981).

36. U.C.C. § 2-302; RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981). It is worth mentioning that the Argentine Civil Code also contains a specific section that regulates unconscionable terms (Cód. Civ. art. 954). However, it is mostly considered as a consequence of the *abuso del derecho* doctrine.

37. Adrián Oscar Morea, *La Doctrina del Abuso Procesal en la Derecho Argentino*, Nov. 22, 2012, INFOJUS, http://www.infojus.gov.ar/doctrina/dacf120195-morea-doctrina_abuso_procesal_en.htm?4 (last visited Feb. 11, 2014).

tual right or obligation.³⁸

2. *Legislative Basis*

The general principle and basis of this doctrine are set forth in the Civil Code, which provides that:

[t]he regular exercise of one's right or the fulfillment of one's legal duty shall not turn illegal any act. The Law does not safeguard the abusive exercise of rights. It shall be considered such [the exercise] that contradicts the ends of the drafter when it recognized [the right], or those that exceed the limits imposed by good faith, moral and goods practices.³⁹

In addition, the Civil Code also contains a related principle that provides that contracts "should be executed, construed and enforced under a good faith standard,"⁴⁰ which further supports this doctrine.

Needless to say, the limits of this doctrine are far from clear and foreseeable. The judge is not always aware of the intent of the drafter; on the other hand, no one is able to clearly say what good faith, moral, or good practices really are.

3. *Practical Consequences and Guidelines*

Whether this doctrine should apply or not to a particular case is a question of fact.⁴¹ Usually, a judge may invoke it when he feels that the outcome of applying the strict legal or contractual provision might be unfair. Although judges are usually cautious when applying this doctrine, it is important to recognize that what is written in an agreement may not necessarily be enforceable because of the factual circumstances surrounding the contract. Even if this is also true for contracts governed by U.S. law (e.g. unconscionable terms), under Argentine law the possibility increases substantially.

It is not easy to provide clear guidelines to prevent the application of this doctrine. However, some circumstances may help to minimize the chances that it will be applied or the effects of its application.

- (i) *Bargaining power.* As in the case of *procedural unconscionability* under U.S. law,⁴² the chances for facing the effects of this doctrine are minimized when it is proven that the parties have specifically

38. As the original drafter of the Civil Code stated when he refused to legislate this doctrine, "[i]f the government acts as a judge of the abuse . . . it will not be long until it acts as a judge of the use, and any true idea of property and freedom would be lost". Cód. Civ. art. 2513 (author note).

39. Cód. Civ. art. 1071.

40. Cód. Civ. art. 1198.

41. Daniel Roque Vitolo, *Un reiterado y saludable freno de la Corte a los acuerdos preventivos abusivos y en fraude a la ley*, LA LEY 2009-F, 328.

42. *Wilcox v. Valero Ref. Co.*, 256 F.Supp.2d 687, 691 (S.D. Tex. 2003) (relying on unequal bargaining power as a factor in ruling that the enforcement of an arbitration agreement implemented after an employee's lawsuit was filed was procedurally unconscionable); FARNSWORTH ON CONTRACTS §4.28 (3rd ed. 2004) ("Procedural unconscionability is broadly conceived to encompass not only the

negotiated the terms of the contracts and both parties have a similar bargaining position.⁴³

Consequently, terms agreed upon by corporate parties are better protected than terms agreed upon by a corporate party and an individual. However, the corporate character of the parties is far from definitive, as *the individual power to bargain is the real factor*. Accordingly, some judges may find that foreign corporations, especially financial institutions, are in a better bargaining position than local counterparts.⁴⁴

Furthermore, judges are bound to rule as abusive some terms in consumer contracts or employment contracts where the application of the doctrine has a legal basis.⁴⁵

- (ii) *Thoroughness of contractual terms*. As stated above, even if both parties have similar bargaining power, the doctrine may still find its way as a subsidiary or default rule. Therefore, legal counsel should draft the agreement with as much detail as possible.
- (iii) *Legislative and case law support*. Even if the doctrine's purpose is to avoid the harshness of legal or contractual provisions, the existence of a law or regulation that supports a specific term (even if completely unrelated to a franchise agreement) would provide some protection. For example, the Central Bank of Argentina has established that the interest rate for outstanding credit card debt should not exceed 50 percent of the original interest rate for said debt.⁴⁶ Therefore, if the default interest rate of any royalty payment is below that limit, it will surely be upheld by a court.

To the contrary, exceeding that limit will mean that a court would surely find that term abusive (even if no specific relation exists between the term and the formal regulation).

F. TERMINATION OF THE FRANCHISING AGREEMENT

1. Introduction

Other than the general rules that uphold any private arrangement among the parties, no specific regulations exist for agency, distribution, or franchising agreements. Nonetheless, courts have been rather active in this area, particularly referring to agency and distribution agreements, and mostly basing their rulings on the *abuso del derecho* doctrine.⁴⁷ Al-

employment of sharp bargaining practices and the use of fine print and convoluted language, but a lack of understanding and an inequality of bargaining power").

43. See Wilcox, 256 F. Supp. 2d at 691.

44. Of course, this tendency may only be described as a feeling among corporate lawyers in Argentina and, obviously, is not reflected in any case or scholar's opinion.

45. Law No. 24240 art. 36, Oct. 15, 1993, B.O. 27744, 34 (as amended) (Arg.); Law No. 20744 art. 7, Sept. 29, 1974, B.O. 23003, 2 (as amended) (Arg.).

46. Central Bank of Argentina, Comunicación "A" No. 3052: Tasas de Interés en las Operaciones de Crédito, Circular OPRAC 1-475, § 2.2.1 (Dec. 23, 1999).

47. Cámara de Apelaciones en lo Civil y Comercial de Lomas de Zamora, sala I [CApel.CCLZ] [Lomas de Zamora Court of Civil and Commercial Appeals, Section I], 06/05/2007, "Mansilla, Oscar c. Shell C.A.P.S.A.," La Ley Buenos Aires [L.L.B.A.] (2007-Oct.-1045) (Arg.).

though this doctrine is present in any termination case, it becomes particularly important with regard to termination without good cause.

2. *Termination for Good Cause*

Contractual parties are free to agree upon any termination clause. Even if there is no special provision on termination, the parties may nevertheless terminate the contract if good cause exists.⁴⁸ In most cases, the good cause will most likely be a party's material breach of the contract,⁴⁹ though there are other valid reasons provided by law (impossibility, impracticability, et cetera).⁵⁰ In addition, the parties may expressly include several events of default (bankruptcy, material change of circumstances, failure to achieve certain economic goals, etcetera).⁵¹ Although these provisions are generally accepted by courts, some issues should be pointed out:

- (i) If no special contractual provision has been included (or even if there was), a minor breach would not permit the other party to terminate the contract: that breach should amount to a material breach.⁵² Although no particular legal provisions exist to qualify a breach as a material breach, the most important factor is the essential benefit sought by the injured party (as provided in the agreement).⁵³
- (ii) As any other term in the contract, the *abuso del derecho* doctrine may also apply for termination clauses.
- (iii) The injured party (terminating party) has the burden of proving materiality of the breach.⁵⁴

3. *Termination Without Good Cause*

Even if the parties can agree to their own termination clauses with almost unlimited freedom (as well as any event of default), the issue arises when a party seeks to exercise a termination clause that allows him to terminate the contract without good cause (usually, only requiring a prior notice).

Under both the Civil and Commercial Codes, this type of termination (when expressly provided by the contract) should not create any liability

48. Cód. Com. art. 216.

49. *Id.*; Cód. Civ. art. 1204 (both provisions are essentially the same); Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal, sala E [CNCom.] [National Court of Commercial Appeals of the Federal Capital, Section E], 31/03/2008, "Pérez, Faustino Jorge c. Correo Arg, S.A.," La Ley [L.L.O.] (2008-AR/JUR-2682).

50. Cód. Civ. arts. 888, 1198.

51. Cód. Civ. art. 1195, 1204.

52. Cámara Nacional de Apelaciones en lo Comercial, sala A [CNCom.] [National Court of Commercial Appeals of the Federal Capital, Section A], 31/03/1995, "C.M.A. Consultoría, Métodos, Asessoria e Mercantil Ltda. c. Finerco S. A.," La Ley [L.L.O.] (AR/JUR/2399/1995).

53. *Id.*

54. *Id.*

for the franchisor.⁵⁵ Although such a provision is most common in indefinite-term contracts, where it may be even construed as existing without specific provision, it may also be included in fixed-term contracts.

Nonetheless, case law developed a doctrine called economic dependency. This doctrine arises in those cases where the ongoing concern of a firm primarily depends on a contract with the other party (usually the stronger party). Pursuant to this doctrine (which is a consequence of the *abuso del derecho* doctrine), the right to terminate a contract can only be exercised in a regular and non-abusive manner and within the limits of good faith,⁵⁶ which has to be evidenced on a case-by-case basis.⁵⁷ It particularly applies to indefinite-term and long-term contracts that required an important investment on behalf of the injured party in order to allow them to amortize such investment.⁵⁸

Dependency on the other party and necessity of a large investment are clearly features to be found in the majority (if not all) franchising agreements.

Several factors might make this doctrine applicable:

- (i) The total length of consecutive contracts (including any renewal between the parties);
- (ii) Whether the franchisee has an exclusivity obligation for the franchise;
- (iii) Whether the contract may be construed as unconscionable (both from a procedural and a material point of view);
- (iv) The parties' actual bargaining power in the contract.

If, in the case of an early termination without proper cause, the doctrine is deemed applicable, prior notice must be submitted reasonably in advance to the other party.⁵⁹ An average of one month per year of contractual relationship has been considered sufficient.⁶⁰

If no proper prior notice was given, the injured party may claim:

- (i) Any investment made upon reliance on the contract that had not been amortized by the performance of the contract,
- (ii) Labor severance payments,

55. Cód. Com. art. 216; Cód. Civ. art. 1204. Note that if no provision is included, parties to a fixed-term agreement are not able to terminate the agreement without good cause or after the contractual term has expired.

56. Cód. Civ. art. 1071; CCLZ, 06/05/2007, "Mansilla, Oscar," LLBA (2007-Oct.-1045).

57. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 08/04/1988, "Automotores Saavedra, S.A. c. Fiat Arg. S.A.," Fallos (1988-311-1352).

58. Cámara Nacional de Apelaciones en lo Comercial, sala E [National Court of Commercial Appeals, section E], 17/08/2006, "Etchelecu, Francisco J. c. Carl Zeiss Argentina S.A. y otros" (Arg.).

59. *Id.*

60. Note that although case law is generally not mandatory in Argentina, judges usually take this rule of thumb into consideration to ground their decisions. CSJN, 08/04/1988, "Automotores Saavedra," Fallos (1988-311-1337).

- (iii) Penalties for early termination of any contract executed by the franchisee to perform the franchising contract (e.g. leases).⁶¹

It is worth noting that the injured party has the burden of proving these damages.⁶² Even if no proper prior notice was given, liability will only extend to the proven damages.⁶³

4. *Fixed-Term Agreements Renewal*

Generally, when the agreement comes to the expiration of its term, it is terminated and no further liability exists for either party because neither party relied on the contract renewal. Therefore, they should have foreseen that any investment they may have made might be useless after termination (at least, with relation to the contract at hand) and, therefore, assumed the business risk that the contract may not be renewed.⁶⁴

Nonetheless, two circumstances should be noted:

- (i) The party in the weaker position may claim that, even if the contract had a fixed term, consecutive fixed-term agreements or continuing an expired contract without a formal renewal have created an indefinite-term agreement. In that case, the franchisor may not be able to prevail under the argument that it was a fixed-term agreement. Such construction would be easier to reach if an automatic renewal provision was included in the contract.
- (ii) The party in the weaker position may also claim that, even if no renewal was executed, the franchisor had expressly or impliedly (through its conduct) assured the franchisee that a renewal would be entered into and that, relying on that fact, it made several investments that turned out to be useless.

Because of these circumstances, it is advisable to give the franchisee notice of the termination, even if the contract is fixed-term and the terminating party is not required to do so.

5. *Termination Under the New Code*

Contrary to the current legislation, the New Code has thoroughly regulated contractual term and termination issues.

First, there is a minimum term of two years for fixed-term franchising agreements.⁶⁵ Only under special circumstances may the parties agree

61. Cámara Nacional de Apelaciones en lo Comercial, sala B [CNCom] [National Court of Commercial Appeals of the Federal Capital, section B], 26/12/2005, "Localiza Franchising Int'l S.R.L. c. Pérez, Marcelo F.", La Ley [L.L.] (2006-D-25).

62. *Id.*

63. Cámara Nacional de Apelaciones en lo Comercial, sala D [CNCom] [National Court of Commercial Appeals of the Federal Capital, section D], 13/07/2000, "Districóndor S. A. c. Editorial Coyuntura S. A.," La Ley [L.L.] (2000-F-524).

64. Cámara Nacional de Apelaciones del Trabajo, sala II [CNTrab] [National Court of Labor Appeals, section II], 26/05/1988, "Garrido, José M. c. Intersec, S. A.," La Ley [L.L.] (1988-E-387).

65. Cód. Civ. y Com. arts. 1514, 1516 (2012 Draft).

upon a shorter term.⁶⁶ Indefinite-term agreements can only be terminated after three years.⁶⁷

Any fixed-term agreement (except for those with a term shorter than three years, provided that there were special circumstances justifying the shorter term) is considered automatically renewed for one (1) year at the expiration of its original term, unless either party has terminated it with thirty days prior notice.⁶⁸ As of that renewal, it will be deemed converted into an indefinite-term agreement.⁶⁹

Finally, if at any moment (for indefinite-term agreements) or upon the term expiration (for fixed-term ones), any party wishes to terminate the agreement without cause, they are required to provide prior notice.⁷⁰ The prior notice period shall be equal to one month per year of contractual relationship, with a maximum period of six months.⁷¹ Failure to provide notice will grant the terminated party the right to claim any lost profits to be obtained during that period.⁷²

Finally, the contract cannot be terminated without good cause (by just one party) during the originally agreed upon term (even if termination without good cause was agreed upon in the agreement).⁷³

III. TAXES

A. LACK OF REGULATION

Similarly to the situation under contract law, there are no special tax rules for franchising agreements.⁷⁴ Therefore, in order to calculate taxes over any franchising agreement and related agreements, general tax principles apply. Needless to say, that lack of regulation may produce some uncertainty for both the franchisor and franchisee.

B. BRIEF SUMMARY OF TAXES IN ARGENTINA

As a federal country, taxes in Argentina are levied at three different levels: (i) national or federal, (ii) provincial, and (iii) municipal.⁷⁵

(i) At the federal level, there are three major taxes: (a) income tax,⁷⁶

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* art. 1516.

70. Cód. Civ. y Com. art. 1522(d) (2012 Draft).

71. *Id.*

72. *Id.*

73. *Id.* at 1522(b).

74. This statement is based on federal level tax law. There may be some legislation at a provincial and municipal level containing special tax regulation for the franchising agreements; nonetheless, its impact on foreign investments should be negligible.

75. *Tax Structure in Argentina*, GLOBAL ALLIANCE OF SMEs, http://www.globalsmes.org/news/index.php?funcdetail&detailid=562&catalog=29&lan=en&search_keywords= (last visited Feb. 17, 2014).

76. Law No. 20628, Dec. 31, 1973, 22821 B.O. 6 (as amended) (Arg.).

- (b) value added tax (VAT),⁷⁷ and (c) tax on credits and debits in bank accounts (CDT).⁷⁸
- The Income Tax is based on the worldwide income obtained by individuals, legal entities domiciled in Argentina (with permanent establishment in Argentina), and Argentine branches of foreign entities.⁷⁹
 - The VAT is levied on the sale of goods, provision of services, and importation of goods.⁸⁰ Basically, it is levied upon the value added at each stage of the production and distribution chain (including purchase for final consumption). Under certain circumstances, services rendered outside Argentina that are effectively used or exploited in Argentina are deemed rendered in Argentina and are therefore subject to VAT (i.e., technical assistance).⁸¹ The tax is levied on the difference between the tax-debit (the tax payable on the value added in that stage) and the tax-credit (the tax that was paid when acquiring the asset from the provider and before adding value to it).⁸² The general rate for this tax is 21 percent.⁸³
 - The CDT is generally levied on every credit or debit made in any checking account.⁸⁴ The rate is 0.6 percent over the amount of the debit or credit and is deductible from the Income Tax.⁸⁵
- (ii) At the provincial level, there are two taxes worth mentioning as they are specially regulated by the provincial legislatures: (a) the Turnover Tax (tax on gross income), which is levied on the amount of gross income resulting from business activities conducted within the provincial territory, and (ii) the Stamp Tax, which is levied on written documents with economic content either executed in or having effects in the provincial territory.⁸⁶
- (iii) At the municipal level, there are several taxes, mostly related to advertising, security, and hygiene, and other duties related to property (i.e., land) located in the territory.⁸⁷

Needless to say, this is only a summary of the main taxes that exist in Argentina, as many others exist as well. This article focuses only on the Income Tax, because of its particular importance to franchising agreements.

77. Law No. 20631, Dec. 31, 1973, 22821 B.O. 14 (as amended) (Arg.).

78. Law No. 25413, Mar. 26, 2001, 29616 B.O. 1 (as amended) (Arg.).

79. Law No. 20628 of Dec. 31, 1973.

80. Law No. 20631 of Dec. 31, 1973.

81. *Id.*

82. *Id.*

83. *Id.*

84. Law No. 25413 of Mar. 26, 2001.

85. *Id.*

86. BAKER & MCKENZIE, THE CONCISE TAX GUIDE: OVERVIEW ON TAXES IN LATIN AMERICA 1 (2012) available at <http://www.bakermckenzie.com/files/Uploads/Documents/Spain/TheConciseTaxGuideLatinAmerica.pdf>.

87. *See, e.g., id.* at 17.

C. INCOME TAX

1. General Characteristics

As stated above, only individuals, corporations, and branches of foreign entities are subject to income tax, on the condition that they have a permanent establishment in Argentina.⁸⁸ As expected, regulations do not provide a clear definition of what exactly constitutes a permanent establishment.

Non-resident individuals and legal entities without a permanent establishment are only taxed on income from Argentine sources, such as (i) assets located, placed, or used in Argentina, and (ii) activities in Argentina that produce an economic benefit.⁸⁹

On the other hand, any taxes that a resident has paid abroad may be used (with some restrictions) as credit for Argentine taxes, but only to the extent that the foreign tax does not exceed the Argentine tax.⁹⁰

2. Rates: Withholding Tax

The general rate for corporate entities (such as *Sociedades Anonimas* and *Sociedades de Responsabilidad Limitada*),⁹¹ subsidiaries of a foreign entity with a domicile or permanent establishment in Argentina, and Argentine branches of foreign entities is 35 percent.⁹² Recently, the distribution of dividends or other corporate profits has become levied on income tax at a reduced rate.⁹³

On the other hand, any payment made by a resident to a foreign individual or entity for services deemed to be from an Argentine source is subject to a withholding tax under different rates.⁹⁴ For the purposes of a franchising investment (and, of course, subject to the particular circumstances), the following rates should be taken into account (bear in mind, however, that no specific regulation for franchising agreements exists):

- Services that cannot be construed as a transfer of technology have a 31.5 percent withholding tax over the amount to be paid.⁹⁵
- Any trademark, know-how, or other performance that may be construed as a transfer of technology, carries a 28 percent withholding tax over the amount to be paid.⁹⁶

88. Law No. 20628 of Dec. 31, 1973.

89. *Id.*

90. *Id.*

91. An equivalent for the Argentine *Sociedad Anónima* may be found in the U.S. corporation. An equivalent for the Argentine *Sociedad de Responsabilidad Limitada* may be found in the U.S. LLC, but unlike the LLC, the *Sociedad de Responsabilidad Limitada*'s regulation comprises more mandatory provisions than the common regulation for the LLC. BAKER & MCKENZIE, LATIN AMERICAN TAX TRANSACTIONS GUIDE 10 (2012), available at <http://www.bakermckenzie.com/files/Uploads/Documents/Spain/LatinAmericanTaxTransactionsGuide%202012.pdf>

92. BAKER & MCKENZIE, *supra* note 86, at 1.

93. Law No. 26893, Sep. 23, 2010, 32728 B.O. 2.

94. BAKER & MCKENZIE, *supra* note 86, at 2.

95. *Id.* at 3.

96. See *infra*, subsection 3; BAKER & MCKENZIE, *supra* note 86, at 2.

- Any transfer of technology that is not acquirable in Argentina carries a 21 percent withholding tax over the amount paid.⁹⁷
- Any goods provided by a foreign individual or entity do not have withholding tax (however, they do have VAT and other customs duties which rates vary according to the particular circumstances).

Argentina is a party to several tax treaties that impose maximum rates on the withholding of certain taxable income. But no double taxation treaty with the United States is in force.

On the other hand, any contractual grossing-up provision included in the agreement is ineffective against the tax authority (although binding among the parties).

3. *Transfers of Technology Act*

It is worth highlighting that trademark licensing and technology transfer agreements executed by either an Argentine resident as licensee or a non-resident as licensor are subject to the provisions of the Transfers of Technology Act.⁹⁸

Under the regulatory decree of this Act, technology is defined as any patent, industrial model or design, and/or any other technical knowledge necessary for the manufacturing of products or the rendering of services.⁹⁹

Even though prior administrative approval of these kinds of agreements is no longer required, all agreements should be registered for statistical purposes with the *Instituto Nacional de Propiedad Industrial* (National Institute of Industrial Property) to obtain preferential rates (if it is determined that the service may be construed as technology and if it is acquirable in Argentina). Note that failure to register the agreement has no effect on its enforceability or validity.¹⁰⁰

4. *Transfer Pricing Provisions*

An unrelated set of provisions involves what is called transfer pricing practices, which are considered to exist when (a) an Argentine company enters into an agreement with either (i) a related foreign company, or (ii) an unrelated foreign company located in a low-tax jurisdiction, and (b) the prices agreed upon in those agreements do not reflect normal market practices (called arm's length).¹⁰¹

Any agreement executed with a foreign related company or non-related company located in a tax haven is presumed not to be at arm's

97. BAKER & MCKENZIE, *supra* note 86, at 2.

98. Law No. 22426, Mar. 23, 1981, 24633 B.O. 2 (as amended) (Arg.).

99. *Id.*

100. BAKER & MCKENZIE, *DOING BUSINESS IN ARGENTINA* 2-3 (2012), available at http://www.bakermckenzie.com/files/Publication/1d92b86d-3535-4780-89d2-24378efa0735/Presentation/PublicationAttachment/e447e0cb-5fcc-43a7-93f6-24c454ab7cb8/bk_dbi_argentina_12.pdf.

101. Law No. 25063, Dec. 30, 1998, B.O. 29053 (as amended) (Arg.).

length, unless proper evidence to the contrary is presented.¹⁰² This presentation is made by submitting detailed information of the agreement and market conditions, as well as supporting documentation.¹⁰³

IV. LABOR ISSUES

A. INTRODUCTION

Argentine labor regulations are one of the major issues any foreign investor will face. It is governed by countless special laws (such as the Labor Contract Act (LCA), a central piece of legislation)¹⁰⁴ and regulations emerging from all three levels of the political division (federal, provincial, and municipal). Although the relationship created between the employer and the employee is technically a contract, no significant regulation on the matter is provided by the Civil or Commercial Codes. Any foreign investor should acknowledge the importance of the issue and procure special professional advice on the matter.

Given that labor regulations are an enormous topic, this article will only provide a general overview of the matter, pointing out some of the legal principles and rules that govern the employment relationship, and briefly touching upon how a franchising investment would be affected by these particular rules.

B. UNEQUAL BARGAINING POWER

The very foundation of Argentine labor law is premised on a simple idea: the lack of equal bargaining power between the employer and the individual employees.¹⁰⁵ Taking this inequity into consideration, labor law is a legal instrument that tries to compensate for such inequality.

In that sense, there are several general principles that shape the Argentine labor regulation:

- a) The protective principle is the very foundation of labor law. It strongly limits the effects of any agreement¹⁰⁶ or resignation¹⁰⁷ made by the employee when such accord is contrary to his or her legally recognized interests by the thorough labor regulations.¹⁰⁸ Therefore, such agreement would not be enforceable against him (even if expressly agreed upon by him).
- b) The reality principle sets forth that whenever there is a relationship where one person acts as a working force for another in exchange

102. *Id.*

103. *Id.*

104. Law No. 20744, Sept. 29, 1974, 23003 B.O. 2 (as amended) (Arg.).

105. *Id.*; Arturo Bronstein, *National Labour Law Profile: Republic of Argentina*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158890/lang-en/index.htm (last visited Feb. 17, 2014).

106. Law No. 20744 of Sept. 29, 1974 art. 7.

107. *Id.* art. 12.

108. *See generally id.*

for a salary under the employer dependency, there will be an employment relationship (subject to labor law), regardless of the legal form, title or name the parties give to said relationship,¹⁰⁹ even if the "employee" has given his or her full consent to said form.¹¹⁰ Therefore, signing a non-labor contract, acting as an intern, or any other of the countless ways in which employers have attempted to disguise an employment relationship in order to bypass labor regulations is of absolutely no value whatsoever. To the contrary, the relationship would still be regarded an employment relationship in every sense, and the employer may be subject to important fines.¹¹¹

- c) The *in dubio pro operario* principle provides that if doubt arises regarding the interpretation of an employee's legal rights, the matter should be interpreted in his favor.¹¹²

C. EMPLOYMENT DURATION AND TERMINATION

There are two types of employment contracts: (i) fixed-term contracts, and (ii) indefinite-term contracts. It is presumed that all employment contracts are for an indefinite term, unless the employer can prove that the parties have agreed in writing to a fixed-term contract¹¹³ (which cannot exceed five years)¹¹⁴ and that a special reason for it exists.¹¹⁵ Failure to prove such circumstance or evidence of any kind of fraud in doing so (by direct application of the *reality* principle) would make the contract to be regarded as an indefinite-term contract.¹¹⁶

The indefinite-term contract may be terminated by either the employee or the employer at any time.¹¹⁷ If terminated by the employer, his or her liability will depend on whether or not there was good cause for said termination (i.e., a gross violation of the employee's duties).¹¹⁸ If the employer cannot prove the existence of a good cause for the termination, he is required to give the employee prior notice (the length of which would depend on the duration of the employment), as well as to pay the employee a severance package based on the employee's highest average monthly salary (one monthly salary per every year of employment).¹¹⁹ Very few cases exist where an employee cannot be terminated by the sole decision of the employer (i.e., union representatives, public employees, discrimination cases, etc.). However, it is uncommon for courts to recognize those exceptional situations.

109. *Id.* arts. 14, 22.

110. *See generally id.*

111. Law No. 24,013 of Dec. 17, 1991, 27286 B.O. 10 (as amended) (Arg.)

112. *Id.* art. 9.

113. *Id.* art. 92.

114. *Id.* art. 93.

115. *Id.* art. 90.

116. *Id.* arts. 90, 245.

117. *Id.*

118. Courts have restricted the existence of good cause to a very narrow extent. Therefore, it is very difficult for an employer to prove said existence.

119. *Id.* art. 245.

D. LABOR LAW AND FRANCHISING

There are no special labor law regulations for the franchising agreement. Therefore, standard labor law applies to the matter.

The most important issue that affects the franchisor is whether or not it should be liable for labor claims made by the franchisee's employees. The LCA provides a legal solution for liabilities emerging from a subcontractor's employees.¹²⁰ Given that no regulation exists for franchisors and franchisees, courts have often relied upon this provision to find a legal solution.

Under this provision, a contractor is liable for its subcontractors' employees' claims if they perform labor that may be deemed to be related to the commercial activity of the contractor.¹²¹ Nonetheless, because this provision was not created for the franchising agreement, when applying the rule to this type of contract there have been two lines of judicial interpretation:

- (i) A *broad interpretation* contemplates that because the commercialization by a franchisee (through its employees) ultimately benefits the franchisor and its activity, the latter should be held liable for any claim arising from the franchisee's employees.¹²² According to this interpretation, there would be no logic in the franchisor's activity if the franchisee would not commercialize its products.¹²³ Furthermore, the existence of franchisor's control over the activities of the franchisee also provides a basis for this interpretation.¹²⁴
- (ii) A *narrow interpretation* has considered that the provisions of the LCA regarding sub-contractors should not be applicable for franchising relations because the franchisor and franchisee are two independent contractors.¹²⁵ Nonetheless, courts have ruled that whenever there is fraud (i.e., the independence of the parties is

120. *Id.* art. 30.

121. *Id.*

122. Cámara Nacional de Apelaciones del Trabajo, sala V [CTrab.] [National Court of Labor Appeals, section V], 18/10/2007, "Santa Clara, Mario c. L.L. y L. S.A. y Otros," L.L.O. AR/JUR/7457/2007 (Arg.).

123. Cámara Nacional de Apelaciones del Trabajo, sala VII [CTrab.] [National Court of Labor Appeals, section VII], 21/09/2005, "Pereyra, Liliana María del Milagro c. Arista, Marcelo Daniel y otro," L.L.O. AR/JUR/9307/2005 (Arg.); Cámara Nacional de Apelaciones del Trabajo, sala VII [CTrab.] [National Court of Labor Appeals, section VII], 17/05/2007, "Serantes, Milagros J. I. c. Quiñones, Julio H. y otro," D.T. 2007 (agosto), 915 (Arg.).

124. Cámara Nacional de Apelaciones del Trabajo, sala II [CTrab.] [National Court of Labor Appeals, section II], 23/04/2008, "Leguizamón, Pablo Javier c. Palerva S.A. y otro," D.T. 2008 (setiembre), 778 (Arg.).

125. Cámara Nacional de Apelaciones del Trabajo, sala III [CTrab.] [National Court of Labor Appeals, section III], 19/02/2007, "Punta, Diego Leonardo c. Pronto Wash S.A. y otros," L.L.O. AR/JUR/469/2007 (Arg.); Cámara Nacional de Apelaciones del Trabajo, sala III [CTrab.] [National Court of Labor Appeals, section III], 26/11/2008, "Chazarreta, Héctor Edgardo c. Emparte S.R.L. y otros s/ despido," D.T. 2009 (julio) (Arg.); Cámara Nacional de Apelaciones del Trabajo, sala III [CTrab.] [National Court of Labor Appeals, section III], 09/03/2009, "Jamar, María Eugenia c. Cheek S.A. y otro s/ despido," L.L.O. AR/JUR/8018/2009 (Arg.).

only apparent), the franchisor should be liable.¹²⁶

Because the solution for this issue is not clear, the franchisor should always account for the serious possibility of being held liable for any labor claims against the franchisee. In this sense, franchisors commonly include two key provisions in the franchising agreement:

- (i) *Indemnity provisions.* Although there are no legal obstacles in agreeing upon an indemnity provision, these commitments are only as good as the franchisee's solvency.
- (ii) *Franchisor's inspection and control abilities.* In most franchising agreements, the franchisor has the ability to inspect the franchisee's activity and records to prevent any future claim (because most claims come from the inaccuracy of the employee's registration). Although this might be the only way to prevent claims, it has been ruled that including this ability also creates a duty for the franchisor.¹²⁷

The New Code expressly sets forth that the franchisor-franchisee relation does not create a labor relationship among the franchisor and the franchisee's employees (except fraud).¹²⁸

E. DIRECTORS AND CORPORATE OFFICERS' LIABILITY

Another issue that foreign franchisors should take into serious consideration is the ease with which Argentine labor courts pierce the corporate veil to find both shareholders¹²⁹ and directors¹³⁰ liable. Although the legal requirements and factors capable of piercing the corporate veil are no different than those under U.S. law (e.g., undercapitalization, alter ego, et cetera), the most important factor is the use of the corporate form in a fraudulent manner. Nevertheless, courts have surprisingly ruled that failing to duly register an employee is equal to creating a corporation just for fraudulent acts.¹³¹

126. Cámara Nacional de Apelaciones del Trabajo, sala VIII [CTrab.] [National Court of Labor Appeals, section III], 17/06/2008, "Fariás, Alicia Cristina c. Dieta Club S.A. y otros," L.L.O. AR/JUR/4787/2008 (Arg.); Cámara Nacional de Apelaciones del Trabajo, sala III [CTrab.] [National Court of Labor Appeals, section III], 28/02/2007, "Fernández, Mirta L. c. Aquino, Marciana y otro" (Arg.).

127. Cámara Nacional de Apelaciones del Trabajo, sala VI [CTrab.] [National Court of Labor Appeals, section VI], 03/04/2008, "Cegna Fichera, Walter Gastón c. Supermercados Norte S.A. y otros," L.L.O. AR/JUR/2439/2008 (Arg.).

128. Cód. Civ. y Com. art. 1520 (b) (2012 Draft).

129. Law No. 19550 art. 54, Apr. 25, 1972, 22409 B.O. 11 (as amended) (Arg.).

130. *Id.* art. 59.

131. Cámara Nacional de Apelaciones del Trabajo, sala III [CTrab.] [National Court of Labor Appeals, section III], 31/08/2012, "Rodríguez Varas, Cristian Martín c. Go For It S.R.L. y otros s/ despido," L.L.O. AR/JUR/45205/2012 (Arg.).

V. CURRENCY ISSUES

A. INTRODUCTION: HISTORICAL AND CURRENT SCENARIO

Currency restrictions in Argentina are probably the most important issue for foreign investors nowadays (in addition to the problems that they regularly cause for domestic businessmen). Even though currency restrictions had been common throughout Argentine history, they are often the product of incidental circumstances because they are contrary to the sense of freedom that guides the Argentine legal system. Furthermore, currency restrictions are usually a result of underlying economic crisis. But, as recent (and not so recent) history has proven, currency restrictions never helped solving economic crises. To the contrary, they have always had the opposite effect by deepening the economic crisis and triggering major political crises.¹³²

Current currency restrictions began soon after the major crisis of 2001–2002, when the government seized all private bank deposits to prevent a collapse of the banking system. The causes of this crisis may be found in the backlash created by the convertibility system enacted by the Convertibility Act in 1991¹³³ as a response to the hyperinflation scenario that existed in the late 1980s. The Convertibility Act created a fixed exchange rate between the USD and the Argentine Peso (a currency created by said law).¹³⁴ After the financial support to that system (the profits of which were generated by the privatization of state-owned national companies) ran out, no further support to exports was developed. They were diminished because of the lack of competitiveness of Argentine commodities in foreign markets since their prices were attached to the USD. The system was dropped and the government was forced to devalue in early 2002.

After the devaluation, certain currency provisions were enacted, creating the *Mercado Único y Libre de Cambios* (Unique and Free Exchange Market), in which only authorized financial institutions are able to perform exchange operations.¹³⁵ At this point, no significant restrictions

132. The most recent example of this occurred at the end of 2001, when a few days after the government decreed that all of the domestic bank deposits in US\$ were to be converted into Argentine Pesos, massive public protests forced the then current president (Fernando de la Rúa) to resign. *Hubo 18 víctimas más en otra jornada de estallido social*, CLARÍN (Dec. 21, 2001) available at <http://edant.clarin.com/diario/2001/12/21/p-329975.htm> (last visited Feb. 18, 2014). Furthermore, the last currency restrictions implemented by the current government in October, 2011 negatively impacted the current president (Cristina Fernandez de Kirchner) causing her approval ratings to drop significantly and currently causing massive public protest against her government. Michael Warren, *Cristina Fernandez De Kirchner's Popularity Plunges As Inflation Soars In Argentina, Polls Show*, HUFFINGTON POST (May 7, 2013, 7:56 PM), http://www.huffingtonpost.com/2013/05/08/cristina-fernandez-de-kirchner-popularity_n_3231726.html?view=print&comm_ref=false.

133. Law No. 23928, Mar. 28, 1991, 27104 B.O. 1 (Arg.).

134. Law No. 23928 of Mar. 28, 1991.

135. AFIP General Resolution No. 3417/2012, Dec. 20, 2012, 32547 B.O. (as amended) (Arg.).

were made, but a simple information control process was introduced.¹³⁶ Exchange operations were freely made and the exchange rate was floatable and solely determined by supply and demand.

It was in 2009 when the government established increasingly stringent measures to slow the rate of inflation. As a preliminary note, it is important to highlight that even if all of these measures were implemented by formal executive legislation (enacted by the Argentine treasury), their final implementation and the granting of any related authorization thereupon was dependent on government officers' final approval. However, the rules and criteria for specifically granting the authorizations were never clarified and, until now, nobody but a few government officers really understands them.

1. *Non-Automatic Import Licenses*

In 2009, the *non-automatic import licenses* were created.¹³⁷ Clearly violating the GATT agreement, these licenses provided that the importation of several products would only be possible after the government authorized the particular import.¹³⁸ Furthermore, no clear rules of procedure were created and only importers close to the government or those who made private and informal commitments with the Industry Department were allowed to import. Most of them were eventually derogated.

2. *Obligation to Liquidate Foreign Currency in the Unique and Free Exchange Market*

Argentine exporters of goods and services are required to bring the foreign currency paid in consideration for the exported commodities and liquidate them in the Argentine Unique and Free Exchange Market at the official rate (the importance of the official rate will be evident after reading the following sections of this article). Consequently, Argentine exporters cannot retain abroad any amount paid to them (even if they are to be used for paying for imports), and they must always repatriate them.

Over the months, the terms and conditions of this repatriation became increasingly stringent.

3. *Foreign Currency Transaction Consultation (FCTC)*

Soon after the current president was re-elected in 2011, the government implemented a system called *Consulta de Operaciones Cambiarias* (Foreign Currency Transaction Consultation).¹³⁹

136. *Id.*

137. See Press Release, United States Challenges Argentina's Widespread Use of Import Restrictions, Office of the U.S. Trade Representative (Aug. 21, 2012), *available at* <http://www.ustr.gov/node/7719> (last visited Feb. 18, 2014).

138. *Id.*

139. AFIP General Resolution No. 3210/2011, Oct. 31, 2011, B.O. 32266, 38 (as amended) (Arg.).

In its original form, the system provided that if any particular entity intended to acquire foreign currency, they would have to log on to the *Administración Federal de Ingresos Públicos* (Argentine Federal Tax Authority, AFIP) website and ask for real-time authorization using their tax identification number.¹⁴⁰ After a few glitches with the online system were solved, the system proved to be effective (although inconvenient) and people with good tax standing were able to acquire USD. It could be estimated that a person would be authorized to acquire up to 60 percent of his or her salary or monthly income, although nobody really knows how this was calculated. However, given that it was required to go through this procedure in order to wire money internationally,¹⁴¹ it was practically impossible to send large amounts of money abroad.¹⁴²

As “well” as things may have been going, in May of 2012 the online system stopped authorizing operations, even when the taxpayer had good tax standing. After a few months like that and though the possibility of buying foreign currency through the system was formally possible (though no operation was ever approved), in July of 2012¹⁴³ the government finally enacted a resolution that prohibited individuals or entities from acquiring USD for what was called *atesoramiento* (roughly translated as “savings”). Therefore, ordinary people were no longer able to buy USD through the official market to protect their savings from inflation by converting them into hard currency (now only able to do so through the illegal market, discussed *infra* section 5.2).¹⁴⁴

4. DJAI (*Anticipated Imports Affidavit*)

The resolution took effect on January 1, 2012¹⁴⁵ and provided that to acquire foreign currency for imports’ payments, the importer would have to file several documents with the AFIP and wait for approval.¹⁴⁶ This requirement was independent from the need to obtain the non-auto-

140. *Id.* The political justification was that only people with good standing with the tax authority should be able to acquire USD and only to the extent that their tax filings would allow.

141. *Id.* Even if the individual already had UDS they would have to convert them into Argentine pesos and, once again, buy USD.

142. *Trade Regulations, Customs, and Standards*, EXPORT.GOV, <http://export.gov/argentina/doingbusinessinargentina/argentinacountrycommercialguide/traderegulationsandstandards/index.asp> (last visited Feb. 18, 2014).

143. Central Bank of Argentina, “A” Communication No. 5318 (Arg.).

144. Only a few exceptions were made for people who could prove that they would be travelling abroad but, obviously, the rules for this acquisition were (and remain) unclear. However, credit card payments made abroad were still possible as it was of paying the credit card bill in Argentine pesos at the official exchange rate. Nonetheless, as of October 1, 2012 a 15 percent withholding tax was added to that payment and, after a few months, it was increased to 20 percent (currently, is 35 percent). Although AFIP eventually restored the individuals’ ability to acquire foreign currency for savings, it can only be done for up to 20 percent of the individual’s monthly income and it is subject to a 20 percent withholding tax has to be added.

145. AFIP General Resolution No. 3252/2012, Jan. 10, 2012, 32314 B.O. 7 (as amended) (Arg.).

146. *Id.*

matic¹⁴⁷ importing license referred to above. Even though many of the non-automatic importing licenses were eventually derogated, the DJAI procedure is still in force.

5. *DJAS (Anticipated Services Affidavit)*

Enacted shortly after the DJAI, this system provides a similar procedure for any payment to be made abroad in consideration for foreign services, including consideration for trademark license agreements and royalties.¹⁴⁸ In this case, the recipient of the services would have to file several documents with the National Central Bank in order to acquire the necessary foreign currency.¹⁴⁹ For payments over \$100,000 USD in one year or over \$10,000 USD in a single payment, the National Central Bank's authorization is needed. For lower payments, only the filing is needed (which itself is rather troublesome, even if no authorization is needed).¹⁵⁰

6. *Dividend Payments for Foreign Shareholders*

By the end of 2012, the currency restrictions for wiring dividends abroad (both for branches of foreign entities as well as subsidiaries) were formalized (even if it was rather difficult to send dividends abroad prior to this, no formal legislation was enacted).¹⁵¹ Once again, there is a filing procedure with the National Central Bank and in every case, an authorization from it is needed.¹⁵² Before this regulation, the National Central Bank required the filing of several documents and in order to get final approval, an email had to be sent (to a *Gmail* address, which further demonstrates the informality of the system). Currently, even if the procedure is duly completed, no authorization of this kind is practically granted.

B. THE CREATION OF THE INFORMAL (AND ILLEGAL) EXCHANGE MARKET

The enactment of these restrictions (mostly the FTCT) led to the creation of an informal market (called the "*blue* market") where both people and entities would resort to acquiring foreign currency without complying with the hard and practically impossible requirements.¹⁵³ This market is completely illegal.¹⁵⁴ Nonetheless, the exchange rate for this market is

147. *Id.* Contrary to an "automatic license," the non-automatic license depends on a particular government approval.

148. AFIP General Resolution No. 3276/2012, Feb. 22, 2012, 32343 B.O. 8 (as amended) (Arg.).

149. *Id.*

150. *Id.*

151. AFIP General Resolution No. 3417/2012, Dec. 20, 2012, 32547 B.O. (as amended) (Arg.).

152. *Id.*

153. Patrick J. McGinnis, Meanwhile, *In Argentina The Black Market Dollar Exchange Has 17,000 Facebook Likes*, BUSINESS INSIDER, <http://www.businessinsider.com/argentina-black-market-dollar-exchange-2013-6> (last visited Feb. 18, 2014).

154. *Id.*

commonly publicized in newspapers and even an *app* for the iOS was developed to provide updated rates.¹⁵⁵

Currently, the difference between the official market and the *blue* market is about 70 percent and it continues to increase with every new currency restriction implemented by the government.¹⁵⁶ Nonetheless, individuals still buy USD in this market since they prefer to save in USD rather than in Argentine pesos.¹⁵⁷ On the other hand, it is worth mentioning that, even though this is an illegal market, most prices and inflation are attached to this rate rather than the official rate.

C. CONSEQUENCES FOR THE FOREIGN INVESTOR/FRANCHISOR

The consequences for the foreign investor/franchisor are evident. Any prospective franchisor thinking about investing should be aware that it would be very difficult to take any profits from the Argentine business venture. If those profits are to be sent abroad by way of royalty payments, they would have to comply with the DJAS procedure and, if over \$100,000 USD, they would have to wait (for a long time) for the National Central Bank authorization. If those profits are to be sent abroad by way of dividends, they would have to wait for an authorization that will never come.

In addition, if they are to import goods they may have to comply with the DJAI and, if applicable, with the non-automatic license import. Regarding this issue, a case involving Starbucks Coffee Company was famous. After running out of their original stock for the classic Starbucks cups, Starbucks had to use domestically-manufactured cups (of a clearly inferior quality) because they were unable to import to correct ones.¹⁵⁸

Even if after considering these restrictions, a foreign franchisor would still be willing to invest in Argentina, he would have to send the foreign investment through the official market and receive the equivalent amount of AR\$ according to the official rate. However, his investment would not be as cost efficient as it could be (because most of the prices in Argentina are attached to the *blue* rate) because this rate does not reflect the actual value of the money.

VI. CONCLUSION: WHAT THE FUTURE LOOKS LIKE FOR FOREIGN INVESTMENTS IN ARGENTINA

Investing in Argentina is, at least for now, unclear. Even if the differences between the Argentine legal system and the U.S. legal system are

155. *DefconSolutions, Dolar Blue Argentina*, iTunes PREVIEW, <https://itunes.apple.com/us/app/dolar-blue-argentina/id642099328?mt=8> (last visited Feb. 18, 2014).

156. See, e.g., McGinnis, *supra* note 164.

157. Because of inflation rates exceeding 25 percent per year. *Argentina's Dollar Tourists: A Vacation From Inflation*, THE ECONOMIST (May 16, 2013), available at <http://www.economist.com/blogs/americasview/2013/05/argentinas-dollar-tourists>.

158. *Starbucks pidió "disculpas" por las primeras disculpas*, LA NACIÓN (July 17, 2012), available at <http://www.lanacion.com.ar/1491119-starbucks-pidio-disculpas-por-las-primeras-disculpas>.

no reason to frighten a foreign franchisor (because they are far more welcoming than many other legislations), the current currency restrictions, though incidental and hopefully temporary, make foreign investment difficult nowadays.

By enacting these restrictions, the current government has closed the door for foreign investments in general and foreign franchisors in particular. Minor franchisors who have already invested in Argentina are currently leaving the country. Major franchisors with huge investments in Argentina are trying to keep them just to avoid the enormous losses that leaving the country would entail, hoping that the situation will eventually change. Surprisingly, they are taking the opportunity to expand their businesses while waiting for a regulatory change because they are not distributing their profits.

Nonetheless, political and economic analysts foresee that any candidate supported by the current government¹⁵⁹ will probably fail to be elected as president in the next presidential election. Although the ruling government did not lose the control of the National Congress after the 2013 legislative elections, they have certainly lost a great deal of political power. Thus, it is yet to be seen what the government's approach will be during the upcoming two years until the 2015 presidential elections.

159. The current government started in 2003, when Nestor Kirchner was elected as president. It currently continues with his wife, Cristina Fernandez, as president. Given that the Argentine Constitution prevents a person from being elected for more than two consecutive terms, she cannot be elected as president in 2015. *Argentina Midterm Elections Expected To Deliver Blow To Cristina Fernandez*, THE GUARDIAN (Oct. 27, 2013), available at <http://www.theguardian.com/world/2013/oct/27/argentina-midterm-elections-cristina-fernandez>.