COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

Peru

FRANCHISE & LICENSING

Contributor

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This country-specific Q&A provides an overview of franchise & licensing laws and regulations applicable in Peru.

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PERU
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1. Is there a legal definition of a franchise and, if so, what is it?

No, there is no legal definition of a franchising and/or a franchise under Peruvian law. However, Peruvian business and legal practice has understood franchise agreements to be arrangements through which a franchisor grants a franchisee the right to reproduce, under the franchisor's assistance, a system previously developed by the franchisor. That system is distinguished by the franchisor's trademarks.

2. Are there any requirements that must be met prior to the offer and/or sale of a franchise? If so, please describe and include any potential consequences for failing to comply.

There are no requirements provided by law that must be met before a business can sell a franchise. However, it is recommended that before the franchisor decides to grant rights to develop a franchise business, the relevant trademarks relating to the franchise are registered before the National Institute for the Defence of Free Competition and the Protection of Intellectual Property (*Instituto Nacional de Defensa de la Competencia y Proteccion de la Propiedad Intelectual – INDECOPI*).

3. Are there any registration requirements for franchisors and/or franchisees? If so, please describe them and include any potential consequences for failing to comply. Is there an obligation to update existing registrations? If so, please describe.

Considering that there is no specific franchise law, franchisors and franchisees are not required to register before any regulatory authority.

4. Are there any disclosure requirements (franchise specific or in general)? If so, please describe them (i.e. when and how must disclosure be made, is there a prescribed format, must it be in the local language, do they apply to sales to sub-franchisees) and include any potential consequences for failing to comply. Is there an obligation to update and/or repeat disclosure (for example in the event that the parties enter into an amendment to the franchise agreement or on renewal)?

There are no disclosure requirements.

5. If the franchisee intends to use a special purpose vehicle (SPV) to operate each franchised outlet, is it sufficient to make disclosure to the SPVs' parent company or must disclosure be made to each individual SPV franchisee?

See answer 4 above.

6. What actions can a franchisee take in the event of mis-selling by the franchisor? Would these still be available if there was a disclaimer in the franchise agreement, disclosure document or sales material?

In the absence of a franchise law, the Peruvian Civil Code and the Peruvian Judicial Procedures Code govern this issue. Therefore, the franchisee can issue proceedings against the franchisor trying to obtain adequate remedy, most likely an award of damages against the franchisor. However, it will be very difficult to obtain an efficient and fast result before the Peruvian Judicial Power.

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7. Would it be legal to issue a franchise agreement on a non-negotiable, “take it or leave it” basis?

Yes, it would be legal. The Peruvian Civil Code recognizes this form of contracts in Article N°1390 (Contrato por Adhesion).

8. How are trademarks, know-how, trade secrets and copyright protected in your country?

Intellectual Property Rights or IPRs must be registered in Peru to be protected from third parties before the National Institute for the Defence of Free Competition and the Protection of Intellectual Property (INDECOPI).

In Peru, protection of intellectual property can be divided into the protection of industrial property and the protection of copyright.

Industrial property protection applies to all economic activities. All natural or legal persons recognized by the constitution and laws of Peru, whether or not domiciled in Peru, are entitled to industrial property protection. The protected components of industrial property are invention patents, certificates of protection, utility models, industrial designs, trade secrets, goods and services marks, among others. Industrial property in Peru is governed mainly by Decision N°486 of the Andean Community (Comunidad Andina), Legislative Decree N°1075 and international provisions. Product and service marks must be registered with INDECOPI to obtain legal protection. Registration is done according to the International Classification of Goods and Services for the Purposes of the Registration of Marks (i.e., Nice Classification) and can be carried out through a multi-class registration request. Upon completion of the registration procedures, the competent authority issues a certificate that grants the holder exclusive rights to the mark for 10 years. Registration may be renewed six months prior to expiration and up to six months after the expiration date.

Likewise, copyright protection accrues to all intellectual works in the literary and artistic domain, whatever their type, form of expression, merit or purpose.

9. Are there any franchise specific laws governing the ongoing relationship between franchisor and franchisee? If so, please describe them, including any terms that are required to be included within the franchise agreement.

There is no specific franchise law in Peru. However, the general principles of contract law stated in the Peruvian Civil Code will apply relating to their effects, interpretation, termination, as well as the requirement to exercise rights and perform duties in good faith.

10. Are there any aspects of competition law that apply to the franchise transaction (i.e. is it permissible to prohibit online sales, insist on exclusive supply or fix retail prices)? If applicable, provide an overview of the relevant competition laws.

Regarding Peruvian competition legislation, it must be noted that, the purpose of Legislative Decree N°1034 (The Peruvian Competition Law) is to prevent and to sanction anti-competitive behaviour, and to promote economic efficiency, to the benefit of consumers. Accordingly, competition law applies to natural or legal persons, public or private, state-owned or not, profitable or non-profitable that are in the market for the supply or demand for goods or services. The Peruvian Competition Law covers the antitrust enforcement of conducts as abuse of a dominant position, horizontal collusive practices and vertical collusive practices.

On the other hand, Legislative Decree N°1044 (The Unfair Competition Law) contains a set of rules that punish business conducts that undermine the adequate functioning of the competitive process. Thus, the Unfair Competition Law sanctions acts that are contrary to the requirements of good entrepreneurial faith, such as acts of deception, denigration, undue comparison, corporate sabotage, among others.

Although franchise agreements have special characteristics, they are not considered to restrict or distort competition. Under this scenario, it is possible to prohibit online sales of the products, state exclusive supply or fix prices.

Lastly regarding Peruvian competition regulations, it is important to highlight the Act on Prior Control of Business Concentration Operations, better known as “Act on Control of Mergers and Acquisitions”, Act N°31112 in force since June 14, 2021, which established a regime of prior control of business concentration operations, with the purpose of promoting effective competition and economic efficiency in markets for consumers’ welfare. In that sense, under certain circumstances, acts of business concentration that produce effects in Peru, including mergers, purchase of assets, acquisition of

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rights, as well as the incorporation of a new economic agent or the signing of a joint venture agreement or any other similar contractual modality implying the acquisition of control over one or several economic agents, will be within the scope of the regulation. Therefore, although it is not common, a franchise agreement could come within the scope of Act N°31112 and require prior authorization, requiring a specific analysis of transaction and sector.

11. Are in-term and post-term non-compete and non-solicitation clauses enforceable?

Local courts will enforce in-term and post-term restrictive covenants against the franchisee, such as non-compete and confidentiality restrictive covenants. There are no limitations on the duration and geographical scope of such restrictions, but they must be in full accordance with the provisions concerning freedom of business and commerce and free competition. It must be noted that, in some cases, such clauses could be considered by judges as a violation of the constitutional right to work, and therefore, unenforceable.

12. Are there any consumer protection laws that are relevant to franchising? Are there any circumstances in which franchisees would be treated as consumers?

There are not consumer protection laws that are relevant to franchising specifically, but the franchisee must know that the final consumer may seek consumer protection under the Consumer Protection and Defence Code. In this regard, it is important for the franchisee to know elementary rights of consumers, such as:

- Supplier must provide consumers with all relevant information to make a decision or an appropriate choice of consumption, and to make proper use or consumption of products or services.
- Supplier shall remain liable for the suitability and quality of the products and services offered; the authenticity of brands and legends displayed by his products or the signs supporting the service supplier, for inconsistencies in commercial advertising of products and services, as well as the content and product lifecycle indicated on the package, if appropriate.

According to the Consumer Protection and Defence Code, franchisees would not be treated as consumers.

13. Is there an obligation (express or implied) to deal in good faith in franchise relationships?

The Peruvian Civil Code establishes in Article N°1362 that agreements must be negotiated, agreed and executed according to rules of good faith and the common intention of the parties.

14. Are there any employment or labour law considerations that are relevant to the franchise relationship? Is there a risk that the staff of the franchisee could be deemed to be the employees of the franchisor? What steps can be taken to mitigate this risk?

According to Supreme Decree N°003-97-TR, two elements must exist for an employment relationship to be formed, namely, subordination and remuneration as defined by Peruvian Labour Legislation. Under the franchising business model, neither of these two requirements exists and therefore, a franchisee cannot be regarded as an employee of the franchisor. It is common to include provisions in the agreements stating that franchisor and franchisee are not economically related. In addition, franchise agreements include an indemnity provision under which the franchisee agrees to hold the franchisor harmless against all claims arising from such claims.

15. Is there a risk that a franchisee could be deemed to be the commercial agent of the franchisor? What steps can be taken to mitigate this risk?

The parties will typically include in the franchise agreement an independent contractor provision stating that the franchisee is an independent company. This clause usually includes an indemnity provision under which the franchisee agrees to hold the franchisor harmless against any and all claims arising from any breach of the franchise agreement, including the independent contractor clause.

16. Are there any laws and regulations that affect the nature and payment of royalties to a foreign franchisor and/or how much

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interest can be charged?

No, there are no laws or regulations that affect the nature and payment of royalties to a foreign franchisor. In addition, there are no exchange control or currency regulations applicable to payments to a foreign franchisor.

It must be noted that the Political Constitution of Peru establishes that domestic and foreign investments are subject to the same conditions.

The Peruvian Civil Code establishes in Article N°1243 that interests can be charged on overdue payments but must be limited to the maximum conventional interest rate, which is fixed by the Central Reserve Bank of Peru.

17. Is it possible to impose contractual penalties on franchisees for breaches of restrictive covenants etc.? If so, what requirements must be met in order for such penalties to be enforceable?

Yes, it is possible to impose contractual penalties on franchisees for breaches of restrictive covenants and others. Penalties are enforceable in Peru as an exclusive remedy or in addition to damages for breach of contract, depending on the provisions of the agreement (Article N°1341 of the Peruvian Civil Code).

18. What tax considerations are relevant to franchisors and franchisees? Are franchise royalties subject to withholding tax?

In general terms, there is a withholding obligation on payments made to an overseas franchisor. However, the rate of the withholding will depend on the nature of the underlying payment and the applicability of any double taxation treaties. At present, Peru maintains treaties to avoid double taxation with Canada, Chile, Brazil, Mexico, Portugal, Switzerland, among others. Therefore, specific tax advice should be sought in each particular case.

Regarding royalties, there currently is a withholding tax obligation on any payment made to an overseas franchisor that amounts to 30% of the total royalty.

19. How is e-commerce regulated and does this have any specific implications on the relationship between franchisor and franchisee? For example, can franchisees be prohibited or restricted in any way from using e-commerce in their franchise businesses?

There are no specific regulations for e-commerce in Peru. However, there are currently regulations governing, for example, the use of digital signatures and certificates, consumer protection and defence, personal data protection, among others that could impact the relationship between the franchisor and the franchisee.

Taking into consideration the above and that there are no regulations directly governing franchises, franchisors may establish in the franchise agreement liabilities and limitations to the franchisee to create, facilitate, regulate, modify or, in some cases, restrict or prohibit the use of e-commerce.

20. What are the applicable data protection laws and do they have any specific implications for the franchisor/franchisee relationship? Does this have any specific implications in the franchising context?

Personal data protection in Peru is regulated by the Personal Data Protection Act N°29733, its regulation and several directives issued by the National Authority of Personal Data Protection (ANPDP, by its Spanish acronym) of the Department of Justice.

In this sense, the franchise agreement must state that both parties are obliged to comply with the regulations related to personal data protection, when applicable. Even more so when there is a cross-border flow of information to the foreign franchisor, such as in the case of referral of information on customers, employees, suppliers, as well as other related aspects.

Authorization procedures for the use of personal data, privacy and cookie policies, registration of personal data banks with the ANPDP and the adoption of organizational, legal and technical security measures should be mainly implemented.

21. Is the franchisor permitted to restrict the transfer of (a) the franchisee's rights and obligations under the franchise agreement or (b) the ownership interests in the franchisee?

Contractually, the franchisor may regulate or limit the transfer of rights and obligations of the franchisee, as

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well as the transfer of the franchised company. According to our experience, franchise agreements always contain these limitations, even establishing the methodology for the valuation of the franchised company at the time of a possible acquisition by the franchisor.

22. Does a franchisee have a right to request a renewal on expiration of the initial term? In what circumstances can a franchisor refuse to renew a franchise agreement? If the franchise agreement is not renewed or it if it terminates or expires, is the franchisee entitled to compensation? If so, under what circumstances and how is the compensation payment calculated?

There is no local law that obliges the franchisor to renew a contract, unless it has been included as an obligation under the original franchise agreement. Under Peruvian legislation, there is no mandatory compensation payable to the franchisee at the end of the term established by the parties. However, one party can terminate an agreement before its expiration in the event of a material breach of contract by the other party. The specific procedure must be stated in the agreement, according to the Peruvian Civil Code.

23. Are there any mandatory termination rights which may override any contractual termination rights? Is there a minimum notice period that the parties must adhere to?

There are no mandatory termination rights that may override any contractual termination rights. The Civil Code states that the parties can freely determine the content of the agreement, provided that it is not contrary to current legislation.

24. Are there any intangible assets in the franchisee's business which the franchisee can claim ownership of on expiry or termination, e.g. customer data, local goodwill, etc.

No. However, it will be important for the franchisor to include this kind of representations in the franchise agreement.

25. What due diligence should both the franchisor and the franchisee undertake before entering into a franchise relationship?

From the franchisor's perspective, the main aspects to be included in the due diligence will be focused on validating the economic solvency of the franchisee, as well as its experience in the specific sector of the franchise.

On the franchisee's side, it should focus on verifying the ownership of the franchised mark, as well as the due transfer of know-how and technical assistance throughout the term of the franchise agreement. Additionally, since franchising is not regulated in Peru and there is no record or supervising entity, it will be very important to validate the information provided by the franchisor, such as the level of sales, expansion plan, amount and return on investment, among other commercial aspects.

26. How widespread is franchising and what are the most active sectors? Are there any specific economic, cultural or regulatory issues that make franchising particularly attractive?

At the beginning of 2020, there were over 500 Franchise Systems in Peru, 52% of them were foreign and 48% were Peruvian, having increased in the past few years. However, due to COVID-19, on March 15, 2020 the Peruvian Government declared State of Emergency and social immobilization until June 30, 2020 when gradual resumption of specific activities started.

Franchise sector has been one of the most beaten nationwide in the last two years, since most Franchise Systems were related to the restaurant industry and retail, and facilities located at the country's main malls, which were closed for more than four months. However, since the beginning of 2022, the franchise sector has begun to recover slowly in some areas such as gastronomy, technology and health.

Furthermore, there are currently more than 80 shopping centers in Peru, which are already open to the public and operating at full capacity. In addition, there are several projects related to new shopping centers and the expansion of existing ones, both in the city of Lima and provinces, which will further promote reactivation of the franchise sector.

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27. Is there a national franchising association? Is membership required? If not, is membership commercially advisable? What are the additional obligations of the national franchising association?

In Peru, there is a national franchise association, the Peruvian Chamber of Franchises, which is for franchisors and master franchisees, an added value tool, where it is possible to find information about franchising companies, franchise consultants, training courses, events and information about franchises.

In this regard, membership is not required, but commercially recommended, since its objective is to ensure the interests of the Franchise Industry in Peru, offering its associates services and benefits that raise their quality standards and reduce costs, through participation in various government and private forums, as well as the organization and development of events.

28. Are foreign franchisors treated differently to domestic franchisors? Does national law/regulation impose any debt/equity restrictions? Are there any restrictions on the capital structure of a company incorporated in your country with a foreign parent (thin capitalisation rules)?

No, the Peruvian Constitution establishes that domestic and foreign investments are subject to the same conditions.

The General Companies Act (LGS, by its Spanish acronym), Act N°26887 is the act that regulates companies in Peru and only requires a minimum of two (2) partners to form a company, which may be national or foreign, natural or legal persons. The mentioned regulation does not establish restrictions of any kind for the concepts of debt/equity in the companies, and there is no limitation in the structure of the capital stock for a company with foreign investment.

Notwithstanding the above, from a tax perspective, there are sub-capitalization tax rules that limit the deductibility of interest for Income Tax (IR) purposes.

29. Are there any requirements for payments in connection with the franchise agreement to be made in the local currency?

No, there are not requirements for payments in connection with the franchise agreement to be made in the local currency. In fact, Article N°1237 of the Peruvian Civil Code states that obligations may be made in foreign currency.

30. Must the franchise agreement be governed by local law?

The franchise agreement does not necessarily have to be regulated by Peruvian legislation. The parties will freely choose the law that will govern the franchise agreement.

31. What dispute resolution procedures are available to franchisors and franchisees? Are there any advantages to out of court procedures such as arbitration, in particular if the franchise agreement is subject to a foreign governing law?

Parties in Peru can choose the forum to hear and resolve their dispute. They can opt in the agreement to resolve their disputes before a civil court or before arbitration. Commonly, parties choose arbitration.

Litigation before civil courts is less expensive than arbitration, but it is time-consuming, as it often takes many years to obtain a final decision.

32. Does local law allow class actions by multiple franchisees?

Considering that Peru is under the Civil Law System, class actions are not common in Peru. However, it is possible that multiple franchisees sue one franchisor. On the other hand, it must be noted that under the Peruvian Competition Law, INDECOPI has the possibility to sue on behalf of consumers for the reparation of damages caused by a cartel.

33. Must the franchise agreement and disclosure documents be in the local language?

Not necessarily, parties are free to choose the language of the agreement and complementary documents.

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34. Is it possible to sign the franchise agreement using an electronic signature (rather than a wet ink signature)?

According to Act N°27269 and its Regulation, it is possible to sign the franchise agreement using an electronic signature. However, in Peru it is not common use electronic signature in commercial transactions. In addition, taking into consideration that disputes may arise and that it can be difficult to document the sufficiency and effectiveness of an electronic signature, we recommend not to destroy the franchise agreement with wet-ink signatures, even if they have been signed using electronic signature.

Therefore, it is recommended to use a wet ink signature, and then, legalized it before a Notary Public.

35. Can franchise agreements be stored electronically and the paper version be destroyed?

Accordingly with answer 34 above, the paper version of the franchise agreement should not be destroyed.

36. Please provide a brief overview of current legal developments in your country that are likely to have an impact on franchising in your country.

Due to regulatory framework modifications regarding Intellectual Property Rights, the registration of trademarks and other distinctive signs has been simplified. Currently, most of the procedure for registering a trademark before INDECOPI is done online, which not only implies a reduction of time, but also makes the registration less expensive.

37. In your opinion, what are the key lessons to be learned by franchisors as a consequence of the COVID-19 crisis?

Based on our experience in the sector and the current situation of the Peruvian market, the economic crisis caused by COVID-19 has resulted in, amongst other, the following lessons for franchisors:

- Great importance of on-line sales
- Development of complementary delivery and to-go services
- Development of digital marketing
- Not to rely on commercial premises, or big infrastructures
- Manage flexible and customizable business structures
- Main contracts with exit clause in cases of fortuitous or force majeure events

While the economic crisis will suspend some expansion and investment plans, it will also cause to adapt and reimagine many Franchise Systems to the new reality; with lower investment (more low-cost franchises), cost reduction, line of business change, increased profitability, increased productivity per square meter and focused on sectors benefitting from the pandemic such as food, health, education and technology.

38. Do you foresee any significant commercial or legal developments that might impact on franchise relationships over the next year or so?

N/A

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