

# Franchise

*Contributing editor*  
**Philip F Zeidman**



**2017**

GETTING THE  
DEAL THROUGH 

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# Guatemala

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## Overview

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

The Guatemalan Commercial Code (Decree of Congress 2-70 as amended by Decree of Congress 55-2010) establishes five types of business entities that could be relevant to the typical franchisor: corporations, limited liability companies, general partnerships, limited partnerships and special limited partnerships. The most common form of business is a corporation. In a corporation the equity is divided into shares, which must be named; bearer shares have not been permitted in Guatemala since the entry into force of the Extinction Property Law on 29 June 2011 (Decree of Congress 55-2010). The law introduces amendments to the Commercial Code, establishing the only type of shares that companies will be allowed to issue (registered shares). All companies constituted before the entry into force of this law were obliged to transform their bearer shares into registered shares.

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

The Commercial Code is the principal law that governs the formation of business entities in Guatemala. The General Mercantile Registry is in charge of the formation of such entities.

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

Companies are organised by means of public deed. This public deed is registered before the General Mercantile Registry. For this purpose the following documents must be submitted:

- an official transcript of the articles of incorporation of the company by public deed;
- a form requesting registration of the entity; and
- evidence of payment of the registration fee, according to the Mercantile Registry rate sheet – this payment is calculated taking as a base the authorised capital or equity of the company, for which the minimum is 5,000 quetzals.

Once registration of a company is requested and the deed meets all the legal requirements, the registrar will make a provisional registration and will make this known to the public on behalf of the interested party in the Official Gazette. If no objection has been raised by eight days after the publication, the registrar will make a definitive registration, the effects of which will be backdated to the date of provisional registration, and will return to the interested person the official transcript, duly annotated.

There is no annual fee for maintaining a business entity in Guatemala. All companies have the obligation to hold a general shareholders' meeting at least once a year within the first four months of the year. Companies must also comply with tax laws.

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

#### Permanent operations

Corporations that have been legally established abroad and wish to establish themselves or operate in any form in Guatemala, or that wish to establish a local office or agency, are subject to the Commercial Code and the laws of Guatemala.

The Commercial Code demands from them a series of requirements that establish the security of those entering into any local relationships. These requirements are:

- proof that the corporation has been duly established under the laws of its country of origin;
- submission of a certified copy of the articles of incorporation, as well as any possible amendments to the same;
- proof that the competent authority of the corporation has adopted a pertinent resolution as to its purpose;
- provision of the name of a representative in Guatemala with ample and sufficient attributes to perform all the responsibilities within its economic ambit and to legally represent the corporation in judicial or extrajudicial matters;
- establishment of a capital stock exclusively assigned to operations in Guatemala and a surety bond in favour of third parties for an amount that the General Mercantile Registry will set, of at least 50,000 quetzals, and which must remain in force during the time that the corporation operates in the country;
- to bear any liabilities incurred in Guatemala with the company assets located in Guatemala and abroad;
- to submit to the courts and laws of Guatemala for all acts and businesses entered in Guatemala, and to render an affidavit that neither the corporation nor its representatives or workers may invoke foreign rights;
- a declaration that before leaving the country, it has to fulfil all its legal requirements; and
- the presentation of a certified copy of its last general balance sheet and profit and loss statement.

Once these requirements are fulfilled, the Mercantile Registry will grant the corporation authorisation to start activities. The only relevant tax is that all documents carry a stamp duty of 0.1 quetzals per sheet.

#### Temporary operations

Foreign corporations that pursue temporary operations in Guatemala for a term of less than two years must obtain special authorisation from the Mercantile Registry.

The requirements that must be fulfilled in order to obtain this special authorisation are:

- proof that the corporation is duly established under the laws of its country of origin;
- provision of the name of a representative in Guatemala with ample and sufficient attributes to perform all the responsibilities within its economic ambit and to legally represent the corporation in judicial or extrajudicial matters, during the time in which the company operates in Guatemala; and
- the rendering of a surety bond in favour of Guatemala for an amount set by the Mercantile Registry, which must be at least 50,000 quetzals.

Once these requirements are fulfilled, the Mercantile Registry will grant the corporation authorisation to start activities. The only relevant tax is that all documents carry a stamp duty of 0.1 quetzals per sheet.

#### Operations requiring no registration or authorisation

Foreign corporations do not require registration or approval in Guatemala to engage in the following activities:

- selling to or purchasing from independent commercial agents legally established in Guatemala;
- seeking orders through agents legally established in Guatemala, provided that such orders are subject to confirmation abroad;
- opening or maintaining accounts in authorised banks in Guatemala;
- acquiring real estate or other property, with the exception of land near international borders and waterfront properties, except where this is not the principal activity of the company;
- granting loans to business established in Guatemala;
- drawing, endorsing or protesting credit instruments in Guatemala; or
- participation in any legal action or proceeding before a Guatemalan court or public office. It is sufficient to grant power of attorney, with sufficient qualifications to act in judicial and extrajudicial affairs, to an accredited Guatemalan attorney.

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

The income tax regime for individual or juridical persons not domiciled in Guatemala and without a permanent establishment (applicable to franchisors) is the following:

- 5 per cent on interest or dividends, profits, revenues and other benefits paid or credited by companies or establishments domiciled in the country;
- 15 per cent on daily stipends, commissions, bonuses and other encumbered wages, including salaries, and the income paid to sportsmen and to performing artists;
- 15 per cent on fees, royalties and other retributions corresponding to the use of patents and industrial brands, as well as the fees for scientific, economic, technical or financial consulting services paid to enterprises or to juridical persons; and
- 25 per cent on any other income of Guatemalan source not provided for above.

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

The Guatemalan Constitution and the Labour Code govern all rights and obligations of employers and employees. Labour law in Guatemala protects employees, granting them preferential juridical protection to compensate for their economic inequality with employers. It constitutes a minimum of social guarantees that protect employees and cannot be forfeited by them.

There are no relevant labour and employment considerations for typical franchisors. There is some minimal risk that a franchisee or employee of the franchisee could be deemed an employee of the franchisor; in order to reduce this risk, the franchise agreement must clearly state that any relationship between franchisor, franchisee and the employees of the franchisee should not constitute a labour relationship of any kind.

##### **7 How are trademarks and know-how protected?**

Obtaining rights over a trademark in Guatemala is achieved only through registration, and depends on the date and time of filing the application: mere use does not grant any rights. The applicant for registration of a trademark may invoke priority based on a previous application for registration in a state that is part of a treaty or agreement to which Guatemala is bound. The priority right has a life of six months starting from the day following the presentation of the priority application. Multiple or partial priorities may be invoked.

Know-how is protected according to the agreement signed between franchisor and franchisee. The protection will be based on what is agreed in the contract. Usually, protection of know-how is linked to a non-disclosure agreement regarding such know-how.

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

There are no limitations on the real estate market and real estate law that could affect franchisors, foreign or domestic. The only limitation concerning foreign entities and individuals, in general, is that regarding the acquisition of property near international borders and waterfront properties without government authorisation.

#### **Laws and agencies that regulate the offer and sale of franchises**

##### **9 What is the legal definition of a franchise?**

The Guatemalan law does not establish a legal definition of a franchise. Where no definition is stated, Guatemalan law states that the definition used will be that established by the Royal Spanish Academy Dictionary, which defines a franchise as a 'concession for the rights of exploiting a product, activity or trade name granted by an enterprise to one or various persons in a determined zone'.

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

There is no specific law or government agency in Guatemala that regulates the offer and sale of franchises. Any offer and sale is subject to general commercial laws and practices.

##### **11 Describe the relevant requirements of these laws and agencies.**

There are no relevant requirements regarding franchises in Guatemalan law.

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

Guatemalan law does not provide any exemptions or exclusions regarding franchises. Franchisor and franchisee establish the provisions of their relationship in the franchise agreement, and this agreement becomes 'law' between the parties.

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

There is no law or regulation in Guatemala that creates any requirements that must be met before a franchisor may offer franchises. The franchise is only subject to the general principles applicable to all contracts and agreements, commercial practices and uses.

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

There is no specific law or government agency in Guatemala that regulates the offer and sale of franchises, nor are there any restrictions on the manner in which a franchisor may recruit franchisees or select its or its franchisees' suppliers.

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

There is no established compliance procedure for making pre-contractual disclosure in Guatemala. Commercial practice and uses make it common for a confidentiality agreement to be signed between the parties in order to disclose information prior to the signing of a final agreement, and also to have a memorandum of understanding (where certain specific terms of the business are disclosed).

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

The franchise agreement must establish the authorisation or prohibition on the franchisee to grant sub-franchises. In such agreement, the franchisor reserves the right to establish the provisions of the sub-franchise.

##### **17 What information must the disclosure document contain?**

Such a disclosure document need only contain such information that both the franchisor and the franchisee consider it necessary to have. It is most common that a disclosure document, drawn up prior to a franchise agreement, discloses only the terms of the proposed franchise relationship contained in the form of a memorandum of understanding.

**18 Is there any obligation for continuing disclosure?**

Only if such an obligation is set out in the disclosure agreement. The parties may contractually agree that confidentiality will be maintained for the term deemed convenient by both parties. This term may be months or years; moreover, confidentiality may be established for the duration of the franchise relationship or for an indefinite term if the parties provide so expressly.

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

There are no government agencies that enforce disclosure requirements in Guatemala. Both parties, by mutual consent, decide which documents should be disclosed. If a franchisor or franchisee decides not to disclose a document that it is required to disclose in the agreement, such disclosure can be forced by means of a court order.

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

There are no precedents in Guatemalan law that allow franchisees to obtain relief for violations of disclosure requirements. If the franchise agreement does not establish a specific amount of damages in case of violation of disclosure requirements, such valuation must be determined by the civil and commercial courts following a summary procedure. Having determined the exact amount of damages and losses caused, such amount will be duly executable. Damages and losses can be calculated by any of the parties or by an expert in such proceedings. Some franchise agreements include a pre-arranged damages clause in the contract, which is duly enforceable.

The franchisee is entitled to reimbursement or damages only if this entitlement is included in the franchise agreement.

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

In the case of sub-franchising, liability for disclosure violations that could be shared by the franchisor and sub-franchisor should be limited in both the franchise and sub-franchise agreements. There is no exposure to liability for individual officers, directors and employees of the franchisor or the sub-franchisor, except with regard to those acts that could be interpreted as criminal behaviour on the part of those officers, directors and employees of the franchisor or sub-franchisor.

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

Any offer and sale of franchises is subject to general commercial law and practices. If an offer is made by the franchisor, such offer has to be accepted by the franchisee in order to finalise an agreement. Guatemalan commercial law states that a signed document is not a requirement to have a commercial relationship of any kind. The agreement, in these cases, will be determined by the practices of such commercial relationship. It is important to note that a franchise contract is necessary in order to determine the rights and obligations of both parties. In the case of selling a franchise, there has to be an agreement between the parties.

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

There is no specific law or government agency in Guatemala that regulates the offer and sale of franchises. Therefore, obligations are regulated by the contractual documents executed by the parties. Generally, a letter of intent for a franchise agreement establishing and formalising the subject matter of the future business relationship and its governing terms will be useful to rule which information should be disclosed pre-sale.

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

In the case of fraudulent practices in connection with the offer and sale of franchises, since there is no specific law that enforces franchises, general civil and mercantile actions and criminal law actions may be referred to against the franchisor. If the franchise agreement states an obligation on behalf of the franchisor or franchisee that has not been complied with, a civil action may be engaged in order to force compliance with such obligation.

**Legal restrictions on the terms of franchise contracts and the relationship between parties in a franchise relationship****25 Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?**

There is no specific law in Guatemala regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect. The relationship is regulated by the agreement signed by both parties.

**26 Do other laws affect the franchise relationship?**

Commercial laws regulate the franchise relationship in Guatemala, but are only supplementary to what is agreed in the franchise contract.

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

There are no other government or trade association policies that affect franchise relationships in Guatemala.

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

Since the franchise relationship is not regulated by Guatemalan law, the franchisor may only terminate a franchise relationship in the circumstances stated in the franchise agreement.

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

Since the franchise relationship is not regulated by Guatemalan law, the franchisee may only terminate a franchise relationship in the circumstances stated in the franchise agreement.

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

The relationship between franchisor and franchisee is governed by the franchise agreement signed between them. The franchisor has an obligation to renew the franchise agreement only if such an obligation was included in the agreement. If not, the franchisor may refuse to renew.

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

The franchisor may restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity. This restriction must be provided for in the franchise agreement.

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

There are no laws or regulations in Guatemala that affect the nature, amount or payment of fees in a franchise relationship.

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

There are no restrictions on the amount of interest that can be charged on overdue payments. Such interest rate must be established in the franchise contract.

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

According to Decree No. 94-2000 enacted by the Congress of Guatemala (the Law of Free Negotiation of Foreign Currency), the disposition, holding, contracting, remittance, transference, purchase, sale, collection and payment in foreign currency is allowed in Guatemala, but the risks derived from such operations correspond to each individual or juridical person, either national or foreign, involved in them.

The Guatemalan quetzal is used as account currency and as a means of payment in every negotiation of monetary content in Guatemala and can therefore be used to discharge debts. Nevertheless, the parties may conventionally and expressly agree that the obligations assumed in Guatemala be paid in foreign currency.

In any case, the courts and the administrative bodies must respect and enforce the fulfilment of the parties' agreements, so that the currency agreed in their contract is applied to their obligations.

With the purpose of granting juridical certainty to the operations accomplished in foreign currency within the country, the external free convertibility of the national currency is guaranteed, as well as the mobility of capital.

**35 Are confidentiality covenants in franchise agreements enforceable?**

Confidentiality covenants in franchise agreements are fully enforceable according to Guatemalan law. Franchisor and franchisee may choose between enforcing the obligations contained in the franchise agreement in the civil and commercial courts of Guatemala or submitting to arbitration or to an alternative mechanism for solving conflict, either in Guatemala or abroad.

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

Although the commercial law principle of good faith governs all commercial relationships in Guatemala, the principle is only supplementary to the provisions stated in the franchise contract, so this generally accepted principle does not affect any franchise relationship.

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

There is no concrete reference in the consumer protection laws in Guatemala regarding treatment of franchisees as consumers; however, the Consumer Protection Law, Decree 6-2003 of the Congress, defines consumers as any person or legal entity, whether public or private, domestic or foreign, that by virtue of any legal act, acquires, uses or enjoys goods or services of any kind. With this in mind, both franchisees and franchisors can be considered consumers by means of the consumer protection legislation in Guatemala.

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

There is no obligation for disclosure documents and franchise agreements to be in Spanish unless they are issued in Guatemalan territory. It is generally accepted that if the franchisor is not Guatemalan, disclosure documents and franchise agreements will be in English but they have to be translated into the official language, Spanish.

**39 What restrictions are there on provisions in franchise contracts?**

Guatemalan law recognises that the power of will prevails in commercial relationships (in this particular case, franchises). There are no restrictions on the provisions contained in franchise contracts, as long as both franchisor and franchisee accept such provisions.

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

Guatemala currently does not have a competition law or agency that enforces infringements in this matter. There are preliminary amendments of this law, but they are in a final draft awaiting the approval of Congress.

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

The court system in Guatemala is divided into specialised courts (civil and commercial, criminal, labour and family courts) and courts of first instance, appeals courts and the Supreme Court of Justice (in the case of some procedures that can be revised by the Supreme Court).

The dispute resolution procedures that are relevant to franchising are the summary procedure (applicable to all disputes that derive from commercial relationships), execution procedures (applicable for all debts with a duly executable document) and arbitration (when both franchisor and franchisee submit all disputes to arbitration).

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

Arbitration today is commonly accepted as an important alternative means for dispute resolution and offers the advantages of expeditiousness, fairness, specialisation, confidentiality and, in certain situations, saving money for the parties involved in the dispute in comparison with judicial proceedings. Having arbitration centres ensures a range of administrative services guaranteeing the smooth flow of the arbitration process by, for example, receiving the claim, giving notice of hearings, demanding that the parties fulfil terms and giving notice of the award.

For arbitration to be possible, it is necessary to record in writing an 'arbitration clause or agreement' stating the parties' desire to submit matters to arbitration and the conditions thereof (language, venue, applicable law, etc).

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Guatemala

A disadvantage that may be presented by arbitration in Guatemala is that some parties use the constitutional remedy known as amparo (appeal for relief) to delay proceedings. The abuse of this remedy is a concern: it has been used in malicious litigation during arbitral proceedings. Abuse of power by arbitrators has also been detected.

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

Foreign and domestic franchisors are treated equally in Guatemalan law.

*\*The content of this chapter is accurate as of July 2015.*

## Getting the Deal Through

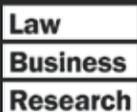
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