ICLG

The International Comparative Legal Guide to:

Franchise 2019

5th Edition

A practical cross-border insight into franchise law

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Switzerland

Badertscher Rechtsanwälte AG

Dr. Jeannette Wibmer

1 Relevant Legislation and Rules Governing Franchise Transactions

1.1 What is the legal definition of a franchise?

There is no statutory definition of the terms 'franchising', 'franchise contract', 'master franchise', 'area development franchise agreement', 'local franchise agreement' or the like. Also, only very few Swiss court decisions deal with franchise systems. In business practice, suitable definitions can, e.g., be found in the Ethics Code ('*Ehrenkodex*') of the *Swiss Franchise Association* ('**SFA**').

Under the SFA Code of Ethics, 'franchising' is defined as a 'sales and distributions system under which *goods and/or services and/or technologies are marketed whereby the franchisor grants a franchisee the right, and imposes the obligation, to conduct a business of a certain type or nature in accordance with the franchisor's specific concept, know-how and continuing support in exchange for a direct or indirect financial consideration. In addition, a franchisee is typically granted a license (and contractually bound) to use the franchisor's intellectual property rights, such as business names, brands, logos, designs, get-up, etc. and the franchisor reserves its right to issue directives and to exercise a certain amount of control over the franchisee's business activities*'.

1.2 What laws regulate the offer and sale of franchises?

In the absence of Swiss statutory provisions which would directly govern franchising contracts, general rules of Swiss law applicable to all sorts of businesses are pertinent. Apart from *public law provisions* which impose, e.g., all sorts of mandatory insurance obligations, e.g., for franchisee's employees, and, of course, taxation, the following provisions are of particular relevance:

- The *Swiss Code of Obligations* ('**CO**') and the related Federal Court Decisions ('**FDC**') case law under which franchise agreements are characterised as a specific and unique kind of contract not yet standardised and, thus, judged on a case-by-case basis based on all specific circumstances of the particular case (FDC 118 II 157ff.). E.g., CO provisions made for lease agreements/partnership agreements could be relevant, and for more subordination like franchise agreements, the rules for agency contracts may apply. In an extreme case, an economically particularly weak and dependent franchisee who is strictly supervised and heavily contractually restricted by a single franchise agreement might even be re-characterised as an employee under the CO and, would, as such, then profit from all sorts of mandatory CO provisions which protect such employees.
- The *Swiss Civil Code* ('**CC**') under which there is a general legal obligation to act in good faith (Article 2 CC). From this result, e.g., mandatory pre-contractual disclosure obligations of the franchisor (see below) and mandatory obligations of both contracting parties to treat each other fairly throughout their franchise relationship. Also 'eternal agreements' are not possible thereunder (Article 27 CC).
- Swiss *Intellectual Property Laws*, in particular the *Trade Mark Act*, the *Designs Act* and the *Copyright Act* but also the CO protecting business and trade names of commercial ventures in Switzerland.
- The *Swiss Unfair Competition Act*, see below question 3.1.
- The *Swiss Act on Cartels and other Competition Restraints*, see below question 3.1, as well as *EU Competition Law*, to the extent extraterritorially applicable also in Switzerland under its terms and recognised as a matter of the Swiss Conflict of Law Rules accepting such extraterritorial application under Article 19 Swiss Private International Law Act ('**PILA**') irrespective of the fact that Switzerland is not a Member State of the European Union.
- The *Swiss Data Protection Act*, the *Swiss Data Protection Ordinance* as well as – to the extent extraterritorially applicable also in Switzerland under its terms and recognised as a matter of the Swiss Conflict of Law Rules accepting such extraterritorial application under Article 19 PILA – also the EU General Data Protection Regulation ('**GDPR**').

1.3 If a franchisor is proposing to appoint only one franchisee/licensee in your jurisdiction, will this person be treated as a "franchisee" for purposes of any franchise disclosure or registration laws?

Under Swiss law, there is no difference between the appointment of only one franchisee as opposed to such of multiple different franchisees by a Franchisor. EU competition law and the EU GDPR may likewise become applicable in both cases alike (under Article 19 PILA).

1.4 Are there any registration requirements relating to the franchise system?

There are no statutory authorisation or supervision rules governing franchise systems in Switzerland as such. However, various mandatory federal, cantonal and communal general provisions which regulate specific types of business activities and reserve them to people and bodies publicly authorised to exercise them must be observed by both the franchisor in its franchise business guidelines and by the franchisee in their exercise, e.g., for banking and insurance,

healthcare, job agencies, casinos, etc. Wherever such professional licences are required, the potential franchisee must first obtain them before the franchise activities can be started.

In addition, under the Swiss Trademarks Act, there is an optional registration upon mutual agreement of both parties for any trademark licence included in a franchise with the Swiss Intellectual Property Office to make the trademark licence also enforceable against third parties. The process for registering a trademark licence is simple and involves submitting a copy of the trademark licence agreement for filing. Registering the licence agreement evidences the use of the trademarks, and therefore a claim cannot be made for non-use of the trademarks, even though it is the franchisee rather the franchisor using the trademarks in the country.

1.5 Are there mandatory pre-sale disclosure obligations?

Under Article 2 CC there exists a mandatory pre-contractual obligation for the franchisor to disclose all important economic and legal information, in a true, fair and complete manner, for the consideration of the franchisee on whether to accept the franchise agreement or not. This must happen well before the signing of the relevant franchise. The franchisor must disclose any missing information which is not publicly accessible to the potential franchisee. Further details can be found in the SFA Ethics Code.

1.6 Do pre-sale disclosure obligations apply to sales to sub-franchisees? Who is required to make the necessary disclosures?

Yes. If a franchisor appoints a master franchisee with the right to grant sub-franchises in the territory, then the master franchisee has a mandatory good faith disclosure obligation to its sub-franchisees under Article 2 CC for whatever material information the master franchisee is aware of.

1.7 Is the format of disclosures prescribed by law or other regulation, and how often must disclosures be updated? Is there an obligation to make continuing disclosure to existing franchisees?

In the absence of statutory legislation, the SFA Ethics Code has stated the following minimum information the franchisor must always provide to the franchisee in writing at least 20 days before the signing of the franchise agreement:

- the relevant market in relation to the franchise business;
- the products and services covered by the franchise business;
- the franchisor's organisation and business activities, particularly with regard to the franchise system;
- the franchise offer (franchise package);
- the potential franchisee obligations (especially an estimate of the necessary financial commitment);
- the franchise agreement and further agreements, guidelines and other terms relating to the franchising activity; and
- alternative distribution channels of the franchisor, if any, for contractual products or services.

This is not intended to be an exhaustive list. Rather, it is necessary to assess on a case-by-case basis, which information the franchisor must disclose in addition to the above before concluding a franchise agreement, in all specific circumstances of the particular case. As a result of the general and mandatory legal obligation to act in good faith (Article 2 CC), further mutual and ongoing information obligations apply throughout the franchise term, if and when it is appropriate for either the franchisor or franchisee, based on specific circumstances which newly arise. The extent of all these information obligations may be controversial in some particular cases, so mutual information obligations should be contractually clarified in advance. In addition, it may be advisable for both a franchisor and a franchisee to include material information in the Annexes of the franchise agreement and to update them from time to time.

1.8 Are there any other requirements that must be met before a franchise may be offered or sold?

There are no other franchise-specific legal requirements that must be met before a franchise is offered or sold, e.g., it is not required that a franchisor incorporates a subsidiary or sets up a branch within Switzerland or is domiciled here for tax purposes. However, various other mandatory federal, cantonal and communal general provisions must be observed which regulate specific types of business activities (see above).

1.9 Is membership of any national franchise association mandatory or commercially advisable?

A Swiss Franchise Association membership may – although not mandatory – be helpful to better prepare the entry into the Swiss market for both the franchisor and the franchisee, as there exists not only a different legal framework here, but also further country- and even region-specific features, such as diverse mentalities and consumer preferences. There are also four different languages which make Switzerland an ideal test market for international franchise operations. With its four national languages, Switzerland as test market may even open the door to France, Germany, Austria and Italy as directly adjacent countries.

1.10 Does membership of a national franchise association impose any additional obligations on franchisors?

The Swiss Franchise Association ('**SFA**'), is a typical professional service association, i.e. it aims to help its members to adhere to the best practices in the industry. An SFA membership is thus an opportunity and not a burden.

1.11 Is there a requirement for franchise documents or disclosure documents to be translated into the local language?

No, and it is often also not necessary from a business perspective as German, French and Italian are the official languages in Switzerland, and a good command of English is also quite common as well. However, it is highly advisable for franchisors to check well ahead of the franchise agreement conclusion to what extent the franchisee understands the contractual terms in practice and – if there are doubts – to have them translated and such translation checked by a Swiss lawyer beforehand. Otherwise, a franchisor risks that contractual terms which the franchisee did not properly understand will not be applied at all or at least be interpreted against the franchisor as author of the franchise contract in case of a dispute.

2 Business Organisations Through Which a Franchised Business can be Carried On

2.1 Are there any foreign investment laws that impose restrictions on non-nationals in respect of the ownership or control of a business in your jurisdiction?

No, local and foreign investors are treated alike in Switzerland.

2.2 What forms of business entity are typically used by franchisors?

As mentioned above, a franchisor does not have to incorporate a subsidiary or to set up a branch in Switzerland. If the franchisor does, either a company limited by shares (*Aktiengesellschaft* '**AG**' in short) is chosen, or simply a branch of a suitable foreign franchisor entity, as this may be advantageous for tax reasons under applicable foreign taxation legislation. Franchisees likewise may either choose an AG, or sometimes, if funding is scarce, a limited liability company (*Gesellschaft mit beschränkter Haftung* ('**GmbH**' in short)) or even only an entry in the Commercial Registry as sole enterprise ('*Einzelfirma*'). Unless a GmbH will be treated as a 'look-through entity' for tax purposes in the franchisor's jurisdiction and is, for this reason desirable for the franchisor, a Swiss GmbH should NOT be chosen by the franchisor as it has various impracticalities.

2.3 Are there any registration requirements or other formalities applicable to a new business entity as a pre-condition to being able to trade in your jurisdiction?

In principle, there is no requirement for foreign entities to be registered in Switzerland prior to doing business here. However, the international taxation should be carefully assessed by any foreign franchisor as the related optimisation potential may be considerable.

3 Competition Law

3.1 Provide an overview of the competition laws that apply to the offer and sale of franchises.

There are two different sets of competition law rules also applicable to franchise systems in Switzerland:

- The *Swiss Unfair Competition Act*, which, e.g., prohibits surprising and unusual contractual clauses which do not regularly exist in contracts of a certain type, to the extent they are not properly brought to the attention of the other contracting party and understood by it well ahead of its contractual agreement. Thereunder, also all ambiguous terms and conditions are interpreted against their stipulator, which in a franchise system usually is the franchisor, and individually agreed contractual agreements preferable to general terms and conditions are imposed by one party only.
- The *Swiss Act on Cartels and other Competition Restraints* ('**Cartel Act**'), which, e.g., sanctions all contractual price fixing (also by minimal or maximum price-fixing) or even price alignment by conscious parallel behaviour, any prohibition of mere passive sales, product tie-ins not justified on the grounds of economic efficiency or suppressing effective competition. In addition, a Swiss court, if it has, e.g., jurisdiction under the franchise agreement, may also apply EU competition law rules applicable to franchises irrespective of a Swiss choice of law in the franchise agreement, if such EU competition law rules consider themselves applicable also in Switzerland as a non-EU member country and, furthermore, Swiss law recognises the foreign legislation purpose at issue as justified (Article 18 Swiss Private International Law Act). Additionally, *EU Competition Law* may also be pertinent to the extent that it is extraterritorially applicable in Switzerland under its terms and recognised as a matter of Swiss Conflict of Law Rules accepting such extraterritorial application under Article 19 ('**PILA**') irrespective of the fact that Switzerland is not a Member State of the European Union.

3.2 Is there a maximum permitted term for a franchise agreement?

There is no specific limit for contract durations under Swiss law. In cases of a long amortisation of the investment of either party it is not unusual to have a contractual term of 10 years or – in exceptional circumstances – even longer, and to foresee that the contract duration even continues beyond that if neither party terminates the contract with, e.g., six months prior notice as of then (see also question 3.3).

3.3 Is there a maximum permitted term for any related product supply agreement?

The only legal barrier for contractual terms is Article 27 CC: thereunder, a very long contractual term may – based on all circumstances of the particular case – be characterised as over restrictive. Again, all circumstances of the particular case are to be taken into account. For example, the Federal Supreme Court once held that a beer supply agreement duration was invalid as it was longer than 20 years (FCD 114 II 159ff.). However, only a few years later in another, non-published case, a beer supply agreement was found as acceptable, even though the agreement was for 30 years.

3.4 Are there restrictions on the ability of the franchisor to impose minimum resale prices?

Article 5 of the Swiss Cartel Act prohibits contractually binding minimum prices. Switzerland traditionally has among the highest price levels in the world, i.e. franchisees could not cover their costs for wages, rentals, etc. if they are selling franchise goods or services too cheaply.

3.5 Encroachment – are there any minimum obligations that a franchisor must observe when offering franchises in adjoining territories?

There is no statutory legislation or court practice requiring a franchisee to be given a specified contractual territory. However, it is perfectly legal for a franchisor to contractually allocate a specific territory on an exclusive or non-exclusive basis to a franchisee. Thereby, also intra-brand competition between franchisees in adjacent territories may be intensified as passive sales by other franchisees may not be prohibited under the Swiss Cartel Act. The same also applies under EU competition law to the extent extraterritorially applicable in Switzerland and recognised to be so under Article 19 PILA in Switzerland, despite the fact that Switzerland is not a member of the European Union or the European Economic Area.

3.6 Are in-term and post-term non-compete and non-solicitation of customers covenants enforceable?

During the franchise agreement term, a contractual non-compete obligation of the franchisee is valid and enforceable. A post-contractual non-compete clause must be agreed upon and is only valid to the extent that it is not too restrictive for the franchisee. Upon termination, it is only valid if the franchisee indeed profited from valuable business know-how or business contacts of the franchisor (Article 340 CO by analogy), must be adequately limited in time, scope and territory in all circumstances of the particular case (Article 340a (1) CO) and, on top of this, only if adequate compensation is paid.

4 Protecting the Brand and other Intellectual Property

4.1 How are trade marks protected?

Under the Swiss Trade Mark Act, any graphically representable sign can be protected, if registered, including words, letter combinations, number combinations, images, three dimensional shapes, slogans and series of tones or colours. Unlike in many other countries, usually only registered trademarks receive protection in Switzerland, i.e. whoever only uses a trademark in commerce here without also registering it will risk losing its rights to the owner of a later deposit of the same trademark! Foreign trademarks which are well-known in Switzerland could, in theory, receive the same level of protection without registration. However, the burden of proof for the well-known character of a foreign trademark lies with its owner alone. To avoid any uncertainty, we thus strongly advise franchisors to always effectuate trademark registrations in Switzerland prior to starting their franchising here. Irrespective of a registration, the protection of a trademark can be cancelled if it has not been used for a period of five years. In all other cases, trademarks can be renewed by simply paying the related renewal fee due at each 10-year anniversary of registration or renewal. Finally, it is beneficial to be further assessed on whether a Swiss trademark licence included in a franchise agreement should be registered with the Swiss Intellectual Property Office or not (see above, question 1.4).

4.2 Are know-how, trade secrets and other business-critical confidential information (e.g. the Operations Manual) protected by local law?

All relevant business information which is not obvious, not generally known and not easily accessible is protected under Swiss civil, criminal, administrative and procedural law provisions. For franchisors it is important to be aware that there is no formal process to seek protection for trade secrets, i.e. franchise businesses are well advised to take additional organisational and contractual measures to protect their business secrets through suitable means, such as, e.g., the restriction of access on a need-to-know rule basis as well as the entering into strict confidentiality and non-disclosure agreements with their franchisees.

4.3 Is copyright (in the Operations Manual or in proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement) protected by local law?

The Copyright Act ('**CA**') protects, e.g., works of literature, music, pictures, titles, characters, works of applied art, letters, diaries, photographs and audiovisual works as well as computer programs, only as a result of their 'unique character'. Franchise operation manuals and proprietory software may thus profit form such copyright protection as well. In the absence of a copyright assignment, only the natural person who created the copyright-protected work is regarded as the author who profits from copyright protection. Only software is directly owned by the employer, i.e. not the employee creating it (Article 17 CA), and such employer is often a legal entity.

5 Liability

5.1 What are the remedies that can be enforced against a franchisor for failure to comply with mandatory disclosure obligations? Is a franchisee entitled to rescind the franchise agreement and/or claim damages?

If the franchisor fails to disclose material information to the franchisee, which is relevant to the franchisee's decision to enter into or to continue the franchise, the franchisee may terminate the agreement and demand damages if it can prove that it would not have concluded or continued the franchise otherwise. Alternatively, the franchisee can uphold the franchise agreement but will require its terms and conditions to be renegotiated.

5.2 In the case of sub-franchising, how is liability for disclosure non-compliance or for pre-contractual misrepresentation allocated between franchisor and master franchisee? If the franchisor takes an indemnity from the master franchisee in the Master Franchise Agreement, are there any limitations on such an indemnity being enforceable against the master franchisee?

The franchisor is responsible for providing the master franchisee with all necessary knowledge, and in particular with the necessary know-how, as well as to comply with its pre-contractual and ongoing disclosure obligations (see question 1.5 above). The franchisor cannot validly waive its related liability for fault and gross negligence. The same applies for the franchise agreement between a Swiss master franchisee (and sub-franchisor) with its Swiss sub-franchisee. If the master franchisee becomes directly liable to a sub-franchisee for an infringement of this pre-sale or ongoing information disclosure obligation, then the master franchisee can seek indemnification from the main franchisor, if, and only if, to the extent such main franchisor did not comply with its related pre-contractual or ongoing information obligations to the master franchisee beforehand and the master franchisee could not pass such information on to the sub-franchisees as a result. In all other cases, the sub-franchisee will have to turn to the master franchisee and sub-franchisor instead, i.e. not to the main franchisor (under the assumption, that there is no direct contractual relationship between the main franchisor and the sub-franchisee).

5.3 Can a franchisor successfully avoid liability for pre-contractual misrepresentation by including disclaimer clauses in the franchise agreement?

No, the liability of the franchisor for gross negligence or unlawful intent regarding the infringement of its pre-contractual or ongoing information obligations cannot be validly excluded even if a foreign law would otherwise govern the franchise agreement between the franchisor and the master franchisee.

5.4 Does the law permit class actions to be brought by a number of aggrieved franchisees and, if so, are class action waiver clauses enforceable?

Class actions are alien to Swiss law. In Swiss legal proceedings, each franchisee must act independently and its claims against the franchisor will be examined individually based on all relevant circumstances of the particular case. At best, a franchisee might rely on parallel judgments covering similar issues in similar circumstances.

6 Governing Law

6.1 Is there a requirement for franchise documents to be governed by local law? If not, is there any generally accepted norm relating to choice of governing law, if it is not local law?

Franchise systems in Switzerland may have a foreign law applicable to the franchise agreements, and a contractual choice of law is in general valid, if not imposed in bad faith. However, to the extent that, e.g., the lease of the premises is involved, the lease and the real estate located in Switzerland will mandatorily be governed by Swiss law irrespective of the law applicable to the contract. In addition, the Swiss legal environment is a favourable one for franchising agreements as Swiss law contains far fewer restrictions than many other legal systems. In international business relationships, Swiss law is also regarded as well-balanced and 'neutral' in the sense of serving the interests of both contracting parties on the base of all relevant circumstances of the particular case. If both a master franchisee and a sub-franchisee are in Switzerland and the sub-franchise is only within the Swiss territory, the 'international element' required as a prerequisite for a valid choice of a foreign law may be regarded as missing in the circumstances of the particular case under the PILA, i.e. a foreign law may then not be validly chosen for the contract between the master franchisee and the sub-franchisee.

6.2 Do the local courts provide a remedy, or will they enforce orders granted by other countries' courts, for interlocutory relief (injunction) against a rogue franchisee to prevent damage to the brand or misuse of business-critical confidential information?

Injunctions are available and will be enforced if made by the competent court under the franchise agreement. However, they are only interim measures, i.e. must subsequently be confirmed in ordinary proceedings. Such interlocutory orders can also stop damaging actions of a franchisee, however, not remedy its inaction as specific performance acts can only be enforced in ordinary proceedings.

6.3 Is arbitration recognised as a viable means of dispute resolution and is your country a signatory to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Award? Do businesses that accept arbitration as a form of dispute resolution procedure generally favour any particular set of arbitral rules?

Arbitration is recognised in Switzerland as the preferred dispute resolution mechanism for international agreements and Switzerland is a signatory to and has ratified the New York Convention in 1965. Foreign arbitral awards of another state which also ratified the New York Convention can be enforced in Switzerland. The grounds for objecting to enforcement of a foreign arbitral award under the New York Convention are similar to the objections which can be raised under PILA against the enforcement of foreign judgment. Furthermore, Switzerland is one of the leading arbitration hubs of the global business world even for international agreements with no business relationship to Switzerland. Arbitration in Switzerland or with Swiss parties in a dispute is often chosen to be governed by the ICC Rules of Arbitration or by the Swiss Rules of Arbitration. Proceedings under the Swiss Rules of Arbitration can be heavily assimilated to common law court procedures under terms of reference to be mutually agreed upon by the parties (i.e. with the cross-examination of witnesses, etc.) whereas ICC Rules of Arbitration proceedings are usually more similar to civil law proceedings, i.e. more arbitration panel controlled and, thus, faster. In general, arbitration proceedings are easier to serve than foreign court proceedings and more confidential, so overall often recommended on an international level.

7 Real Estate

7.1 Generally speaking, is there a typical length of term for a commercial property lease?

There is no typical duration for a commercial property lease and lease agreements. Instead, leases are normally customised to ensure that they run in parallel with the duration of the franchise agreement.

7.2 Is the concept of an option/conditional lease assignment over the lease (under which a franchisor has the right to step into the franchisee/tenant's shoes under the lease, or direct that a third party (often a replacement franchisee) may do so upon the failure of the original tenant or the termination of the franchise agreement) understood and enforceable?

A right of the franchisor to step into the franchisee/tenant's shoes under the lease, or to direct a third party (often a replacement franchisee) which may do so upon the failure of the original franchisee/tenant is, in principle, only enforceable against the lessor with its advance consent to such step-in or replacement or the termination of the franchise agreement). However, even in the complete absence of an advance consent by the real estate owner/lessor to accept the franchisor or its assignor as new tenant in the lease contract of the franchisee, the lessor would only be legally entitled to refuse further assigns of the franchisor/assignor as such new tenants, if the lessor had 'important reasons' to do so in the sense of Article 263 CO.

7.3 Are there any restrictions on non-national entities holding any interest in real estate, or being able to sub-lease property?

Commercial real estate is currently not subject to any such restrictions.

7.4 Give a general overview of the commercial real estate market. Specifically, can a tenant reasonably expect to secure an initial rent free period when entering into a new lease (and if so, for how long, generally), or are landlords demanding "key money" (a premium for a lease in a particular location)?

The Swiss commercial real estate market varies sharply from region to region. While commercial real estate property in cities like Basel, Berne, Geneva, Lausanne, Lucerne, Zurich, etc. is expensive,

commercial real estate in rural areas can be significantly cheaper. In city centres, key money and full refurbishments at the cost of the tenant are customary, whereas in remote mountain or rural areas (away from touristic hotspots like St. Moritz, Gstaad, Interlaken, etc.) tenants can be in a better bargaining position.

8 Online Trading

8.1 If an online order for products or request for services is received from a potential customer located outside the franchisee's exclusive territory, can the franchise agreement impose a binding requirement for the request to be re-directed to the franchisee for the territory from which the sales request originated?

No; online distribution upon receipt of a non-solicited order is regarded as a passive sale which is mandatorily always allowed under the Swiss Cartel Act. Additionally, *EU Competition Law* may also prohibit such a clause to the extent that it is extraterritorially applicable in Switzerland under its terms and recognised as a matter of Swiss Conflict of Law Rules accepting such extraterritorial application under Article 19 ('**PILA**') irrespective of the fact that Switzerland is not a Member State of the European Union.

8.2 Are there any limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement?

No. To the extent the franchisor also profits from trademark protection for the domain at issue, there is also a fast and efficient domain name dispute resolution procedure outside the ordinary courts for '.ch' domains with the World Intellectual Property Organisation in Geneva.

9 Termination

9.1 Are there any mandatory local laws that might override the termination rights that one might typically expect to see in a franchise agreement?

Pursuant to the leading case FDC 118 II 157ff., franchisee's claims for compensation may be admissible in the case of an improper or abusive extraordinary termination by a franchisor. Long-term agreements like franchises may only be extraordinarily terminated for good cause ('*Wichtiger Grund*'), if and to the extent their continuation becomes intolerable for the termination party. Any enumerations of good causes in the franchise agreement serve only as an indication as to what the contracting parties deem intolerable, i.e. are not exhaustive for the court.

9.2 Are there local rules that impose a minimum notice period that must be given to bring a business relationship that might have existed for a number of years to an end, which will apply irrespective of the length of the of notice period set out in the franchise agreement?

No, however, if a franchise is terminated without a 'good cause' by a franchisor, the franchisor may become liable to compensate the franchisee for the damage caused to the franchisee by such franchisor termination.

10 Joint Employer Risk and Vicarious Liability

10.1 Is there a risk that a franchisor may be regarded as a joint employer with the franchisee in respect of the franchisee's employees? If so, can anything be done to mitigate this risk?

There are cases where franchisees may be recharacterised as employees (see above) and will then profit from the mandatory provisions of the CO for their protection. Under the applicable Swiss social security legislation, franchisees may also be classified as pseudo-self-employed whereupon social security contributions will become due by both the franchisee and the franchisor in analogy to normal employment relationships. To mitigate these risks it is important for a franchisor to not too closely instruct, monitor and correct franchisees in their daily business, i.e. to grant them a certain freedom to pursue it as they deem fit.

10.2 Is there a risk that a franchisor may be held to be vicariously liable for the acts or omissions of a franchisee's employees in the performance of the franchisee's franchised business? If so, can anything be done to mitigate this risk?

Under Swiss law, a franchisor may become directly liable under the Cartel Act for acts or omissions of its franchisees, if such acts or omissions are foreseen as contractual obligations in the franchise agreement despite being contrary to the Cartel Act (e.g. if passive sales were prohibited or prices fixed, see above).

11 Currency Controls and Taxation

11.1 Are there any restrictions (for example exchange control restrictions) on the payment of royalties to an overseas franchisor?

No, there are no restrictions on the payment of royalties to an overseas franchisor.

11.2 Are there any mandatory withholding tax requirements applicable to the payment of royalties under a trade mark licence or in respect of the transfer of technology? Can any withholding tax be avoided by structuring payments due from the franchisee to the franchisor as a management services fee rather than a royalty for the use of a trade mark or technology?

No, Switzerland is one of the few countries which does not impose any withholding taxes on royalties. However, foreign franchisors which incorporate a subsidiary in Switzerland should be aware of the 35% withholding tax especially with regard to distributed dividends. However, through an extensive network of double taxation treaties, this tax burden can be partly or wholly reduced.

11.3 Are there any requirements for financial transactions, including the payment of franchise fees or royalties, to be conducted in local currency?

No, there are no requirements for financial transactions to be conducted in the local currency.

12 Commercial Agency

12.1 Is there a risk that a franchisee might be treated as the franchisor's commercial agent? If so, is there anything that can be done to help mitigate this risk?

Under Swiss law, the franchisee is not normally treated as an agent. However, under special circumstances, franchisees can be re-characterised as agents if the franchisee is integrated into the franchisor's sales organisation and is required to transfer its customers to the franchisor at the end of the franchise agreement. In such cases, a franchisor may be held as liable to pay the compensation for the income losses of the franchisee as a result of the franchise termination (by analogy to Article 418u CO). This risk can be restricted by excluding any obligation of the franchisee to disclose any customers to the franchisor.

13 Good Faith and Fair Dealings

13.1 Is there any overriding requirement for a franchisor to deal with a franchisee in good faith and to act fairly in its dealings with franchisees according to some objective test of fairness and reasonableness?

As mentioned, there is a general legal obligation to act in good faith (Article 2 CC), e.g., mandatory pre-contractual and ongoing disclosure obligations of the franchisor (and the franchisee) as well as mandatory obligations of both contracting parties to treat each other fairly and reasonably throughout their franchise relationship.

14 Ongoing Relationship Issues

14.1 Are there any specific laws regulating the relationship between franchisor and franchisee once the franchise agreement has been entered into?

In the absence of Swiss statutory provisions which would directly govern franchising contracts, general rules of Swiss law applicable to all sorts of businesses are pertinent also for the ongoing relationship issues (see above, question 1.2).

15 Franchise Renewal

15.1 What disclosure obligations apply in relation to a renewal of an existing franchise at the end of the franchise agreement term?

As a result of the general and mandatory legal obligation to act in good faith (Article 2 CC), mutual information obligations apply also upon renewal if and when specific circumstances newly arise beyond what either party already knew beforehand as a result of its operating the franchise as franchisee or franchisor.

15.2 Is there any overriding right for a franchisee to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term irrespective of the wishes of the franchisor not to renew or extend?

Under the freedom of contract of Swiss law, franchisees are not automatically entitled to a renewal or extension of the franchise when the franchise expires. Under certain circumstances, a franchisor which has a particular dominant position may be forced to renew a franchise agreement with a franchisee under the Cartel Act.

15.3 Is a franchisee that is refused a renewal or extension of its franchise agreement entitled to any compensation or damages as a result of the non-renewal or refusal to extend?

Pursuant to the leading case FDC 118 II 157ff., a franchisee's claims for compensation may be admissible in the case of an improper or abusive extraordinary termination by a franchisor. Likewise, compensation may be due if a franchisee is contractually bound to disclose its clients to the franchisor upon termination (Article 418u CO by analogy).

16 Franchise Migration

16.1 Is a franchisor entitled to impose restrictions on a franchisee's freedom to sell, transfer, assign or otherwise dispose of the franchised business?

A transfer of the franchise agreement by the old franchisee to a new franchisee requires the approval of the franchisor, i.e. a franchisee cannot simply get rid of its contractual obligations by selling the franchise business to a third party. It is also not unusual to contractually foresee that a franchisee needs a prior written approval of the franchisor for a change of control within the franchisee entity.

16.2 If a franchisee is in breach and the franchise agreement is terminated by the franchisor, will a "step-in" right in the franchise agreement (whereby the franchisor may take over the ownership and management of the franchised business) be recognised by local law, and are there any registration requirements or other formalities that must be complied with to ensure that such a right will be enforceable?

If the franchise requires the franchisee to acquire real estate or to directly enter into a lease agreement, the franchisor's right to take it over upon termination of the franchise agreement must be secured. Contracts confirming the right to purchase real estate, require a notarised deed to be valid. The purchase right or option may also be registered in the land registry to make it enforceable against third parties. If the franchisee is only the lessee of the business premises, the approval of the lessor is required for a franchisor to enter into the lease (see above) as a result of which the franchisor is recommended to address this issue with the lessor before the conclusion of the franchise agreement already.

16.3 If the franchise agreement contains a power of attorney in favour of the franchisor under which it may complete all necessary formalities required to complete a franchise migration under pre-emption or "step-in" rights, will such a power of attorney be recognised by the courts in the country and be treated as valid? Are there any registration or other formalities that must be complied with to ensure that such a power of attorney will be valid and effective?

Powers of attorney are not common in Switzerland in this respect as they may, in an extreme case, even validly be unilaterally withdrawn

with immediate effect and additionally require public notarisation in all cases involving the transfer of real estate. Instead, it is highly recommended for both franchise parties to contractually agree in advance on such pre-emption or step-in rights.

17 Electronic Signatures and Document Retention

17.1 Are there any specific requirements for applying an electronic signature to a franchise agreement (rather than physically signing a "wet ink" version of the agreement), and are electronic signatures recognised as a valid way of creating a binding and enforceable agreement?

Under the *Swiss Electronic Signature Act*, an electronically signed document with a so-called qualified electronic signature can, since 2003, be used as an alternative to a handwritten signature. The electronic signature must be based on a valid Swiss electronic signature certification when it is issued. Qualified electronic signatures are visible on documents, usually on a signature line or block. You can check their validity directly in Adobe Acrobat Reader or through the Federal online service (www.eservice.admin.ch/validator).

In theory, no particular form is required for a franchise agreement under the CO, i.e. not even the written form. For evidence purposes it is, nevertheless, highly advisable to put all franchise terms and conditions in writing, to initial a printout of the franchise agreement on each page and to sign it by hand on the signature page. On top, a foreign franchisor must check the Swiss Commercial Registry for the signature rights of a Swiss counterparty, it is quite common in Switzerland that even C level representatives of a Swiss company are only entitled to sign jointly by two, i.e. not alone, pursuant to their commercial registry entry as signatory.

17.2 If a signed/executed franchise agreement is stored electronically (either having been signed using e-signatures or a "wet ink" version having been scanned and saved as an electronic file), can the paper version of the agreement be destroyed?

Under Swiss company law, a Swiss business is only required to keep its business files electronically, i.e. it is perfectly fine for the Swiss company to keep any signed originals as a PDF copy only. However, if a counterparty later claims that the electronic version is a fake or has a fake signature, then it may be helpful to have a signed original in storage with the help of which the authenticity of the signature can be proven for evidence purposes. On top, original signatures or even deeds may be required in the jurisdiction of the foreign franchisor or under a foreign law chosen by the parties to govern their franchise agreement.

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