

Franchising - Switzerland

A guide to franchise standard form agreements

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Introduction

The Swiss legal system is known for its liberal approach to parties' contractual freedom, as few statutory restrictions exist which limit the parties' ability to define their business relationship. This approach, combined with the fact that Switzerland is a neutral country with a legal system based on the principles of good-faith dealing between reasonable people, is the reason why Swiss law is regularly chosen to govern international business contracts. Unlike similar laws in some other jurisdictions, Swiss franchising rules are no exception to this principle.

Standard form agreements are used regularly in franchising. A franchisor usually authorises and contractually binds various franchisees in different jurisdictions for the establishment and operation of the franchise pursuant to the standard terms and conditions. In principle, contractual freedom also applies to such standard form agreements under Swiss law. Nevertheless, the franchisor must keep in mind certain aspects before submitting a standard form agreement to the franchisee for signing.

General terms and conditions

For franchise agreements which also embody general terms and conditions (ie, pre-defined standard clauses unilaterally prepared by one party), the Federal Supreme Court has developed specific rules as to how such general terms and conditions should be adopted to become binding and how they should be interpreted under general Swiss contract law principles. In 2012 a restatement of Article 8 of the Unfair Competition Act came into effect, which deals with the use of abusive general terms and conditions. However, the scope of application of Article 8 is limited to business-to-consumer contracts; it does not usually apply to business-to-business (B2B) relationships, as franchisees are not generally treated as B2B consumers under Swiss law.

As a result, the revised Article 8 does not play an important role in Swiss franchising relationships. Instead, case law on the adoption and interpretation of general terms and conditions developed before the rewording of Article 8 continues to apply to B2B relationships between franchisors and franchisees.

Incorporation of general terms and conditions into contract

Franchise general terms and conditions may be regarded as invalid (ie, non-binding and non-enforceable) if the franchisor cannot produce clear evidence that the general terms and conditions were noted, understood and accepted by the franchisee. Thus, the franchisor should ensure that important clauses (eg, those regarding liability limitations or places of jurisdiction) are listed in individual contractual clauses specifically agreed between the franchisor and franchisee, and not only in unilaterally pre-determined and often small-print general terms and conditions.

Interpretation of general terms and conditions

Ambiguous terms and conditions in the general terms and conditions will be interpreted against the party which made them (ie, to the detriment of a franchisor using standard forms across various jurisdictions). It is therefore paramount for the franchisor to have its general terms and conditions reviewed under Swiss law to avoid this.

Unusual clauses rule

Surprising or unusual clauses (eg, clauses which deviate from Swiss law) are non-binding and unenforceable if they are not brought to the attention of the franchisee. The franchisor must therefore direct the franchisee's attention specifically to these rules and be able to prove this with suitable documentation (eg, by highlighting them in bold or placing them close to the franchisee's signature).

Further aspects for consideration

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A franchisor runs the risk that a Swiss court may find individual clauses in a franchise agreement void (ie, non-binding and unenforceable), or may find that such clauses must be interpreted to its disadvantage. When entering into a franchise agreement covering Switzerland or with Swiss franchisees, franchisors are strongly advised to:

- adjust the franchise agreement to the franchisee's specific situation – in particular, to the extent possible and insofar as this does not jeopardise the homogeneity of the franchising chain, to accommodate particular modification or amendment requests of the franchisee;
- proactively offer, ideally in writing, the franchisee the opportunity to ask questions and request modifications and amendments to the draft franchise agreement;
- be aware of the fact that individual agreements which differ from the general terms and conditions take precedence over the provisions in the general terms and conditions;
- allow possible franchisees a reflection period, which enables them to seek legal advice before the franchise agreement is concluded; and
- conduct negotiations about the changes and amendments requested by the franchisee and keep records of these negotiations.

Even though adherence to these points can be laborious and time consuming, the benefits are worth the effort. A court upholding the content and validity of the franchise agreement may be highly advantageous for the franchisor.

Comment

It is of paramount importance to seek legal advice on applicable case law and assistance when drafting or reviewing a franchise agreement. An attorney will advise on the interpretation of legal jargon and offer a clear structure and precise wording, which will help to avoid future disputes. A concise, not unduly onerous franchise agreement may facilitate the swift conclusion of profitable franchise agreements with suitable partners, creating a sustainable win-win situation for both parties in the long term.

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