Franchise

Contributing editor
Philip F Zeidman

2019

GETTING THE DEAL THROUGH

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Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Franchise*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the Netherlands, Poland and Ukraine.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Philip F Zeidman of DLA Piper LLP (US), for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
July 2018

Switzerland

Mario Strebel, Christophe Rapin and Renato Bucher

Meyerlustenberger Lachenal

Overview

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

While there is no requirement for a foreign franchisor offering or selling franchises in Switzerland to form a Swiss corporate vehicle for this purpose, many do. Franchisors have a variety of legal forms from which to choose; however, the most common form is the corporation (AG), followed by the limited liability company (GmbH). The minimum share capital of an AG amounts to 100,000 Swiss francs divided into shares with a nominal value of at least 0.01 Swiss francs. Upon incorporation, 20 per cent of the par value of each share must be paid in cash, by a contribution in kind or by a set-off. In any event, the contributions made must amount to at least 50,000 Swiss francs. For the establishment of a GmbH a minimum capital of 20,000 Swiss francs is required, which must be fully paid in either in cash, by a contribution in kind or by a set-off. The capital of the GmbH may be divided into contributions with a nominal value of at least 100 Swiss francs each. Both the AG and the GmbH are companies with limited liability for its holders. Only the AG qualifies for a listing on a stock exchange in Switzerland, namely the SIX Swiss Exchange or the BX Berne eXchange.

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

The formation of business entities is governed by the Swiss Code of Obligations (CO). An AG or a GmbH must be registered with the commercial register in the canton of its registered office. The Commercial Register Ordinance governs the technicalities of the registration.

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

An AG or a GmbH may be formed by one or more natural persons or legal entities. The founders have to declare formation in a formal act, the minutes of which must be notarised. In this act the founders have to adopt the articles of association, appoint the company's officers, subscribe to the shares or contributions and record that the promised contributions have been made. The articles of association contain, in particular, the name and registered office of the company, its purpose and capital. The board of directors of an AG is responsible for the management and the representation of the legal entity. Nevertheless, the day-to-day management and representation can also be delegated to some of its members, but also to managers who are not members of the board of directors if the articles of association so provide. In the case of a GmbH, all members are listed in the publicly accessible commercial register and also act as managers unless the articles of association provide otherwise. Foreign franchisors must be aware that for an AG and a GmbH it is mandatory that at least one person residing in Switzerland be entitled to represent the company with sole signature power. This person may be a board member or a member of the top management in the case of an AG, or a managing officer or member of the top management in the case of a GmbH. If joint signature power is granted, the above residency and position requirements must be met by at least two individuals having joint signature power.

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

See question 3 regarding the residency requirement and question 8 regarding the restrictions relating to the acquisition of real estate by persons abroad. There are no other special requirements applicable to foreign franchisors in Switzerland.

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

Switzerland is a confederation of 26 cantons (states) with currently about 2,220 municipalities. Taxes are levied at the federal, cantonal and communal level. This system leads to a certain degree of tax competition between the cantons and municipalities and therefore to relatively low tax rates compared to other countries in Europe or worldwide.

Resident individuals are subject to personal income and net wealth tax. Partnerships (and similar groups of persons without legal personality) are transparent for tax purposes, with the partners being taxed individually. Generally, non-residents deriving income from Swiss sources may be subject to certain withholding taxes, but admission fees and royalties payable to foreign franchisors are generally not subject to Swiss withholding taxes.

The effective corporate income tax rate in Switzerland depends on the location of the taxable entity and amounts from 12.3 to 24.2 per cent. Attractive tax planning opportunities are available for international groups of companies for activities such as (regional) headquarter or finance functions as well as intellectual property management or international trading. Tax rates for these types of activities may be significantly lower than the effective rates indicated above.

Generally, pursuant to decision BGE 134 I 303 of the Federal Supreme Court, the business of a franchisee does not qualify as a permanent establishment of the franchisor even if premises owned by the franchisor are rented to the franchisee. Therefore, no tax duties arise for franchisors in the cantons in which their franchisees are domiciled.

In general, the Swiss VAT system is in line with the principles applicable in the European Union, in particular with those of the Sixth VAT Directive of the European Union on the common system for value added tax and the uniform basis of assessment. Deliveries and services rendered in Switzerland by a taxable person are in principle subject to VAT. Taxable persons are classified as entrepreneurs exercising a business activity in Switzerland if their turnover exceeds 100,000 Swiss francs per year. The legal form of the business has no influence on liability to VAT. All persons (also private individuals) must pay VAT if they import services exceeding 10,000 Swiss francs per year. In addition, persons (also private individuals) importing goods from abroad are subject to VAT if they are liable to customs duties. The ordinary VAT rate is 7.7 per cent. Reduced rates apply for, among other things, lodging services and the personal consumption of food, pharmaceuticals and newspapers. Services related to franchise relationships are subject to ordinary VAT and do not benefit from special rates.

In February 2017 Swiss voters, in a popular vote, rejected the federal bill on Corporate Tax Reform III (CTR III). CTR III was supposed to align the Swiss corporate tax system with international tax standards by replacing existing tax regimes with a new set of internationally accepted measures. Among other provisions, the CTR III included the abolition of the cantonal tax regimes for holding, domiciliary and

mixed companies and their substitution by new competitive and internationally accepted measures.

The need for tax reform is undisputed in Switzerland. Therefore, the Swiss government is currently preparing a revised bill (tax proposal 2017) with similar measures to those of the CTR III. At best, the Swiss parliament can adopt tax proposal 2017 in the autumn session of 2018. If no referendum is called, first measures could then come into force at the beginning of 2019 and the remainder in 2020.

The rejection of CTR III has no direct impact for Swiss-based companies in the short term. The current tax laws remain in full force until a new law is passed. Therefore, current tax regimes should generally remain available until a revised tax reform is effectively enacted.

The Swiss cantons are sovereign to adopt unilateral changes to their cantonal tax laws within the framework of the federal tax harmonisation law. Therefore, the cantons have the possibility to unilaterally reduce their corporate tax rates in order to strengthen their fiscal competitiveness. As a consequence, many cantons are already providing very attractive low effective tax rates.

6 Are there any relevant labour and employment considerations for typical franchisors?

According to Swiss law, franchisees are considered to be 'independent contractors'. Nevertheless, where the terms of the franchise contract provide for specific dominance of the franchisor, thereby substantially limiting the entrepreneurial freedom of the franchisee, there is a certain risk that protective provisions of Swiss employment law may be applied by analogy to the franchise relationship. In a major case, BGE 118 II 157, the Federal Supreme Court confirmed that employment law provisions on abusive termination and the respective indemnifications must be applied by analogy to such relationships. This risk may be reduced in the franchise contract by limiting the level of control and influence that a franchisor may exercise on the franchisee and by extending the franchisee's entrepreneurial freedom.

Nevertheless, even in cases where the subordination is less marked, there is still a risk that the protective provisions of Swiss agency law may be applied by analogy to a franchise relationship. In particular the claim of an agent for compensation for lost clientele could be relevant (see BGE 134 III 497 regarding an exclusive distribution agreement). Unfortunately, no further decisions of the Federal Supreme Court have been rendered that might offer more guidance regarding these issues. Where a noncompete agreement has been concluded, upon termination of the contract the franchisee might also have an entitlement to adequate special remuneration. There is no landmark decision of the Federal Supreme Court concerning this issue yet, but parts of the Swiss legal doctrine tend towards recognising such a claim on the part of the franchisee.

7 How are trademarks and know-how protected?

In Switzerland, trademarks may be protected in two ways: franchisors can register trademarks nationally with protection in Switzerland, or via an international trademark based upon a foreign trademark. The World Intellectual Property Organization in Geneva is responsible for registering and administering international trademark applications, whereas the Swiss Federal Institute for Intellectual Property handles national applications. The scope of protection is the same whether the trademark is registered nationally or internationally. Well-known trademarks (in terms of article 6-bis of the Paris Convention) are an exception to the registration principle. The Swiss Trademark Protection Act is based on a liberal concept of trademarks: basically, all graphically representable signs may be used as trademarks in the legal sense as long as they may serve as an indication of origin for the goods or services claimed by the trademark. Trademarks, except for famous ones, are protected only for the goods and services for which they are registered. Infringement of a registered trademark occurs by the unauthorised use of either an identical or a similar trademark for identical or similar products, if such trademark is likely to cause confusion. Statutory remedies are (in particular) injunctive relief and financial compensation (whereby such financial compensation may consist of a claim for damages, a right to adequate royalties or to a disgorgement of the infringer's profits as well as, to a certain extent, compensation for attorneys' fees and costs). Switzerland also provides an 'opposition system', open within three months as from the publication of a trademark registration, to request the removal of infringing trademarks from the trademark register. Once registered, trademarks must in principle be genuinely used. If a trademark is not genuinely used in relation to the goods or services for which it is claimed for an uninterrupted period of five years following the expiry of the opposition period (if no opposition was filed) or upon conclusion of opposition proceedings, the trademark holder can no longer assert its right to the trademark unless there are proper reasons for the non-use. In such cases, an unused trademark may be deleted from the trademark register by means of cancellation proceedings.

Know-how as such is not protected as intellectual property by any specific legislation. Nevertheless, by qualifying know-how as confidential information, protection may be provided by the terms of the franchise contract. Moreover, according to the Swiss Criminal Code, the disclosure of manufacturing or trade secrets may, upon petition, be punished by imprisonment for up to three years or a monetary penalty. In cases of unfair competition through the use of know-how, a franchisor may obtain protection through the Swiss Unfair Competition Act. Additionally to other remedies, such unfair competition may, upon petition, also be punished by imprisonment for up to three years or a monetary penalty pursuant to the Swiss Unfair Competition Act.

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

In Switzerland, no specific regulations apply to franchise relationships specifically. The Federal Act on the Acquisition of Real Estate by Persons Abroad (BewG) governs and, in certain areas, restricts the acquisition of real estate by foreigners. Nevertheless, real estate that is used for commercial purposes, such as manufacturing or retail premises or offices, may be acquired without authorisation.

Besides the restrictions of the BewG, the general rules of the Swiss Civil Code (CC) with regard to the acquisition of real estate and the general rules of the CO are applicable. Among other things, these rules provide for notarisation of purchase contracts relating to real estate.

Under Swiss tenancy law, tenants and lessors are, in principle, free to arrange their tenancy agreement. Nevertheless, the CO and an ordinance specifying the provisions on tenancy agreements contain various protective provisions in favour of tenants, such as compliance with specific formalities when giving a notice of termination or when increasing the rent.

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

Neither the CO nor other acts or regulations define or specifically regulate franchise contracts. According to the Swiss legal doctrine and Swiss case law, a franchise contract is deemed to be an ongoing contractual relationship involving close cooperation between the parties. This relationship embraces the sale by the franchisor and the purchase as well as the resale by the franchisee of goods or services, whereby the franchisee is independent, self-employed and acts on its own account and risk but under a uniform distribution concept provided by the franchisor. The franchisee, in exchange for a franchise fee or other forms of compensation, receives ongoing assistance, training and advice from the franchisor and may use the latter's labels, trademarks, know-how, equipment or other items or intellectual property rights. The franchisor usually reserves the right to issue directives and thus to maintain a certain degree of control over the business activities of the franchisee.

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

As already indicated, franchise contracts are neither regulated by a special statute nor are they monitored by a specific public agency. In particular, there are no statutory pre-contractual disclosure provisions (see question 15). Therefore, the general provisions of the CO, the CC and, to some extent, the United Nations Convention on Contracts for the International Sale of Goods (CISG, which applies automatically under Swiss law unless it is explicitly excluded), intellectual property laws, the Swiss Unfair Competition Act, the Swiss Act on Cartels and other Restraints of Competition (Swiss Cartel Act) and data protection laws (in particular the Swiss Data Protection Act, but often also the new General Data Protection Regulation (GDPR) of the European Union) are applicable. The principle of good faith plays an important role with regard to contractual negotiations and the conduct of the parties under the franchise contract. Therefor,e contractual negotiations have to be

serious and any disclosed information, particularly with respect to the basic elements of the franchise contract, has to be true. Furthermore, the disclosed information should also contain all information a franchisee may, in view of the disclosed information and under the principle of good faith, expect to be disclosed.

As regards general terms and conditions, which play an important role in franchise relationships, Switzerland does not have a specific legal act on general terms and conditions. Nevertheless, pursuant to the Swiss Federal Supreme Court, there exist certain rules with regard to the adoption and interpretation of general terms and conditions. These rules concern in particular the question as to how general terms and conditions have to be included in a contract in order to be validly adopted. Moreover, the Swiss Unfair Competition Act prohibits an undertaking from using general terms and conditions that inappropriately put consumers at a disadvantage. This prohibition, however, only applies to relationships between businesses and consumers (B2C), but not to relationships between businesses (B2B). Finally, it should be kept in mind that individual agreements differing from the general terms and conditions have precedence over such provisions in general terms and conditions.

11 Describe the relevant requirements of these laws and agencies.

Not applicable.

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

Not applicable.

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

No, under Swiss law no such requirements exist. Nevertheless, the Swiss Franchise Association (www.franchiseverband.ch), a private, self-regulating trade organisation with no official function, requires that potential members fulfil certain requirements in order to be admitted. For example, they must have been in the franchising business for a minimum of two years prior to applying for a full membership, and they must operate their franchise system with at least two franchisees in Switzerland. In principle, only franchisors and master franchisees may become members of the Swiss Franchise Association.

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?

No, there are no specific rules on this matter, and it is up to the parties to a franchise contract to decide whether they want to introduce certain restrictions into the contract, for example, by limiting the number of franchisees with which the franchisor can conclude a contract. It is worth noting that the Swiss Unfair Competition Act puts constraints of a more general nature on the way in which franchisors can recruit franchisees. If a franchisor were to aggressively entice away franchisees who are working for competitors, or even incite them to break the contract with the competitor, such actions could constitute unfair competition, which is a criminal offence. In general, however, franchisors benefit from substantial freedom of contract.

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

No specific compliance procedure exists under Swiss law. Nevertheless, disclosure of all relevant information in writing is recommended for reasons of evidence (see question 10). The ethics code of the Swiss Franchise Association can be used as a guideline in this respect (see question 16).

16 In the case of a sub-franchising structure, who must make presale 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?

As already indicated, pre-contractual disclosure provisions are neither regulated by a special statute nor monitored by a specific agency, and this is the case for franchise as well as for sub-franchise contracts. In principle, the general provisions of the CO and CC apply (see question 10). However, the ethics code of the Swiss Franchise Association (see question 13) contains certain provisions regarding disclosure and, in particular, pre-contractual disclosure with which members of the Swiss Franchise Association must comply. In summary, pre-contractual disclosure must contain information about the market relating to the franchise, the products or services which shall be the subject of the franchise relationship, the franchisors' organisation and its experience with regard to the respective franchise system, the franchise package, the contractual duties (in particular the estimated financial commitment of the franchisee), the franchise contract and all related documents and all alternative distribution channels for the contractual products or services. Members of the Swiss Franchise Association must disclose such information in writing at least 20 days before signing the franchise contract. These rules apply for the relationship between the franchisor and its franchisees and between the master franchisees, as sub-franchisors, and sub-franchisees. However, the rules of the ethics code of the Swiss Franchise Association do not apply to the relationship between (master) franchisors and master franchisees. Since disclosed information may contain business or industrial secrets, including know-how, conclusion of a confidentiality agreement before the disclosure is highly recommended.

17 What information must the disclosure document contain?

Swiss law does not provide for any specific presale disclosure provisions. Beyond the applicable general provisions set forth in the CO and the CC, the ethics code of the Swiss Franchise Association can be used as a guideline (see questions 10 and 16).

18 Is there any obligation for continuing disclosure?

Swiss law does not provide for specific obligations relating to continuing disclosure. According to the Swiss legal doctrine and Swiss case law, a franchise contract is deemed to be an ongoing contractual relationship involving close cooperation between the franchisor and the franchisee. In particular, the franchisee receives ongoing assistance, training and advice and the franchisor usually reserves the right to issue directives and, accordingly, to maintain a certain control over the business activities of the franchisee. Thus, the contracting parties have a general and continuing duty to act in good faith and assist each other in achieving contractually agreed objectives. Therefore, the franchisor is not only interested but generally also obliged to inform its franchisees about material developments, particularly the marketing concept, and about all other material aspects that the franchisee needs to know of in order to run its business successfully. Because Swiss law does not provide specific obligations in this regard and ongoing disclosure obligations may vary from case to case depending on the specific circumstances, it is advisable to include specific disclosure obligations in the franchise contract.

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

Not applicable.

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?

As the franchisee may not have entered into the franchise agreement if full disclosure had been made, it may rescind or terminate the franchise contract and claim damages. Nevertheless, the courts take into consideration the experience and knowledge of the franchisee. Pursuant to culpa in contrahendo liability, a franchisee is generally entitled to claim that it should be placed in the position it would have been in had the franchise agreement never been concluded. The franchisor may be ordered to reimburse the costs, fees and expenses incurred in connection with the franchise relationship, with any income made being deducted. In this context it has to be stated that in Switzerland claims based on culpa in contrahendo are rather difficult to assert before the courts.

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 principle, sub-franchisors are liable for fulfilling their obligations (as outlined under questions 16 and 18) towards the sub-franchisees. Nevertheless, a sub-franchisor could take recourse against the franchisor if the latter violated its obligations towards the sub-franchisor. In principle, no individual officer, director or employee of the franchisor is liable to the franchisor's business partners as long as the franchisor is a corporation or a limited liability company. In certain circumstances, however, members of the board of directors, directors or officers of a Swiss corporate franchisor may become liable, directly or indirectly, if they intentionally or negligently violate their duties of care and thus cause damage to either the franchisee as a creditor or to the corporation or limited liability company. Furthermore, acts of officers, directors or employees that violate provisions of criminal law (including the Swiss Unfair Competition Act) may lead to their direct liability.

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?

See questions 10, 16 and 20.

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 presale disclosure that might apply to such transactions?

See questions 10 and 16.

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?

Regarding civil claims, see question 20. Regarding criminal proceedings, the franchisee could file a complaint against the respective individuals. A criminal conviction for fraud pursuant to the Swiss Criminal Code may lead to imprisonment for up to five years (or 10 years if committed on a commercial basis) or a monetary penalty. A criminal conviction for deceptive acts under the Swiss Unfair Competition Act may lead to imprisonment for up to three years or a monetary penalty. Further, a corporate franchisor can be punished with a fine of up to 5 million Swiss francs if such fraudulent or deceptive act cannot be attributed to a natural person due to the deficient organisation of the company.

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?

The ongoing relationship between the parties of a franchise contract is mainly regulated by the general provisions of the CO and the CC (see questions 10, 18 and 36).

26 Do other laws affect the franchise relationship?

Like the offer and sale of a franchise, the franchise relationship itself is mainly regulated by the general provisions of the CO. To some extent it is also regulated by certain special provisions of the CO regarding labour and agency law which may be applied by analogy (see question 6), the CISG with regard to cross-border sales contracts between the franchisor and the franchisee that take place under the umbrella of the franchise agreement (see question 10), the CC, the Swiss Unfair Competition Act, the Swiss Cartel Act, the Swiss Data Protection Act (and often also the GDPR, despite the fact that Switzerland is not a member state of the EU) and intellectual property laws (trademarks, designs, copyrights and patents).

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

The Swiss Franchise Association provides for some standard business policies (see question 13 and 16), but membership of the association is not compulsory. Nevertheless, many franchisors are members, as such membership may have a positive impact on the reputation of the franchisor.

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?

Franchise relationships, like other continuing contractual relationships, end owing to lapse of time, termination with notice as specified in the franchise contract or upon mutual agreement. The majority of the legal doctrine argues that a six-month notice period applies if the franchise contract does not govern such notice period. In the case of regular termination or non-renewal of the franchise relationship by the franchisor, the franchisee might claim compensation for lost clientele and, under certain circumstances, also investments. There is no established case law concerning these issues and there are different opinions in the legal doctrine regarding the existence of such claims (see also question 6). Nevertheless, the term of a franchise contract should be determined in such a way that the franchisee can amortise its investments (see BGE 107 II 216 regarding an exclusive distribution agreement). Pursuant to a landmark decision of the Federal Supreme Court (BGE 118 II 157) regarding franchise contracts, claims for compensation are also possible in the case of an improper or abusive termination of a franchise relationship. Nevertheless, the Federal Supreme Court confirmed that continuing contractual relationships may be terminated without a notice period if there is good cause. Good cause is assumed whenever an ongoing contractual relationship becomes intolerable for the terminating party. It should be borne in mind that if the contract provides for a definition of the term 'good cause', or if it enumerates behaviour that constitutes 'good cause', this serves only as an indication of what the contractual parties deem to be intolerable. It does not bind the court and, in particular, such contract clauses do not limit the possibility of immediate termination in the case of other undefined or enumerated good causes (BGer 4A_148/2011). An immediate termination must be communicated to the other party within a reasonably short time after the occurrence of the event that gave rise to the intolerable situation. Unfortunately, in its leading case regarding franchise contracts, the Federal Supreme Court did not state what the effects of an immediate termination should be if there is no 'good cause' justifying such immediate termination. Some courts and parts of the legal doctrine are of the opinion that any immediate termination without a 'good cause' shall be null and void, and that therefore the party that has given notice of termination with immediate effect may be compelled to continue abiding by the contract, even through preliminary injunctions if necessary. Yet, it might be possible that the provision for unjustified immediate termination of employment relationships applies to a franchise contract by analogy. In this case, the franchisee would be entitled to damages in the amount of what it would have earned if the franchise contract had ended after the required notice period or on expiry of its agreed duration.

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

The same legal restrictions apply as in the case of termination by the franchisor (see question 28).

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

Swiss contract law is dominated by the principle of freedom of contract. Therefore, the conclusion or renewal of a franchise contract is subject to the parties' mutual agreement. Nevertheless, if one party has started to make investments in good faith based on the other party's promises or declarations of its intention to renew the franchise contract, a subsequent refusal to renew the franchise contract may entitle the other party to file a claim for compensation. Moreover, under certain circumstances a franchisor that has a dominant position on a specific market may be obliged to enter into or renew a franchise contract with a franchisee based on the Swiss Cartel Act.

Update and trends

In February 2014, Swiss voters affirmed the Mass Immigration Initiative, which requires Switzerland to control immigration autonomously, in particular through quotas. Following a lengthy debate, in December 2016 the Swiss parliament adopted a legislative proposal, which aims at implementing the Mass Immigration Initiative, albeit in a weak manner in order not to violate the Free Movement Treaty between Switzerland and the European Union. Concretely, as from July 2018, employers are obliged to notify job vacancies to the public employment agencies if professions with a Swiss-wide unemployment rate of more than 8 per cent (as from 2020: 5 per cent) are concerned. In particular, numerous professions in the hotel and hospitality business are affected but also marketing and PR-related professions. During the five days following the mentioned notification, employers are not allowed to publish a job vacancy on their own. Instead, the unemployment agencies can provide employers within three days with files of job seekers, which have to be invited for an interview provided they are suitable for the job. Ultimately, employers have to inform the employment agency about the outcome of the interviews. In sum, the new provision introduces a weak form of 'priority' to persons registered with public unemployment agencies over foreigners applying for a job. However, it remains to be seen whether the new regime will prevail – some political groups and parties are taking steps towards stricter measures, including a termination of the Free Movement Treaty.

In September 2017, the Swiss government submitted a revision of the Swiss Data Protection Act to the Swiss parliament. The proposed amendments shall adapt the existing law in order to align it with the developments on the European level, in particular the amendments introduced into European law by the General Data Protection Regulation (GDPR), which apply as of 25 May 2018, replacing Directive 95/46/EC. Because of the wide scope of application, numerous Swiss companies will be subject to the GDPR in some manner, regardless of the fact that Switzerland is not a member state of the European Union.

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

Yes, it is possible to introduce restrictions to that effect in the franchise contract. In practice, transfers are commonly made subject to the franchisor's prior written approval. Likewise, it is possible to make a transfer of ownership (including pledge) in an incorporated franchisee (usually a corporation or a limited liability company; see question 1) subject to the franchisor's prior written approval or to provide for a right to extraordinarily terminate the franchise contract in the event of such a transfer of ownership (change of control clause).

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

There are no specific laws or regulations affecting the nature, amount or payment of fees. They are solely a matter of negotiation between the parties. However, if the agreed fees constitute an obvious disparity to the franchisor's performance by exploiting the distress, inexperience or improvidence of the franchisee, the franchise contract may, in general, be rescinded within one year, and already paid fees can generally be claimed back.

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

Interest rates are subject to negotiation between the contracting partners. In the absence of an agreement, the CO provides for a standard rate of 5 per cent per annum for overdue payments. This rule applies even if the parties agree on lower interest rates. If a higher interest rate has been agreed in the contract, such higher interest may also be claimed during the period of default unless such interest reaches the limit of usury which is around 10 to 15 per cent. Usury may lead to imprisonment for up to five years (or 10 years if committed on a commercial basis) or a monetary penalty.

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

No, in fact, pursuant to the provisions of the CO, financial debts must be paid in the legal tender of the owed (foreign) currency. Nevertheless, the debtor is entitled to pay in the national currency based upon its value at the date of maturity unless, through the use of the term 'actual', 'actual currency' or another similar addition, literal performance of the contract has been agreed upon.

35 Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants in franchise contracts are enforceable according to Swiss law. The franchisor may ask for an injunction and claim damages in the case of a breach of confidentiality by the franchisee. In order to avoid difficulties regarding proof of damage, it is recommended to provide a liquidated damages clause (contractual penalty) that is triggered by each breach. It is also recommended to specify that payment of liquidated damages shall not release the breaching party from the obligation to comply with the confidentiality covenant and that the non-breaching party shall be entitled to seek specific performance of the breaching party's obligations as well as to claim damages in excess of the liquidated damages. The breach of confidentiality obligations may also amount to a criminal act (see question 7).

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?

Yes, such a general legal obligation exists under Swiss law (see questions 10 and 18).

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

In general, franchisees are not treated as consumers but as businesses under Swiss statutory laws. However, franchisees may under certain circumstances be treated as employees or agents (see question 6).

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

The language of documents and agreements is subject to the parties' discretion. Nevertheless, if a Swiss court is competent to decide on claims arising out of the franchise contract, the documents will usually have to be translated into the court's official language, which will be one of the country's four official languages (German, French, Italian and Romansh). The court's official language principally depends on the region in which it is located. However, the Swiss Federal Patent Court also provides for proceedings in English. Moreover, certain courts might, for example, accept English documents if the judges in charge can understand English and if neither party to the proceedings opposes. The Swiss Franchise Association's code of ethics stipulates that all agreements and covenants in connection with the franchise relationship must be in the official language of the franchisee's location, or, if they are drafted in another language, must be translated by an accredited translator.

39 What restrictions are there on provisions in franchise contracts?

Swiss law is based on the principle of freedom of contract and therefore the parties may negotiate franchise contracts freely, even if a large number of restrictions need to be followed. Major restrictions are provided by the antitrust and competition regulations (see question 40). There are also general restrictions stemming from the CO and the CC. For example, certain protective provisions from labour and agency law may be applied by analogy (see question 6). Finally, the principle of good faith is a cornerstone of Swiss civil law (see question 36).

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

Protection of competition is, in principle, dealt with by the Swiss Cartel Act. The Cartel Act applies to private or public undertakings that:

- are parties to cartels or to other agreements affecting competition;

- exercise market power; or
- participate in concentrations of undertakings that must be notified.

The Swiss Competition Commission (Comco) is responsible for the administration and enforcement of the Cartel Act. Whenever a practice seems to hinder or prevent competition in an unlawful way through the concerted behaviour of market actors, in the case of an abuse of a dominant position or when a merger must be reported, Comco takes direct action against the originators. Comco may act upon notification or on its own initiative. In particular, any practice set out in a franchise contract, which is seen as a vertical agreement in the sense of the Swiss Cartel Act, that hinders or prevents competition in an unlawful way may be contested and investigated by Comco. In principle, vertical agreements on fixed or minimum prices or on the allocation of territories, which have the effect that passive sales by other distributors into these territories are prevented, are forbidden and invalid. Such restrictions may be sanctioned by fines of up to 10 per cent of the Swiss turnover made by the violator in the preceding three financial years. Further guidance by Comco regarding vertical agreements may be found in the Comco notice of 28 June 2010 on the application of these rules to different categories of vertical agreements, which were last revised on 22 May 2017, and in new accompanying guidelines dated 12 June 2017, which were last revised on 9 April 2018. The notice also deals with non-compete clauses and restrictions regarding cross-supplies. The Comco notice is substantially similar to European Commission Regulation No. 330/2010 of 20 April 2010 (the Vertical Block Exemption Regulation). Indeed, in a recent landmark ruling (BGE 143 II 297) the Swiss Supreme Court stated that the Swiss legislature, when adopting the rules on vertical agreements on fixed or minimum prices or on the allocation of territories, aimed at establishing a regime that is 'substantially identical' to EU competition law. The Comco's accompanying guidelines address, inter alia, competition law-related e-commerce aspects, thereby also substantially relying on the European developments such as the recent decision of the Court of Justice of the European Union in the Coty case (ECLI:EU:C:2017:941) concerning bans of sales via third-party branded online platforms such as Amazon or eBay.

There is a leniency programme applicable under the Swiss Cartel Act for whistle-blowers who inform Comco about violations of the Cartel Act or cooperate with Comco during an ongoing investigation at a suitably early stage. The first whistle-blower may, under certain circumstances, benefit from full immunity, whereas further undertakings cooperating also with the Comco may benefit from reductions of fines of only up to 50 per cent or exceptionally even 80 per cent (if they inform Comco about another infringement of the Cartel Act not yet investigated by Comco). Comco also has significant powers when investigating potential violations of the Cartel Act, including the right to conduct dawn raids. The latter are conducted particularly in cases of alleged hardcore restrictions such as horizontal price and quota fixing, resale price maintenance or absolute territorial protection.

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

Switzerland is a civil law jurisdiction. Because of the country's federal structure, the 26 cantons have a certain autonomy regarding the organisation of their courts. The Swiss court system traditionally distinguishes between civil, criminal and administrative courts. Civil courts are responsible for civil and commercial matters. The Swiss Code of Civil Procedure and the Swiss Code of Criminal Procedure govern the civil and criminal court procedures in Switzerland. Unlike in some other countries, the Swiss Federal Supreme Court acts as an ordinary appellate body to which most cases can be brought, ordinarily under the condition that the amount in dispute exceeds 30,000 Swiss francs. Usually the cantons provide for two instances of courts. Yet, some Swiss cantons (St Gallen, Zurich, Aargau and Berne) have a commercial court that acts in commercial matters as the first and sole cantonal instance, the decisions of which may only be appealed to the Swiss Federal Supreme Court. Within the limitations of the applicable law (especially Swiss International Private Law and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters), franchisors and franchisees are free to agree on arbitration proceedings or choose their preferred jurisdictions and applicable laws.

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

Arbitration can provide substantial benefits for the parties to a dispute. In principle, it may resolve disputes more efficiently than litigation, saving time and ensuring confidentiality. In addition, arbitration allows the parties to control the process, to obtain, in principle, an award which may be not appealed against, and to reduce translation costs in cases where the contractual parties' documents are not mainly in one of the official Swiss languages (see question 38).

Switzerland is a popular arbitration venue, certainly also due to the arbitration-friendly laws. For example, appeals against arbitration awards are dealt with directly by the Swiss Federal Supreme Court and are possible based on very limited grounds only (lack of jurisdiction, violation of the principle of equal treatment or the right to be heard, or violation of public policy).

Yet, franchisors have to bear in mind that arbitration procedures do not always result in the expected benefits. It is crucial that franchisors assess their exact needs before deciding on arbitration, and in particular the appropriate form; namely, ad hoc or institutional arbitration

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(eg, under the Swiss Rules of International Arbitration by the Swiss Chambers' Arbitration Institution). For example, in cases where a small sum is in dispute, arbitration may result in disproportionate costs. Furthermore, limited discovery and procedural safeguards may cut both ways. Considering these disadvantages and, in particular, the good reputation of the Swiss commercial courts mentioned in question 41, arbitration is in particular recommended in cases where large amounts are in dispute or where secrecy is of particular importance.

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

In general, foreign franchisors are not treated differently from domestic franchisors. There are, however, areas where foreigners (especially if they are not domiciled in EU or EFTA states) are subject to special restrictions. Such restrictions apply, for example, with regard to the acquisition of real estate (see question 4) and to residence and work permits regarding individuals. Obtaining a residence and work permit does usually not create any significant problems for citizens of EU and EFTA countries, as they benefit – at least for the time being – from the Treaty between the European Union and Switzerland on the Free Movement of Persons. However, special restrictions apply to citizens of Bulgaria, Croatia and Romania. Moreover, special rules apply to certain professions with a high unemployment rate (see 'Update and trends'). While it is at present quite simple for EU and EFTA citizens to work in Switzerland, the opposite is true for citizens of all other countries. It might be quite a challenge for them (and for their employers) to obtain a residence and work permit as the requirements are rather strict and the applicable quotas rather low.

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