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The Legal 500 Country Comparative Guides Switzerland **FRANCHISE & LICENSING**

Contributing firm

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

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SWITZERLAND FRANCHISE & LICENSING



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

In Switzerland, 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'

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

There are no 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. A foreign franchisor willing to enter into the Swiss market has a general duty of care to its Swiss franchisees and other contractual partners to tailor and up-date its franchise systems to make it fully

suitable for this new target market. The more integrated a franchise system is, the higher the threshold of the duty of care of the franchise system provider will be in this respect.

For integrated distribution systems in particular, it is, thus, strongly recommended that the franchise system supplier makes all adaptations to its concept in the short term and possibly for a limited period of time wherever necessary and possible with a view to implements them quickly. On the one hand, this is absolutely necessary in various fields of possible franchise activities in order to enable the franchise business to simply continue to operate and exist in Switzerland. On the other hand, it may even be compulsory under mandatory Swiss general contract law provisions governing a particular franchise agreement, as those would otherwise enable the franchisee to simply extraordinarily and validly terminate the franchise agreement and even claim damages from the franchisor as a result. Franchisors have an obligation to provide and maintain the use of their franchise systems for the benefit of their franchisees/contractual partners.

E.g. not taking any action to adapt to the 'new normal' under the extraordinary circumstances created by the current corona pandemic or refusing franchise amendment negotiations in this respect, is therefore a non-starter from the outset for all franchise agreements targeting the Swiss market. Some concepts do not travel well from a foreign country or region to the affluent, sophisticated and demanding Swiss target market e.g. characterised by three major language regions, a very international residents base with above 20% immigrants from all over the globe and many additional languages spoken by them, in particular in the bigger cities. In addition, small things may make an important difference to your home market, such as e.g. the love of many Swiss residents for healthy and often organic food and the like.

Finding your niche in the already very well-supplied Swiss market can be tricky: does your product or service exist here already, if not, what exactly sets it apart? How do you communicate its «difference» or «superiority»?

Does your concept fit into the local multicultural and often also up-market or international lifestyle? As with any market expansion abroad, your entry into the Swiss market must, thus, be very well prepared. Not only are the legal framework conditions different than in other countries, there are also further cultural, country-specific features that will have a major impact on your expansion.

Despite all the changes that have taken place, Switzerland represents a very stable environment and an excellent test market for your franchise expansion into Europe. With its four national languages as well as English spoken by many, Switzerland opens the door to France, Germany, Austria, Italy as well as other affluent European markets which share a similar cultural background with Switzerland.

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

There are no statutory authorisation or supervision rules governing franchise systems in Switzerland as such. However, various mandatory federal, cantonal and communal general provisions exist, which regulate specific types of business activities and e.g. 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.

In principle, there is no requirement for foreign entities to be registered in Switzerland prior to doing business

here. However, the international and cross-border taxation issues should be carefully assessed by any foreign franchisor. As Switzerland is a party to over 80 double taxation treaties, the tax optimisation potential resulting from the use of a local franchisor entity may be considerable.

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

Under Article 2 Swiss Civil Code (“CC”) there exists a mandatory pre-contractual as well as ongoing 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 (or later continue) the franchise agreement or not. This must first happen well before the signing of the relevant franchise and must be up-dated whenever any material information which is not publicly accessible to the potential franchisee or specific circumstances which newly arise become newly known to the franchisor. Further details can be found in the SFA Ethics Code. 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. 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. If a franchisor appoints a master franchisee with the right to grant sub-franchises in the territory, then the master franchisee likewise has a mandatory good faith disclosure obligation to its sub-franchisees under Article 2 CC for whatever material information and circumstances the master franchisee is aware of.

Whether such information must be in the local language depends on the language command and understanding of the franchisee. Often the use of local language is not necessary from a business perspective as German, French and Italian are the official languages in Switzerland, and a good command of English is quite common as well. However, it is highly advisable for franchisors to check well ahead of the franchise agreement's 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.

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

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. In addition, it merits to be noted, that Swiss company law usually does not 'pierce the corporate veil', i.e. disclosure to the parent will not be regarded to also be disclosure to the subsidiary. EU competition law and the EU GDPR may likewise become applicable in both cases alike (under Article 19 PILA).

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

The franchisor is responsible for providing the 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 above). 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 e.g. 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 can require its terms and conditions to be renegotiated and can likewise demand damages for breach of contract from the franchisor.

The franchisor cannot validly waive its related liability for unlawful intent (fault) or gross negligence even if a foreign law would otherwise govern the franchise agreement between the franchisor and the master franchisee. 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 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).

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

The Swiss Unfair Competition Act 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. Such 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).

Thereunder, also all ambiguous terms and conditions are interpreted against their stipulator, which in a franchise system usually is the franchisor. Thus, a franchisor imposing franchise terms and conditions on a non-negotiable, "take it or leave it" basis on any franchisee risks, that they will be deemed to not apply at all in a later dispute. For all the above reasons, individually agreed contractual agreements are preferable to general terms and conditions are imposed by one party only. When entering into a franchise agreement covering Switzerland or with Swiss franchisees, franchisors are thus 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 jeopardize the homogeneity of the franchising chain;
- 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 as a court upholding the content and validity of the franchise agreement as it stands may be highly advantageous for the franchisor later.

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

Under the Swiss Trade Mark Act, any graphically

representable sign can be protected if and when successfully registered as trademark in Switzerland, including words, letter combinations, number combinations, images, three-dimensional shapes, slogans and series of images, 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 as such risks losing its earlier rights to the owner of a later deposit of the same trademark! Foreign trademarks which are notoriously 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 franchise business 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).

Regarding trade secrets, the following applies: 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 basis as well as the entering into strict confidentiality and non-disclosure agreements with their franchisees.

The Swiss 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. Franchise operation manuals and proprietary software may thus profit from such copyright protection as well. In the absence of any copyright assignment, 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.

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

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.

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

The Swiss Cartel Act allows a franchisor to contractually allocate a specific territory or a particular sales channel on an exclusive or non-exclusive basis to a franchisee. Thereby, intra-brand competition between franchisees in adjacent territories or sales channels may also be intensified, as passive sales by other franchisees may not be prohibited under the Cartel Act. However, non-solicited passive sales of the franchisees to third parties cannot be forbidden and product tie-ins are usually not justified on the grounds of economic efficiency. Likewise, non-solicited passive purchases by the franchisee from third parties as well as on-sales by customers of the franchisee to third parties cannot be forbidden either. In addition, the Swiss Cartel Act sanctions all contractual price-fixing (also by minimal or maximum price-fixing) or even price alignment by conscious parallel behaviour, i.e. contractually binding minimum prices are not possible. In practice, however, this is no problem: Switzerland traditionally has one of the highest price levels in the world, i.e. franchisees could not cover their costs for wages, rent, etc. if they are selling franchise goods or services too cheaply.

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 PILA). Additionally, EU competition law may also be pertinent to the extent that it is extraterritorially applicable in Switzerland under its own terms and recognised to be so 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.

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

During the franchise agreement term, a contractual non-compete obligation or a contractual non-solicitation obligation of the franchisee is valid and enforceable. A post-contractual non-compete clause is only valid to the extent that it is not too restrictive for the franchisee. Upon termination, non-compete and non-solicitation clauses are only valid if

- the franchisee indeed profited from valuable business know-how or business contacts of the franchisor (Article 340 CO by analogy),
- they are 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 for such non-compete and non-solicitation clauses.

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

Swiss franchisees must, of course, adhere to all Swiss consumer protection laws protecting end-consumers of a particular franchise product or service at issue. In general, consumers profit e.g. from mandatory jurisdiction in Switzerland at their place of residence and the application of certain mandatory Swiss law rules, such as e.g. legal warranties, (product) liability rules and the like. The franchisees themselves, however, are not treated as consumers.

Instead, Swiss courts determine for each particular franchise relationship whether it is – based on all economic characteristics of the particular franchise business – a so-called “partnership franchise”, to which the rules on partnership contracts in the Swiss Code of Obligations (“CO”, i.e. Articles 530ss CO) apply by analogy or rather a subordination franchise (to which the rules for work or agency contracts in Articles 319ss or 418a ss CO or even mandatory employment and social security laws may apply in favour of the franchisee. In

the latter case, the consequences may be severe: franchisees may become entitled to a compensation for the client base they developed for the franchisors during the franchise relationship at the end thereof under Article 418u CO or even become entitled to be paid social security contributions by franchisors like employees.

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

Under the Swiss CC, 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 above) and mandatory obligations of both contracting parties to treat each other fairly throughout their franchise relationship and even at the end thereof.

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

Swiss franchisees must in relation to employees of their franchise business in Switzerland, of course, adhere to all mandatory Swiss employee protection and social security laws, such as e.g. mandatory minimum wages applicable for certain business sectors, maximum working hours, social security insurance obligations against unemployment, illness, accidents, old age and pension funds etc.

In addition, franchisees may even be regarded as de facto employees of the franchisor if they are fully subordinated to the franchisor's instructions in certain important areas such as the fee structure to be agreed with clients under the franchise system such as e.g. Uber drivers which are not even allowed to themselves fix the prices their customers have to pay for their services. The more detailed provisions as to marketing, client handling and invoicing as well as integration into the franchisor's network must be adhered to by a franchisee and the closer the supervision of the franchisee's day to day operations by the franchisor is, the higher the risk becomes, that a franchise will be regarded as a so called subordination franchise, in which the franchisee is possibly recharacterized as employee of the franchisor. Should this be avoided, a franchisor is thus well advised,

not to subordinate its franchisees too much within the franchise system but, instead, to grant them sufficient entrepreneurial freedom.

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

Under Swiss statutory law, an "agent" is defined as someone who acts as an intermediary on behalf and for the account of one or several principals to advance their business transactions (Article 418a CO). Thus, a franchisee, who does not conclude business transactions within the franchise system in its own name and for its own account, but only as a representative directly or indirectly acting on behalf of the franchisor, is re-characterized as "agent" under mandatory Swiss agency law and, as such, becomes entitled to mandatory customer base compensation under Article 418u CO upon termination of the franchise relationship.

Should this be avoided, a franchisor is thus well advised, not to subordinate its franchisees with regard to the conclusion and implementation of business transactions by e.g. having fees owed by franchisees' clients invoiced and charged by the franchisor (even if by naming the franchisee thereon) and only transferring them to the franchisee after deducting the upfront fee instalments or net turnover percentage royalties. Instead, a franchisee should remain entitled to handle such customer contracts, related invoicing and payment collection alone.

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

No, there are no restrictions on the payment of royalties to an overseas franchisor. It must be noted, however, that it can be very beneficial for a foreign franchisor to agree on Swiss franc payments by its Swiss franchisee, as the Swiss franc has been for decades and still is one of the strongest currencies in the world, even now during the COVID-19 pandemic. In the current low interest business environment, Swiss courts will be reluctant to award high interest payments in the current pandemic. Even in ordinary times, there are restrictions to impose interest on interests as well as too high interests recharacterized to amount to penally sanctioned "usury" pursuant to cantonal legislation and federal penal law court practice.

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

To what extent a contractual penalty can be validly and enforceably agreed upon in a particular franchise agreement, will depend on all circumstances of the specific business case at hand. As a general rule, penalties for the infringement of restrictive covenants may only be validly contractually agreed upon, to the extent the covenants are “adequately” limited in time, territorial reach and substance of the restrictive covenant (Article 340a CO by analogy). As a general rule, penal damages are alien to Swiss law, Swiss courts will thus also have a tendency to assess, what actual damage is caused by the infringement of a restrictive covenant and limit the penalty accordingly, if they award it at all.

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

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. Through an extensive network of double taxation treaties, this tax burden can be partly or wholly reduced.

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

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 extraordinary circumstances, a franchisor who has a particular dominant position might exceptionally be forced to renew a franchise agreement with a franchisee under the Cartel Act.

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. In such a case, the franchisee is compensated for the loss suffered as a result of the improper or abusive extraordinary termination and put into the financial position in which he would have been after the ordinary franchise term lapsed based on all economic terms and conditions of the franchise business at issue. 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).

Are there any mandatory termination rights which may override any contractual termination (Article 418u CO by analogy).

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

To franchise systems already active in Switzerland, the legal concept of ‘clausula rebus sic stantibus’ for Swiss law-governed long-term franchise agreements is of importance: franchise systems, for which the circumstances of the particular business or revenue model on which the related franchise agreement is based have changed substantially and in a manner unforeseeable for the contract partners, e.g. as a result of the current COVID-19 pandemic, have to be adapted to the ‘new normal’ by negotiations in good faith should either of the contract partners require this. Should the parties not agree how to so adapt them, they may be extraordinarily terminated by either party instead. In addition, if a franchise is terminated without ‘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.

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

Under the Swiss Data Protection Act as well as the EU General Data Protection Regulation (‘GDPR’) all business data of a franchisee is the franchisee’s own property to the extent such data does – such as e.g. for customer data – not even directly belong to its customers. A

franchisor is thus not entitled to be transferred such customer data unless the franchisee contractually agreed to an obligation to do so in advance and its customers are likewise consenting to such a transfer to the franchisor. In addition, a franchisee is entitled to keep all its business secrets, which were developed by the franchisee without the use of know how and business secrets of the franchisor, i.e. a franchisor will usually not get back more know-how than what he gave to the franchisee before, unless the franchisee agreed to so give it in advance. Should a franchisor wish to profit from the findings of a franchisee, a license-back or re-transfer must thus be contractually agreed upon ahead .

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

The SFA is a typical professional service association, i.e. it aims to help its members to adhere to the best Swiss practices in the industry. A Swiss Franchise Association membership may – although not mandatory – thus 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 as well as four different languages which make Switzerland an ideal test market for international franchise operations. An SFA membership is thus an opportunity and not a burden. With its four national languages, Switzerland as a test market may even open the door to France, Germany, Austria and Italy as directly adjacent countries.

23. Are foreign franchisors treated differently to domestic franchisors?

No local and foreign franchisors are, in principle, treated alike in Switzerland. The only restriction on non-nationals in respect of the ownership or control of a franchisor business in Switzerland is that the Swiss entity needs one authorized sole signatory resident in Switzerland, or two such signatories if they are only authorized to sign collectively.

Moreover, Switzerland saw no need for investment controls for decades. However, as the European Union 'Ordinance on the Verification of Foreign Direct Investment' (valid from October 2020) was issued in 2019, a parliamentary motion was launched in the Swiss

parliament advocating investment controls in Switzerland as well. Thus, in light of the rising trade wars between foreign countries, it may not be guaranteed that the absence of foreign direct investment regulation will continue in Switzerland in the future.

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

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

25. Must the franchise agreement be governed by 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. 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 basis 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. In addition, many mandatory Swiss provisions possibly governing certain elements of a foreign franchise business must be adhered too (see above). Another example would e.g. be the lease of the premises and the real estate located in Switzerland will mandatorily be governed by Swiss law irrespective of the law applicable to the contract.

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

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 has 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 a 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 into 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.

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 but not remedy its inaction as contractual specific performance undertakings can only be enforced in ordinary proceedings.

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

No, class actions are still alien to Swiss procedural law.

28. Must the franchise agreement and disclosure documents be in 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 quite common as well. However, it is highly advisable for franchisors to check well ahead of the franchise agreement's 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.

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

In theory, no particular form is required for a franchise agreement under the CO, i.e. not even the written form. 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 if 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.e-service.admin.ch/validator).

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 by hand, and to sign it by hand on the signature page, i.e. to exchange physical initials and signatures 'the traditional way'. Otherwise, a counterparty not willing to adhere to the terms and conditions of a franchise agreement can try to argue, that it did not itself electronically sign the franchise agreement or at least not OK all single pages thereof. Apart from that, a foreign franchisor must always check the Swiss Commercial Registry for the signature rights of a Swiss counterpart; in Switzerland, it is quite common even for C-level representatives of a Swiss company only to be entitled to sign jointly, i.e. not alone, which can only be seen in their commercial registry entry as signatories.

30. Can franchise agreements be stored electronically and the paper version 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. In addition, 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.

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

From a Swiss perspective, the greatest and quite positive legal impact to franchising and business in general results from the Coronavirus legislation in Switzerland. To ease the COVID-19 pandemic burden for both Swiss employers and employees alike, the Swiss federal government and later also the Swiss federal parliament as well as the Swiss cantons quickly started to offer very substantial monetary relief to Swiss employers and employees alike whereby franchisors and franchisees may also benefit from these in Switzerland to the extent they are incorporated (in case of legal entities) or resident (in case of natural persons) here: The Swiss federal authorities set aside more than CHF65 billion (for a population of roughly 8.5 million inhabitants only) by way of government emergency ordinances to support the restart of the Swiss economy after a temporary standstill of many business activities from mid-March to Mid-June 2020 as a result of the temporary lockdown of schools, various retail businesses, such as shops other than food shops, restaurants, and events of all sorts, and a government recommendation for the whole Swiss workforce to work from home, whenever possible. At the beginning of April 2020 already, an economic support package of CHF40 billion was put in place by the Swiss government. This consists of emergency zero interest term loans in favour of struggling Swiss companies and other businesses for up to seven years. These loans are available through the normal Swiss house banks of Swiss businesses and benefit from repayment default guarantees by the Swiss government. Their goal is relief for liquidity problems and, pursuant to a recent amendment thereto, these bank loans may even be used for investments, i.e. also allow businesses, including existing franchise systems, to make the necessary adaptations of their business and revenue models to the abovementioned 'new normal'.

In May 2020, the Swiss federal government also agreed to an additional CHF14.2 billion in financing for the compulsory Swiss unemployment insurance, which covers between 70% and 80% of the former salaries of employees who lost their job during the pandemic. Again, pre-existing franchisor and franchisee employers may likewise profit from those in favour of their employees. In Switzerland, such employees must often NOT even be terminated, because their employers may

profit, on top of unemployment insurance payments to employees upon termination, also from so-called short-term work benefits covering temporary non-employment claims of employees otherwise remaining with the business. Employers who do not need the work of their employees as a result of the pandemic may cover between 70% and 80% (in case of zero work obligation of their employee) of their former salaries by Swiss short-term work benefits, provided the employers agree to continue to pay Swiss social security insurance contributions for them. The period allowed for placing employees on such short-time work was raised from 12 months to 18 months from September 1, 2020 onwards.

Apart from the above financial support for businesses (hardship loans) and the easement (unemployment insurance payments) and prevention of unemployment (short-time work benefits at firms), specific business sectors like, e.g., event management, the aviation industry and the sports sector have also so far received emergency relief payments and further such emergency relief payments are expected for other sectors as well as the need arises. The Swiss federal government also implemented a plan to offer additional loans totalling up to CHF154 million especially for existing start-up companies together with the Swiss cantons, in which the start-ups are located. However, these are only available if the respective cantons decide to participate in this federal plan as well. Also, from these start-up loans franchisees and franchisors in Switzerland can profit alike, provided they were already in existence before the pandemic. Swiss employers hit by the pandemic will in addition be able to defer payment of compulsory Swiss social security contributions temporarily and without interest and Swiss businesses threatened by bankruptcy. Firms can delay declaring their financial difficulties to the bankruptcy courts.

As a result of all of the above measures, Swiss unemployment so far only rose to between 3% and 4% and a Swiss business illiquidity and bankruptcy wave could be avoided altogether. Thus, the Swiss economy remains stable and is even fit to grow again back to where it was prior to the pandemic. Thus, it offers excellent conditions also to franchise systems either already active here or willing to become so in the future.

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

Franchisors have an obligation to provide and maintain the use of their franchise systems for the benefit of their franchisees/contractual partners. A foreign franchisor willing to enter into or to continue business within the

affluent Swiss market has a general duty of care to its Swiss franchisees and other contractual partners to tailor and up-date its franchise system to make it fully suitable for the 'new normal' under the COVID-19 pandemic here. Not doing so or refusing franchise amendment negotiations in this respect, is therefore a non-starter from the outset. The more integrated a franchise system is, the higher the threshold of the duty of care of the franchise system provider is in this respect.

Despite all COVID-19 related changes that have taken place, Switzerland thus represents a very stable environment and an excellent test market for your franchise expansion in Europe. With its four national languages as well as English spoken by many,

Switzerland opens the door to France, Germany, Austria, Italy as well as other affluent European markets which share a similar cultural background with Switzerland. The other way round, if e.g. a German franchise is launched within the German-speaking part of Switzerland, the German brand will often be already known to the Swiss consumers there. The same is true for the French- and Italian-speaking part of Switzerland: This helps franchisors and franchisees alike to keep the advertising budget low and increases their chances of success here. Either way, foreign franchisors are thus well advised to very well prepare their entry into the Swiss market with a view to fully profit from the excellent business opportunities here.

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