

Success Profit Approach
Concept Regulation

Franchise

Law Global Growth
Consulting Agreement

Market

Investment

INTERNATIONAL
FRANCHISE
HANDBOOK
1st EDITION



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area: 41,285 km² | **population:** 8,183,800 |
official language: German, French, Italian, Romansh | **capital city:** Bern |
currency: Swiss Franc (CHF) | **gross national product:** 444 bn. USD

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Dr. Gion Giger, LL.M., Andrea Haefeli / Walder Wyss AG



SWITZERLAND

Switzerland has **no specific legislation on franchising**. Apart from the general rules on contracts, specific rules on other types of contracts are applied to franchise agreements by analogy according to the case law. Other than contract law, unfair competition law and antitrust law have a major impact on franchise agreements.

As there is no legal definition of "franchise" in

Swiss law, it may be difficult to draw a clear distinction in practice between an ordinary distribution agreement and a product franchise agreement where the franchisee sells products or services under a uniform distribution concept. The distinction may be easier for business format franchising agreements where the integration of the franchisee in the distribution organization of the franchisor is more extensive.

For most businesses, there are no significant restrictions for **foreign franchisors**. Restrictions

may apply to the acquisition of real estate by foreign individuals or companies, except for the acquisition of real estate for business activities. Restrictions may apply with regard to residence and work permits for foreign citizens (in particular for non-EU/EFTA nationals).

Swiss **corporate law** is favorable for Swiss and foreign companies. A company does not need a license to do business in Switzerland, except for certain businesses.

A foreign franchisor has several options to implement its franchise system in Switzerland: It may choose to enter into franchise agreements with Swiss franchisees as a foreign company. Alternatively, it may establish a branch office or found a subsidiary in Switzerland. A subsidiary allows the franchisor to limit the liability from the franchise business in Switzerland to the liability of its Swiss subsidiary.

The shareholders of a Swiss company do not need to be Swiss citizens or Swiss companies. However, the company must be able to be represented by one person who is resident in Switzerland. This requirement may be fulfilled by a member of the board of directors or by an executive officer.

Franchisees are unlikely to be qualified as consumers, but their customers may. The level of **consumer protection** in Switzerland is rather low compared to other jurisdictions. The Unfair Competition Act protects consumers against certain unfair commercial practices. As for all distribution systems for products, the rules of the Product Liability Act ("PLA") and of the Product Safety Act ("PSA") are relevant for franchise systems. The PLA provides for a strict liability for manufacturers, importers, and suppliers for personal injuries and damages to property in private use which are caused by defective products.

According to the PSA, a product can only be put on the market if it does not endanger the safety and health of users and third parties. Once products are on the market, the manufacturer or importer has to take measures to identify and avoid dangers from the products and to implement measures to trace them back.

In **antitrust law**, there are no specific rules for franchise agreements. Assuming that neither party has a dominant position on the relevant markets, the general rules for vertical agreements apply. Resale price maintenance and absolute territorial protection are considered the most harmful vertical restraints. Many franchise agreements will qualify as selective distribution agreements, for which reason the rules for selective distribution need to be complied with.

Labor law and sales agent law are not directly applicable to franchise agreements. However, single rules may apply by analogy to protect the franchisee; in particular in a subordination franchise agreement where the franchisee lacks autonomy for its business decisions (similar to an employee). The application of labor law rules to franchise agreements may have extensive consequences for the franchisor. For example, it may become responsible for the franchisee's social security contributions.

Under article 418u of the Code of Obligations, a sales agent may be entitled to an inalienable compensation for clientele at the end of the contract. It is controversial if such a claim should be granted to a franchisee by analogy; in our view, only under extraordinary conditions.

It is important to clearly state in the agreement that the franchisee will remain a legally independent entrepreneur, free to make its own business decisions. Still, it is not fully excluded that a judge might come to a different conclusion after having assessed the

full agreement and the way it was put into practice.

Switzerland has a favorable **tax** burden for undertakings, which partly varies from Canton to Canton. Important taxes are the tax on corporate income, withholding taxes and VAT.

Intellectual property rights (such as trademarks or patents) are protected by federal law and international treaties. Know-how is often of particular interest for franchise agreements. Know-how can only be protected by keeping it secret and by imposing confidentiality obligations on anyone to whom it is disclosed. To the extent that know-how qualifies as business secrets, it is partly protected by the Unfair Competition Act and by criminal law. Licensing of know-how is possible.

Under Swiss law, no special **pre-sale disclosure** exists. However, all relevant facts of a franchise agreement (*essentialia negotii*) must be disclosed by the franchisor to the potential franchisee. The disclosed facts must be accurate and the negotiations shall be conducted seriously. The language of documents and agreements is subject to the parties' discretion, but in the event of a court proceeding, the documents need to be translated into the court's official language (normally German, French or Italian).

If the franchisor violates its duty of disclosure, the (potential) franchisee is entitled to claim damages. Usually, the potential franchisee may claim damages for the created trust in the conclusion of the agreement and (if an agreement has been concluded) the franchisee may claim that it should be placed in the position as if it had never concluded the agreement with the franchisor, respectively. In case the franchisee has concluded the agreement under error, fraud or duress, it could declare to the franchisor not to honor the contract. The master-franchisee is liable

for its own acts and omissions and is not liable for the behavior of a third party (franchisor). As a principle, individual officers, directors or employees of the franchisor/master-franchisee are not liable to the franchisor's/master-franchisee's business partners, provided that the franchisor/master-franchisee is an incorporated enterprise; unlawful conduct remains reserved.

Franchise agreements are principally governed by the freedom of contract principle, but **legal restrictions** may affect them. Amongst others, general restrictions exist regarding the prohibition of infinite agreements, the limitation of liability or any clauses which significantly restrict competition (as may be the case for non-competition clauses).

There are no written laws regarding the nature, amount or payment of a **franchise fee**. Usually, the franchisee has to pay an initial fee as remuneration for the advanced services of the franchisor (planning and development of the system). For the rights and advantages related to the use of the system, it has to pay ongoing fees (often a percentage of the sales figures or a higher purchase price of the products). Generally spoken, a debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum, unless a higher rate of interest – up to 15% for consumer credits and 15-18% for ordinary credits – has been agreed. A franchisee is principally free to make payment to a foreign franchisor in the franchisor's domestic currency.

If a **confidentiality clause** is (allegedly) violated by a party, the non-breaching party may claim enforcement of the clause before the competent court and the arbitral tribunal, respectively. Injunctions and preliminary injunctions are both possible prior to or during the main court proceedings.

A **termination** of the franchise agreement by a party usually occurs by proper notice of termi-

nation (ordinary termination). However, an extraordinary termination is possible at any time and with immediate effect in the event of changed circumstances and for so-called "valid reasons". Where in essence the franchise agreement has been entered into with the parties in person, death, incapacity to act, insolvency, bankruptcy and debt enforcement lead – unless otherwise agreed – to the termination of the agreement. Valid reasons for an extraordinary termination exist when the continuation of the contract until the next proper termination date is unacceptable to the other party.

Generally spoken and unless otherwise agreed in the franchise agreement, the renewal of a franchise agreement is subject to the parties' mutual agreement.

The parties may agree on a restriction of the

franchisee's ability to **transfer** its franchise or its ownership interest in a franchise entity. Such (restricted) transfers are often subject to prior written approval of the franchisor.

The **court system** varies from Canton to Canton, but the rules on civil procedure are national. Switzerland is well-known for international arbitration. Arbitration is a good option for commercially important franchise agreements if one or both parties are not familiar with the Swiss court system or the Swiss languages.

According to Swiss international private law, the parties can freely choose the **law applicable** to a franchise agreement. The Swiss legal environment is favorable for franchising. Swiss law is a good option to choose for international franchise systems.

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