Franchising - Switzerland

Overview (April 2003)

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Development

In recent years, franchising has developed into an important distribution system in Switzerland. There are currently some 200 franchise networks in operation in Switzerland.

Alongside exclusively national franchise systems, a number of Swiss companies are also active in international franchising, such as Bally, Mövenpick and Swatch.

In addition, several foreign franchise companies (primarily US, English and German companies) are also operating in Switzerland, with all forms of international franchising represented. Some franchisors have a subsidiary in Switzerland which grants single franchises; others work through a master franchisee; while other franchisors, particularly those from neighbouring Germany, grant single franchise agreements themselves.

After an initial teething period characterized by contractual mishaps and misunderstandings, a professional franchising culture has now developed.

Test Market for Europe

The Swiss Franchise Association describes the Swiss franchise market as follows:

> "*Switzerland is a uniquely affluent, sophisticated and demanding market in the heart of Europe. Its multicultural and multilingual people and decentralized structure contribute to forming a unique franchise test market. Success and experience gained in this internationally oriented country mean success and growth in other regions of the European continent. Switzerland's stability, combined with its financial strength... its association with European trading partners and its economic openness make it a choice location either for a preliminary operational base or for a permanent headquarters for overseeing agreements with master franchisees throughout the European continent.*"

Legal Framework

Swiss law and court practice governing intellectual property provide effective protection for the franchisor's IP rights.

The Swiss Federal Supreme Court decision in the *Computerland Case*(1) is of interest to foreign franchisors seeking to develop their franchising systems in Switzerland. On the basis of the Swiss Unfair Competition Act, the court decided to forbid a Swiss company from using the name 'Computerland', as this would have made it impossible for US franchise chain Computerland, then on the verge of entering the Swiss market, to open franchised retail stores under its name.

Despite the increasing importance of the Swiss franchising industry, there is no dedicated legislation in place and none is planned for the foreseeable future. Swiss legislation has no franchise-specific pre-contractual disclosure or registration requirements, and the legal framework governing franchising is generally viewed as liberal.

However, this does not mean that franchising in Switzerland is beyond the law. Rather, it has been clearly demonstrated that the general provisions of the Swiss Civil Code and the Swiss Code of Obligations, together with the Swiss Unfair Competition Act, the Swiss Trademark Act and the Swiss Cartel Act, provide sufficient legal structure for the franchising industry.

The principle of liberty of contract is not beyond limitation. In most cases the general applicable regulations protect the weaker contractual party, which is usually the franchisee.

Contract negotiation must follow the principle of good faith, which to a certain extent also encompasses the duty of disclosure. In the case of a breach of these duties, the franchisee may recover damages in accordance with the principle of *culpa in contrahendo* (which imposes pre-contractual liability).

The Swiss Code of Obligations also contains regulations which protect the contracting parties from:

- excessive restriction of their individual rights;
- exploitation of one party's inexperience or recklessness; and
- intentional deceit on the part of the other party.

Any of the above may render the contract void or contestable. The injured party may also claim compensation for damages, although compensation will only be awarded for proven and actual damages. Punitive damages are not awarded in Switzerland.

The Swiss courts apply the rules on ambiguity and unconscionability to standard form agreements. Under the ambiguity rule, ambiguous clauses must always be interpreted against the party which drafted them (the *contra stipulatorem* rule). The unconscionability rule stipulates that provisions in standard form agreements are not binding where the contracting party would not, under the circumstances, have expected them.

The Unfair Competition Act provides that the use of misleading general conditions or standard form agreements is unfair. However, whether such conditions or agreements are also void is debated in Swiss jurisprudence.

Regulations on instalment payment agreements and consumer credit protect private consumers only. The application of these regulations to trade or professional organizations is expressly excluded. As franchise agreements routinely serve business purposes, consumer protection regulations are therefore not applicable.

If personal data is transferred between the franchisor and the franchisee, the provisions of the Swiss Data Protection Law must be observed. A transfer of personal data is in accordance with this law only if the prior consent of the data subject has been obtained or if the transfer relates to the drafting of a contract.

Finally, when drawing up franchise agreements Swiss cartel law must be considered. The Swiss Cartel Act of October 6 1995 leans heavily on EU antitrust law. Unless there is specific justification, the following are considered illegal restraints on trade:

- price agreements;
- agreements on restricted production, purchase or delivery; and
- market division.

The Cartel Act expressly allows for the justification of competition agreements in distributorship and licence agreements. The extensive use of such justification in franchise agreements appears reasonable and permissible.

In general, the Swiss cartel authorities will not pose a problem if EU competition laws have been observed and if the agreement is valid from a cartel law point of view.

Comment

In light of Switzerland's attractive economic conditions, its favourable tax regime and the liberal legal framework for franchising, it is perhaps surprising that many larger franchisors from both Europe and farther afield have not yet explored the potential of the Swiss market.

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Endnotes

(1) BGE 109 II 483 and following.

FEEDBACK