
THE FRANCHISE LAW REVIEW

FOURTH EDITION

EDITOR
MARK ABELL

LAW BUSINESS RESEARCH

This book is dedicated to
JOHN NELSON-JONES,
an exceptional lawyer and mentor,
who passed the wonder and pleasure of
practising law from one generation to another,
with an unsurpassed generosity of spirit.

THE FRANCHISE LAW REVIEW

Fourth Edition

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EDITOR'S PREFACE

This book is dedicated to my dear, recently deceased mentor, John Nelson-Jones, who took me under his wing and first introduced me to international franchising in the early 1980s. At that time I had no idea what an incredible professional journey I was embarking upon. Without John's immense intellect, keen understanding of the commercial world and enormous generosity of spirit, supporting and encouraging me, I may well have given it up as being far too much of a challenge for a young lawyer. It soon became clear to me that to advise clients upon franchising one needed to have a strong understanding of a wide range of legal disciplines, from competition law and intellectual property through real estate, contract, commercial, corporate, tax and private international law to the boundaries of new and previously undreamed of areas of jurisprudence in jurisdictions far beyond one's own. Who in the early 1980s, for example, had even imagined areas of law such as privacy and data protection, which now play such an important role in how franchising is structured and regulated across the globe? It all seemed an incredible intellectual and professional challenge in respect of an area of commerce that was not even recognised as existing under English law. However, John was gently insistent and understood the role that franchising would play in an increasingly global economy. For John, who was a true legal polymath (having authored several leading textbooks on areas of law as diverse as taxation and package holidays), the breadth and depth of legal knowledge that was required merely made franchising a more interesting and rewarding area of law in which to specialise.

Showing his characteristic altruism and desire to help young lawyers make the most of their talents, John guided and supported me as I struggled to understand the international complexities of franchising, sending me to the United States, where I was able to immerse myself in the dynamic and highly regulated world of American franchising. I also had the pleasure of co-authoring my first chapter in a legal text book on franchising with John, or 'JANJ', as the younger lawyers in the firm referred to him. In his typically gracious and humorous manner, he insisted that my name appear before his in the index and on the first page of the chapter as, in his words, "The 'A' is mightier than the 'N'!"

John was a charming and self-effacing individual, with a kind word for everyone and a genuine interest in everybody who worked with him. I was only one of his protégées, and he steered many other young lawyers to become internationally renowned practitioners in

a number of other areas of law, such as taxation and international travel. John took all of the hard work involved in supporting and shaping the careers of young lawyers easily in his stride, while at the same time successfully managing one of the City's up-and-coming law firms, looking after a large and demanding portfolio of blue-chip clients and making regular Saturday visits to Plough Lane, where he watched his local football club, Wimbledon (aka 'the Crazy Gang'), win the FA Cup in 1988 and then try to defy gravity by vainly battling to avoid relegation from the first division for the rest of the decade.

Thirty-five years on from the time that John introduced me to international franchising, his confidence in the future role and importance of franchising in the world economy has been vindicated. As usual, he was able to see what most others could not – potential, whether it was in respect of people or ways of doing business.

The Franchise Law Review is therefore just one small part of John's legacy to the legal profession and it is my great pleasure to dedicate this fourth edition to him.

Since the publication of the third edition of *The Franchise Law Review*, there have been major economic and geopolitical developments that have had a significant impact on world trade, not least the election of Donald Trump as president of the United States and the referendum that resulted in Brexit. The price of oil is still low, China's manufacturing sector is still suffering significant setbacks, Europe faces a further range of challenges, Iran and Saudi Arabia are exacerbating the problems in the Middle East and the Russian economy continues to float in the doldrums. Through all this, however, the apparently inexorable march towards the globalisation of commerce has continued unabated.

Despite the slow emergence of a few economic bright spots, the economy of what was once called the 'developed' world continues to struggle for the most part, while even Brazil (despite the recent Olympics) is still wallowing in recession. As a consequence, businesses are often presented with little choice but to look to more vibrant markets in Asia, the Middle East and Africa for their future growth.

The key word would seem to be uncertainty.

Brexit is set to have an impact on franchising in Europe, but it is as yet unclear what that impact will be. With the fall in the pound against the dollar we have already seen a number of US franchisors buy out their UK master franchisees. However, whether that is a long-term trend remains to be seen. In legal terms, the only potentially significant impact so far has been upon EU trademarks, resulting in many franchisors taking the precaution of also registering UK brands for their marks. On the other side of the Atlantic, the election of Donald Trump to the presidency is another unknown that will most probably have an impact upon franchising during the next few years.

The political uncertainty in continental Europe is also likely to have some impact. With the demise of both Hollande in France and Renzi in Italy, and the general rise of anti-establishment and anti-EU parties, Chancellor Merkel in Germany seems likely to be one of the few strands of continuity over the coming few years.

South–South trade continues to increase, perhaps at the expense of its North–South counterpart. All of this, coupled with the unstable wider geopolitical landscape, presents business with only one near certainty: there will be continued deleveraging of businesses in the coming years and, thus, growing barriers to international growth for many of them. All but the most substantial and well-structured of such businesses may find themselves facing not only significant difficulties because of their reduced access to funding for investment in their foreign ventures, but also challenges arising from their lack of managerial experience and bandwidth.

At the same time, the regulation of franchising continues to evolve and the past 12 months have seen the EU Parliament focus on how it might best change the regulatory environment for franchising within the European Single Market.

Despite all of the above uncertainty, franchising, in its various forms, continues to present businesses with one way of achieving profitable and successful international growth without the need for either substantial capital investment or a broad managerial infrastructure. In sectors as diverse as food and beverages, retail, hospitality, education, healthcare and financial services, it continues to be a popular catalyst for international commerce and makes a strong and effective contribution to world trade. We are even seeing governments turning to it as an effective strategy in the future development of the welfare state, as social franchising continues to gain traction as a means of achieving key social objectives.

Given the positive role that franchising can make in the world economy, it is important that legal practitioners have an appropriate understanding of how it is regulated around the globe. This book provides an introduction to the basic elements of international franchising and an overview of the way it is regulated in 36 jurisdictions.

As will be apparent from the chapters of this book, there continues to be no homogeneous approach to the regulation of franchising around the world. Some countries specifically regulate particular aspects of the franchising relationship. Of these, a number try to ensure an appropriate level of pre-contractual hygiene, while others focus instead on imposing mandatory terms upon the franchise relationship. Some do both. In certain countries, there is a requirement to register certain documents in a public register. Others restrict the manner in which third parties can be involved in helping franchisors meet potential franchisees. No two countries regulate franchising in the same way. Even those countries that have a well-developed regulatory environment seem unable to resist the temptation to continually develop and change their approaches to regulation – as is well illustrated by the recent changes to the Australian regulations. The inexorable onward march of franchise regulation continues, with countries such as Argentina – which previously had not specifically regulated franchising – adopting franchise-specific laws in the past 12 months.

Many countries do not have franchise-specific regulation, but nevertheless strictly regulate certain aspects of the franchise relationship through the complex interplay of more general legal concepts such as antitrust law, intellectual property rights and the doctrine of good faith. This heterogeneous approach to the regulation of franchising presents yet another barrier to the use of franchising as a catalyst for international growth.

This book certainly does not present readers with a full answer to all the questions they may have about franchising in all the countries covered – that would require far more pages than it is possible to include in this one volume. It does, however, in the first section, try to provide the reader with a high-level understanding of the challenges involved in international franchising, and then, in the second section, explain how these basic themes are reflected in the regulatory environment within each of the countries covered.

I should extend my thanks to all of those who have helped with the preparation of this book, in particular Caroline Flambard and Nick Green, who have invested a great deal of time and effort in making it a work of which all those involved can be proud.

It is hoped that this publication will prove to be a useful and often-consulted guide to all those involved in international franchising, but needless to say it is not a substitute for taking expert advice from practitioners qualified in the relevant jurisdiction.

Mark Abell

Bird & Bird LLP

London

January 2017

Chapter 46

SWEDEN

Elisabeth Vestin and Victoria Sörving¹

I INTRODUCTION

Franchise arrangements are common in Sweden and the industry has been growing at a steady pace for many years. While there are no official statistics concerning the Swedish franchise industry, a survey conducted by HUI Research in 2016 on behalf of the interest group the Swedish Franchise Association (SFF),² found that there were 33 000 franchisees operating in Sweden in 2016 and that the number is estimated to increase by 3 per cent in 2017.

The greater part of franchise enterprises in Sweden operate within the retail sector. Furthermore, franchise arrangements providing installation services to companies, and arrangements within the restaurant and hotel industry are well represented.³

A few examples of Swedish franchisors are Make Up Store, Team Sportia, HusmanHagberg, O'Learys and IKEA. Among international franchisors operating in Sweden McDonald's, Starbucks and Subway can be mentioned.

The above-mentioned interest group, the SFF, is an organisation that during the past 40 years has been active in expanding and promoting ethical franchise practices in Sweden. Its Code of Ethics has been in force since 1994, and is binding for all members of the SFF, which include both franchisees and franchisors. Furthermore, the SFF has established an ethical committee that decides upon questions regarding the interpretation of ethical questions within the franchise industry.

1 Elisabeth Vestin is a specialist partner and Victoria Sörving is a senior associate at Hannes Snellman Advokatbyrå AB.

2 Sw. Svenska Franchiseföreningen.

3 According to a survey conducted by HUI Research on behalf of the SFF in 2015.

II MARKET ENTRY

i Restrictions

There are no restrictions or approvals required for foreign franchisors entering the Swedish market. Being a member of the European Union, Sweden adheres to the principle of the right of free movement of goods, persons, services and capital. Accordingly, there are no franchise-related restrictions in respect of a foreign entity granting a master franchise right or development rights to a Swedish entity. Neither are there any restrictions in respect of foreign franchisors owning equity or real property in Sweden.

ii Foreign exchange and tax

Payments to and from Sweden are not subject to any restrictions (i.e., there are no restrictions on taking banknotes and coins out of or into Sweden, nor are there restrictions on other external transactions, including loans from and deposits with foreign banks, or portfolio investments and direct investments). However, reporting requirements may exist for the intermediary (usually a bank or similar).

There are no tax regulations in Sweden dealing specifically with franchising.⁴

III INTELLECTUAL PROPERTY

i Brand search

Trademarks

Registered Swedish trademarks are found in the database kept by the Swedish Patent and Registration Office (PRV),⁵ community trademarks can be searched using the register provided by the European Union Intellectual Property Office (EUIPO),⁶ and international trademarks can be identified using the search engine made available by the World Intellectual Property Organization (WIPO).⁷

Where protection of a Swedish trademark is based on the use of the trademark,⁸ the trademarks are not included in any registers.

Company names

Swedish company names can be protected either by registration or by means of the use thereof. Searches for registered company names can be conducted using a search engine supplied by the Swedish Companies Registration Office.⁹

4 See Section V.i, *infra*.

5 PRV's register is available at www.prv.se.

6 EUIPO's register is available at <https://euipo.europa.eu/eSearch/>.

7 WIPO's register is available at www.wipo.int.

8 See Section III.ii, *infra*.

9 The Companies Registration Office's search engine is available at www.verksamst.se.

Domains

In respect of domains, Swedish domain names (.se or .nu) can be identified using the search services provided by the Internet Foundation in Sweden (IIS).¹⁰

The process for ascertaining whether there is a conflict follows the standard procedures for determining whether there is an intellectual property infringement.

ii Brand protection

There are four ways by which trademark protection can be obtained in Sweden; these consist of:

- a* a company registering a Swedish trademark via PRV;
- b* a company registering a community trademark via EUIPO (with or without the assistance of PRV);
- c* a company registering an international trademark via WIPO; and
- d* a company using the trademark in Sweden to such an extent that protection is granted by means of use.

Although protection of a trademark can be obtained by means of use, it is recommended that trademarks are registered, to minimise the risk of legal disputes regarding the rights to a trademark.

When applying for registration, the applicant shall attach a copy of the trademark and indicate the relevant services or goods, including classifications, for which it is to be registered. If registered, these indications will be important in determining the extent of the protection.

Company names are registered via the Companies Registration Office, and may be registered provided that neither an identical nor a very similar company name is already registered.

Domain names are registered via an IIS distribution agency.

iii Enforcement

A holder of an intellectual property right, or its licensors, as applicable, may assert the following remedies in the event of an infringement.

Court injunction

A court can impose an injunction requiring the allegedly infringing company to refrain from using the concerned right; such an injunction may also be accompanied by a fine. Where there is a risk that the value of the right may be derogated, a preliminary injunction may under certain circumstances be imposed.

Damages

In respect of claiming damages, the holder shall generally receive compensation for the use of the rights,¹¹ and may also claim for damages arising from the infringement.

10 The IIS register is available at www.iis.se.

11 To be set at an amount corresponding to an appropriate licence fee.

Information request

A court may also issue an order requiring an allegedly infringing company to provide certain information. This information generally concerns the distribution chain of the relevant product, and may be very useful in future proceedings.

Criminal sanctions

In the event an infringement is made intentionally or by gross negligence, an infringing person may be sentenced to pay a fine or to imprisonment.

iv Data protection, cybercrime, social media and e-commerce

In processing personal data, franchisors and franchisees shall, where the processing is subject to Swedish law, comply with the Swedish Personal Data Act.¹² Main concerns include determining which of the parties is the data controller and the data processor, respectively, as the franchise arrangement often necessitates common customer relationship management systems, and entail that the personal data collected are used for a variety of purposes. Securing the registered persons' consent to the processing is essential, and any processing to be carried out by a data processor on behalf of a data controller shall be regulated by a written contract entered into between the parties. Furthermore, there are strict provisions to be adhered to in terms of permitting transfers of personal data to countries outside the EU/EEA.

Where a franchisor or franchisee supplies information society services, the Swedish E-Commerce Act¹³ applies. Furthermore, in respect of sales to consumers where the agreement is entered into outside any business premises (e.g., in an e-commerce context), the Swedish Distance and Off-Premises Contracts Act¹⁴ applies. Both acts set forth detailed provisions on information to be provided to a consumer before an agreement is entered into.

Currently, there is no specific legislation in respect of cybercrime. However, the Swedish Penal Code¹⁵ contains certain provisions criminalising unlawful access, changes, deletions, additions or blocking of data for automatic processing.

Finally, the parties are obligated – in respect of any marketing activities throughout the franchise arrangement, including e-commerce – to abide by the Swedish Marketing Practices Act.¹⁶ In general, the Act prescribes that all marketing must comply with good marketing practices. In short, this means that all marketing shall be fair and not misleading, and there are, naturally, a number of specific principles that govern the various situations that companies face. The Act is based on an EU directive, but, in contrast to that directive, is applicable in respect of both business-to-business and business-to-consumer marketing activities.

12 The Swedish Personal Data Act (SFS 1998:204). The current act will be replaced by the General Data Protection Regulation 2016/679/EU as of 25 May 2018 (GDPR).

13 The Swedish Act (SFS 2002:562) on E-commerce and other Information Society Services.

14 The Swedish Distance and Off-Premises Contracts Act (SFS 2005:59).

15 The Swedish Penal Code (SFS 1962:700).

16 The Swedish Marketing Practices Act (SFS 2008:486).

IV FRANCHISE LAW

i Legislation

Other than the Swedish Franchise Disclosure Act¹⁷ (the Disclosure Act), which prescribes certain pre-contractual disclosures, there is no legislation in Sweden specifically regulating the franchise relationship.

As for other Swedish legislation, the general principle of the Swedish Contracts Act¹⁸ is freedom of contract, which entails that parties are free to enter into contracts in the way that they see fit. Accordingly, there are no formal requirements to be fulfilled for a franchising agreement to be valid.

In drafting a franchise agreement, the above-mentioned SFF Code of Ethics should, however, be observed, as it may be applied by a court not only in respect of SFF members, but in determining generally accepted business practices for franchise agreements.

ii Pre-contractual disclosure

The Disclosure Act

According to the Disclosure Act, the franchisor is under a mandatory obligation to provide the prospective franchisee with certain information. This obligation applies in respect of all agreements where the franchisee will operate in Sweden and, naturally, also where an existing franchise agreement is to be transferred to a new franchisee.

The franchisor shall provide clear, written information on the implications of the agreement and other matters that are relevant in the circumstances, which shall, at least, include:

- a* a description of the franchise that the franchisee is to run;
- b* information about other franchisees that the franchisor has entered into agreements with regarding the same franchise and the magnitude of their business;
- c* the remuneration that the franchisee shall pay to the franchisor and other economic conditions for the franchise;
- d* the intellectual property rights that are to be licensed to the franchisee;
- e* the goods or services that the franchisee is obligated to buy or rent;
- f* the prohibition of competition that applies during or after the franchise agreement has expired;
- g* details regarding the term of the agreement, the terms applied in respect of changes, extension and termination of the franchise agreement and the economic consequences of a termination; and
- h* details concerning the procedure for any future proceeding in connection to the agreement and the cost responsibilities in terms of such proceedings.

The information shall be provided well in advance, prior to the parties entering into an agreement. It is recommended that it is provided in writing and at least 14 days prior to the conclusion of the agreement.

17 The Swedish Franchise Disclosure Act (SFS 2006:484).

18 The Swedish Contracts Act (SFS 1915:218).

Other pre-contractual obligations

Apart from the Disclosure Act, there is no legislation in Sweden that regulates pre-contractual disclosure requirements. However, the doctrine of *culpa in contrahendo* is a recognised principle of Swedish law, even though it is rarely applied by the Swedish courts.

iii Registration

There are no registration requirements in Sweden for franchises, nor any registration requirements in general law that impact franchising.

iv Mandatory clauses

Swedish law does not prescribe any mandatory clauses in respect of franchise agreements.

v Guarantees and protection

There is no specific legislation in Sweden that relates to guarantees in franchisor agreements. Since the general principle in the Swedish Contract Act is the principle of freedom of contract, guarantees given from individuals and companies are in general enforceable.

V TAX

i Franchisor tax liabilities

General

There are no rules in Sweden specifically dealing with franchising structures. Hence, the taxation of a franchise generally depends on whether the business is incorporated or not. Furthermore, there are also differences depending on where the company or individual is domiciled for tax purposes. Any double taxation arising may be ameliorated or eliminated by tax treaties, domestic law, or EU directives. The comments below focus on Swedish tax residents unless otherwise stated.

Taxation of companies

A company is tax domiciled in Sweden if registered with the Companies Registration Office. Companies are subject to 22 per cent tax on their net income (i.e., the taxable income is offset by expenses, depreciations and similar items). The most notable limitations apply in relation to interest deductions on group internal debt, which may often be denied on the basis of anti-abuse rules. Companies may also be subject to, *inter alia*, withholding taxes (WHT), value added tax, real estate taxes, stamp duty and social security contributions. The said tax liabilities may also, with certain limitations, apply if a foreign company is considered to have a permanent establishment in Sweden. However, Sweden does not levy a branch profit tax (or similar).

Sweden does not levy WHT on interest or royalties (including, *inter alia*, franchise fees), but this is the case in relation to dividends unless reduced or eliminated under tax treaties, domestic rules or EU directives. The most notable exception, much simplified, is that dividends paid to a foreign parent may be entirely exempt from WHT if the receiver is comparable to a Swedish limited liability company and the shares are held for business purposes. Furthermore, royalty payments are generally considered business income in Sweden for the receiver and taxed at the corporate income tax rate of 22 per cent. However, the tax liability may be eliminated by tax treaties or under an EU directive.

Taxation of individuals

An individual is subject to different tax rates depending the character of the income. In short, salary income is taxed at between 30–58 per cent on a progressive scale and capital income is in turn taxed at between 20–30 per cent. Business income is, much simplified, taxed at 22 per cent through a fairly complex set of rules. For all types of income, certain deductions may be allowed.¹⁹

ii Franchisee tax liabilities

See Section V.i, *supra*.

iii Tax-efficient structures

The structuring of a franchise business in Sweden is generally not driven by tax considerations. However, from both a tax and a liability perspective, respectively, it may be easier and prudent to conduct the business in incorporated form.

VI IMPACT OF GENERAL LAW

i Good faith and guarantees

Good faith is a recognised principle of Swedish law. It is usually described as a duty to observe and attend to the other party's interests.²⁰ However, the specific application of the principle is very unclear, as is the application of legal remedies if the principle is not respected. The uncertainty can be explained by the fact that the principle of good faith is not expressed in any general legislation in Sweden.

ii Agency distributor model

There is no specific distribution law in Sweden, instead general commercial contractual principles apply. Whether a franchisor–franchisee relationships shall be treated as one of principal and agent or principal and a commission agent depends on the actual arrangement between the parties. If the arrangement falls within the scope of either the Agents Act²¹ or the Commission Act,²² the respective provisions of these acts apply, regardless of how the parties classify the agreement.

The Agents Act applies where an independent agent on a permanent basis, on behalf of a principal, buys or sells goods by receipt of offers made to the principal or enters into agreements in the name of the principal. Mandatory provisions of the Agents Act include provisions on good faith and the agent's rights to compensation.

The Commission Act applies where a commission agent buys or sells goods on behalf of the principal in its own name. The commission agent is obligated to follow the instructions of the principal, and receives a compensation for the goods sold. There are only a few mandatory provisions, most of which concern the termination of the agreement.

19 In relation to WHT, see Section V.i, on taxation of companies, *supra* (applicable *mutatis mutandis*).

20 Jori Munukka, *SvJT* (2010), page 837.

21 The Swedish Act (SFS 1991:351) on Commercial Agents.

22 The Swedish Act (SFS 2009:865) on Commission.

iii Employment law

In a genuine franchisor–franchisee relationship, franchisees are not and cannot be treated by the courts as employees.

iv Consumer protection

The franchisee is not seen as a consumer according to Swedish law.

v Competition law

General

In substance, Swedish competition law corresponds to the rules of EU competition law. Franchise agreements can, thus, become subject to the prohibition of anticompetitive agreements under the Swedish Competition Act.²³ Franchise agreements are categorised as vertical agreements (the franchisor and the franchisee operate at different levels in the production or supply chain) and can fall within the scope of the Swedish Vertical Block Exemption Regulation (SVBER).²⁴ An agreement that benefits from the SVBER will be exempted from the prohibition against anticompetitive agreements between undertakings. There are two essential conditions that a franchise agreement has to fulfil to enjoy the ‘safe harbour’ provided by the block exemption: (1) the market shares of the parties must be below the relevant market share thresholds and (2) the agreement may not contain any hardcore or excluded restrictions. Inclusion of just one hardcore restriction precludes the entire franchise agreement from benefiting from the VBER, while the inclusion of an excluded restriction will preclude that particular clause from enjoying the protection provided by the block exemption. An excluded restriction will not necessarily prevent the possibility of the remaining provisions of the franchise agreement from benefiting from the VBER. Even if the market-share thresholds are exceeded or if the agreement includes one of the hardcore restrictions, there is neither a presumption that the agreement infringes the prohibition against anticompetitive agreements nor that it may not satisfy the criteria for exemption from the Competition Act.

Hard-core restrictions

Price-fixing arrangements, such as resale price maintenance, and certain market partitioning by territory or customer group, are classified as hardcore restrictions and are thus prohibited. Franchisors are, however, permitted to set a maximum price or recommend a resale price to their franchisees.

Active and passive sales

The VBER distinguishes between ‘active sales’ and ‘passive sales’. Active sales are sales where a franchisee individually approaches customers; for instance, by mailing, visiting or actively implementing advertisement or promotion efforts specifically targeted at a customer group; or approaches a customer group outside its designated territory. Franchisors are entitled to prohibit and restrict active sales outside the franchisee’s designated territory.

23 The Swedish Competition Act (SFS 2008:579).

24 Which is identical to the Vertical Block Exemption Regulation at EU level (VBER).

Passive sales are characterised as sales where the customer approaches the franchisee and are typically made in response to unsolicited requests from customers. Sales over the internet are generally classified as passive sales and cannot be prohibited by the franchisor. However, a franchisor can include control mechanisms in the agreement; for instance, by requiring that a certain level of the franchisee's total sales shall be attributable to a physical store. A franchisor cannot prevent franchisees from operating their own websites, although the franchisor can impose quality standards relating to, *inter alia*, the general design and content of the website.

vi Restrictive covenants

If a non-compete obligation purports to last indefinitely or for a longer period than five years, it will be treated as an excluded restriction and will not receive the benefit of the VBER. In the Guidelines on Vertical Restraints issued by the European Commission, the Commission expresses that a non-compete obligation in a franchise agreement exceeding five years may still be acceptable if the non-compete obligation is necessary to maintain the common identity and reputation of the franchised network. In such circumstances, the duration of the non-compete obligation is immaterial provided that it does not exceed the duration of the franchise agreement itself.

vii Termination

There is no minimum period for termination notices applicable to franchise agreements. A very short period of notice could, however, be deemed unjust under the Swedish Contracts Act. If the agreement does not contain any notice period or is valid until further notice, the parties are obligated to observe a reasonable notice period. What constitutes a reasonable notice period depends on the circumstances of the particular case, including term, the size of the investments made, the possibilities of finding an appropriate substitute and trade practices. If the franchisee does not receive compensation for goodwill, that may result in a longer termination period.²⁵

There is no specific right or obligation for a franchisor to take over the franchisee's business at the termination of the agreement or for the franchisee to sell the business to the franchisor, if not stipulated in the agreement.

viii Anti-corruption and anti-terrorism regulation

Bribery

The Swedish Penal Code's prohibitions on giving and receiving bribes apply within the public and the private sectors, and include franchise relationships. Apart from the active and passive bribery prohibitions, the Penal Code stipulates that individuals or entities providing money or other assets to an intermediary and thereby promoting a bribe being given can be convicted for negligent financing of bribery. Adequate control and precautions when providing a counterparty with money or other assets are thus required to ensure that the assets are not used for bribes. Furthermore, taking this into account, a franchise agreement should provide for adequate control mechanisms.

25 Further information can be found in the Swedish Supreme Court ruling, judgment NJA 2009 s. 672.

Money laundering

Under the Swedish anti-money laundering legislation,²⁶ persons can be convicted of money laundering if they have committed an act with the intention to conceal the derivation of money or other assets obtained through criminal activity, or if supporting the possibility of someone benefiting from such assets. Moreover, a person can be sentenced for money laundering if assisting someone in concealing the derivation of criminal earnings, or if improperly favouring the possibility of someone utilising money or other assets obtained through criminal activity. Naturally, therefore, caution should always be exercised when managing transactions, and this may also be relevant in relation to franchise arrangements.

Fraud

Fraud and other fraudulent behaviour, including usury, dishonest conduct, breach of faith committed by an agent against its principal, embezzlement and dishonesty against creditors are criminalised under the Penal Code. Criminal liability for fraud requires an intention to commit an act for the purpose of gain that causes a corresponding loss to the victim. Within the contractual context, fraud and fraudulent behaviour generally constitute grounds for termination of a contract.²⁷

ix Dispute resolution

The most common dispute resolution mechanism in commercial relations in Sweden is arbitration. Usually, Swedish franchise agreements do not deviate from that practice. One of several reasons why the parties to a franchise agreement may prefer arbitration to litigation is that an arbitration procedure is confidential, which is of value particularly for the franchisor. In arbitration, the parties also have the opportunity to appoint one arbitrator each. The parties can therefore appoint an arbitrator with specific knowledge and relevant experience of franchising. In comparison to court proceedings, arbitration proceedings also tend to be quicker.

As a third alternative, or as a first step in resolving a dispute, the franchisor and the franchisee can agree on appointing an impartial mediator, with assistance, for example, from the Swedish Franchise Association or the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). However, mediation is used less frequently compared with arbitration and litigation. Mediation, just like arbitration, is subject to an agreement between the parties.

The parties to a franchise agreement may decide that disputes arising out of the agreement shall be settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the SCC (the SCC Rules). The SCC is one of the world's leading forums for dispute settlement between commercial parties, and nearly 50 per cent of the cases filed with the SCC are international. The SCC Rules provide a flexible and efficient institutional framework for resolving commercial disputes. Pursuant to the SCC Rules, a final award shall be rendered no later than six months from the date upon which the case was referred to the arbitral tribunal. The Board of the SCC can extend the time limit upon a reasoned request from the arbitral tribunal, or if it is otherwise deemed necessary. However, this is rarely necessary since an arbitration award is usually rendered within the given time frame of six months.

26 The Swedish Anti-Money Laundering Act (SFS 2014:307).

27 The Swedish Contracts Act (SFS 1915:218).

The subject of a dispute between a franchisor and a franchisee may vary, but usually relates to the interpretation of the franchise agreement. For example, with respect to the licensing or transfer of rights, the question may arise as to whether rights are granted on an exclusive basis or on a non-exclusive basis, respectively. Pursuant to the Disclosure Act, as mentioned in Section IV.ii, *supra*, a franchisor has an obligation to supply the franchisee with certain information before the agreement is concluded. The information listed in the Disclosure Act is rather detailed and in line with the types of matter that the parties should preferably set forth in detail in their contract. This statutory obligation to disclose relevant information is, of course, of significant relevance for a party that is contemplating initiating a dispute.

Pursuant to the Disclosure Act, a franchisee that does not, upon request, receive the information listed in the Act from the franchisor in writing, can apply to the Swedish Patent and Market Court and request that the Court order the franchisor to supply the franchisee with the relevant information. This injunction can be combined with a penalty, but the Disclosure Act does not provide for any other sanctions. If, on the other hand, a former franchisee continues to use the franchisor's trademark or other intellectual property rights belonging to the franchisor after the contractual term has ended, the franchisor can obtain a court injunction or even an interim injunction, combined with a penalty, which orders the franchisee to stop using the franchisor's intellectual property.

With regard to jurisdiction, the Brussels Convention and the Lugano Convention are both applicable in Sweden.²⁸ If neither of these regulations is applicable to an individual case, a Swedish court may determine the issue of jurisdiction based on the principles stated in Chapter 10 of the Swedish Code of Judicial Procedure.²⁹ With regard to the issue of applicable law, the Rome Convention is applicable to agreements entered into between 1 July 1998 and 17 December 2009. Agreements signed after the latter date are covered by the Rome I Regulation.³⁰ As a final point, Sweden has also acceded to the Brussels I and Brussels II Regulations³¹ regarding jurisdiction and enforcement of foreign judgments.

The parties to a franchise agreement are at liberty to agree on the substantive law that should govern the agreement and thereby potential disputes arising out of the agreement. The parties may also agree as to the country in which potential disputes shall be adjudicated. In general, Swedish courts recognise and uphold choice of law and jurisdiction clauses in franchise agreements.

28 The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

29 The Swedish Code of Judicial Procedure (SFS 1942:740).

30 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

31 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels II).

With respect to enforcement of arbitral awards, Sweden has acceded to the New York Convention.³² Accordingly, and also according to the Swedish Arbitration Act,³³ foreign arbitral awards are enforceable in Sweden, irrespective of where they were rendered. However, Swedish courts may refuse recognition and enforcement on grounds such as public policy or because of violations of procedural due process.³⁴

There are no specific procedural laws on franchising in Sweden, except for the Disclosure Act mentioned above. Neither are there any specific rules for calculating damages arising from a breach of a franchise agreement or from misrepresentation. Hence, general principles of contract and tort law, as the case may be, are applicable, unless otherwise agreed by the parties. The general principle for calculating damages arising from a material breach of an agreement under Swedish law is that the injured party shall be placed in the position that it had been in if the other party had performed in accordance with the agreement.

With respect to legal costs for a litigation process or an arbitration procedure, the general rule in Sweden is that the unsuccessful party has to bear its own costs and reimburse the successful party for its legal costs. In arbitration, the unsuccessful party will also be liable for the costs of the arbitration. Nevertheless, a court or an arbitral tribunal may decide to allocate the costs between the parties in a way that the court or arbitral tribunal finds reasonable, taking into account relevant circumstances such as the outcome of the case and time spent on particular issues in dispute.

VII CURRENT DEVELOPMENTS

There is no pending legislation or other upcoming events that can be expected to significantly impact the business operations of companies active within the franchising sector as such, but the sector appears to be thriving, especially taking into account the continued internationalisation of the retail sector, including, in particular, e-commerce.

As with all companies, franchising companies will need to observe the GDPR. Also other legislation requiring further compliance measures to be implemented will result in companies having to carefully consider and evaluate the implications of their practices and adjust routines accordingly. In relation to franchising, this sector is already very accustomed to implementing policies and procedures, which will be an advantage in this regard.

Finally, the results of the 2016 survey conducted by HUI Research on behalf of the SFF show that Swedish franchise companies have a very positive outlook with regard to future years, in terms of turnover and employment trends in particular. It will indeed be very exciting to follow the continuing development of these companies, as well as the challenges they may encounter moving forward.

32 The 1958 New York Convention on the recognition and enforcement of foreign arbitral awards.

33 The Swedish Arbitration Act (SFS 1999:116).

34 Kaj Hobér, *International Commercial Arbitration in Sweden* (2011), page 360.

Appendix 1

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Elisabeth Vestin heads the intellectual property and technology, media and telecom (IP&TMT) practice at Hannes Snellman's Stockholm office. Her fields of expertise include IP law, privacy law, market law, consumer law, e-commerce as well as sports, media, music and entertainment law.

Her practice includes drafting, interpreting, negotiating and disputing commercial agreements. She also advises on M&A in the IP&TMT field.

In addition, Elisabeth has worked with corporate sustainability, bribery, anti-corruption and compliance matters for over a decade. She regularly conducts presentations and training in these areas.

Because of her vast experience of working with franchise chains and other chain companies, Elisabeth has become a board member of the Swedish Franchise Association.

VICTORIA SÖRVING

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Victoria Sörving is a member of the intellectual property and technology, media and telecom practice at Hannes Snellman's Stockholm office. She regularly assists clients with drafting, interpreting and negotiating various commercial contracts, such as distribution agreements, supply agreements, franchise agreements, agent agreements and contracts that otherwise concern licensing or assignments of rights. Furthermore, she continuously assists various companies with regard to preparing general terms and conditions for provision of goods and services to other companies or consumers through traditional channels, and with regard to e-commerce, marketing law and related matters.

Prior to joining Hannes Snellman, Victoria served as general counsel at a medical device software company, and has also, through her other previous engagements, assisted numerous clients within the life sciences sector. She is, therefore, well acquainted with the challenges faced by companies within this sector, and also continues to specialise in the relevant areas of law.

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