

THE INTERNATIONAL
HOTEL LAW
REVIEW

SECOND EDITION

Editors

Mark Abell and Karen Friebe

THE LAWREVIEWS

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CONTENTS

PREFACE.....	v
<i>Mark Abell and Karen Friebe</i>	
Chapter 1	FRANCHISING IN THE HOTEL SECTOR..... 1
<i>Mark Abell</i>	
Chapter 2	AUSTRALIA..... 19
<i>Vince Baudille and Adrian Rodrigues</i>	
Chapter 3	CANADA..... 33
<i>Trevor Lawson</i>	
Chapter 4	CHINA..... 52
<i>Sven-Michael Werner and Grace Zhao</i>	
Chapter 5	DENMARK..... 68
<i>Søren Narv Pedersen, Marie Grønlund, Mogens Dyhr Vestergaard and Claudia Vindbjerg Mortensen</i>	
Chapter 6	FRANCE..... 81
<i>Alexandre Vuchot, Ariane Mole, Anne-Charlotte Le Bihan, Bertrand Levy, Djazia Tiourtite and Boris Martor</i>	
Chapter 7	GERMANY..... 93
<i>Elie Kaufman, Joseph Fesenmair and Benjamin Karcher</i>	
Chapter 8	INDIA..... 109
<i>Hardeep Sachdeva and Priyamvada Shenoy</i>	
Chapter 9	ITALY..... 121
<i>Antonella Ceschi</i>	

Contents

Chapter 10	JAPAN	134
	<i>Makoto Saito and Shinichiro Horaguchi</i>	
Chapter 11	POLAND	141
	<i>Marcin Świerżewski, Kuba Ruiz, Maciej Georg, Marta Kwiatkowska-Cylke, Mateusz Dubek and Paulina Grotkowska</i>	
Chapter 12	SINGAPORE	154
	<i>Lorraine Anne Tay and Audrey Lim</i>	
Chapter 13	SWITZERLAND	169
	<i>Sibylle Schmyder</i>	
Appendix 1	ABOUT THE AUTHORS	181
Appendix 2	CONTRIBUTORS' CONTACT DETAILS	195

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Over the past 34 years, he has constantly advised a wide range of household names, particularly in the hotels and leisure, retail, food and beverage, education and healthcare sectors, on the development and implementation of their international expansion strategies and the corresponding re-engineering of their businesses.

Having written his doctoral thesis on 'The Law and Regulation of Franchising in the EU', he has acted as an expert to the WIPO and WTO on franchising and is co-editor of the world's leading legal periodical in his field of practice, the *International Journal of Franchising Law*.

He is a member of the IBA Franchise Committee and the ABA Franchise Forum. He is a frequent speaker at both legal and commercial conferences around the world on franchising and multichannel strategies.

He has published more than 500 articles in a wide variety of publications and journals. He is also the author of nine books, including *European Franchising: Law and Practice in the European Community*, *The International Franchise Option*, *The Franchise Option: A Legal Guide*, *Franchising in India*, *Alternative Corporate Re-engineering* and *The Law and Regulation of Franchising in the EU*. He is the co-author of the WIPO publication on franchising and currently edits the LexisNexis *Encyclopaedia of Forms and Precedents* volume on franchising, distribution and agency, a standard text of the UK legal profession.

He is currently advising the Committee on Internal Market and Consumer Protection of the EU Parliament on potential new franchise legislation, and is the author of its recent report 'Legal Perspective of the Regulatory Framework for Franchising in the EU'.

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Karen is a London-based partner in the international real estate group with many years' experience in real estate transactions. She also leads the international hotels, hospitality and leisure team, specialising in the acquisition, development and disposal of all types of hotels, from budget to luxury and in the negotiation of hotel management agreements.

Working with a skilled team, she is involved in buying, selling and developing hotels. She also negotiated hotel franchise agreements and hotel management agreements and related

documents such as IP licences and technical services agreements. In recent years, Karen has successfully concluded a number of high-profile M&A transactions and hotel management agreements in London and globally.

She is listed in the legal directories as an expert in the hotels and leisure sector. In addition, she is a regular panellist at industry conferences such as the International Hotel Investment Forum.

She is one of the founder members of Real Estate Balance, which works to address the gender imbalance in the real estate sector. It brings people together from all areas of real estate to help address gender inequality in the sector.

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SWITZERLAND

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I INTRODUCTION

While lodging nights in Switzerland have continuously increased in recent years, the overall number of hotels has slightly decreased. Nevertheless, the number of chain hotels has risen significantly in recent years. Swiss hotel chains contribute to about half of the growth of the chain hotel industry. In addition, foreign hotel operators already present in Switzerland have expanded and a number of foreign hotel brands have entered the Swiss market or have new hotel projects in their pipeline. Medical hotels represent a current trend and growth market in Switzerland. Hotel properties are the focus of real estate investors, which creates opportunities for hotel operators who expand or enter the Swiss market. Although the average room rates are higher than in the surrounding countries, hotel operators are challenged by relatively high costs, in particular for salaries and supplies.

New concepts such as Airbnb are expanding in Switzerland; the regulatory framework for such new concepts is relatively liberal in Switzerland, but nevertheless punctual legislative developments could be observed, mostly on a local level.

II MARKET ENTRY

Swiss legislation (federal law on the acquisition of real estate by persons abroad, also known as Lex Koller) restricts the acquisition of real estate by foreigners. Foreign buyers are generally prohibited from acquiring residential real estate in Switzerland for investment purposes. Citizens from EC/EFTA member states that have a residence permit in Switzerland are not deemed to be foreign buyers. Commercial real estate such as office buildings, retail properties, industrial buildings, shopping centres and hotels may, however, be bought by foreign investors. Special provisions apply with respect to holiday apartments that may, if certain conditions are met (e.g., hotel infrastructure and services), also be acquired by foreign investors. In the mountain regions, there are special provisions allowing foreigners to buy a holiday apartment for their own personal use.

Under Swiss law, there are no foreign exchange restrictions for investors.

Tax rates in Switzerland are relatively low compared with other European countries. The Swiss tax system is characterised by considerable tax autonomy of the cantons, which leads to tax competition between the cantons. The corporate income tax rate varies between

¹ Sibylle Schnyder is a partner at CMS von Erlach Partners Ltd.

the cantons and, therefore, depends on the location of the hotel. It currently ranges between approximately 12 and 21.6 per cent, with an average of approximately 15 per cent. Regarding VAT, the turnover of accommodation services is taxed at a reduced rate of 3.7 per cent.

III LEGAL STRUCTURES

The most common ownership structures are owner-operated hotels (mainly unbranded hotels) and hotels operated under a lease agreement. In the case of hotels operated under a lease agreement, the hotel property is typically owned by an institutional or a private investor, sometimes also by a public sector company. The predominant ownership form in the hotel property is individual ownership but sometimes there is also condominium or a ground lease. Condominium means, that the land and building are owned jointly by several co-owners, whereby each co-owner has the exclusive right to use certain building parts (condominium units). In the case of a ground lease, the beneficiary of the ground lease is entitled to construct, own and use a building, against payment, on a plot of land that belongs to someone else. Ground leases are typically entered into for a time between 50 and 100 years; they are entered into the land register and provide the beneficiary with a right *in rem* over the building.

In a lease structure, certain services, such as restaurants, spa, shops, etc., are sometimes outsourced and operated under a separate lease or a sublease. The lease structure is chosen in Switzerland for branded and unbranded hotels. Management agreements are not very common, which is, among others, owing to regulatory restrictions applying to institutional investors (in particular, real estate funds).

Depending on cantonal or municipal law, hotels may be built within the residential zone or only within special hotel zones. Building or alteration of a hotel requires a building permit. Whereas the hotel operation as such does not need a special operating permit, the processing and distribution of food, as well as the sale of alcoholic beverage, requires a respective permit in line with the applicable cantonal and municipal laws.

IV LEASES

Swiss law distinguishes between lease and usufructuary lease. An usufructuary lease differs from a conventional lease in that the tenant is not only entitled to use the property but can also use or consume the fruits or proceeds of the object of the lease. As a general rule, if the leased object consists not only of the building but also of further utilities (e.g., furniture, fixtures and equipment (FF&E)), the agreement is likely to be considered as usufructuary lease. The legal framework for conventional leases and usufructuary leases is largely the same.

Lease agreements are governed by the Swiss Code of Obligations (CO) and the Federal Ordinance on the Rental of Residential and Commercial Property. Swiss tenancy law is, generally, rather tenant friendly. However, unless the law contains mandatory provisions, the parties are free to agree contractually on the terms and conditions of a hotel lease.

Lease agreements are typically entered into for a term of 10 to 20 years, with two to four renewal options of five years each. Many leases contain a fixed rent that is only subject to adaptations to the Swiss Consumer Price Index. Turnover rents are becoming increasingly popular; they are usually combined with an indexed minimum rent. Often, the landlord also provides for the initial FF&E. To ensure the continued upkeep and replacement of FF&E the parties often provide for a renewal fund to be accrued by the lessee. Commercial lease agreements usually oblige the lessee to provide a rental guarantee in the amount of six

to 12 months' rent. The obligations of the parties with respect to maintenance, repair and renewal of the leased object are usually defined in an interface paper, whereby the landlord is typically responsible for core and shell and the tenant is responsible for the fit-out. Double and triple-net lease agreements are not very common in the hotel industry. Swiss law provides restrictions on subletting and transferring the lease to a third party. Subletting and lease transfers require the landlord's prior consent, whereby such consent may not unreasonably be withheld.

V INTELLECTUAL PROPERTY AND BRANDING

Intellectual property matters in connection with a hotel may arise in various contexts as, e.g., the following:

- a* Construction works designed by an architect or designer (be it initial works for the building of a hotel, interior design or later refurbishing) may be protected by intellectual property rights such as copyrights or similar rights as trade secrets, if particular (secret and commercially viable) know-how is involved in such works. The same applies to plans, drawings or written guidelines embodying the creative criteria of such construction works.²
- b* Distinctive signs used to designate the services of a hotel (or secondary goods sold by the hotel) may be registered as trademarks in Switzerland or as company names if the purpose is to designate the hotel itself. A trademark or company name holder may enjoin other parties from using the identical or similar signs to designate their services or company.³
- c* Although it is less likely to be crafted and owned by a hotel, distinctive three-dimensional forms (e.g., chairs, sofas or tables) may enjoy protection as a registered design in Switzerland. A design holder may enjoin other parties from introducing identical or substantially similar items into the market.⁴

In the past, various trademark registration cases have emerged with a connection to hotels or resorts that wished to or have registered names of close locations (such as a well-known mountain nearby) as trademarks.⁵ This may lead to obstacles since direct geographical indications for goods and services are considered descriptive and, therefore, not permitted for registered trademarks. Not only may this cause difficulty in the trademark registration process, but also can it lead to registered, yet 'weak' trademarks that do not provide for strong exclusivity rights against third parties.

A recent noteworthy copyright case with an impact on hotels is the decision of the Swiss Federal Supreme Court (SFSC) rendered on 13 December 2017 regarding the permitted redistribution of radio and TV programmes in hotel guest rooms and other hospitality

² See Article 2 para. 3 of the Swiss Federal Act on Copyrights and Related Rights (CopA), also available under <https://www.admin.ch/opc/en/classified-compilation/19920251/index.html>.

³ See Article 3 and 13 of the Swiss Federal Act on Trademarks (TmPA), also available under <https://www.admin.ch/opc/en/classified-compilation/19920213/index.html>.

⁴ See Article 2 and 9 of the Swiss Federal Act on Designs (DesG), also available under <https://www.admin.ch/opc/en/classified-compilation/20000457/index.html>.

⁵ As one prominent example, see the decision *Bürgenstock* for Bürgenstock Hotels AG, decision of the Swiss Federal Administrative Court of 14 December 2012, B-1260/2012.

undertakings.⁶ In its decision, the SFSC held that such redistribution is subject to a statutory licence scheme and hotels or hospitality undertakings must pay a license fee under the common tariff '3a addition' established by Swiss collective copyright societies. This decision is insofar new as the SFSC had once rendered a decision under which such redistribution was considered a lawful 'private use' and did not require any approval of the copyright owner or collective societies (see SFSC 119 II 51, *CNN v. Société anonyme du Grand Casino*; the decision was highly criticised by Swiss scholars). The payment obligation established under the new decision of the SFSC not only applies forwards but also backwards for any redistributions of radio and TV programmes that may have occurred after 8 July 2015.

VI DATA AND HOTEL TECH

Hotel operators in Switzerland are held to manage any personal data obtained (be it from customers or other stakeholders such as, e.g., employees or suppliers) in accordance with the Swiss Federal Act on Data Protection (FADP).⁷ Personal data means any data pertaining to an identified or identifiable natural person or legal entity. Personal data must be obtained lawfully, treated proportionately and only for the purposes apparent at the time of collection. It must be secured with adequate technical and organisational matters against unauthorised access. Data may not be forwarded into foreign countries that do not provide for an adequate data protection standard without adequate safeguards taken. In the wake of the new European data protection legislation (General Data Protection Regulation, GDPR), which has introduced a system of draconian administrative sanctions,⁸ Switzerland has taken the attempt to revise the FADP to align with principles of the GDPR.⁹ However, Switzerland has refrained from introducing sanctions in the amount zone of the GDPR.¹⁰ The revision of the FADP is not yet closed.¹¹ The relevance of data protection for hotels has substantially increased due to the stronger online-presence and online-ordering process made available to hotel customers and the increased collaboration of hotels with third-party processors and online platform providers (e.g., referral websites).

It has become a general standard for hotels to offer use of their WLAN to hotel guests. Since guest data is stored in such WLANS controlled by hotel operators, this raises additional concerns on the treatment of such data retrieved (and combined analysis with other data obtained from hotel customers). Customers are recommended to be informed about their data being processed in separate WiFi terms of use or a data privacy statement. Based on the Swiss Federal Act on Telecommunications, hotels offering WiFi are not considered

6 Decision of the SFSC of 13 December 2017, 2C_685/2016, 2C_806/2016.

7 See a version available of the FADP under <https://www.admin.ch/opc/en/classified-compilation/19920153/index.html>.

8 See <https://gdpr-info.eu/> for further information on the GDPR. The administrative sanctions may amount up to €20 million or 5 per cent of the worldwide turnover of a company.

9 For further information on the newly envisaged revised FADP (first draft), see <https://www.admin.ch/opc/de/federal-gazette/2017/7193.pdf>.

10 Switzerland currently envisages to introduce criminal (and not administrative) sanctions in the amounts of maximum 250,000 Swiss francs.

11 For further information on the newly envisaged revised FADP (first draft), see <https://www.admin.ch/opc/de/federal-gazette/2017/7193.pdf>.

telecommunication service providers.¹² Nevertheless, under the newly revised federal act on surveillance of post and telecommunications traffic (FASPT),¹³ anyone providing WiFi to the public is required to cooperate and tolerate surveillance of such data traffic if it is necessary for criminal investigation purposes of severe crimes if surveillance is ordered by a specific surveillance authority¹⁴ (and only marginal data must be disclosed).¹⁵

Electronic commerce in the hotel sector is not regulated specifically in Switzerland, in particular not sector-specifically for hotels. Since Swiss contract law is fairly liberal, electronic commerce is generally permitted and considered an essential feature of freedom of trade. However, in the B2C-field, consumer law-oriented provisions may impose stricter conditions on hotel operators for electronic offerings. For instance, the Swiss ordinance on price declarations¹⁶ stipulates that services offered via online offerings to consumers in Switzerland must be presented in Swiss francs and prices indicated must be all-inclusive (i.e., contain all public charges, copyright levies, expedition or shipment charges or additive costs). Furthermore, the Swiss Federal Act against Unfair Competition (UCA)¹⁷ imposes certain rules on electronic contracting, for example:

- a* services offered online must be accompanied by clear indications on the identity of the offeror, the technical steps leading to contract formation, adequate means to correct typing errors before ordering and confirming an electronic order immediately via electronic path upon receipt;
- b* customers may not be burdened with unsolicited emails without their prior consent and an easily accessible opt-out option; and
- c* customers may generally not be misled with unfair practices to enter into agreements.

VII FRANCHISING OF HOTELS

Franchise agreements can be found in the Swiss hotel industry especially in the case of white label hotel operators that enter into a lease agreement with the owner of the hotel property and wish to benefit from the brand and knowhow of an international hotel brand.

There is no specific legislation on franchising in Switzerland, hence, the general rules of the Swiss contract law as well as provisions on other types of contract apply. According to the SFSC,¹⁸ it is not possible to conclusively determine which rules apply to franchise agreements, the applicable provisions must be identified in each individual case. As a general rule, if the relationship between the parties is rather a partnership than a subordination (partnership

12 Article 2 paragraph a, Swiss Ordinance on Telecommunications Services (ordinance to the Swiss Federal Act on Telecommunications). The ordinance is available under <https://www.admin.ch/opc/en/classified-compilation/20063267/index.html>.

13 The FASPT is available under <https://www.admin.ch/opc/en/classified-compilation/20063267/index.html>.

14 The surveillance authority is called Post and Telecommunications Surveillance Service (PTSS), see more information available under <https://www.admin.ch/opc/en/classified-compilation/20063267/index.html>.

15 Article 27 et seq. FASPT.

16 See under <https://www.admin.ch/opc/de/classified-compilation/19780313/> (unfortunately only available in German).

17 See under <https://www.admin.ch/opc/de/classified-compilation/19860391/> (unfortunately only available in German).

18 Decision of the SFSC 118 II 157, cons. 2c; decision of the SFSC of 8 September 2011, 4A 148/2011, cons. 4.1.

franchising), the application of corporate law provisions is appropriate. If, however, the franchisee is clearly subordinated to the franchisor (subordination franchise), the analogous application of the protective regulations of employment or agency law take precedence.¹⁹

According to mandatory Swiss commercial agency law, where (1) an agent's activities have resulted in a substantial expansion of the principal's clientele and (2) considerable benefits accrue even after the end of the agency relationship to the principal from his or her business relations with clients acquired by the agent, the agent has a claim for adequate compensation (compensation for clientele).²⁰ The amount of such claim must not exceed the net annual earnings from the contractual relationship calculated as the average for the last five years or, where shorter, the average over the entire duration of the contract.

According to the SFSC,²¹ this provision also applies per analogy to exclusive distribution agreements if the following conditions are met:

- a* the distributor is fully integrated into the distribution organisation; and
- b* the clientele is transferred to the principal after termination of the contractual term.

The majority of the legal doctrine is of the opinion, that this analogy may also apply to franchise agreements, as a franchisee is integrated in the organisation of the franchisor and the customers acquired by the franchisee are likely to remain with the franchise system or the franchisor after the contractual term. However, it is controversial and the SFSC has not yet issued a clarifying ruling.

VIII HOTEL MANAGEMENT AGREEMENTS

Hotel management agreements (HMA) are relatively rare in the Swiss hotel industry. Given the regulatory restrictions applying to Swiss institutional investors, hotel management agreements are mainly entered into by private or foreign real estate owners with industry expertise.

HMAs are not regulated under Swiss law (i.e., they are outside the legally provided contract types). Owing to this, different types of contracts provided for by law and their respective provisions may apply on a case-by-case basis. An HMA typically consists of elements of a rental and licensing contract as well as of some elements of a mandate contract.

The partly qualification as mandate contract under Swiss law regularly leads to the question of whether and to what extent mandate contract provisions, especially the right of termination pursuant to Article 404 CO, are applicable to HMAs. According to Article 404 CO, a mandate contract may be revoked or terminated at any time by either party. However, if the termination is deemed to be untimely (because, e.g., the counterparty has just hired new people to fulfil the mandate), the terminating party has to compensate for the damage to the other party.

This termination right is rather unfavourable for the parties of an HMA, since it is usually in the interests of the owner and the manager of a hotel to conclude an HMA for a fixed period of time (e.g., 10 or even more years). Often, the parties do not only enter into an HMA but also into other contracts – such as contracts regarding marketing services or trademark licence agreements – which are connected with the HMA and which reciprocally

19 Decision of the SFSC of 118 II 157, cons 2c.

20 Article 418u CO.

21 Decision of the SFSC BGE 134 III 497.

provide for automatic terminations. In practice, owing to the complex contractual relationship between the owner and the manager of a hotel, the right to terminate an HMA at any time is rather inappropriate.

The Swiss Federal Supreme Court has so far considered Article 404 CO as mandatory for contracts similar to mandate contracts. Consequently, for such contracts, Article 404 CO can neither be waived nor restricted. The reason given is the special relationship of trust between the contracting parties, which is why it would be unreasonable to expect the contract to be maintained in the event of a disturbance of trust, and, according to the SFSC, why it is essential to have the possibility of terminating the contract without notice. The Swiss legal doctrine has widely criticised this case law. According to the prevailing opinion among legal scholars, Article 404 OR should only apply to mandate contracts characterised by a special relationship of trust (e.g., contracts with doctors, lawyers or architects). Legal doctrine unanimously holds that Article 404 CO can be waived within HMAs. The SFSC has so far not decided upon the mandatory character of Article 404 CO specifically within HMAs. However, in any case, it is recommended that the parties explicitly exclude the right of termination at any time according to Article 404 CO.

Effects of the covid-19 pandemic on contracts

Against the background of the covid-19 pandemic and its economic effects, the question arises how contractual defaults related to the consequences of covid-19 have to be legally assessed. For example, questions as to whether certain obligations under a HMA may be (temporarily) suspended or whether payment obligations under a franchising or lease agreement can be modified became relevant in the course of the pandemic.

Many jurisdictions treat the unexpected extent of the covid-19 pandemic as *force majeure* event. Swiss law does not explicitly regulate *force majeure*. However, the principle is recognised in case law and is defined as exceptional and at the time of conclusion of the contract unforeseeable event, not attributable to the risk sphere or responsibility of one party, which cannot be prevented by applying due care. Usually, Swiss law governed HMAs or franchising agreements provide for specific *force majeure* clauses that define the term's scope of application and usually release the party affected by *force majeure* from its obligation to fulfil the contract, at least for a certain period, without entitling the opposite party to claim damages or to terminate the contract. Whether these clauses include pandemics depends on the actual wording in the individual contract. In addition, also the parties' rights in case of *force majeure* (e.g., suspension of contractual obligations, extraordinary right to terminate) may differ from contract to contract. Thus, whether or not the covid-19 pandemic is treated as *force majeure* event and what consequences such qualification has on contractual obligations will depend on the actual circumstances and the interpretation of the respective contract.

In the absence of a *force majeure* clause, general principles of Swiss contract law apply: If performance has become impossible due to circumstances beyond the affected party's control, this party is no longer obligated to fulfil its contractual obligation and respective considerations already provided from the other party are reversed. If the performance of the contract is, however, still possible, the principle of *clausula rebus sic stantibus* may apply. According to this principle, if the performance of the contract becomes excessively onerous for one party due to special circumstances, the judge may adequately adapt the contract at his or her discretion, provided that the change of circumstances occurred after the time of conclusion of the contract and the change of circumstances have not been taken into account when concluding the contract and, therefore, the risk of the change of circumstances is not

to be borne by the party affected. In practice, the bar to meet these prerequisites is very high, but the effects of the covid-19 pandemic on certain contracts may fulfil these requirements. However, a conclusive assessment can only be made on the basis of the specific circumstances and the wording of the contract in question.

IX FINANCING

Investors typically finance the acquisition or construction of a hotel property by means of a mortgage loan provided by a Swiss or foreign bank. As collateral for the loan, the bank receives mortgage certificate encumbering the real estate. In addition, the lender might ask for an assignment or pledge of the rental income. In the case of a default of the debtor and a subsequent enforcement and realisation of the real property, any lease agreements are simultaneously transferred to the buyer of the real estate pursuant to Swiss statutory law. Only in exceptional cases, if the claims of the mortgage secured creditors would otherwise not be covered by the sales proceeds, is there an extraordinary right to terminate the lease agreement prematurely. If the hotel is operated under a management agreement, such management agreement would not by law be transferred to a new owner of the real estate (e.g., in the case of a realisation in debt enforcement proceedings). In this scenario, a non-disturbance agreement between lender, debtor and manager would be advisable. However, non-disturbance agreements are quite rare in Switzerland since management agreements are also relatively rare.

When hotel operators (e.g., lessees) take out debt financing, they would typically enter into short-term loans or bank overdrafts.

The Swiss Society for Hotel Loans provides know-how to hotels with respect to financing and supports hotel financing in cooperation with the Swiss Federation, banks and other financial institutions and cantons.

X EMPLOYMENT LAW

Employment relationships in Switzerland are essentially governed by the CO. The individual employment contract is extensively regulated with regard to its content. Still, public law also has a considerable impact on private employment relationships. The Swiss Labour Act (and the various ordinances thereto), for example, regulates in detail, inter alia, the maximum weekly working hours, the requirements and conditions of night and Sunday work, as well as the protection of pregnant and minor employees also for private employment relationships. For the hospitality industry, a collective bargaining agreement (CBA) is in force.²² This CBA applies to all establishments offering hospitality and their employees. Establishments are considered to be hospitality establishments if they accommodate persons for a fee or offer meals or drinks for consumption on the premises. Not subject to the CBA are employees of such establishment who, on the basis of their position and responsibility and also depending on the size of the company – have extensive decision-making powers or can exert a significant influence on decisions of major importance and thus have a lasting impact on the structure, course of business, and the development of the company (e.g., hotel managers are usually not within the scope of the CBA). Furthermore, students from professional schools (e.g., hotel management schools) and apprentices are also not subject to the CBA.

22 See under <https://l-gav.ch/vertrag-aktuell> (available in German, French and Italian).

The CBA for the hospitality industry contains, *inter alia*, provisions regarding probationary period, dismissal, salary (minimum salary, 13th month salary and payment modalities), working hours, rest periods and vacation. The applicable minimum salary stated in the CBA depends on the employee's education and currently ranges between 3,470 and 4,910 Swiss francs.

Any employment contract concluded for an indefinite period of time may be unilaterally terminated after a notice given by either party (ordinary termination). Statutory notice periods range from one to three months depending on the length of service. Accordingly, the CBA provides for a notice period from one to two months. These notice periods may generally be altered by mutual consent, provided they are the same for both the employer and the employee. As a general rule, an employment contract for an indefinite period may basically be terminated by either party at will. The termination of an employment relationship generally neither requires a specific reason nor the consent of an authority. However, Swiss statutory law provides for protection from termination in certain cases, and further distinguishing between an abusive and an untimely notice of termination.

Abusive notice of termination: there are certain constellations in which a termination is considered abusive (e.g., 'revenge termination', discriminating termination or violation of the employer's duty of care). Even an abusive termination is valid, and the employment relationship ends with the expiry of the applicable notice period. However, a party abusively terminating the employment relationship must pay an indemnity that may be up to the employee's salary for six months.

Untimely notice of termination: there are certain periods during which a termination of the employment relationship is considered untimely and, therefore, invalid, in particular while the employee is sick or pregnant.

In particular, employment contracts with management employees often provide for a bonus entitlement of the employee subject to the condition that the employee is still in an unterminated employment relationship at the payout date. When determining whether the payout of the bonus may indeed be made subject to the condition of an existing and non-terminated employment relationship at the payout date, the crucial factor is whether the bonus in question must be considered a gratification or a (variable) salary or salary component, respectively. It is inadmissible to make a salary component subject to such a condition, even if according to the employment contract, the payment of a bonus is at the employer's discretion. By contrast, such reservation is possible for a gratification.

The criterion of demarcation between a salary component and a gratification is, whether the employer has discretion with regard to bonuses. A salary exists if the occurrence and amount of a bonus can be determined objectively, so the employer has no discretion. A second criterion of demarcation is the ratio between the amount of the base salary and the amount of the bonus. If the bonus compared to the base salary is not accessory, a bonus qualifies as salary.²³ Against this background, the set-up of bonus schemes and the wording of bonus clauses in employment contracts require particular consideration.

If a hotel is operated under a management agreement, the hotel employees are often formally employed by the owner of the hotel. From an employment law perspective, it must

23 For very high incomes, the second criterion of demarcation of accessoriness (the ratio between the amount of the base salary and the amount of the bonus) is not relevant. The threshold is set at a total compensation of five times the Swiss median wage (78,024 francs), see under <https://www.bfs.admin.ch/bfs/en/home/statistics/work-income/wages-income-employment-labour-costs.html>.

be taken into account that in this situation the right to give instructions must be delegated to the operating company (i.e., hotel manager) by the formal employer (i.e., owner). However, there is no clear case law on the question of whether a delegation by means of a power of attorney by the formal employer is sufficient. Therefore, it is desirable to expressly provide for a corresponding delegation of the right to give instructions in the employment agreements between the formal employer and the employees. As regards the delegation of the right to give instructions, the determination of targets within the framework of bonus programmes may also be transferred to the operating company. Furthermore, it is – for the sake of clarity – desirable to extend the duty of loyalty under employment law with regard to the safeguarding of the interests of the operating company in the employment contract. It is also advisable to agree to release the concerned employee of the owner from the obligation of confidentiality towards the operating company.

XI DISPUTE RESOLUTION AND MANAGEMENT

The parties are free to agree upon the applicable law in a hotel management agreement and also in a hotel lease agreement. Hotel management agreements in Switzerland are often subject to Swiss law or to the law of one of the parties. Typically, hotel management agreements provide for a dispute resolution by arbitration and, for certain matters, by expert determination. If the hotel management agreement is subject to Swiss law, it is advisable to agree upon arbitration proceedings in Switzerland as it is more convenient to have local arbitrators familiar with Swiss law, and Switzerland is a renowned arbitration place.

Arbitration is not very common in hotel lease agreements, although Swiss law does allow arbitration clauses in commercial lease agreements. Typically, disputes in lease matters are brought before the local state court at the place of the hotel.

Hotel operators are liable for any damage, destruction or misappropriation of personal belongings brought onto the premises by their guests unless they can prove that such loss or damage is attributable to the guest him or herself or to visitors, companions or staff or to *force majeure*. This liability is limited to a maximum of 1,000 Swiss francs per guest; a liability of the hotel operator for damages exceeding 1,000 Swiss francs per guest requires negligence or intent. If a guest does not hand over valuables or major sums of money to the hotel operator for safekeeping, if this can be reasonably expected, the hotel operator is only liable for a loss in case of negligence or intent. As an illustration, the SFSC dealt in 2017 with a case where a guest had been robbed in the room and valuable jewellery was stolen.²⁴ The court held that it could be expected of a guest in a five-star hotel to deposit valuable jewellery in the hotel's central safe rather than the safe in the room, even more so as the possibility to use the central hotel safe was mentioned in the hotel information. Therefore, it reduced the amount of damages by 50 per cent arguing that the hotel guest was also partly at fault.

On 19 October 2015, the Swiss Competition Commission (ComCo) rendered a noteworthy decision regarding hotel booking platforms (Booking.com, HRS and Expedia). These online platforms obliged the hotels in their contracts to either offer no better conditions to a third party than to the booking platform, or to also offer the best conditions offered to third parties to the online platform. Such clauses are called most favoured nation clauses (MFN) or price parity clauses.

24 Federal Supreme Court decision of 10 February 2017 (4A_341/2016).

The ComCo considered that wide MFN, prohibiting hotels from offering their rooms cheaper on any other distribution channel, were considered unlawful under Swiss competition law and their use was prohibited. However, they did not lead to direct sanctions.

The ComCo did not decide whether narrow MFN, which were newly introduced by online booking platforms Europe-wide, raised competition concerns or not. The authority reserved the right to become active in this field again at a later stage. Narrow MFN do not restrict the pricing of hotels with regard to different online booking platforms. However, narrow MFN restrict the hotel from offering the rooms at lower prices on their own website compared to the offer on the platform.

Furthermore, the ComCo found 'strong indication' for a dominant position of Booking.com in the national market for the placement of hotel bookings between hotels and end customers over online platforms. However, the authority could not prove an abuse of such potential dominant position. Therefore, the ComCo closed the investigation with regard to the allegation of an abuse of a dominant position.

By way of a parliamentary intervention, the Motion Bischof was filed on 30 September 2016, and accepted by both chambers of the parliament. The Federal Council must now draft the required legal adjustments to prohibit any type of price parity clauses (including narrow MFN) in agreements between online-booking platforms and hotels. From November 2020 until February 2021, the Federal Council opened a consultation procedure for an amendment of the UCA (article 8a), which would prohibit price-fixing clauses in the general terms and conditions of online-booking platforms for accommodation services. As a result, also narrow MFN would be prohibited by law. During the consultation, various hotels suggested extending the ban of price-fixing clauses to parity clauses in general in order to avoid loopholes. As a next step, the Federal Council will present its report on the findings of the consultation procedure.²⁵ This development is being closely followed in the hotel industry, as it might offer hotel operators more freedom in pricing again and reduce the (de facto) dependence on booking platforms.

XII OUTLOOK

Given its attractive geographical and economic situation, Switzerland is an interesting and growing hotel market. The Swiss legal system is very stable and generally rather liberal; there are no significant barriers to entry into the Swiss hotel market. Hotels are predominantly operated under lease agreements, whereby the amount of hotel management agreements is continuously increasing. When building and operating a hotel in Switzerland the regulations regarding building and zoning law, labour law and data protection, among others, must be observed.

Due to the effects of covid-19 on tourism and international travel, Swiss hotels had to take a sharp decline in sales in recent months. This affected in particular business and city hotels, whereas touristic hotels could partly compensate the loss of foreign guests with an increase of domestic tourists. The ongoing challenges raised by covid-19 are expected to lead to certain market corrections that will eventually create opportunities for stronger and growing operators.

25 The current status of the consultation proceedings is available on: https://fedlex.data.admin.ch/eli/dl/proj/6020/68/cons_1.

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