



# ICLG

The International Comparative Legal Guide to:

## Franchise 2015

**1st Edition**

A practical cross-border insight into franchise law

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## Published by

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London SE1 3PL, UK  
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## GLG Cover Design

F&F Studio Design

## GLG Cover Image Source

iStockphoto

## Printed by

Information Press Ltd  
January 2015

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No photocopying

ISBN 978-1-910083-28-4

ISSN 2055-8082

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# Sweden

Sagell & Co. Advokatbyrå AB

Dan-Michael Sagell



## 1 Relevant Legislation and Rules Governing Franchise Transactions

### 1.1 What is the legal definition of a franchise?

Since 2006 there has been a disclosure law called the Act on Franchisor's Obligations to Inform Franchisee (2006:484), which regulates the information a franchisor must disclose within a reasonable time and before a potential franchisee signs the franchise agreement. This law contains the following legal definition of a franchise agreement:

"A franchise agreement is an agreement by which an enterprise agrees with a party that the party against consideration shall use the specific business model of the enterprise regarding the marketing and selling of products or services, and shall use the trademarks and the proprietary rights of the enterprise, and accepts regular controls that the franchise agreement adheres to."

### 1.2 What laws regulate the offer and sale of franchises?

There is no particular law that regulates the offer and sale of franchise. Such offer and sale is covered by the general commercial laws that govern business contracts.

### 1.3 Are there any registration requirements relating to the franchise system?

There are no particular registration requirements regarding a certain business just because the business is operating under a franchise system.

### 1.4 Are there mandatory pre-sale disclosure obligations?

The Swedish disclosure law states that the franchisor shall provide information about the implication of the franchise agreement and about any other conditions that are needed concerning the circumstances in question, in good time before the signing of the franchise agreement.

The information shall be in writing, clear and understandable and shall, as a minimum, contain the following:

1. A description of the franchise business model that is to be operated by the franchisee.
2. Information about the other franchisees in the franchise chain and the size of their businesses.

3. Information about the payments the franchisee shall make to the franchisor and about the other financial conditions in the franchise agreement.
4. Information about the intellectual and proprietary rights that are to be licensed to the franchisee.
5. Information about the products and services that the franchisee is obligated to buy or lease.
6. Information about any non-competition clause that is to be valid during the term of the franchise agreement or after the expiration of the agreement.
7. Information about the term of the franchise agreement, the conditions for amendments, prolongation and termination of the franchise agreement and about the financial consequences connected with the termination of the franchise agreement.
8. Information about the dispute resolution rules in the franchise agreement and how the costs for such dispute resolution shall be finally distributed between the parties.

Said information shall also be handed over when the franchise agreement is to be transferred with the consent of the franchisor from the present franchisee to a new franchisee.

However, the list above is only a minimum requirement. The law requires also that if there is a clause in the franchise agreement that can be seen as particularly financially onerous upon the franchisee, such clause must also be disclosed beforehand.

### 1.5 Do pre-sale disclosure obligations apply to sales to sub-franchisees? Who is required to make the necessary disclosures?

The pre-sale disclosure obligations are also applicable to a sub-franchise, and it is the master franchisee that must hand over the information in question to its potential sub-franchisees.

### 1.6 Is the format of disclosures prescribed by law or other regulation, and how often must disclosures be updated? Is there an obligation to make continuing disclosure to existing franchisees?

The only format of disclosure that is prescribed by the law is that the information is handed over in writing and in understandable language.

Since it is the franchisor who has the burden of proof in a dispute whether the franchisee has been informed according to the law or not, it is advisable that the franchisor sees to it that the franchisee signs a receipt confirming that the information has been received in good time before the signing of the franchise agreement.

There is no obligation to make continuing disclosure to existing franchisees.

### 1.7 Are there any other requirements that must be met before a franchise may be offered or sold?

No, there are no other such requirements that must be met just because it is a franchise.

### 1.8 Is membership of any national franchise association mandatory or commercially advisable?

No, membership of a national franchise association is not mandatory, but could be commercially advisable because such membership says to the potential franchisee that the franchisor is prepared to follow not only the disclosure law but also the ethical rules of the national franchise association.

### 1.9 Does membership of a national franchise association impose any additional obligations on franchisors?

Yes, membership of the Swedish Franchise Association (*Svenskfranchise*) means that the franchisor must comply with the ethical rules of that association. These ethical rules are identical to the ethical code of the European Franchise Federation (EFF), called the European Code of Ethics for Franchising ([www.eff-franchise.com](http://www.eff-franchise.com)).

### 1.10 Is there a requirement for franchise documents or disclosure documents to be translated into the local language?

No, the legal requirement in the disclosure law is that such a document shall be understandable for the potential franchisee in question. However, the European ethical code requires that the franchise agreement be translated into the official language of the country in which the franchisee is established. However, as many business people in Sweden understand English today, it is fairly common for franchise agreements as well as disclosure documents written in plain English to be considered acceptable.

## 2 Business Organisations Through Which a Franchised Business can be Carried On

### 2.1 Are there any foreign investment laws that impose restrictions on non-nationals in respect of the ownership or control of a business in Sweden?

No, a company or person that is registered in or a citizen of a country within the EU Common Market or the European Economic Area (EEA) can start or buy a business in Sweden without any restrictions. The same can be said with regard to companies or persons from outside the Common Market or the EEA but, for instance, a Swedish company owned by such a company/person must have a person on its board of directors who is domiciled within the EU or EEA.

### 2.2 What forms of business entity are typically used by franchisors?

A franchisor is typically a limited liability company (*Aktiebolag*) with no personal liability for its owners.

### 2.3 Are there any registration requirements or other formalities applicable to a new business entity as a precondition to being able to trade in Sweden?

No, there are no such general formalities except for the formalities required to form a company if trade is to be made through the company, and the tax formalities, and the formalities required for the particular trade in question, for instance with respect to health issues. But, there are very few kinds of trade in Sweden that need a licence or a permit from the authorities before they start being conducted.

## 3 Competition Law

### 3.1 Provide an overview of the competition laws that apply to the offer and sale of franchises.

There are no competition laws that apply to the offer and sales of franchises. With regard to Swedish competition laws, these are identical to the competition laws applied by the EU Common Market.

### 3.2 Is there a maximum permitted term for a franchise agreement?

No, but the common term for a franchise agreement in Sweden is 5 years with the option for the franchisee to sign a new franchise agreement for an additional 5-year period. The reason for the 5-year period is that there are competition laws that say that you cannot, for a period longer than 5 years, restrict a business (a franchisee) in a contract to only buying from suppliers appointed by the franchisor and/or only selling certain products in its business to a third party.

### 3.3 Is there a maximum permitted term for any related product supply agreement?

No, there is not. If there is not a fixed end date in the agreement, either party has the right at any time during the life of the agreement to terminate the agreement within a reasonable notification period. The longer the time such an agreement has existed, the longer the notification period must be.

### 3.4 Are there restrictions on the ability of the franchisor to impose minimum resale prices?

Yes, a franchisor cannot impose upon the franchisee, or by other means determine, the minimum price at which the franchisee sells its product or service to its customers. The franchisor is entitled to have recommended resale prices but it must be clear that the franchisee is free to deviate from the recommended prices. However, there is one exemption to this rule and that is that the franchisor is allowed to determine the maximum resale prices.

### 3.5 Encroachment - are there any minimum obligations that a franchisor must observe when offering franchises in adjoining areas or streets?

No, there are not.

### 3.6 Are in-term and post-term non-compete and non-solicitation of customers covenants enforceable?

Yes, in-term non-compete and non-solicitation of customers covenants

are enforceable as long as the agreement is in force. Such covenants are also valid for a time period of 6 months, but sometimes also up to 2 years after the termination of the agreement. The length of this time period depends on the type of business in question. If a longer time period is needed post the agreement, the ex-franchisee must then be compensated in some form for this restriction upon its business, to avoid the longer time period being deemed unreasonable and thus null and void.

## 4 Protecting the Brand and other Intellectual Property

### 4.1 How are trade marks protected?

A trade mark is protected by registration, or by the use of the fact that the trade mark owner can prove that the trade mark in question is well-known within the majority of its the market. But, since the latter can be difficult to prove in a court dispute against an infringer, the recommendation is that the trade mark should be registered in order to get protection.

Trade mark registration is made at the Swedish Patent and Registration Office, is valid for a period of 10 years, and can be renewed for additional 10-year periods. Sweden has ratified the Protocol Relating to the Madrid Agreement on the International Registration of Marks, and recognises European Community Trademarks.

### 4.2 Are know-how, trade secrets and other business-critical confidential information (e.g. the Operations Manual) protected by local law?

Yes, they are protected by law and by non-disclosure agreements or non-disclosure clauses in agreements, but it is very important to also treat this information as confidential by protecting the information physically, by having the information accessible only within restricted areas and/or by only granting a limited group of persons access to the information, and finally, by using visible signs to brand the documents (e.g. the Operations Manual) as trade secrets and confidential information.

### 4.3 Is copyright (in the Operations Manual or in proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement) protected by local law?

Yes, the Operations Manual and the software are automatically protected under copyright law. There is no need for registration.

## 5 Liability

### 5.1 What are the remedies that can be enforced against a franchisor for failure to comply with mandatory disclosure obligations? Is a franchisee entitled to rescind the franchise agreement and/or claim damages?

The only remedy provided by the Swedish disclosure law is that a franchisor failing to provide information that should be disclosed can be ordered by the court to provide this information and to amend its

disclosure document accordingly for its future usage and, if not complying with this order, can be ordered by the court to pay a penalty sum to the government. Unfortunately, the franchisee that has not received the information is not entitled to rescind the franchise agreement and/or claim damages.

Furthermore, the absence of such information could, according to the preparatory work behind the disclosure law, give a franchisee a good argument for pleading that an onerous clause in his agreement should be declared by the court or the arbitrator to be unreasonable and thus null and void under section 36 of the Swedish Contract Act, because he or she had not been informed about this clause. If the court then rules in favour of this franchisee, the clause in question can no longer be enforced by the franchisor, but the franchise agreement will still be valid except for this clause. However, this argument and such a case have yet to be tested before a district court and eventually the Swedish Supreme Court in order to establish a precedent for such an argument and ruling.

### 5.2 In the case of sub-franchising, how is liability for disclosure non-compliance or for misrepresentation in terms of data disclosed being incomplete, inaccurate or misleading allocated between franchisor and franchisee? If the franchisor takes an indemnity from the master franchisee in the Master Franchise Agreement, are there any limitations on such an indemnity being enforceable against the master franchisee?

If there are clauses – and there should be – in the master franchise agreement stating that the master franchisee must comply with local laws, including local disclosure laws, and the master franchisee fails to do so in relation to its sub-franchisee, the franchisor has the right to indemnify the master franchisee. However, if this failure is due to actions or omissions by the franchisor, then it can be seen as unreasonable to indemnify the master franchisee.

The sub-franchisee has no case against the franchisor under the disclosure law and by the fact that they are not bound to each other by an agreement between them.

### 5.3 Can a franchisor successfully avoid liability for pre-contractual misrepresentation by including disclaimer clauses in the franchise agreement?

No. A party to a contract cannot be free from liability for any false statements that have misled the other party to enter into the contract in question. Such an agreement is rescinded by the court, provided that the other party has proved that it decided to enter into the contract based on a representation that has turned out to be a misrepresentation.

### 5.4 Does the law permit class actions to be brought by a number of allegedly aggrieved claimants and, if so, are class action waiver clauses enforceable despite the expense and inconvenience of individual arbitrations?

Yes, class actions can be initiated but are so far rare in Sweden. The validity of a clause in a franchise agreement preventing the franchisee to be part of a class action has not yet been tried by a court in Sweden. However, arbitration clauses in franchise agreements are valid.

## 6 Governing Law

### 6.1 Is there a requirement for franchise documents to be governed by local law? If not, is there any generally accepted norm relating to choice of governing law, if it is not local law?

The franchisor and the franchisee are, under the freedom of contract principle, free to decide the law that shall govern the franchise agreement and shall be applicable when solving a dispute between them. They can also decide whether the trial shall take place in Sweden or somewhere else.

### 6.2 Do the local courts provide a remedy, or will they enforce orders granted by other countries' courts, for interlocutory relief (injunction) against a rogue franchisee to prevent damage to the brand or misuse of business-critical confidential information?

Yes, the Swedish courts can do that if the decision of the other country's court is not against *ordre public*.

A court injunction in Sweden does generally demand that the party seeking an injunction put forward a security before the court in order to protect the party being stopped by the injunction, if the following lawsuit and trial regarding the main issue ends with a ruling that this party has not done anything wrong, and subsequently has the right to be compensated for the stoppage of its business. The security shall cover such compensation sum. Additionally, an injunction in Sweden must be followed by a lawsuit within a few weeks following the injunction. If not, the injunction will be lifted.

## 7 Real Estate

### 7.1 Generally speaking, is there a typical length of term for a commercial property lease?

The typical length of term for a commercial property lease is 3 or 5 years with an automatic extension for 3 or 5 years each time, if none of the parties have notified their termination of the lease agreement at the latest 9 months prior to the expiration of the then current lease period of 3 or 5 years.

If the tenant has been notified properly, it has to move out of the premises when the lease agreement expires, but the tenant then has the right, provided the termination is not due to the tenant's breach of contract or the landlord does not have a reasonable cause for the termination, to a compensation sum from the landlord that is, at the minimum, equal to the rent the tenant paid during the last year of the lease; or the tenant is entitled to a new location, provided by the landlord, which shall be similar to the existing premises. However, the tenant can, in a separate written document, waive these rights of compensation and of relocation to other premises.

### 7.2 Is the concept of an option/conditional lease assignment over the lease (under which a franchisor has the right to step into the franchisee/tenant's shoes under the lease, or direct that a third party (often a replacement franchisee) may do so upon the failure of the original tenant or the termination of the franchise agreement) understood and enforceable?

This concept is enforceable between the franchisor and the franchisee/tenant; but with regard to the landlord it is not

enforceable. The landlord must give its consent to this change of tenants in order for the concept to be enforceable against the landlord.

The landlord can only under certain circumstances be overruled by a government body with the competence to rule over disputes between landlord and tenant (*Hyses- och arrendenämnden*) if the present tenant has had the lease for at least three years and the incoming tenant takes over the business from the outgoing tenant that has been conducted on the premises in question.

### 7.3 Are there any restrictions on non-national entities holding any interest in real estate, or being able to sub-lease property?

No; please see questions 2.1 and 2.2.

### 7.4 Give a general overview of the commercial real estate market. Specifically, can a tenant reasonably expect to secure an initial rent free period when entering into a new lease (and if so, for how long, generally), or are landlords demanding "key money" (a premium for a lease of a particular location)?

Under the principle of freedom of contract, a landlord and a tenant are free to negotiate the terms of the lease agreement, including a rent free period and key money.

## 8 Online Trading

### 8.1 If an online order for products or request for services is received from a potential customer located outside the franchisee's exclusive territory, can the franchise agreement impose a binding requirement for the request to be re-directed to the franchisee for the territory from which the sales request originated?

No, the franchise agreement can state that the franchisee cannot actively solicit business outside its exclusive territory, but the agreement cannot state that the franchisee is prohibited from selling to a customer outside the exclusive territory, if the customer in question wants to do business with this franchisee.

### 8.2 Are there any limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement?

No, there are no such limitations in Sweden.

## 9 Termination

### 9.1 Are there any mandatory local laws that might override the termination rights that one might typically expect to see in a franchise agreement?

No, there are no such laws in Sweden.

## 10 Labour Laws

- 10.1 Is there a risk that a franchisee or a franchisee's employees might be treated as the employees of the franchisor, so that the franchisor has vicarious liability for their acts and omissions? If so, can anything be done to mitigate this risk?**

The Swedish court which has the competence to solve disputes between employer and employee (*Arbetsdomstolen*) has tried the issue concerning whether a franchisee is an independent contractor or an employee, and has ruled that a franchisee is an independent contractor. Some of the most important factors for this decision were that the franchisee was a limited liability company (*aktiebolag*), a company cannot be an employee, and there are no circumstances in any particular case whereby the forming of a company is only made with the purpose of circumventing labour laws.

Therefore, when an employer tells its employee to form a company and carry out its duties as before, but now through this company, in accordance with a franchise agreement, a court may conclude from this action that there is still an employer-employee relationship between these parties.

## 11 Currency Controls and Taxation

- 11.1 Are there any restrictions (for example exchange control restrictions) on the repatriation of royalties to an overseas franchisor?**

No, there are no such restrictions.

- 11.2 Are there any mandatory withholding tax requirements applicable to the payment of royalties under a trade mark licence or in respect of the transfer of technology? Can any withholding tax be avoided by structuring payments due from the franchisee to the franchisor as a management services fee rather than a royalty for the use of a trade mark or technology?**

No, there is only a withholding tax regarding dividends that are paid to shareowners domiciled abroad.

- 11.3 Are there any requirements for financial transactions, including the payment of franchise fees and royalties, to be conducted in local currency?**

No, there are no such requirements.

## 12 Commercial Agency

- 12.1 Is there a risk that a franchisee might be treated as the franchisor's commercial agent? If so, is there anything that can be done to help mitigate this risk?**

No; only if the franchise agreement has clauses that mean it falls under the Agency Act (1991:351). This act is based on EU law. The court disregards what the agreement is called by the parties. The court looks at the real character of the agreement.

## 13 Good Faith and Fair Dealings

- 13.1 Is there any overriding requirement for a franchisor to deal with a franchisee in good faith and to act fairly according to some objective test of fairness and reasonableness?**

There is no such objective test, but a franchisor shall deal with a franchisee in good faith and act fairly by following the general principles that are embedded in all commercial agreements meaning that each party must be loyal to the other and make its best efforts to meet its obligations. If not, that could be seen as a material breach of the contract, giving the other party the right to terminate the contract prematurely and claim damages.

## 14 Ongoing Relationship Issues

- 14.1 Are there any specific laws regulating the relationship between franchisor and franchisee once the franchise agreement has been entered into?**

No. This relationship is governed by general commercial laws and precedents.

## 15 Franchise Renewal

- 15.1 What disclosure obligations apply in relation to a renewal of an existing franchise at the end of the franchise agreement term?**

There are no such obligations.

- 15.2 Is there any overriding right for a franchisee to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term irrespective of the wishes of the franchisor not to renew or extend?**

No, there is no such right.

- 15.3 Is a franchisee that is refused a renewal or extension of its franchise agreement entitled to any compensation or damages as a result of the non-renewal or refusal to extend?**

No, it is not.

## 16 Franchise Migration

- 16.1 Is a franchisor entitled to impose restrictions on a franchisee's freedom to sell, transfer, assign or otherwise dispose of the franchised business?**

Yes, a franchisor is entitled to impose such restrictions.

**16.2 If a franchisee is in breach and the franchise agreement is terminated by the franchisor, will a “step-in” right in the franchise agreement (whereby the franchisor may take over the ownership and management of the former franchisee’s franchised business) be recognised by local law, and are there any registration requirements or other formalities that must be complied with to ensure that such a right will be enforceable?**

This remedy is recognised by Swedish law, if it is stated clearly in the franchise agreement. It does not require any registration or other formalities beforehand, although such a “step-in” can be seen as unreasonable if the franchisee’s franchised business is wealthy. The “step-in” clause should therefore be connected with some kind of compensation for the takeover, equal to an objective value of the franchised business at the time of this takeover.

**16.3 If the franchise agreement contains a power of attorney in favour of the franchisor under which it may complete all the necessary formalities required to complete a franchise migration under pre-emption or “step-in” rights, will such a power of attorney be recognised by the courts in the country and be treated as valid? Are there any registration or other formalities that must be complied with to ensure that such a power of attorney will be valid and effective?**

This power of attorney is recognised and does not need any registration or other formalities. A power of attorney can be given to a company. However, in order not to have it deemed unreasonable in a certain case, this power of attorney should be on a separate document appended to the franchise agreement instead of being hidden among all the sections and paragraphs of the franchise agreement.



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Sagell & Co. is a boutique firm and has developed first rate know-how about franchise law and about the related laws that a franchise system must consider in its day-to-day operations.

We also use our first rate know-how by giving advice to other types of joint ventures between independent companies and businesses. We are the legal counsel to several franchise systems in Sweden.

Sagell & Co. also serves franchisees, licensees and retailers.

The law firm provides assistance in business negotiations with the aim of reaching a win-win solution. We also assist in legal disputes with the aim of resolving such disputes in a business-orientated and constructive way.

Sagell & Co. has good relations with franchise consultants and franchise accountants so we can quickly form a team of advisors to set up a new franchise system, to establish a foreign franchise system in Sweden, or to convert an existing business into a franchise.

## Other titles in the ICLG series include:

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