

UNIDROIT 1999
Study LXVIII - Doc. 18
(English Only)

Unidroit

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
=====

STUDY GROUP ON FRANCHISING

DRAFTING COMMITTEE
First Session,
Rome, 14 – 16 January 1999

REPORT
(prepared by the Secretariat)

Rome, November 1999

TABLE OF CONTENTS

1.	INTRODUCTION	1
2.	SCOPE OF THE FUTURE MODEL LAW.....	1
3.	ARTICLE BY ARTICLE EXAMINATION OF THE WORKING DOCUMENT TEXT	2
	(i) Preamble (Purpose of the Law).....	3
	(ii) Article 1 Definitions.....	3
	(iii) Article 2 - Scope of Application	6
	(iv) Article 3 Purpose of Disclosure Document.....	6
	(v) Article 4 Persons obliged to Disclose	7
	(vi) Article 5 - Exemptions from Obligation to Disclose	8
	(vii) Article 6 - Handing over of Disclosure Document. Cooling Off Period.....	10
	(viii) Article 7 - Acknowledgement of Receipt of Disclosure Document	11
	(ix) New Article on Confidentiality.....	12
	(x) Article 8 - Language of Disclosure Document	12
	(xi) Article 9 - Form of the Disclosure Document	13
	(xii) Article 10 - Up-dating of Disclosure Document	13
	(xiii) Article 11 - Current Disclosure Document.....	14
	(xiv) Article 12 - Right of Action.....	14
	(xv) Article 13 - Burden of Proof	16
	(xvi) Article 14 - Sanctions	16
	(xvii) Article 15 - Items to be Disclosed.....	17
	(xviii) Article 16 - Good Faith and Fair Dealing	25
4.	OTHER ISSUES DISCUSSED	26
	ANNEX 1 LIST OF PARTICIPANTS.....	27
	ANNEX 2 TEXT OF THE DRAFT MODEL LAW AS ADOPTED BY THE DRAFTING COMMITTEE...	28

1. INTRODUCTION

The First Session of the new *Drafting Committee* of the *Study Group on Franchising* was held from 14 to 16 January 1999, at the seat of Unidroit in Rome.¹ Opening the meeting, **Mr Walter Rodinò**, Deputy Secretary-General of Unidroit, expressed the deep appreciation of the Institute for the invaluable contribution made by the members of the Study Group to the work of Unidroit on franchising. He expressed the deep regret of the organisation for its inability to provide more than a minimum funding for the project, despite the importance it attached to it. The willingness of the members of the Group to participate notwithstanding was all the more deeply appreciated in these circumstances. These words were echoed by **Mr Herbert Kronke**, Secretary-General of Unidroit, when he joined the Committee. Mr Kronke also conveyed the deep appreciation and gratitude of the Governing Council of the Institute to the members of the Study Group.

Mr Alexander Konigsberg and **Mr Michael Brennan** thanked the Secretary-General and Deputy Secretary-General for their words, and indicated that their commitment was also due to the very great urgency they perceived in finalising an international instrument on franchising. This urgency was felt in particular in view of the franchising legislation that had recently been adopted in a number of countries, which was regrettably often inadequate or even harmful to franchising. There was furthermore a risk that the increasing number of States that were contemplating adopting legislation on franchising would follow the example of these States. An instrument adopted under the auspices of Unidroit would provide legislators with a product of quality that would ensure that the legislation adopted assisted the franchising industry instead of hampering it. This view was strongly supported by both **Mr Schulz** and **Mr Binder**.

The urgency they perceived led **Messrs Konigsberg** and **Brennan** to propose that the Study Group stage in the preparation of the model law be completely by-passed and that the text that resulted from the meeting of the Drafting Committee be transmitted directly to a Committee of Governmental Experts. The **Secretary-General** indicated that this was not normal practice in Unidroit, but that the proposal would be transmitted to the Governing Council for consideration.

2. SCOPE OF THE FUTURE MODEL LAW

As regards the scope of the future model law, **Mr Kronke** asked the members of the Drafting Committee why they were proposing a model law on disclosure only, why they were not considering the whole relationship, in particular problem areas such as termination and its effects. He stated that this question was prompted by a consideration of the fate of a number of uniform law instruments that had been adopted in the past: all too often international conventions prepared on very narrow areas had resulted in failures, in the conventions remaining a dead letter. Taking office, he had therefore promised both himself and the Council that he would do his utmost to avoid the very scarce resources of the Institute being spent on projects that covered very narrow and very specialised areas. Disclosure he felt to be such a narrow field, in particular considering that the majority of disputes arose in relation to the termination of the franchise agreement. He himself would not be able to recommend the adoption of a model law that was limited to disclosure to any European legislator, as it dealt with what he saw as a very small part of a large area. He therefore asked the members of the Drafting Committee to provide him with the arguments he needed to justify the choice of disclosure as the only issue dealt with in the model law. He suggested that if there were a two-sided obligation of good faith and fair dealing, then a law on disclosure would probably not be necessary, as a duty to disclose would be implied in the requirement of good faith and fair dealing.

Mr Schulz stressed that a duty to disclose would not be implied in the requirement of good faith and fair dealing, as the disclosure requirement related to the pre-contractual stage. As was well-known, one of the major differences between the common law and continental civil law was that in the common law good faith and fair dealing governed the franchisor/franchisee relationship only during the term of the contract, whereas in Germany in particular it applied also to the pre-contractual stage, as it came under the *culpa in contrahendo* concept. In his experience disclosure was what was most important. Everything else that a contract contained was regulated by existing legislation, with the consequence that for the contractual relationship as such, no new legislation was required.

¹ A list of participants appears as Annex 1 to this Report.

Mr Brennan added that although disclosure might seem to be a narrow area, in reality it was not. For the franchising industry, for the phenomenon of franchising, it was extremely important. Furthermore, it was probably the only important issue on which it would be possible to arrive at a consensus in the next twenty years, as there was no agreement on broad principles as applied to franchising other than freedom of contract and presale disclosure. Franchising was very varied in nature. Once one went beyond the definition of the fundamental elements of franchising, it was very difficult to find common threads or to find legal principles that would make sense across a very broad spectrum of businesses and contractual terms that fell under the loose umbrella of franchising.

Mr Binder stressed that the most important element of the proposed model law was the definition it contained. For the first time outside competition law there was a definition of a franchise system, of a franchisor, of a franchisee. The importance was due to the fact that this law would constitute the first level of protection for franchising opportunities in countries where there was no disclosure law, no franchising law, and where the level of protection in areas such as intellectual property and labour law was not sufficiently high. He stressed that the proposed regulation of disclosure was very important, because in most courts decisions had to be rendered in the light of or interpreting what the intentions of the parties had been at the beginning of the contract. A disclosure law was therefore much more important in its effects than in the list it contained of the information that had to be provided before the contract was signed.

Mr Konigsberg felt that the issue had to be considered in a historic perspective. In the 70's and 80's no country in the world had franchise legislation except the United States, which had it at federal level in the Federal Trade Commission's Rule and at state level in about fifteen states, and the province of Alberta in Canada. There was a misconception in many developing countries that if franchising was successful in the USA this was as a result of the legislation, whereas in reality it was successful in spite of the legislation. In Canada, what had transpired over time was that there were no fewer problems in Alberta than there were in the rest of Canada. There was no historic evidence that legislation helped franchising. Many legislators wanted to legislate franchising because the agreement was one-sided, but if it was a one-sided agreement this was because there were three parties: the franchisor, the franchisee and the network. Someone had to protect the network and its members, and to do that it was necessary for the agreement to be one-sided. He pointed out that Alberta had changed its legislation to depart totally from the registration requirements and the regulation of relationship issues to concentrate solely on disclosure. There were countries that had adopted franchise legislation that purported to be disclosure legislation, but that went one step further, and in his view this would be the death of franchising in those countries. Furthermore, good faith and fair dealing did not apply to disclosure, it only impacted the relationship following disclosure.

Mr Brennan added that there was a tendency also in the United States for the state legislatures to modify franchise legislation to make it less regulatory of relationship issues. This was the case in, for example, Illinois, Michigan and Wisconsin.

3. ARTICLE BY ARTICLE EXAMINATION OF THE WORKING DOCUMENT TEXT

In order to speed up and facilitate the deliberations of the Drafting Committee the Secretariat had prepared a first preliminary draft model law. This preliminary draft was based on existing legislation and was intended to cover the issues most frequently dealt with in that legislation. The text of the preliminary draft is reproduced at the beginning of the sections dealing with the single articles. The text of each article as finally adopted is reproduced at the end of the section dealing with it. As the order of the articles was changed, the final text of each article indicates its new number. Annex 2 to this report contains the entire text of the draft as finally approved by the Drafting Committee.

Opening the discussion on the draft text, **Mr Bonell** noted that the working paper was based on existing legislation and stated that he found it unconvincing, as it was un-technical and clearly questionable from the point of view of consistency and systematic order. A number of very sensitive issues were raised, such as cooling-off periods, pre-contractual liability and post-contractual rights of withdrawal from the contract. He felt that in the drafting consideration should be given also to, for example, European Community legislation on consumer transactions and the Unidroit *Principles of International Commercial Contracts*. The latter might not be of express relevance to the franchising

draft, but if Unidroit was to embark on this exercise, then it should take account of past experience in contract law and revise the draft in the light of this experience, where appropriate.

(I) PREAMBLE (PURPOSE OF THE LAW)

The purpose of this law is:

(1) to promote fair dealing among the participants in franchising;

(2) to provide a means by which franchisors and franchisees are able to govern themselves; and

(3) to assist prospective franchisees in making informed investment decisions by requiring the timely disclosure of necessary information.

In addition to the above text, a question submitted to the Committee was whether the model law should apply only to pre-contractual disclosure, or whether it should apply also to the exchange of information that might be necessary subsequent to the conclusion of the agreement, in fact throughout the relationship. This question was not discussed in detail by the Committee.

It was felt that it would be useful to have a statement of principle at the beginning of the model law. The wording should however ensure that there was no confusion between the purpose of the law itself and the purpose of the disclosure document referred to in the law.

In the end, it was decided to delete paragraphs (1) and (2) of the Preamble, but to keep paragraph (3) with a new formulation derived from Article 3. Consequently, it was decided to delete Article 3.

The text of the Preamble as finally adopted reads as follows:

**PREAMBLE
(PURPOSE OF THE LAW)**

The purpose of this law is to assist prospective franchisees in making an informed decision as to whether or not to enter into a franchise agreement by requiring the franchisor to provide timely disclosure of necessary and accurate information on the franchisor and the franchised business.

**PREAMBULE
(OBJET DE LA LOI)**

La présente loi a pour objet de permettre aux éventuels franchisés de décider en connaissance de cause de s'engager ou non dans un contrat de franchise, en exigeant que le franchiseur fournisse, en temps utile, des informations nécessaires et précises sur lui-même et sur son activité commerciale franchisée.

(II) ARTICLE 1 DEFINITIONS

For the purposes of this law:

*a **disclosure document** is the document by which the franchisor transmits to the prospective franchisee information regarding itself and its history, the franchise system it has created, and the franchise network and its members;*

*a **franchise** includes the rights and obligations under a franchise agreement, a master franchise, and a sub-franchise;*

*a **franchisee** is the person to whom a franchise is granted and includes a sub-franchisee;*

*a **franchise agreement** is an agreement under which a person (the franchisor) grants to another person (the franchisee) the right to engage in the business of selling, offering for sale or distributing goods or services under a system or marketing plan in whole or in part [substantially] determined by the franchisor, that is substantially associated with a trademark, service mark, trade name or logotype of the franchisor or designating the franchisor, and that involves a continuing financial obligation to the franchisor by the franchisee and significant continuing*

operational controls by the franchisor on the operation of the franchised business and most frequently the payment of a franchise fee;

*a **franchise system** is a business system developed by a franchisor and which the franchisor grants a franchisee the right to use;*

*a **franchisor** is a person who has developed a system of doing business (the franchise system) and grants another person (the franchisee) the right to do business following this system under the terms of a franchise agreement, and includes a sub-franchisor;*

***master franchising** involves the franchisor granting another person (the sub-franchisor) the right within a certain territory to grant franchises to sub-franchisees and/or to open franchise outlets itself;*

*a **master franchise agreement** is the agreement by which a franchisor grants a master franchise to a sub-franchisor;*

*a **sub-franchise** is a franchise granted by a sub-franchisor to a sub-franchisee;*

*a **sub-franchise agreement** is the agreement by which a sub-franchisor grants a sub-franchise to a sub-franchisee;*

*a **sub-franchisee** is the person to whom a sub-franchise is granted by a sub-franchisor; and*

*a **sub-franchisor** is the person to whom the franchisor has granted a master franchise and who as a consequence thereof has the right to grant sub-franchises to sub-franchisees and to open franchise outlets itself.*

Mr Bonell observed that there was a general reluctance on the part of scholars to provide definitions. Of the definitions provided in the draft, a number could be deleted or moved. Furthermore he missed definitions of key concepts such as “domestic” as distinguished from “international”, “franchising relationship”, “sale of a franchise”, “associate”, “franchised business”, and “misrepresentation”. He suggested that “misrepresentation” was an example where one should to the greatest extent possible stick to the language used in general contract law.

Mr Konigsberg indicated that the whole notion of “domestic” versus “international” was irrelevant. The law would apply to any franchise agreement or relationship that was carried out in the country that adopted the law, irrespective of whether its origin was international or domestic. On the other hand, he was concerned that the distinction between above all a franchise and a license, but also between a franchise and a distribution or a representation agreement, should be clear, as should the fact that the model law did not cover these other agreements.

The discussion on the definition of a “franchise” centred on whether both a significant degree of control on the part of the franchisor, and assistance by the franchisor, were required, or whether only control would be sufficient. In North America only control would be considered essential, whereas in Europe also assistance was required, as the Block Exemption Regulation (Reg. 4087/88) referred to “the continuing provision by the franchisor to the franchisee of commercial or technical assistance during the life of the agreement” (Article 1(3)(b)). Even if the Block Exemption Regulation had been adopted for competition law purposes, in Europe the definition it contained had become the generally recognised definition of franchising. **Mr Binder** pointed out that in France, control without assistance would lead directly to the possibility that the franchisee might claim employee status. In this case if the franchisee went bankrupt the franchisor would receive claims for compensation of debts incurred by the franchisee. In the end it was decided not to include the concept of “assistance”. It was decided that the definition of a “franchise” should be limited to a statement to the effect that it was the rights granted to a franchisee under a franchise agreement. A general description of what was involved would instead be provided in the definition of the franchise agreement. Furthermore, to overcome the problem of whether a franchise should imperatively include both control and assistance, it was decided not to speak of a “franchise system”, but simply to refer to a “system” determined by the franchisor which in substantial part prescribes the manner in which the franchised business is to be operated and which includes continuing operation controls by the franchisor.

With reference to the definition of the “franchise”, it was also decided to indicate the different relationships covered in the model law in sub-paragraphs (a) to (c).

In the course of the discussions the possibility of adding definitions of “affiliate” and “associate” was considered. In this respect the US and Canadian legislation was referred to. Considering that the

term “associate” was used only once, and that where it was used it was possible to use “affiliate”, it was decided that only affiliate should be added. A suggested definition of “affiliate” was “a legal entity controlled by, controlling or under common control with the franchisor”. The last of these three categories referred to the situation where both the affiliate and the franchisor were under the control of a third entity. The problem with this definition was the definition of “control”. It was however decided not to add a definition of the word “control”.

It was decided that the definition of “sub-franchisor” and “sub-franchisee” should be made by inference in the definition of a master franchise.

The text of Article 1 as finally adopted reads as follows:

ARTICLE 1
(DEFINITIONS)

For the purposes of this law:

affiliate of the franchisor means a legal entity who directly or indirectly controls or is controlled by the franchisor, or is controlled by another party who controls the franchisor;

development agreement means an agreement under which a franchisor in exchange for direct or indirect financial compensation grants to another party the right to enter into multiple franchise agreements with the franchisor to operate franchise businesses within a specified territory;

disclosure document means a document containing the information required under this law;

franchise means the rights granted by a franchisor to a franchisee under a franchise agreement and includes:

- (a) the rights granted by a franchisor to a sub-franchisor under a master franchise agreement;
- (b) the rights granted by a sub-franchisor to a sub-franchisee under a sub-franchise agreement
- (c) the rights granted by a franchisor to a party under a development agreement;

franchisee means the party to whom a franchise is granted;

franchise agreement means an agreement under which a party (the franchisor) in exchange for direct or indirect financial compensation authorises and requires another party (the franchisee) to engage in the business of selling, offering for sale or distributing goods or services under a system determined by the franchisor which in substantial part prescribes the manner in which the franchised business is to be operated, which includes significant and continuing operation controls by the franchisor, and which

ARTICLE 1
(DEFINITIONS)

Aux fins de la présente loi :

est considéré comme **un affilié** du franchiseur, une entité légale contrôlée directement ou indirectement par celui-ci ou exerçant un contrôle direct ou indirect sur celui-ci ou se trouvant sous le contrôle d'une tierce partie qui contrôle le franchiseur ;

un contrat de développement désigne la convention aux termes de laquelle un franchiseur concède à une autre partie, en échange de contreparties financières directes ou indirectes, le droit de contracter différents contrats de franchise avec lui dans le but de développer une activité commerciale franchisée, dans un territoire spécifique;

un document d'information est un document contenant les renseignements exigés par la présente loi;

une franchise signifie les droits concédés par un franchiseur à un franchisé dans le cadre d'un contrat de franchise y inclus:

- a) les droits concédés par un franchiseur à un sous-franchiseur dans le cadre d'un contrat de franchise principale,
- b) les droits concédés par un sous-franchiseur à un sous-franchisé dans le cadre d'un contrat de sous-franchise
- c) les droits concédés par un franchiseur à une partie, dans le cadre d'un contrat de développement;

un franchisé est une personne physique ou morale à qui est concédée une franchise.

un contrat de franchise s'entend de tout accord par lequel une partie (le franchiseur) autorise et engage une autre partie (le franchisé), en échange de contreparties financières directes ou indirectes, à se livrer à une activité commerciale de vente, d'offre de vente, ou de distribution de marchandises ou de services, dans le cadre d'un système établi par le franchiseur qui décrit de façon substantielle les modes d'exploitation de l'activité franchisée, et qui est associé à une marque de commerce, d'une marque de

is associated with a trademark, service mark, trade name or logotype designated by the franchisor;

franchised business means the business run under a franchise agreement;

franchisor means a party who grants another party the right to engage in a business under a franchise agreement;

master franchise means the right granted by a franchisor to another party (the sub-franchisor) to grant franchises to third parties (the sub-franchisees);

material fact means any information that can reasonably be expected to have a significant effect on the value or price of the franchise to be granted or on the decision to acquire the franchise;

misrepresentation means a statement of fact that was known by the person making the statement to be untrue at the time the statement was made; and

sub-franchise agreement means a franchise agreement concluded by a sub-franchisor and a sub-franchisee pursuant to a master franchise.

service, d'une appellation commerciale ou d'un logo prescrit par le franchiseur ;

une activité commerciale franchisée est une activité commerciale entreprise dans le cadre d'un contrat de franchise ;

un franchiseur désigne toute partie qui concède à une autre partie le droit de se livrer à une activité commerciale dans le cadre d'un contrat de franchise ;

une franchise principale s'entend du droit accordé par un franchiseur à une autre partie (le sous-franchiseur), de concéder des franchises à de tierces parties (les sous-franchisés) ;

un fait important s'entend de tout renseignement qui peut raisonnablement être considéré comme ayant une incidence significative sur la valeur ou le prix de la franchise concédée, ou sur la décision d'acquiescer une franchise ;

une représentation inexacte des faits s'entend d'une déclaration dont l'auteur savait qu'elle était erronée lorsqu'elle a été faite ; et

un contrat de sous-franchise s'entend d'un contrat de franchise conclu entre un sous-franchiseur et un sous-franchisé conformément à une franchise principale.

(III) **ARTICLE 2 - SCOPE OF APPLICATION**

The provisions of this law apply to franchise relationships irrespective of whether they are concluded at national or international level and irrespective of the form they assume.

Considering that the national or international origin of a franchise agreement should be of no particular relevance to the applicability of the law, it was agreed that the formulation of the article should be modified to read as follows:

ARTICLE 2 (SCOPE OF APPLICATION)

This law applies to franchises granted for the operation of one or more franchised businesses.

ARTICLE 2 (CHAMPS D'APPLICATION)

La présente loi s'applique aux franchises concédées pour l'exploitation d'une ou plusieurs activités commerciales franchisées.

(IV) **ARTICLE 3 PURPOSE OF DISCLOSURE DOCUMENT**

The purpose of the disclosure document is to assist franchisors and franchisees make an informed decision prior to entering into a franchise agreement [or to renewing their agreement].

There was general agreement on the principle stated in Article 3, although it was felt that the formulation should be reconsidered. The possibility of distinguishing between the case of the same

parties entering into a new agreement and the case where they renewed an old agreement was considered, as was the case where, in the case of a transfer, a new agreement instead of the old agreement was offered to another franchisee of the same system.

As regards the case of renewal, the question whether the franchisor should have a general duty to provide the franchisee with a disclosure document, or whether the franchisee should merely be entitled to request it, upon renewal or also at any other time during the relationship, was considered. **Mr Binder** pointed out that in France the franchisee could waive his right to ask for further information when he signed the agreement. The franchisor on the other hand could not waive his duty to provide the information. He also pointed out that there might be no substantial modification in the contract provisions, but that there might be a substantial modification of the economic surroundings.

It was pointed out that in American statutes reference was often made to whether the relationship was renewed or extended on substantially the same terms, in which case there were no disclosure requirements. If there were "substantial modifications" disclosure was instead required. The problem was the definition of "substantial modification".

A problematic situation referred to by **Mr Brennan**, was that of a franchisor having ceased to grant franchises. If it were possible for the franchisee to request a disclosure document at any time, then the franchisor would be forced to keep an up to date disclosure document even if he no longer offered franchises. **Mr Konigsberg** drew attention to the situation where the franchise was sold. In this case the question was whether the purchaser would be required to enter into a new franchise agreement and what obligations to disclose the franchisor would have. The general conclusion was that if the purchaser was required to enter into a new franchise agreement with the franchisor, then the franchisor would have an obligation to disclose.

Mr Binder suggested that the whole question might be dealt with under the article dealing with sanctions, and that it could be couched in terms of the lack of provision of new information permitting the franchisee to consider that his consent had been vitiated when it had signed the renewal. This would give him the possibility to consider himself not to be bound by the contract as the lack of information had induced him in error. Hesitations were however expressed in relation to this approach. A simple system that created an obligation for the franchisor to disclose was considered to be preferable and, in view of the fact that no registration requirement was involved, not too heavy a burden to place upon the franchisor.

On the other hand, it was generally considered not to be necessary for the franchisee to disclose to the franchisor. Placing such a duty on the franchisee would offer the franchisor a protection he did not need. A franchisor would make it his business to get all the information he needed on the franchisee. It was therefore decided that the reference to the franchisee in this article should be deleted, as should the obligation placed upon the franchisee to disclose in Article 4 (2).

The possibility of adding a paragraph stating that the information given should be accurate was considered. It was in general felt that this should be stated explicitly. In French, the English concept of "accurate" would however have to be rendered by two words: "*sincère et véritable*". It was decided that the explanatory note should state that the intended meaning of the two expressions was the same.

In the end, it was decided to delete Article 3, also in the light of the discussion on the Preamble.

(v) ARTICLE 4 PERSONS OBLIGED TO DISCLOSE

(1) It is the duty of the franchisor to provide the prospective franchisee with the information it needs to decide whether or not to enter into a franchise agreement with the franchisor.

(2) It is the duty of the prospective franchisee to provide the franchisor with the information it needs to decide whether the prospective franchisee is a suitable candidate for a franchise.

(3) The duty placed upon either of the parties to provide the other party with information shall continue throughout the term of the franchise agreement.

Mr Bonell observed that the formulation “it needs to decide” in paragraphs (1) and (2) introduced very subjective tests. He suggested that a better approach would be to define the duty, thereby making clear and ensuring the achievement of certain purposes without explicitly indicating them. This was to avoid one party saying he had provided all the information necessary and the other saying that on the basis of the information he had received he had been unable to exactly evaluate whether or not to enter into the agreement or whether or not the other party was a suitable partner.

Following the discussion on Article 3, it was decided to delete Article 4(2), as it was felt that there was no need to protect the franchisor. It was also decided to delete Article 4(3), which was considered not to be necessary as franchisees usually communicated quite efficiently among themselves. Secondly, **Mr Brennan** indicated that in his view the obligation in paragraph (3) carried with it an implication that the franchisee could either change the terms of the agreement or terminate it depending on what disclosures were made. **Mr Binder** indicated that if there was agreement on information being provided at each stage in the life of a contract (the original contract and for each renewal) then paragraphs (2) and (3) could be deleted without problem. What was contained in paragraph (3) should in effect be part of everyday relations between the parties. The problem was not the relationship between a franchisor and a franchisee, but between a franchisor and a sub-franchisor.

In the end, it was decided to delete Article 4 in its entirety.

(VI) ARTICLE 5 - EXEMPTIONS FROM OBLIGATION TO DISCLOSE

No disclosure is required in case of

(a) the sale of a franchise to a person who has been an officer or director of the franchisor or its associate for at least [X] months;

(b) the sale of an additional franchise to an existing franchisee if that additional franchise is substantially the same as the existing franchise that the franchisee is operating; or

(c) a renewal or extension of an existing franchise agreement.

As regards Article 5, it was observed that paragraph (c) should be considered to have been deleted, as it had been decided that disclosure should be made compulsory also in case of renewal.

Mr Brennan drew the attention of the Committee to the fact that in the US sophisticated investors were in general exempted from disclosure requirements. There were several franchise laws that had exemptions for large investments on the part of sophisticated franchisees. The philosophy behind these exemptions was that there were certain types of franchise investors that really did not need the protection of this type of law, as they were sophisticated investors who had advisors, who had substantial experience in business transactions and who often ended up negotiating a very different franchise agreement from the standard one. If the disclosure requirement applied, it would be necessary for the franchisor to prepare a special disclosure document describing the negotiated contract. Whether or not one wanted to place such a burden on the franchisor was debatable. It was clear that the burden was much greater in the US, where disclosure documents had to be registered. He also suggested that cases where the franchisee was simply one of several owners of the franchise business (a joint venture), should be exempted, as should out-bound transactions. At the other end of the spectrum were very small transactions, which might also be exempted. The problem with these last transactions, according to **Mr Binder**, was their high risk. For such cases he preferred a short list of documents to be disclosed, rather than nothing at all.

The case of the sale of a franchise by an executor or administrator was considered. Whereas on the one hand it was felt that the buyer had to be provided with some information, on the other it was felt that it would not be right to place the disclosure burden on trustees in bankruptcy. It was pointed out that in the US the exemption referred exclusively to the trustee or executor: depending on the franchise the franchisor might still have a disclosure obligation. In the end it was decided to include an exclusion for executors and other comparable officers. It was pointed out that this would include also the estate of someone who had died. It was suggested that the situation where a franchise was sold by one franchisee to another franchisee should also be considered in this connection.

Of other exemptions contained in existing US and Canadian legislation it was decided that an exemption for “the sale of a right to a person to sell goods and services within or adjacent to a retail establishment as a department or division of the establishment, if the person is not required to purchase goods or services from the operator of the retail establishment” was not required.

As regards fractional franchises, **Mr Binder** observed that in France the percentage of the business that the franchise represented was not relevant, as the law required disclosure from any person having an exclusivity or quasi-exclusivity. A prospective franchisee who had his own pre-existing business could require complete disclosure even if the new franchise business was only 20% of the whole, as long as the relationship was based on exclusivity. **Mr Brennan** observed that for a franchisor who had fractional franchises that represented only a small percentage of his sales, to provide disclosure to those franchises was no burden. The case was however different if the entire franchise concept was inherently a fractional franchise. It was agreed that an exemption for a fractional franchise should be added, although to avoid problems of definition, the term “fractional franchise” should not be mentioned in the text, reference should instead be made to the franchise not exceeding 20% of the total aggregate sales of the business. The comments to the provision should indicate that this type of arrangement was known as a fractional franchise in some countries.

A suggestion to include an exemption for cases where the franchisee made a large investment and where the franchisee was a large corporation was accepted. It was decided that it was preferable to provide criteria that were measurable in monetary terms, rather than to speak of an “informed franchisee”, as that would involve problems of definition. It was decided that the amount and the currency should be left blank, so as to permit each State to select its own or another currency as it preferred, and to state in the comments that the sum involved should be the equivalent of 1 – 2 million US dollars.

In this connection also the question of joint ventures was considered. Often, what appeared to be an absurd situation arose, in that the franchisor ended up disclosing to itself. In view of the fact that the joint venture was a new legal entity, it was however considered that disclosure should be made to the joint venture.

A number of possible different scenarios were discussed in relation to the transfer of the rights under a franchise agreement. These included the old franchise agreement of franchisee A being transferred to new franchisee B with no modifications and only the term being extended; the franchise relationship being transferred from franchisee A to new franchisee B on the basis of a contract that was identical with that between the franchisor and franchisee A; new franchisee B taking over the franchise relationship of franchisee A on the basis of the franchisor’s then current franchise agreement; the franchise agreement of franchisee A being transferred to another old franchisee C of the same network; the franchise agreement of franchisee A being transferred to new franchisee B through the good offices of the franchisor. In the end it was decided to exempt from disclosure only the situation where a franchisee’s rights and obligations under an existing franchise agreement were assigned or transferred, unless the assignee or transferee was required to enter into a new franchise agreement as a condition for the assignment or transfer.

The text of the Article as finally adopted reads as follows:

ARTICLE 3
(EXEMPTIONS FROM OBLIGATION TO DISCLOSE)

No disclosure is required in case of:

- (a) the grant of a franchise to a person who has been an officer or director of the franchisor or of its affiliate for at least six months immediately before the delivery of the disclosure document;

ARTICLE 3
(DISPENSES DE L’OBLIGATION DE DIVULGATION D’INFORMATION)

Aucune délivrance d’information n’est requise dans les hypothèses suivantes :

- a) la concession d’une franchise à une personne qui a été un dirigeant ou un administrateur du franchiseur ou de l’un de ses affiliés pendant les six mois immédiatement précédant la délivrance du document d’information ;

- | | |
|--|--|
| (b) the assignment or other transfer of a franchisee's rights and obligations under an existing franchise agreement, unless as a condition for the assignment or transfer the assignee or transferee is required to enter into a new franchise agreement; | b) la cession ou toute autre forme de transfert des droits et obligations du franchisé dans le cadre d'un contrat de franchise en cours, à moins que le cessionnaire se soit vu imposer, comme condition de la cession, de souscrire un nouveau contrat de franchise ; |
| (c) the grant to a person of a franchise to sell goods or services within that person's existing business, if the sales of the franchise, as anticipated by the parties or as should reasonably be anticipated by the parties at the time the franchise agreement is entered into, will not exceed 20% of the total aggregate sales of the franchisee's combined business; | c) la concession d'une franchise à une personne qui lui permette de vendre des marchandises ou services dans le cadre de son exploitation commerciale déjà existante, dans la mesure où le chiffre d'affaires réalisé sur les ventes dans le cadre de cette franchise, ne dépasse pas 20 % du total cumulé de toutes les ventes de l'ensemble des activités commerciales de cette personne, pour autant que la proportion des ventes dans le cadre de la franchise ait pu être anticipée par les parties ou aurait dû raisonnablement être anticipée par les parties au moment où le contrat de franchise a été souscrit ; |
| (d) the grant of a franchise pursuant to which the franchisee commits to a total investment in excess of [X]; or | d) la concession d'une franchise conformément à laquelle le franchisé s'engage à réaliser un investissement total excédant le montant de [x] ; ou |
| (e) the grant of a franchise to a franchisee who has a net worth in excess of [Y]. | e) la concession d'une franchise à un franchisé dont la valeur nette dépasse [Y] |

(VII) ARTICLE 6 - HANDING OVER OF DISCLOSURE DOCUMENT. COOLING OFF PERIOD

(1) A franchisor must give every prospective franchisee a copy of the franchisor's disclosure document at least twenty days prior to

(a) the signing by the prospective franchisee of any agreement relating to the franchise; or

(b) the payment by the prospective franchisee of any fees relating to the franchise whichever is earlier.

(2) The franchisee may at any time during the twenty days indicated in paragraph (1) determine that it will no longer enter into the franchise agreement with the franchisor, without this giving rise to any sanctions.

Mr Bonell stated that he felt lost as to the whole mechanism of Article 6. How was it possible to deliver something twenty days before something which had not occurred? Furthermore, paragraph (2) cut off a huge amount of case law and legislation in the field of pre-contractual liability, in particular that relating to promissory estoppel in the common law countries. To state explicitly that it was possible for the franchisee to terminate at any time during the twenty days specified without this giving rise to any sanction whatever, was contrary to basic principles applicable to the pre-contractual stage. The words "opportunity to understand" furthermore gave rise to "caveat emptor" and similar matter.

Mr Konigsberg pointed out that in the franchising community the possibility to terminate within a fixed period of time was recognised as something that was very important to protect franchisees from unscrupulous franchisors. There were also reasons for the dual conditions in Art. 3(1)(a) and (b).

Mr Brennan observed that in consumer legislation cooling off periods occurred after the signing of the contract, so strictly speaking what was referred to here was not a cooling off period, but a period

during which the franchisee was to study the disclosure document and do all the necessary investigations. What was intended was that it was not possible for the franchisor to accept any money or to sign the agreement until at least twenty days after the delivery of the disclosure document. Personally he found the possibility to terminate within a specified time-period to be unnecessary and suggested that it should be deleted completely and that the general principles of law should be left to govern what happened. In effect, this was all taking place before a contract was signed, and if there was no contract, then neither party was contractually bound to the other.

As regards the possibility for the franchisee to terminate the agreement within a specific period of time, the Committee decided to keep this possibility. Twenty days was however felt by some to be excessive, whereas others felt that this length of time was justified. It was therefore suggested that the number of days should be left to the national legislator, and that the comments should reflect the considerations expressed by the Group.

There was general agreement that paragraph (2) should be deleted. There was also general agreement that there should be no cooling off period after the signing of the contract.

ARTICLE 5
(DELIVERY OF THE DISCLOSURE DOCUMENT)

A franchisor must give every prospective franchisee a disclosure document at least fourteen days before

- (a) the signing by the prospective franchisee of any agreement relating to the franchise; or
 - (b) the payment by the prospective franchisee of any fees relating to the franchise
- whichever is earlier.

ARTICLE 5
(REMISE DU DOCUMENT D'INFORMATION)

Un franchiseur doit délivrer à tout franchisé éventuel le document d'information au moins quatorze jours avant la survenance du premier des deux événements suivants :

- a) la signature par le franchisé éventuel de tout contrat ayant trait à la franchise ;
- b) le paiement par le franchisé éventuel de toute somme, compensation, indemnité de dédit ou de toute sorte d'honoraires en relation avec la franchise.

(VIII) ARTICLE 7 - ACKNOWLEDGEMENT OF RECEIPT OF DISCLOSURE DOCUMENT

(1) Prior to the entering into of the franchise agreement, the prospective franchisee must give the franchisor a written statement to the effect that it has received, read and had a reasonable opportunity to understand the disclosure document.

(2) The prospective franchisee must also give the franchisor a statement that it has been given advice about the proposed franchise agreement or franchised business by an independent legal adviser, and an independent business adviser respectively.

With reference to the statement that a prospective franchisee was required to make to the effect that it had "been given advice" (paragraph (2)), **Mr Bonell** stated that he had never seen a formulation like that and that it was up to each party to decide whether or not to follow the advice they were given.

Mr Konigsberg stressed the importance of making prospective franchisees aware of the fact that they should not look at the disclosure document as all that was necessary. They had to be made aware that they had to exercise due diligence in obtaining the information that they needed.

As regards the advice to be obtained from an independent adviser, **Mr Brennan** suggested that it would be better to follow US practice and to place a statement in bold letters somewhere in the disclosure document to the effect that the prospective franchisee ought to consult an adviser and should also take his/her time to understand the disclosure document to make an informed decision. It should in other words be stated in the form of advice, not as a compulsion. The important thing was that prospective franchisees understood that they needed to treat the offer as a business proposition,

that it was a commercial matter and that they should look into every aspect, ought to consult advisers and should not limit their investigation to what was in the disclosure document.

In the end, it was agreed to delete paragraph (2) and to phrase paragraph (1) in the form of a request on the part of the franchisor. The text of the Article as adopted reads as follows:

ARTICLE 8
(ACKNOWLEDGEMENT OF RECEIPT OF
DISCLOSURE DOCUMENT)

As a condition for its signing the franchise agreement, the franchisor may require the prospective franchisee to acknowledge in writing the receipt of the disclosure document.

ARTICLE 8
(ACCUSE DE RECEPTION DU DOCUMENT
D'INFORMATION)

Le franchiseur peut exiger du franchisé éventuel, comme condition déterminante de la signature du contrat de franchise, que ce dernier lui accuse réception par écrit de la bonne réception du document d'information.

(IX) NEW ARTICLE ON CONFIDENTIALITY

Mr Schulz suggested that a new article be added, stating that the franchisee must at the request of the franchisor sign a statement acknowledging the confidentiality of the information contained in the disclosure document. This proposal was supported by **Mr Binder** and accepted by the other members of the Committee.

The text of the new Article reads as follows:

ARTICLE 7
(CONFIDENTIALITY)

The franchisor may require the prospective franchisee to sign a statement acknowledging the confidentiality of the information contained in the disclosure document.

ARTICLE 7
(CLAUSE DE CONFIDENTIALITE)

Le franchiseur peut exiger du franchisé éventuel la signature d'un engagement par lequel ce dernier s'engage à préserver la confidentialité de l'information qu'il recevra, contenu dans le document d'information.

(X) ARTICLE 8 - LANGUAGE OF DISCLOSURE DOCUMENT

The disclosure document must be written in the local language of the prospective franchisee in a clear and comprehensible manner.

As regards "local language", **Mr Bonell** observed that it was not always easy to determine what the local language was. **Mr Konigsberg** suggested that reference should not be made to the local language of the prospective franchisee, but to the language of the jurisdiction in which the franchise was to be located. The provision should therefore specify that the disclosure document had to be provided in the language of the jurisdiction in which the franchise was to be located, unless the franchisee asked to receive it in the language of the jurisdiction of the franchisor. This might happen in the case of, for example, an Indian prospective franchisee who intended to open an American franchise in France.

The text of the Article as modified reads as follows:

ARTICLE 9
(LANGUAGE OF DISCLOSURE DOCUMENT)

The disclosure document must be written in a clear and comprehensible manner in the official language of the jurisdiction within which the prospective franchise is to be located.

ARTICLE 9
(LANGUE UTILISEE DANS LE DOCUMENT D'INFORMATION)

Le document d'information doit être écrit d'une manière claire et compréhensible, dans la langue officielle de la juridiction dans laquelle le franchisé éventuel sera situé.

(XI) ARTICLE 9 - FORM OF THE DISCLOSURE DOCUMENT

- (1) *Disclosure must be provided in writing.*
(2) *Specific forms elaborated by national bodies or jurisdictions may be used, provided that the information provided therein corresponds to that required by this law.*

With reference to the form of the disclosure document, **Mr Bonell** wondered whether this referred to the format or to the content, as the requirement that the specific form used must conform to the requirements of the law went to the content of the document. He also suggested that the requirement that disclosure must be in writing was redundant and might therefore be deleted. The members of the Committee however unanimously decided that it should be kept.

As regards the forms elaborated by national bodies or jurisdictions, it was pointed out that this was a clear reference to the *Uniform Franchise Offering Circular (UFOC)* used in the United States. **Mr Konigsberg** added that not only was there the UFOC which prescribed the content of the document, there actually were countries that prescribed a specific format.

In the end, it was decided that the provision should specify that any format might be used, provided that the information contained in the document met the requirements imposed by the law. The text of the Article as adopted reads as follows:

ARTICLE 4
(FORMAT OF DISCLOSURE DOCUMENT)

- (1) Disclosure must be provided in writing.
(2) The franchisor may use any format for the disclosure document, provided that the information contained therein meets the requirements imposed by this law.

ARTICLE 4
(PRESENTATION DU DOCUMENT D'INFORMATION)

- 1) L'information doit être fournie par écrit.
2) Le franchiseur peut établir le document d'information dans la forme de son choix, à condition que les renseignements qu'il contient soient conformes aux prescriptions imposées par la présente loi.

(XII) ARTICLE 10 - UP-DATING OF DISCLOSURE DOCUMENT

The franchisor must ensure that the disclosure document is always up to date and that it reflects the most recent developments of the franchise system.

Mr Brennan was troubled by the implication that the disclosure document had to be under constant revision. Even if the concept was acceptable, it was impracticable. He suggested that a materiality standard had to be introduced into the provision, so that the document had to be updated only when there was a material change.

In the end it was suggested that Article 10 should be deleted, and that the concept of up-to-date information should be dealt with in the Preamble, where the reference should be to necessary and up-to-date information.

(XIII) ARTICLE 11 - CURRENT DISCLOSURE DOCUMENT

- (1) A franchisor must in writing provide the franchisee with a description of any material change to the disclosure document.*
- (2) A franchisor must provide the franchisee with a current disclosure document if the franchisee makes a request to this effect.*

As a consequence of the deletion of Article 10, the Committee decided to delete also Article 11.

(XIV) ARTICLE 12 - RIGHT OF ACTION

- (1) If a franchisee suffers a loss because of a misrepresentation contained in a disclosure document, the franchisee has a right of action [for damages] against the franchisor.*
- (2) If a franchisor fails to give a prospective franchisee the disclosure document by the time established in Article 6, the franchisee has a right to [rescind the franchise agreement] and to claim compensation for any expenses it has incurred.*

As regards Article 12, **Mr Bonell** suggested that the concept “misrepresentation” should not be used, as there was both innocent misrepresentation and non-innocent misrepresentation, as well as non-disclosure. In the course of the discussion it was suggested that the term “misrepresentation” should be replaced by an explanation of the term, such as “incorrect, incomplete or misleading information”. In the end, it was however decided to use the term “misrepresentation of a material fact” and to define both “misrepresentation” and “material fact” in Article 1.

In relation to misrepresentation on the one hand and the non-providing of the disclosure document on the other, **Mr Konigsberg** did not feel that it was necessary to distinguish between these two situations. He suggested that the remedies might be combined. **Mr Brennan** agreed that it was not necessary to distinguish between the two. As long as a demonstrable loss flowed from the misrepresentation in, or omission of, the disclosure document, there should be an action for damages and if the misrepresentation was material the judge would award more damages.

Mr Schulz observed that in general contract law sanctions were different in the case of fraud and in case of something not happening. The French *Cour de Cassation* had in the past followed the line that if the document were not given the contract was null and void. The Court had however changed this in 1998, when it had stated that the contract was void only if there was misrepresentation under general contract law. Not to fulfil the disclosure obligation would under general contract law not lead to automatic nullity. **Mr Konigsberg** pointed out that this was because under general contract law there was no general obligation imposed upon one party to supply the other with specific information. This law would state that A, B and C had to be provided and that if they were not provided, then the contract was null and void even if there were no losses, the franchisee would not have to prove that it had suffered damage. If the disclosure document contained erroneous or misleading information, or omitted something material, then this should also give rise to a right to terminate, even if not to damages.

Mr Schulz stated that in Germany there were two different kinds of sanctions: if one party defrauded the other, the defrauded party had the right to rescind the contract. It was not automatic. If he had suffered a loss he would also be able to claim damages. As the contract was terminated *ex tunc*, the franchisee would in such a case be able to ask for the return of the franchise fees he had paid.

Mr Binder stated that French case law now stated that it was not because there was a lack of information that there was nullity. What was important was whether this lack of information had exercised an influence on the consent of the franchisee when he had signed the agreement. If it had not done so, then the contract was not null and void. The franchisor had the burden of proof, meaning that he had to prove that despite this lack of information the consent of the franchisee was not vitiated. In the case of insufficient information it was instead the franchisee who had the burden of proof.

It was suggested that paragraph (2) should say “If a franchisor fails to give a franchisee the disclosure document by the time established in Article 6, the franchisee has a right to terminate the franchise agreement unless the franchisor can prove that at the time of the entering into of the franchise agreement the franchisee had the information necessary to make an informed decision”, and that this provision should be moved to Article 14, which dealt with sanctions. It was decided that the same should apply in the case of misrepresentation of a material fact.

Opinions were divided as regards whether or not the franchisee should always have a right to claim damages. **Mr Brennan** stated that the franchisee should have a right to damages irrespective of whether or not he terminates, as the business might be sufficiently healthy for him to want to continue even if he has been harmed, whereas **Mr Konigsberg** sustained that if the franchisee chose not to terminate, then he should not have a right to claim damages. If he did claim damages, then yet another question was whether or not that would include the repayment of the franchise fee. **Mr Binder** observed that in France the franchisee would not be entitled to compensation if in the circumstances this compensation was to be understood as illegitimate profit, which might indeed be the case with a claim for the reimbursement of royalties that had already been paid.

Mr Schulz raised the question whether it was appropriate to handle damages issues in a disclosure law, whether it was not a question of general contract law or general tort law. In France, there had been problems with the *Loi Doubin* because it did not speak of civil law consequences at all, and it was not clear what the effects of the non-respect of the disclosure law was. He suggested it might be sufficient to state that if there was no disclosure at all, or if there was material misrepresentation, the franchisee in the first case had the right to rescind the agreement *ab initio* or in the second case to terminate it for the future. Any question of damages would then be left to general contract law. **Mr Konigsberg** suggested that in such a case it would be necessary to specify that the franchisee had this right “without derogating from any other right the franchisee may have under the applicable law in the circumstances”.

Mr Binder explained that when it had been adopted the *Loi Doubin* had been considered to be public order. The consequence of the law being considered public order, which brought with it a system of criminal sanctions and fines (even if the latter had never been applied), was that in cases of illegal behaviour the contract could be considered null and void. This was no longer the case. The *Cour de Cassation* had recently decided that in such circumstances the contract was not necessarily void *ab initio*. **Mr Schulz** added that under French law it was not up to the parties to decide to terminate a contract, the intervention of a court was necessary. This was not the case in Germany, where it was sufficient for a party to declare the contract terminated.

Mr Konigsberg made a distinction between nullity based on error and nullity based on fraud. In his recollection under French law it was possible for a party to get out of a contract if he made a mistake, for example as to the person with whom he had contracted. In this case the nullity was only for the future. In the case of fraud, the nullity was absolute and would go back to the time of entering into of the contract. **Mr Schulz** stated that under German law it was possible to rescind *ex ante* for both mistake and fraud, but the consequences would be different. If it was a case of fraud it was possible for the franchisee to claim damages, whereas in the case of mistake it would be possible for the franchisor to claim damages as the franchisee had entered into the agreement with him on the basis of his mistake and had thus caused the franchisor damage.

Mr Brennan agreed that the agreement should be rescinded *ab initio*, but suggested that the Committee should discuss what exactly that meant, and what the standards for compensation were.

The Committee further agreed that there should be a deadline for the exercise of the right to terminate on the part of the franchisee. So as to cover all possible situations, it was decided to fix three different deadlines, one from the date of occurrence of the event, another from the date when the event became known to the franchisee and a third from the date when the franchisee received a written notice providing details of the breach.

In the end, it was decided to merge Articles 12 and 14. The text as finally adopted is reproduced as the new Article 10 under the report on Article 14.

(XV) ARTICLE 13 - BURDEN OF PROOF

In any proceeding under this law, the burden of proving an allegation of non-disclosure or of misrepresentation in a disclosure document lies with the party who makes the allegation.

Mr Schulz stated that it would be impossible for a franchisee to prove that a statement made by the franchisor was wrong. The difficulties for the franchisee in proving that the information of the franchisor was wrong were further increased by the fact that in continental Europe American-style discovery did not exist. The burden of proof depended on the procedural and litigation system of the individual countries. He suggested that this question was best left to the national procedural systems.

Mr Konigsberg considered Article 13 to be a duplication of Article 12 and therefore not necessary. **Mr Brennan** agreed, but indicated that he preferred the wording of Article 12.

In the end, it was decided to delete Article 13.

(XVI) ARTICLE 14 - SANCTIONS

(1) If a franchisor does not provide a prospective franchisee with a disclosure document within the required time-limit, or if the information provided in the disclosure document is incorrect, incomplete or misleading, the franchisee is entitled to rescind the franchise agreement by a notice of cancellation transmitted to the franchisor no later than [X] days after it became aware of the default.

(2) In addition to rescinding the contract the franchisee may

(a) claim the restitution of the fees it has paid the franchisor;

(b) claim compensation for any expenses incurred or any loss suffered in connection with the acquiring, setting up and operating of the franchised business.

(3) If a franchisee does not provide the franchisor with true and sincere disclosure, the franchisor is entitled to rescind the franchise agreement by a notice of cancellation transmitted to the franchisee no later than [X] days after it became aware of the default.

(4) In addition to rescinding the contract the franchisor may claim compensation for any expenses incurred or any loss suffered as a result of the incorrect information provided by the franchisee.

(5) The rights of action conferred by this law are in addition to and do not derogate from any other right the franchisee or franchisor may have at law.

To a large extent Article 14 was discussed together with Articles 12 and 13 (see the sections of this report dealing with those articles). As regards Article 14, **Mr Bonell** suggested that it would be preferable to use the same terminology as the *UN Convention on Contracts for the International Sale of Goods*, i.e. "termination". "Rescind" was a word that created problems, as in some legal systems "rescission" was different from "termination". In Article 14 he had the impression that there was an overlap between different situations and different problems, as in some cases it was taken for granted that there already was a binding agreement, whereas in others it was not.

It was decided to insert a new paragraph (2) to the effect that in case of misrepresentation the franchisee was allowed to terminate the agreement, unless the franchisor could prove that the franchisee did not rely on this misrepresentation.

The text of the article on remedies as adopted reads as follows:

**ARTICLE 10
(REMEDIES)**

(1) If a franchisor fails to give a prospective franchisee the disclosure document within the period of time established in Article 5, the franchisee is entitled to terminate the franchise agreement, unless the franchisor can prove that at the time of the conclusion of the franchise agreement the franchisee had the information necessary to make an informed decision.

(2) If the disclosure document contains a misrepresentation of a material fact, the franchisee is entitled to terminate the franchise agreement unless the franchisor can prove that the franchisee did not rely on this misrepresentation.

(3) The right to terminate the franchise agreement in accordance with paragraphs (1) and (2) of this article must be exercised within:

- (a) two years of the act or omission constituting the breach upon which the right to terminate is based; or
- (b) one year of the franchisee becoming aware of facts or circumstances that reasonably indicate that a breach entitling the franchisee to terminate has occurred; or

(c) within 90 days of the delivery to the franchisee of a written notice providing details of the breach.

(4) A written notice providing details of the breach giving the franchisee the right to terminate in accordance with paragraphs (1) and (2) of this article must be accompanied by the franchisor's then current disclosure document.

(5) The right to terminate in accordance with paragraphs (1) and (2) of this article does not derogate from any other right the franchisee may have under the applicable law.

**ARTICLE 10
(VOIES DE RECOURS)**

1) Si un franchiseur manque à son obligation de délivrer au franchisé éventuel un document d'information dans les temps requis par l'article 5 de la présente loi, le franchisé aura le droit de mettre fin au contrat de franchise, à moins que le franchiseur n'apporte la preuve qu'au moment de la conclusion du contrat de franchise, le franchisé disposait de toutes les informations nécessaires pour lui permettre de s'engager en connaissance de cause.

2) Si le document d'information contient une représentation inexacte d'un fait essentiel, le franchisé a le droit de mettre fin au contrat de franchise, à moins que le franchiseur n'apporte la preuve que le franchisé n'avait pas pris en considération cette représentation inexacte des faits.

3) Le droit de mettre un terme à un contrat de franchise en application des paragraphes 1) et 2) du présent article, doit être exercé :

- a) dans le délai de deux ans de l'acte ou de l'omission constitutive de la violation sur laquelle le droit de mettre un terme au contrat est basé ; ou
- b) dans le délai d'un an à compter du moment où le franchisé est supposé avoir conscience de faits ou de circonstances qui conduisent raisonnablement à une violation autorisant le franchisé à mettre un terme au contrat de franchise ; ou
- (c) dans les 90 jours qui suivent la délivrance au franchisé d'un avis écrit indiquant les détails de la violation.

4) Un avis écrit indiquant les détails de la violation donnant droit au franchisé de mettre un terme au contrat en application des paragraphes 1) et 2) du présent article doit être accompagné du document d'information du franchiseur tel qu'il existe alors.

5) Le droit de mettre un terme au contrat de franchise en application des paragraphes 1) et 2) du présent article n'est pas exclusif de l'exercice par le franchisé de tout autre droit aux termes de la loi applicable.

(XVII) ARTICLE 15 - ITEMS TO BE DISCLOSED

(1) *The franchisor shall provide the following information in the disclosure document:*

- (a) *the name and address of the franchisor;*
- (b) *the name under which the franchisor does or intends to do business;*

- (c) *the principal business address of the franchisor;*
- (d) *the business form of the franchisor;*
- (e) *a description of the business experience of the franchisor, including:*
 - (i) *the length of time the franchisor has conducted a business of the type to be operated by the franchisee; and*
 - (ii) *the length of time the franchisor has offered franchises for the same type of business as that to be operated by the franchisee;*
- (f) *other lines of business in which the franchisor has offered franchises;*
- (g) *the names and addresses of each associate of the franchisor that is not a body corporate;*
- (h) *the names, addresses, position held and qualifications of each director, executive officer or partner of the franchisor who has or is likely to have management responsibilities for the franchisor's business operations in relation to the franchise;*
- (i) *the litigation history for the previous [X] years relating to the franchisor and its associates and any of the directors, executive officers or partners of the franchisor;*
- (j) *the bankruptcy history of the franchisor, its affiliates or officers for the previous [X] years;*
- (k) *the names, addresses and phone numbers of all existing franchisees operating an outlet and the addresses and phone numbers of those outlets;*
- (l) *franchise terminations, transfers and renewals in the previous [X] years;*
- (m) *the sub-franchisors of the network;*
- (n) *a description of the franchise to be operated by the franchisee;*
- (o) *the initial franchise fee;*
- (p) *other fees and payments;*
- (q) *products and/or services supplied by the franchisor or by suppliers recommended or approved by the franchisor and information on restrictions on sources of supply;*
- (r) *the franchisee's obligations under the franchise agreement, including information on its required participation in the operation of the franchised business;*
- (s) *the franchisor's obligations under the franchise agreement;*
- (t) *initial and on-going training programmes;*
- (u) *exclusivities granted, including territorial exclusivities;*
- (v) *limitations to which the franchisee is subject, including limitations on sales territories or on the customers to which the franchisee is entitled to sell;*
- (w) *information on the franchisor's intellectual property relevant for the franchise;*
- (x) *the term of the agreement and conditions of renewal;*
- (y) *conditions on which the agreement may be terminated*
 - (i) *by the franchisor;*
 - (ii) *by the franchisee;*
- (z) *financial matters, including:*
 - (i) *the franchisee's initial investment;*
 - (ii) *the financing available from the franchisor or arranged by it;*
 - (iii) *the market, with earnings claims where applicable;*
 - (iv) *financial statements of the franchisor for the previous three years;*
 - (v) *amount of share capital; and*
 - (vi) *rebates or other benefits to the franchisor.*
- (2) *The prospective franchisee shall provide the franchisor with information concerning:*
 - (a) *its business experience;*
 - (b) *its financial situation;*
 - (c) *bankruptcy history;*
 - (d) *information on any relevant litigation it has been a party to.*

At the beginning of the discussion on Article 15, the Committee determined the items on which they felt it to be important for the franchisee to receive information. These items were:

- the franchisor:
 - ❑ general information
 - ❑ whether or not the franchisor was honest,
 - ❑ whether or not the franchisor had been sued repeatedly by franchisees and had lost;
 - the number of outlets;
 - termination and its consequences;
 - whether the franchise network had existed for a long time;
 - the turnover of franchisees;
 - information on the trademark
 - ❑ whether or not it was registered
 - ❑ whether or not there had been any infringements;
- and
- if the franchisor controlled the profits and the prices.

Examining the items listed in the draft article, the question of the difference between the official address of the franchisor in (a) and the address of the principal place of business of the franchisor in (c) was raised. It was observed that, in an international situation, if the franchisor had an independent branch or subsidiary in the foreign country, that would be his official address, whereas his principal place of business would be his headquarters in his country of origin. **Mr Binder** observed that this distinction was important in two cases: first, to identify the place where service of documents and other notification could be made, and second, to identify where the decisions were taken by the executives of the company.

It was observed that the term “business form” in (d) meant “legal form”.

With reference to (e), **Mr Schulz** raised the question of the difference between (i) and (ii). **Mr Brennan** stated that (i) dealt with the type of business (e.g. hamburgers), whereas (ii) dealt with the specific item of that type of business (e.g. McDonald’s hamburgers).

With reference to (f), **Mr Schulz** suggested that it was of no interest to know whether or not the franchisor was engaged in franchising in other, non competing fields. **Mr Brennan** however observed that it would be of interest to know whether or not the franchisor was a good franchisor in that other field, as it was likely that the franchisor would follow the same pattern of behaviour also in the franchise concerned. In the end, it was decided to delete (f).

As regards (g), there was a discussion on who should be considered to be an “associate” of the franchisor as distinguished from an “affiliate”. **Mr Schulz** indicated that an “associate” would be an associate of the company, whereas an “affiliate” would be a subsidiary under the law. **Mr Brennan** stated that under US law an affiliate could be either on the same level as the party referred to, or above or below.

With reference to (h), the discussion centred on whom should be considered to be an executive officer, as practice differed in different countries. Notably in the US the executive officers would also be members of the Board, which they would not necessarily be in continental European countries, where furthermore not all Board members would be executive officers. It was suggested that the persons referred to should be those who represented the organisation, or who had management responsibilities. What was important was that the formulation make clear that all the persons referred to had management responsibilities. The degree of detail with which the provision should enumerate the persons intended was also discussed, it being in the end decided that a brief formulation containing merely a reference to persons who had management responsibilities would be sufficient.

Lit. (i) referred to the litigation history of the franchisor and its associates, as well as of any of the persons mentioned in (h). The discussion centred on what kind of litigation was interesting (all, franchise matters plus fraud and criminal matters, or only litigation relating to franchise matters) and on whose litigation was interesting (only the franchisor’s, the franchisor’s and his directors, etc). In the end it was decided to refer to the franchisor, the franchisor’s affiliates and any of the persons listed in (h). It was also decided that the type of litigation that had to be disclosed should be specified, and should include also criminal convictions: it was pointed out that in the US a company could be

criminally liable. Furthermore, it was suggested that the provision should use the term “any finding of liability” to catch also decisions that were not judgments, such as injunctions. It was pointed out that in, for example, the US, injunctions were not findings of liability, and that the formulation should therefore be reconsidered.

A problem discussed concerned whether or not all the litigation should be disclosed, or only that going back five or ten years, and whether all the litigation of the franchisor in all countries should be disclosed, or only that in the country of the prospective franchisee. Furthermore, in the case of master franchising, a question was whether the litigation to be disclosed should be only the litigation that concerned the sub-franchisor, or also the litigation that concerned the franchisor.

With reference to (j), it was decided to add insolvency and other comparable proceedings to “bankruptcy”. Reformulated, the provision should read “relevant details concerning any bankruptcy, insolvency or comparable proceedings involving the franchisor”.

As regards (k), it was decided to limit the requirement to the 50 franchisees located closest to the prospective franchisee. As regards (l), the discussion centred on whether or not the provision should specify all the different categories of franchises that no longer were part of the network, or whether it would be sufficient to request that they be listed with a specification of the reason for which they were no longer members of the network. This latter solution was the one opted for in the end. Furthermore, it was felt that a certain limitation, both as to number and as to geographic distribution, had to be introduced, as it would not be feasible to list all the franchisees who had left the system all over the world.

It was decided to delete (m).

In relation to the products and/or services specified in (q), a proposal by **Mr Konigsberg** that a distinction be made between the products that the franchisee was required to purchase from the franchisor, those for which he could suggest alternative suppliers and those for which he was free to select the supplier, was accepted by the Committee.

It was decided to place all requirements as to financial matters together and to add a requirement that the franchisor provide information on any policy it had adopted as to pricing. Two distinct questions were here involved: how the franchisor set the prices for the suppliers that he in one way or another controlled, and secondly (in relation to all suppliers) whether or not they paid rebates to the franchisor and its affiliates. It was therefore decided to reformulate (z)(vi) to read “information on pricing practices with regard to the goods and/or services indicated in (m), including information as to the treatment of revenue or other benefits that may be received by the franchisor or any of its associates from any supplier of goods and/or services to the franchisee”.

Mr Schulz suggested that the franchisee should be given examples of how much he could expect to pay in fees. He stated that these figures were normally expressed in percentages and that a figure expressed as a percentage did not mean very much to the franchisee. The other members of the Committee however felt that a franchisee who was unable to discover the information he required, also by asking the other franchisees of the network, or to make the necessary calculation, was a hopeless case. The suggestion was therefore not accepted.

It was decided to delete (r) and (s) as they would be mere reproductions of the text of the franchise agreement, and the Committee felt that the disclosure document should not replicate the agreement.

A debate followed on whether or not information on training should be included in the model law as a requirement for disclosure. **Mr Schulz** insisted that this information should be included, as the information on training that the franchisor provided in the agreement was often inadequate. Although the other members of the Committee felt that the disclosure document should not duplicate what was in the agreement, they admitted that the information provided on training in the agreement was often insufficient. It was therefore decided to include a brief description of the initial training programme as a disclosure requirement.

As regards (u) and (v), the question of the difference between the exclusive territory in (u) and the sales territory in (v) was taken up. **Mr Brennan** suggested that in (u) the territory was protective, in that it referred to the market the franchisee had been given the exclusive right to develop, whereas the sales territory could extend beyond the walls of the exclusive market. It was suggested that this difference might be explained in the comments.

In relation to the intellectual property rights under (w), it was decided that it was necessary to include also information on litigation associated therewith, and that this should be specifically stated in this sub-paragraph, rather than under the general sub-paragraph dealing with information on litigation. It was further decided that it was necessary to specify the most important of the intellectual property rights covered (trademarks, copyright, software) and to state in the comments that it was very important that information on registration was given. It was suggested that the word "status" might cover the different aspects on which information was desired. It was also suggested that the information to be provided should relate to the franchisee's country and not to the franchise network as a whole.

It was suggested that what was very important was whether or not the franchisor reserved the right to sell or distribute different goods under the same trademark. For example, if the franchisor gave the franchisee the right to sell t-shirts under X-brand and then proceeded himself to distribute, or to grant to another the right to distribute, mugs under X-brand. This situation was to be distinguished from that in which the franchisor reserved for himself the right to distribute the goods that were the subject of the franchise through other channels of distribution. In the end, it was decided to add a provision requiring disclosure of any reservation by the franchisor of the right (i) to use the trademarks covered by the franchise agreement in any other manner, and (ii) to sell or distribute the goods and/or services authorised for sale by the franchisee directly or indirectly through the same or any other channel of distribution, whether under the trademarks covered by the agreement or any other trademark.

With reference to (z)(ii), **Mr Binder** indicated that there was a problem translating the word "arranged" into French, the closest being "*mis en place le cas échéant*". **Mr Schulz** suggested that information should be given on any Government scheme that existed for the funding of franchises, but the other members of the Committee preferred not to enter into such details. **Mr Kronke** wondered whether there were franchisors with banking subsidiaries. **Mr Brennan** indicated that although there were franchisors that provided their own financing for limited purposes, and others that set up a financing programme with a particular bank for their franchisees, they did not have banking subsidiaries as such. **Mr Schulz** added that in Germany there was the public venture and other public banks that gave subsidised loans to franchisees. They would ask for a lot of information on the quality of the system, but in general they did not ask that much about the interests of the franchisees. What was most important for banks in Germany was the quality of the franchise system, and in relation to this they wanted to know how many franchisees had failed and other similar information. **Mr Konigsberg** pointed out that it was a misconception to assume that franchisors were keen to terminate franchise agreements. Quite the opposite was true in his experience, termination was the last resort, also because in many instances the franchisor was involved in the arrangements made by the franchisees (e.g. leases), with the consequence that the liability of the franchisor became significant if the franchisee failed. Many banks insisted on the franchisor providing the guarantees that they required, so the franchisor would not be able to terminate a franchise without serious consequences flowing from it.

A lengthy discussion took place with reference to the term "market" used in (z)(iii) and with the earnings claims referred to. The members of the Committee agreed that there was a clear problem of definition, in that concepts such as "market" and "relevant market" were very difficult to define.

As regards earnings claims, it was felt that what basically had to be supplied was historic data on the performance of units, both franchised and company owned, in the franchisee's own country. What had to be delivered was information that would be sufficient to allow the franchisee to prepare his own estimates, to calculate his return on the investment, and to provide the criteria necessary for him to make this calculation. What had to be stated clearly, was first of all that the results of the prospective franchisee might differ from the figures given in the disclosure documents. Secondly, an indication should be given of the number of outlets that were company owned and the number that were franchisee-owned, as performance might vary quite considerably between these two categories. As most franchisors did provide information, what had to be done was to control the quality of the

information given. It was therefore decided to add a new paragraph (3) along the lines of Section 16 of Schedule 1 of the Appendix to the *Alberta Franchises Act*. It was also decided to omit the reference to "market".

Following the discussion held on Article 4, and the deletion of Article 4(2), it was decided to delete the requirement contained in paragraph (2) that the franchisee provide the franchisor with information.

ARTICLE 6
(INFORMATION TO BE DISCLOSED)

- (1) The franchisor shall provide the following information in the disclosure document:
- (a) the business name and address of the franchisor;
 - (b) the trade name under which the franchisor does or intends to do business;
 - (c) the address of the principal place of business of the franchisor if different from that indicated in lit. (a);
 - (d) the business form of the franchisor;
 - (e) a description of the business experience of the franchisor, including:
 - (i) the length of time over which the franchisor has run a business of the type to be operated by the franchisee; and
 - (ii) the length of time over which the franchisor has offered franchises for the same type of business as that to be operated by the franchisee;
 - (f) the names, addresses, positions held, business experience and qualifications of any person who has senior management responsibilities for the franchisor's business operations in relation to the franchise;
 - (g) relevant details relating to any finding of liability in a civil action involving franchises or other businesses relating to misrepresentation, unfair or deceptive acts or practices or comparable actions, as well as relating to any criminal convictions of:
 - (i) the franchisor;
 - (ii) any affiliate of the franchisor; and
 - (iii) any of the persons indicated in lit. (f)

ARTICLE 6
(CONTENU DES INFORMATIONS FOURNIES)

- 1) Le franchiseur doit fournir, dans le document d'information, les renseignements suivants :
- a) la raison sociale et l'adresse du franchiseur ;
 - b) le nom commercial sous lequel le franchiseur exerce ou a l'intention d'exercer son activité ;
 - c) l'adresse de localisation principale de l'activité du franchiseur si elle est différente de celle indiquée à l'alinéa a) ci-dessus ;
 - d) l'identification de l'activité commerciale du franchiseur ;
 - e) une description de l'expérience commerciale du franchiseur, incluant notamment :
 - i) l'ancienneté du franchiseur dans la conduite d'opérations de franchise du type de celles devant être exploitées par le franchisé et,
 - ii) l'ancienneté du franchiseur dans l'offre de franchises dans le même type d'activités que celles prévues comme devant être exploitées par le franchisé ;
 - f) les noms, adresses, positions tenues, expérience commerciale et qualifications de toute personne qui a des hautes responsabilités de direction dans la conduite des activités commerciales du franchiseur en relation avec la franchise ;
 - g) tout détail utile au sujet de condamnations pénales et de procédures judiciaires ayant trait à une représentation inexacte des faits, un comportement malhonnête ou une pratique déloyale ou toute action analogue impliquant la franchise ou d'autres activités commerciales dans lesquels se sont trouvés concernés,
 - i) le franchiseur ;
 - ii) tout affilié du franchiseur ; et
 - iii) toute personne mentionnée à l'alinéa f) ci-dessus

- for the previous five years, as well as the relevant details relating to any pending actions;
- (h) relevant details concerning any bankruptcy, insolvency or comparable proceeding involving the franchisor and/or the legal entities and persons indicated in lit. (f) for the previous five years;
- (i) the total number of franchisees in the network;
- (j) the names, addresses and phone numbers of the franchisees whose outlets are located nearest to the proposed outlet of the prospective franchisee, but in any event of not more than 50 franchisees;
- (k) information about the franchisees that have ceased to be members of the network during the three years before the one during which the franchise agreement is entered into, with an indication of the reasons for which the franchisees have ceased to be members of the network;
- (l) a description of the franchise to be operated by the franchisee;
- (m) goods and/or services which the franchisee is required to purchase or lease, indicating
- (i) which, if any, have to be purchased or leased from the franchisor, its affiliates or from a supplier designated by the franchisor; and
- (ii) those for which the franchisee has the right to recommend other suppliers for approval by the franchisor;
- (n) information on pricing practices with regard to the goods and/or services indicated in lit. (m), including information as to the treatment of revenue or other benefits that may be received by the franchisor or any of its associates from any supplier of goods and/or services to the franchisee;
- (o) a brief description of the initial training programme;
- (p) exclusive rights granted, if any, including exclusive rights relating to territory and/or to customers;
- et ce dans les cinq dernières années, ainsi que tout détail utile relatif à toute action encore pendante.
- h) tout détail utile concernant toute procédure de faillite, d'insolvabilité, ou tout autre procédure comparable intervenue pendant les cinq dernières années ayant impliqué le franchiseur et/ou les entités légales ou les personnes mentionnées à l'alinéa f) ci-dessus ;
- i) le nombre total de franchisés appartenant au réseau ;
- j) les noms, adresses, et numéros de téléphones des franchisés dont les unités exploitées sont situées le plus près possible de l'unité d'exploitation proposée au franchisé éventuel, sans que les coordonnées ne doivent être données, en toute hypothèse, pour plus de 50 franchisés environnants ;
- k) tout renseignement concernant les franchisés qui ont cessé d'être membres du réseau, au cours des trois années précédant la conclusion du contrat, en précisant les motifs pour lesquels les franchisés ont cessé d'être membres du réseau ;
- l) une description de la franchise susceptible d'être exploitée par le franchisé ;
- m) les marchandises et/ou les services que le franchisé est tenu d'acheter ou louer, en indiquant :
- i) lesquels, le cas échéant, doivent être achetés ou loués auprès du franchiseur, de ses affiliés, ou auprès d'un fournisseur désigné par le franchiseur ; et,
- ii) ceux pour lesquels le franchisé a le droit de soumettre d'autres fournisseurs de son choix à l'agrément du franchiseur ;
- n) toute information concernant les pratiques de prix, au regard des marchandises et/ou des services mentionnés à l'alinéa m) ci-dessus, incluant tout renseignement concernant le traitement de toute source de revenus que le franchiseur ou ses associés peuvent recevoir en provenance de tout fournisseur de marchandises et/ou de services à destination du franchisé ;
- o) une brève description des programmes de formation initiale ;
- p) tout droit d'exclusivité accordé, le cas échéant, en incluant les droits d'exclusivité relatifs au territoire et/ou à la clientèle ;

- | | |
|--|---|
| <p>(q) limitations imposed on the franchisee, if any, in relation to territory and/or to customers;</p> <p>(r) any reservation by the franchisor of the right</p> <p style="margin-left: 20px;">(i) to use the trademarks covered by the franchise agreement;</p> <p style="margin-left: 20px;">(ii) to sell or distribute the goods and/or services authorised for sale by the franchisee directly or indirectly through the same or any other channel of distribution, whether under the trademarks covered by the agreement or any other trademark;</p> <p>(s) information regarding</p> <p style="margin-left: 20px;">(i) the registration, if any, and</p> <p style="margin-left: 20px;">(ii) litigation or other legal proceedings, if any,</p> <p style="margin-left: 40px;">in the national territory or territories in which the franchised business is to be run concerning the franchisor's intellectual property relevant for the franchise, in particular trademarks, patents, copyright and software;</p> <p>(t) the initial franchise fee;</p> <p>(u) other fees and payments, including any gross-up of royalties imposed by the franchisor in order to offset withholding tax;</p> <p>(v) other financial matters, including:</p> <p style="margin-left: 20px;">(i) (aa) estimates of the franchisee's total initial investment and of the minimum working capital required for the first year of operation;</p> <p style="margin-left: 40px;">(bb) financing offered or arranged by the franchisor, if any;</p> <p style="margin-left: 40px;">(cc) audited financial statements of the franchisor, including balance sheets and statements of profit and loss, for the previous three years. If the most recent audited financial statements are as of a date more than 180 days before the date of delivery of the disclosure document, then unaudited financial statements as of a date within 90 days of the date of delivery of the disclosure document;</p> | <p>q) toute restriction relative au territoire et/ou à la clientèle imposée le cas échéant au franchisé, ;</p> <p>r) tout droit réservé que le franchiseur peut s'accorder à lui même</p> <p style="margin-left: 20px;">i) d'utiliser les marques couvertes par le contrat de franchise</p> <p style="margin-left: 20px;">ii) de vendre ou de distribuer les marchandises et/ou les services autorisés à la vente par le franchisé, directement ou indirectement à travers le même réseau de distribution ou tout autre, que ce soit sous le couvert des marques prévues dans le contrat de franchise ou toute autre marque ;</p> <p>s) toute information concernant :</p> <p style="margin-left: 20px;">i) l'enregistrement le cas échéant et,</p> <p style="margin-left: 20px;">ii) les procédures judiciaires ou toute autre procédure légale engagées le cas échéant</p> <p style="margin-left: 40px;">sur le ou les territoires nationaux dans lesquels l'activité commerciale franchisée doit être entreprise ayant trait aux droits de propriété intellectuelle du franchiseur en relation avec la franchise, et en particulier aux marques, brevets, droits d'auteurs, et droit de protection logicielle ;</p> <p>t) la redevance initiale de franchise ;</p> <p>u) toute autre rémunération ou tout autre règlement incluant toute majoration de redevances imposé par le franchiseur comme compensation pour l'impôt retenu à la source</p> <p>v) tout autre élément d'information financière incluant :</p> <p style="margin-left: 20px;">i) aa) le montant total prévisionnel de l'investissement initial du franchisé et du fonds de roulement minimum requis pour la première année d'exploitation,</p> <p style="margin-left: 40px;">bb) les modes de financements offerts ou organisés par le franchiseur le cas échéant,</p> <p style="margin-left: 40px;">cc) les rapports financiers audités du franchiseur, et notamment les bilans, comptes d'exploitation et de pertes et profits pour les trois années précédentes. Si le plus récent rapport financier audité est antérieur de plus de 180 jours à la date de délivrance du document d'information, une situation financière non auditée devrait être fournie, datant de moins de 90 jours au moment de la délivrance du document d'information ;</p> |
|--|---|

- (ii) (aa) If information is provided to the prospective franchisee by or on behalf of the franchisor concerning the historical or projected financial performance of outlets owned by the franchisor, its affiliates or franchisees, the information must:
- have a reasonable basis at the time it is made;
 - include the material assumptions underlying its preparation and presentation;
 - state whether it is based on actual results of existing outlets;
 - state whether it is based on franchisor-owned and/or franchisee-owned outlets; and
 - indicate the percentage of those outlets that meet or exceed each range or result.
- (bb) If the financial information referred to in the preceding subparagraph is provided, the franchisor must state that the levels of performance of the proposed franchisee's outlet may differ from those contained in the information provided by the franchisor.
- (w) restrictions or conditions imposed on the franchisee in relation to the goods and/or services that the franchisee may sell.
- (3) Where the franchise is a master franchise, the sub-franchisor must in addition disclose to the prospective sub-franchisee the information on the franchisor that it has received under paragraph (1), lits. (a), (e), (h), (p), (q) and (r) of this article, as well as to inform the prospective sub-franchisee of the situation of the sub-franchise agreements in case of termination of the master franchise agreement and of the content of the master franchise agreement.
- ii) aa) si l'information est délivrée au franchisé éventuel, par le franchiseur ou en son nom, concernant les résultats financiers historiques ou les projections financières prévisionnelles d'unités exploitées en propre par le franchiseur, ses affiliés ou ses franchisés, cette information doit :
- reposer sur une base raisonnable au moment où elle est établie,
 - inclure les hypothèses importantes ayant donné lieu à sa préparation et sa présentation,
 - stipuler si elle est basée sur des résultats actuels d'unités existantes;
 - spécifier si elle est basée sur des unités appartenant au franchiseur et/ou aux franchisés, et,
 - indiquer le pourcentage d'unités d'exploitation correspondant à chaque éventail de chiffres ou à chaque résultat affiché, ou qui les dépasse.
- bb) Si l'information financière à laquelle il est fait allusion dans le précédent paragraphe aa) est fourni, le franchiseur doit déclarer que les niveaux de performance de l'unité d'exploitation proposée au franchisé éventuel peuvent être différents des informations fournies par le franchiseur ;
- w) les restrictions ou conditions imposées au franchisé au sujet des marchandises et ou des services que le franchisé a le droit de vendre.
- 3) Si la franchise est une franchise principale, le sous-franchiseur doit en outre délivrer au franchisé éventuel l'information concernant le franchiseur requise aux alinéas a), e), h), p), q) et r) du paragraphe 1) du présent article, de même qu'il devra informer le sous-franchisé éventuel du contenu du contrat de franchise principale et du sort de tous les contrats de sous-franchise dans l'hypothèse où le contrat de franchise principal viendrait à se terminer.

(XVIII) ARTICLE 16 - GOOD FAITH AND FAIR DEALING

Each party must act in accordance with good faith and fair dealing.

Mr Konigsberg suggested that the draft provision on good faith and fair dealing should be deleted, as the model law was a disclosure law and not a law regulating the relationship between the parties. If the scope of the model law were to be broadened to include also relationship issues, then

the possibility of including a provision on good faith and fair dealing might be reconsidered. Furthermore, in his experience the existing legislation that had introduced provisions on good faith and fair dealing had done so more for political reasons than as a result of a real need.

Mr Konigsberg's proposal was accepted and the draft article consequently deleted.

4. OTHER ISSUES DISCUSSED

Other issues discussed included whether or not the personal liability of any specific person, the franchisor or any of its affiliates, should be expressly stated. In the end, it was decided that the commentary should simply indicate that the issue had been discussed and that the Committee had decided to leave this question to national jurisdictions.

The question of how much a sub-franchisor had to disclose to sub-franchisees of the disclosure he himself had received from the franchisor was also discussed. In general, it was considered to be pointless for the sub-franchisee to receive a copy of the disclosure document that the sub-franchisor had been provided with by the franchisor. There were however a number of elements that were important, such as information relating to the type of relationship that the sub-franchisor had with the franchisor, the term of the master franchise agreement and what would happen to the sub-franchise agreements if the master franchise agreement were to be terminated. In general, information that was relevant for and had an impact on the sub-franchisor's relationship with the sub-franchisees. The Committee in the end decided to insert a special provision listing the information relating to the franchisor that had to be transmitted by the sub-franchisor to the sub-franchisees (see Article 6(3) in the new numbering).

The question of the confidentiality of some of the information listed, such as lists of addresses of franchisees, was also discussed. It was pointed out that in some countries, such as Germany, it would be against the data protection law to provide such information. It was however observed that if the agreement specifically required this information to be given, or if, for example, the information to be transmitted to the sub-franchisees was approved by the franchisor, it was likely that it would be possible to transmit it. In this connection the question of the liability of the franchisor and sub-franchisor for incorrect information was considered. **Mr Brennan** pointed out that in the US statutes they were jointly and severally liable.

The possibility of providing for a registration system was also briefly considered, but, in the light of US and Canadian experience, discarded.

The best way to obtain the in-put of franchisee organisations was discussed. The members of the Committee recalled that franchisee organisations were typically organised along brand lines, and that it therefore was very difficult to obtain the in-put of a properly representative association of franchisees. **Mr Schulz** stated that he knew two franchisee organisations in Germany, neither of which could be considered to be particularly serious. The conclusion the Committee arrived at was that, as they all represented both franchisors and franchisees, and as the legislation that existed and that had been used as sources of inspiration for the drafting of the draft model law had been heavily inspired by franchisee interests, the interests of both franchisors and franchisees could be considered to be represented on the Study Group.

LIST OF PARTICIPANTS

MEMBERS OF THE DRAFTING COMMITTEE

Mr Olivier BINDER	CEJEF Société d'avocats, Paris
Mr Michael BRENNAN	Rudnick Wolfe, Chicago Secretary of the Committee on International Franchising of the Section on Business Law of the IBA
Mr Alexander S. KONIGSBERG, Q.C.	Goodman Lapointe Ferguson, Montreal, Former Chairman of the Committee on International Franchising of the Section on Business Law of the IBA
Mr Albrecht SCHULZ	CMS Hasche Sigle Eschenlohr Peltzer, Stuttgart, Former Chairman of the Committee on International Franchising of the Section on Business Law of the IBA

UNIDROIT

Mr Herbert KRONKE, Secretary-General
Mr Walter RODINÒ, Deputy Secretary-General
Mr M. Joachim BONELL, Legal Consultant
Ms Lena PETERS, Research Officer
Ms Isabelle DUBOIS, Library Assistant/Secretary

TEXT OF THE DRAFT MODEL LAW AS ADOPTED BY THE DRAFTING COMMITTEE

PREAMBLE
(PURPOSE OF THE LAW)

The purpose of this law is to assist prospective franchisees in making an informed decision as to whether or not to enter into a franchise agreement by requiring the franchisor to provide timely disclosure of necessary and accurate information on the franchisor and the franchised business.

ARTICLE 1
(DEFINITIONS)

For the purposes of this law:

affiliate of the franchisor means a legal entity who directly or indirectly controls or is controlled by the franchisor, or is controlled by another party who controls the franchisor;

development agreement means an agreement under which a franchisor in exchange for direct or indirect financial compensation grants to another party the right to enter into multiple franchise agreements with the franchisor to operate franchise businesses within a specified territory;

disclosure document means a document containing the information required under this law;

franchise means the rights granted by a franchisor to a franchisee under a franchise agreement and includes:

- (a) the rights granted by a franchisor to a sub-franchisor under a master franchise agreement;
- (b) the rights granted by a sub-franchisor to a sub-franchisee under a sub-franchise agreement;
- (c) the rights granted by a franchisor to a party under a development agreement;

franchisee means the party to whom a franchise is granted;

franchise agreement means an agreement under which a party (the franchisor) in exchange for direct or indirect financial compensation authorises and requires another party (the franchisee) to engage in the business of selling, offering for sale or distributing goods or services under a system

PRÉAMBULE
(OBJET DE LA LOI)

La présente loi a pour objet de permettre aux éventuels franchisés de décider en connaissance de cause de s'engager ou non dans un contrat de franchise, en exigeant que le franchiseur fournisse, en temps utile, des informations nécessaires et précises sur lui-même et sur son activité commerciale franchisée.

ARTICLE 1
(DÉFINITIONS)

Aux fins de la présente loi :

est considéré comme **un affilié** du franchiseur, une entité légale contrôlée directement ou indirectement par celui-ci ou exerçant un contrôle direct ou indirect sur celui-ci ou se trouvant sous le contrôle d'une tierce partie qui contrôle le franchiseur ;

un contrat de développement désigne la convention aux termes de laquelle un franchiseur concède à une autre partie, en échange de contreparties financières directes ou indirectes, le droit de contracter différents contrats de franchise avec lui dans le but de développer une activité commerciale franchisée, dans un territoire spécifique;

un document d'information est un document contenant les renseignements exigés par la présente loi;

une franchise signifie les droits concédés par un franchiseur à un franchisé dans le cadre d'un contrat de franchise y inclus:

- a) les droits concédés par un franchiseur à un sous-franchiseur dans le cadre d'un contrat de franchise principale,
- b) les droits concédés par un sous-franchiseur à un sous-franchisé dans le cadre d'un contrat de sous-franchise
- c) les droits concédés par un franchiseur à une partie, dans le cadre d'un contrat de développement;

un franchisé est une personne physique ou morale à qui est concédée une franchise.

un contrat de franchise s'entend de tout accord par lequel une partie (le franchiseur) autorise et engage une autre partie (le franchisé), en échange de contreparties financières directes ou indirectes, à se livrer à une activité commerciale de vente, d'offre de vente, ou de distribution de marchandises ou

determined by the franchisor which in substantial part prescribes the manner in which the franchised business is to be operated, which includes significant and continuing operation controls by the franchisor, and which is associated with a trademark, service mark, trade name or logotype designated by the franchisor;

franchised business means the business run under a franchise agreement;

franchisor means a party who grants another party the right to engage in a business under a franchise agreement;

master franchise means the right granted by a franchisor to another party (the sub-franchisor) to grant franchises to third parties (the sub-franchisees);

material fact means any information that can reasonably be expected to have a significant effect on the value or price of the franchise to be granted or on the decision to acquire the franchise;

misrepresentation means a statement of fact that was known by the person making the statement to be untrue at the time the statement was made; and

sub-franchise agreement means a franchise agreement concluded by a sub-franchisor and a sub-franchisee pursuant to a master franchise.

ARTICLE 2 **(SCOPE OF APPLICATION)**

This law applies to franchises granted for the operation of one or more franchised businesses.

ARTICLE 3 **(EXEMPTIONS FROM OBLIGATION TO DISCLOSE)**

No disclosure is required in case of:

- (a) the grant of a franchise to a person who has been an officer or director of the franchisor or of its affiliate for at least six months immediately before the delivery of the disclosure document;
- (b) the assignment or other transfer of a franchisee's rights and obligations under an existing franchise agreement, unless as a condition for the assignment or transfer the assignee or transferee is

de services, dans le cadre d'un système établi par le franchiseur qui décrit de façon substantielle les modes d'exploitation de l'activité franchisée, et qui est associé à une marque de commerce, d'une marque de service, d'une appellation commerciale ou d'un logo prescrit par le franchiseur ;

une activité commerciale franchisée est une activité commerciale entreprise dans le cadre d'un contrat de franchise ;

un franchiseur désigne toute partie qui concède à une autre partie le droit de se livrer à une activité commerciale dans le cadre d'un contrat de franchise ;

une franchise principale s'entend du droit accordé par un franchiseur à une autre partie (le sous-franchiseur), de concéder des franchises à de tierces parties (les sous-franchisés) ;

un fait important s'entend de tout renseignement qui peut raisonnablement être considéré comme ayant une incidence significative sur la valeur ou le prix de la franchise concédée, ou sur la décision d'acquiescer une franchise ;

une représentation inexacte des faits s'entend d'une déclaration dont l'auteur savait qu'elle était erronée lorsqu'elle a été faite ; et

un contrat de sous-franchise s'entend d'un contrat de franchise conclu entre un sous-franchiseur et un sous-franchisé conformément à une franchise principale.

ARTICLE 2 **(CHAMPS D'APPLICATION)**

La présente loi s'applique aux franchises concédées pour l'exploitation d'une ou plusieurs activités commerciales franchisées.

ARTICLE 3 **(DISPENSES DE L'OBLIGATION DE DIVULGATION D'INFORMATION)**

Aucune délivrance d'information n'est requise dans les hypothèses suivantes :

- a) la concession d'une franchise à une personne qui a été un dirigeant ou un administrateur du franchiseur ou de l'un de ses affiliés pendant les six mois immédiatement précédant la délivrance du document d'information ;
- b) la cession ou toute autre forme de transfert des droits et obligations du franchisé dans le cadre d'un contrat de franchise en cours, à moins que le cessionnaire se soit vu imposer, comme

required to enter into a new franchise agreement;

- (c) the grant to a person of a franchise to sell goods or services within that person's existing business, if the sales of the franchise, as anticipated by the parties or as should reasonably be anticipated by the parties at the time the franchise agreement is entered into, will not exceed 20% of the total aggregate sales of the franchisee's combined business;
- (d) the grant of a franchise pursuant to which the franchisee commits to a total investment in excess of [X]; or
- (e) the grant of a franchise to a franchisee who has a net worth in excess of [Y].

ARTICLE 4
(FORMAT OF DISCLOSURE DOCUMENT)

- (1) Disclosure must be provided in writing.
- (2) The franchisor may use any format for the disclosure document, provided that the information contained therein meets the requirements imposed by this law.

ARTICLE 5
(DELIVERY OF THE DISCLOSURE DOCUMENT)

A franchisor must give every prospective franchisee a disclosure document at least fourteen days before

- (a) the signing by the prospective franchisee of any agreement relating to the franchise; or
 - (b) the payment by the prospective franchisee of any fees relating to the franchise
- whichever is earlier.

ARTICLE 6
(INFORMATION TO BE DISCLOSED)

- (1) The franchisor shall provide the following information in the disclosure document:

condition de la cession, de souscrire un nouveau contrat de franchise ;

- c) la concession d'une franchise à une personne qui lui permette de vendre des marchandises ou services dans le cadre de son exploitation commerciale déjà existante, dans la mesure où le chiffre d'affaires réalisé sur les ventes dans le cadre de cette franchise, ne dépasse pas 20 % du total cumulé de toutes les ventes de l'ensemble des activités commerciales de cette personne, pour autant que la proportion des ventes dans le cadre de la franchise ait pu être anticipée par les parties ou aurait dû raisonnablement être anticipée par les parties au moment où le contrat de franchise a été souscrit ;
- d) la concession d'une franchise conformément à laquelle le franchisé s'engage à réaliser un investissement total excédant le montant de [x] ; ou
- e) la concession d'une franchise à un franchisé dont la valeur nette dépasse [Y]

ARTICLE 4
(PRÉSENTATION DU DOCUMENT D'INFORMATION)

- 1) L'information doit être fournie par écrit.
- 2) Le franchiseur peut établir le document d'information dans la forme de son choix, à condition que les renseignements qu'il contient soient conformes aux prescriptions imposées par la présente loi.

ARTICLE 5
(REMISE DU DOCUMENT D'INFORMATION)

Un franchiseur doit délivrer à tout franchisé éventuel le document d'information au moins quatorze jours avant la survenance du premier des deux événements suivants :

- a) la signature par le franchisé éventuel de tout contrat ayant trait à la franchise ;
- b) le paiement par le franchisé éventuel de toute somme, compensation, indemnité de dédit ou de toute sorte d'honoraires en relation avec la franchise.

ARTICLE 6
(CONTENU DES INFORMATIONS FOURNIES)

- 1) Le franchiseur doit fournir, dans le document d'information, les renseignements suivants :

- | | |
|---|---|
| <p>(a) the business name and address of the franchisor;</p> <p>(b) the trade name under which the franchisor does or intends to do business;</p> <p>(c) the address of the principal place of business of the franchisor if different from that indicated in lit. (a);</p> <p>(d) the business form of the franchisor;</p> <p>(e) a description of the business experience of the franchisor, including:</p> <p style="padding-left: 20px;">(i) the length of time over which the franchisor has run a business of the type to be operated by the franchisee; and</p> <p style="padding-left: 20px;">(ii) the length of time over which the franchisor has offered franchises for the same type of business as that to be operated by the franchisee;</p> <p>(f) the names, addresses, positions held, business experience and qualifications of any person who has senior management responsibilities for the franchisor's business operations in relation to the franchise;</p> <p>(g) relevant details relating to any finding of liability in a civil action involving franchises or other businesses relating to misrepresentation, unfair or deceptive acts or practices or comparable actions, as well as relating to any criminal convictions of:</p> <p style="padding-left: 20px;">(i) the franchisor;</p> <p style="padding-left: 20px;">(ii) any affiliate of the franchisor; and</p> <p style="padding-left: 20px;">(iii) any of the persons indicated in lit. (f)</p> <p style="padding-left: 20px;">for the previous five years, as well as the relevant details relating to any pending actions;</p> <p>(h) relevant details concerning any bankruptcy, insolvency or comparable proceeding involving the franchisor and/or the legal entities and persons indicated in lit. (f) for the previous five years;</p> <p>(i) the total number of franchisees in the network;</p> <p>(j) the names, addresses and phone numbers of the franchisees whose outlets are located nearest to the proposed outlet of the prospective</p> | <p>a) la raison sociale et l'adresse du franchiseur ;</p> <p>b) le nom commercial sous lequel le franchiseur exerce ou a l'intention d'exercer son activité ;</p> <p>c) l'adresse de localisation principale de l'activité du franchiseur si elle est différente de celle indiquée à l'alinéa a) ci-dessus ;</p> <p>d) l'identification de l'activité commerciale du franchiseur ;</p> <p>e) une description de l'expérience commerciale du franchiseur, incluant notamment :</p> <p style="padding-left: 20px;">i) l'ancienneté du franchiseur dans la conduite d'opérations de franchise du type de celles devant être exploitées par le franchisé et,</p> <p style="padding-left: 20px;">ii) l'ancienneté du franchiseur dans l'offre de franchises dans le même type d'activités que celles prévues comme devant être exploitées par le franchisé ;</p> <p>f) les noms, adresses, positions tenues, expérience commerciale et qualifications de toute personne qui a des hautes responsabilités de direction dans la conduite des activités commerciales du franchiseur en relation avec la franchise ;</p> <p>g) tout détail utile au sujet de condamnations pénales et de procédures judiciaires ayant trait à une représentation inexacte des faits, un comportement malhonnête ou une pratique déloyale ou toute action analogue impliquant la franchise ou d'autres activités commerciales dans lesquels se sont trouvés concernés,</p> <p style="padding-left: 20px;">i) le franchiseur ;</p> <p style="padding-left: 20px;">ii) tout affilié du franchiseur ; et</p> <p style="padding-left: 20px;">iii) toute personne mentionnée à l'alinéa f) ci-dessus</p> <p style="padding-left: 20px;">et ce dans les cinq dernières années, ainsi que tout détail utile relatif à toute action encore pendante.</p> <p>h) tout détail utile concernant toute procédure de faillite, d'insolvabilité, ou tout autre procédure comparable intervenue pendant les cinq dernières années ayant impliqué le franchiseur et/ou les entités légales ou les personnes mentionnées à l'alinéa f) ci-dessus ;</p> <p>i) le nombre total de franchisés appartenant au réseau ;</p> <p>j) les noms, adresses, et numéros de téléphones des franchisés dont les unités exploitées sont situées le plus près possible de l'unité d'exploitation proposée au franchisé éventuel, sans</p> |
|---|---|

- franchisee, but in any event of not more than 50 franchisees;
- (k) information about the franchisees that have ceased to be members of the network during the three years before the one during which the franchise agreement is entered into, with an indication of the reasons for which the franchisees have ceased to be members of the network;
- (l) a description of the franchise to be operated by the franchisee;
- (m) goods and/or services which the franchisee is required to purchase or lease, indicating
- (i) which, if any, have to be purchased or leased from the franchisor, its affiliates or from a supplier designated by the franchisor; and
- (ii) those for which the franchisee has the right to recommend other suppliers for approval by the franchisor;
- (n) information on pricing practices with regard to the goods and/or services indicated in lit. (m), including information as to the treatment of revenue or other benefits that may be received by the franchisor or any of its associates from any supplier of goods and/or services to the franchisee;
- (o) a brief description of the initial training programme;
- (p) exclusive rights granted, if any, including exclusive rights relating to territory and/or to customers;
- (q) limitations imposed on the franchisee, if any, in relation to territory and/or to customers;
- (r) any reservation by the franchisor of the right
- i) to use the trademarks covered by the franchise agreement;
- ii) to sell or distribute the goods and/or services authorised for sale by the franchisee directly or indirectly through the same or any other channel of distribution, whether under the trademarks covered by the agreement or any other trademark;
- que les coordonnées ne doivent être données, en toute hypothèse, pour plus de 50 franchisés environnants ;
- k) tout renseignement concernant les franchisés qui ont cessé d'être membres du réseau, au cours des trois années précédant la conclusion du contrat, en précisant les motifs pour lesquels les franchisés ont cessé d'être membres du réseau ;
- l) une description de la franchise susceptible d'être exploitée par le franchisé ;
- m) les marchandises et/ou les services que le franchisé est tenu d'acheter ou louer, en indiquant :
- i) lesquels, le cas échéant, doivent être achetés ou loués auprès du franchiseur, de ses affiliés, ou auprès d'un fournisseur désigné par le franchiseur ; et,
- ii) ceux pour lesquels le franchisé a le droit de soumettre d'autres fournisseurs de son choix à l'agrément du franchiseur ;
- n) toute information concernant les pratiques de prix, au regard des marchandises et/ou des services mentionnés à l'alinéa m) ci-dessus, incluant tout renseignement concernant le traitement de toute source de revenus que le franchiseur ou ses associés peuvent recevoir en provenance de tout fournisseur de marchandises et/ou de services à destination du franchisé ;
- o) une brève description des programmes de formation initiale ;
- p) tout droit d'exclusivité accordé, le cas échéant, en incluant les droits d'exclusivité relatifs au territoire et/ou à la clientèle ;
- q) toute restriction relative au territoire et/ou à la clientèle imposée le cas échéant au franchisé, ;
- r) tout droit réservé que le franchiseur peut s'accorder à lui même
- i) d'utiliser les marques couvertes par le contrat de franchise
- ii) de vendre ou de distribuer les marchandises et/ou les services autorisés à la vente par le franchisé, directement ou indirectement à travers le même réseau de distribution ou tout autre, que ce soit sous le couvert des marques prévues dans le contrat de franchise ou toute autre marque ;

- | | |
|---|---|
| <p>(s) information regarding</p> <ul style="list-style-type: none"> (i) the registration, if any, and (ii) litigation or other legal proceedings, if any, <p>in the national territory or territories in which the franchised business is to be run concerning the franchisor's intellectual property relevant for the franchise, in particular trademarks, patents, copyright and software;</p> <p>(t) the initial franchise fee;</p> <p>(u) other fees and payments, including any gross-up of royalties imposed by the franchisor in order to offset withholding tax;</p> <p>(v) other financial matters, including:</p> <ul style="list-style-type: none"> (i) (aa) estimates of the franchisee's total initial investment and of the minimum working capital required for the first year of operation; (bb) financing offered or arranged by the franchisor, if any; (cc) audited financial statements of the franchisor, including balance sheets and statements of profit and loss, for the previous three years. If the most recent audited financial statements are as of a date more than 180 days before the date of delivery of the disclosure document, then unaudited financial statements as of a date within 90 days of the date of delivery of the disclosure document; (ii) (aa) If information is provided to the prospective franchisee by or on behalf of the franchisor concerning the historical or projected financial performance of outlets owned by the franchisor, its affiliates or franchisees, the information must: <ul style="list-style-type: none"> - have a reasonable basis at the time it is made; - include the material assumptions underlying its preparation and presentation; - state whether it is based on actual results of existing outlets; | <p>s) toute information concernant :</p> <ul style="list-style-type: none"> i) l'enregistrement le cas échéant et, ii) les procédures judiciaires ou toute autre procédure légale engagées le cas échéant <p>sur le ou les territoires nationaux dans lesquels l'activité commerciale franchisée doit être entreprise ayant trait aux droits de propriété intellectuelle du franchiseur en relation avec la franchise, et en particulier aux marques, brevets, droits d'auteurs, et droit de protection logicielle ;</p> <p>t) la redevance initiale de franchise ;</p> <p>u) toute autre rémunération ou tout autre règlement incluant toute majoration de redevances imposé par le franchiseur comme compensation pour l'impôt retenu à la source</p> <p>v) tout autre élément d'information financière incluant :</p> <ul style="list-style-type: none"> i) aa) le montant total prévisionnel de l'investissement initial du franchisé et du fonds de roulement minimum requis pour la première année d'exploitation, bb) les modes de financements offerts ou organisés par le franchiseur le cas échéant, cc) les rapports financiers audités du franchiseur, et notamment les bilans, comptes d'exploitation et de pertes et profits pour les trois années précédentes. Si le plus récent rapport financier audité est antérieur de plus de 180 jours à la date de délivrance du document d'information, une situation financière non auditée devrait être fournie, datant de moins de 90 jours au moment de la délivrance du document d'information ; ii) aa) si l'information est délivrée au franchisé éventuel, par le franchiseur ou en son nom, concernant les résultats financiers historiques ou les projections financières prévisionnelles d'unités exploitées en propre par le franchiseur, ses affiliés ou ses franchisés, cette information doit : <ul style="list-style-type: none"> - reposer sur une base raisonnable au moment où elle est établie, - inclure les hypothèses importantes ayant donné lieu à sa préparation et sa présentation, - stipuler si elle est basée sur des résultats actuels d'unités existantes; |
|---|---|

- state whether it is based on franchisor-owned and/or franchisee-owned outlets; and
- indicate the percentage of those outlets that meet or exceed each range or result.

(bb) If the financial information referred to in the preceding subparagraph is provided, the franchisor must state that the levels of performance of the proposed franchisee's outlet may differ from those contained in the information provided by the franchisor.

- (w) restrictions or conditions imposed on the franchisee in relation to the goods and/or services that the franchisee may sell.

(3) Where the franchise is a master franchise, the sub-franchisor must in addition disclose to the prospective sub-franchisee the information on the franchisor that it has received under paragraph (1), lits. (a), (e), (h), (p), (q) and (r) of this article, as well as to inform the prospective sub-franchisee of the situation of the sub-franchise agreements in case of termination of the master franchise agreement and of the content of the master franchise agreement.

**ARTICLE 7
(CONFIDENTIALITY)**

The franchisor may require the prospective franchisee to sign a statement acknowledging the confidentiality of the information contained in the disclosure document.

**ARTICLE 8
(ACKNOWLEDGEMENT OF RECEIPT OF
DISCLOSURE DOCUMENT)**

As a condition for its signing the franchise agreement, the franchisor may require the prospective franchisee to acknowledge in writing the receipt of the disclosure document.

**ARTICLE 9
(LANGUAGE OF DISCLOSURE DOCUMENT)**

The disclosure document must be written in a clear and comprehensible manner in the official language of the jurisdiction within which the prospective franchise is to be located.

- spécifier si elle est basée sur des unités appartenant au franchiseur et/ou aux franchiseés, et,
- indiquer le pourcentage d'unités d'exploitation correspondant à chaque éventail de chiffres ou à chaque résultat affiché, ou qui les dépasse.

bb) Si l'information financière à laquelle il est fait allusion dans le précédent paragraphe aa) est fourni, le franchiseur doit déclarer que les niveaux de performance de l'unité d'exploitation proposée au franchiseé éventuel peuvent être différents des informations fournies par le franchiseur ;

- w) les restrictions ou conditions imposées au franchiseé au sujet des marchandises et ou des services que le franchiseé a le droit de vendre.

3) Si la franchise est une franchise principale, le sous-franchiseur doit en outre délivrer au franchiseé éventuel l'information concernant le franchiseur requise aux alinéas a), e), h), p), q) et r) du paragraphe 1) du présent article, de même qu'il devra informer le sous-franchiseé éventuel du contenu du contrat de franchise principale et du sort de tous les contrats de sous-franchise dans l'hypothèse où le contrat de franchise principal viendrait à se terminer.

**ARTICLE 7
(CLAUSE DE CONFIDENTIALITÉ)**

Le franchiseur peut exiger du franchiseé éventuel la signature d'un engagement par lequel ce dernier s'engage à préserver la confidentialité de l'information qu'il recevra, contenu dans le document d'information.

**ARTICLE 8
(ACCUSE DE RECEPTION DU DOCUMENT
D'INFORMATION)**

Le franchiseur peut exiger du franchiseé éventuel, comme condition déterminante de la signature du contrat de franchise, que ce dernier lui accuse réception par écrit de la bonne réception du document d'information.

**ARTICLE 9
(LANGUE UTILISÉE DANS LE DOCUMENT
D'INFORMATION)**

Le document d'information doit être écrit d'une manière claire et compréhensible, dans la langue officielle de la juridiction dans laquelle le franchiseé éventuel sera situé.

**ARTICLE 10
(REMEDIES)**

(1) If a franchisor fails to give a prospective franchisee the disclosure document within the period of time established in Article 5, the franchisee is entitled to terminate the franchise agreement, unless the franchisor can prove that at the time of the conclusion of the franchise agreement the franchisee had the information necessary to make an informed decision.

(2) If the disclosure document contains a misrepresentation of a material fact, the franchisee is entitled to terminate the franchise agreement unless the franchisor can prove that the franchisee did not rely on this misrepresentation.

(3) The right to terminate the franchise agreement in accordance with paragraphs (1) and (2) of this article must be exercised within:

- (a) two years of the act or omission constituting the breach upon which the right to terminate is based; or
- (b) one year of the franchisee becoming aware of facts or circumstances that reasonably indicate that a breach entitling the franchisee to terminate has occurred; or

(c) within 90 days of the delivery to the franchisee of a written notice providing details of the breach.

(4) A written notice providing details of the breach giving the franchisee the right to terminate in accordance with paragraphs (1) and (2) of this article must be accompanied by the franchisor's then current disclosure document.

(5) The right to terminate in accordance with paragraphs (1) and (2) of this article does not derogate from any other right the franchisee may have under the applicable law.

**ARTICLE 10
(VOIES DE RECOURS)**

1) Si un franchiseur manque à son obligation de délivrer au franchisé éventuel un document d'information dans les temps requis par l'article 5 de la présente loi, le franchisé aura le droit de mettre fin au contrat de franchise, à moins que le franchiseur n'apporte la preuve qu'au moment de la conclusion du contrat de franchise, le franchisé disposait de toutes les informations nécessaires pour lui permettre de s'engager en connaissance de cause.

2) Si le document d'information contient une représentation inexacte d'un fait essentiel, le franchisé a le droit de mettre fin au contrat de franchise, à moins que le franchiseur n'apporte la preuve que le franchisé n'avait pas pris en considération cette représentation inexacte des faits.

3) Le droit de mettre un terme à un contrat de franchise en application des paragraphes 1) et 2) du présent article, doit être exercé :

- a) dans le délai de deux ans de l'acte ou de l'omission constitutive de la violation sur laquelle le droit de mettre un terme au contrat est basé ; ou
- b) dans le délai d'un an à compter du moment où le franchisé est supposé avoir conscience de faits ou de circonstances qui conduisent raisonnablement à une violation autorisant le franchisé à mettre un terme au contrat de franchise ; ou

(c) dans les 90 jours qui suivent la délivrance au franchisé d'un avis écrit indiquant les détails de la violation.

4) Un avis écrit indiquant les détails de la violation donnant droit au franchisé de mettre un terme au contrat en application des paragraphes 1) et 2) du présent article doit être accompagné du document d'information du franchiseur tel qu'il existe alors.

5) Le droit de mettre un terme au contrat de franchise en application des paragraphes 1) et 2) du présent article n'est pas exclusif de l'exercice par le franchisé de tout autre droit aux termes de la loi applicable.