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STUDY GROUP ON FRANCHISING

Fifth Session,
Rome, 7 December 2000

REPORT
(prepared by the Secretariat)

Rome, May 2001

The Fifth meeting of the **Study Group on Franchising** met at the seat of the Institute on 7 December 2000. A list of participants appears as Appendix 2 to this Report. The documents under discussion were:

Study LXVIII – Doc. 21: Model Franchise Disclosure Law – Text of the Preliminary Draft as adopted by the Study Group at its Fourth Session, held in Rome from 9 to 10 December 1999, with Draft Explanatory Report prepared by the UNIDROIT Secretariat;

Study LXVIII – Doc. 22: Comments submitted by Mr Souichirou KOZUKA, Associate Professor of Law, Sophia University (Tokyo);

Study LXVIII – Doc. 23: Proposal submitted by Mr Philip ZEIDMAN, Piper, Marbury, Rudnick & Wolfe LLP (Washington D.C.);

Study LXVIII – Doc. 24: Position paper submitted by the European Franchise Federation (EFF);

Study LXVIII – Doc. 25: Proposal for a Preface to the Model Law submitted by Messrs István KISS, Secretary-General and CEO of the Hungarian Franchise Association (Budapest) and Philip ZEIDMAN, Piper, Marbury, Rudnick & Wolfe LLP (Washington D.C.);

Study LXVIII – Doc. 26: Comments and Proposal submitted by Mr Albrecht SCHULZ, CMS Hasche Sigle Eschenlohr Peltzer (Stuttgart);

Study LXVIII – Doc. 27: French Text as revised by Mr Olivier Binder, CEJEF (Paris); and

Study LXVIII – Doc. 28: Comment on Study LXVIII – Doc. 25 submitted by Mr Michael Brennan, Piper, Marbury, Rudnick & Wolfe LLP (Chicago).

The text of the Draft Model Law as modified by the Study Group at its Fifth Session appear as Appendix 1, in English and French.

At the opening of the meeting, the Group welcomed Ms Corinne TRUONG of the *International Chamber of Commerce (ICC)*, Ms Carol CHOPRA of the *European Franchise Federation (EFF)* and Mr Jim MCCracken of the *World Franchise Council (WFC)*, who participated in the meeting for the first time.

GENERAL QUESTIONS

A general proposal was submitted (see Doc. 22) to the effect that it be made clear in the Explanatory Report that the Study Group found this text preferable to any other type of regulation of franchising and that the terms of franchise agreements should be left to the general principles of the law of contracts, the most important of which was freedom of contract, provided that necessary information was duly disclosed before such terms were agreed. This proposal was accepted by the Study Group.

The European Franchise Federation (Doc. 24) suggested that the final document should contain a substantiated preamble the purpose of which would be to stress that whatever form the final document took, “Model Law” or “Guide”, the spirit of the text was that of a “Guide to Legislators” and not “a Recommended Legislative Proposal”. It also suggested that the historical background to the different legislation on franchising around the world be provided, so as to underline either the benefits or the difficulties raised by such legislation, and that legislators be educated to the real need, or not, to legislate in the field of franchising in their particular country.

In relation to the second of these purposes, it was observed that the document would be far too heavy with an analysis of the legislation applicable in different parts of the world and of the benefits it provided or the difficulties it gave rise to. Furthermore, the Secretary-General of UNIDROIT pointed out that it was not the role of an organisation such as UNIDROIT to enter into a discussion of the advantages or disadvantages of legislation in general and of specific legislation in particular. Such considerations were the prerogative of States, and each State would, if and when it decided to adopt legislation, make the appropriate considerations. Nor could an international organisation take upon itself the role of teacher vis-à-vis national legislators.

As regards the first purpose proposed by the EFF, it tied in with the general discussion that took place in relation to the proposal to insert a Preface.

PROPOSALS TO INSERT A PREFACE

Two proposals for a Preface to the Explanatory Report were submitted to the Study Group (Docs. 23 and 25).

Introducing the proposal in Doc. 25, Mr KISS recalled that at an EFF Board meeting held in June 2000, he had had to explain what was intended with the Model Law, which at the time had not been accompanied by the Explanatory Report prepared for the present meeting. He had also explained that the situation in countries in transition was different from that in countries with consolidated market economies. Furthermore, there were developing countries in which codes of ethics were not readily used or even accepted. For instance, in Hungary, the political, social and economic life of which was undergoing a profound reorganisation, codes of ethics could not be operational without being to a certain extent underpinned by law. The same would in all likelihood apply to other countries as well. A number of countries in the region had adopted legislation, such as for instance Romania, and others might follow suit. If no reference material were provided, the legislation might turn out to be as surprising as that which had already been adopted. The Model Law might well serve as just such reference material. He therefore supported the Model Law, even if Hungary at present had no proposal underway for the introduction of legislation. Prior to the meeting of the Study Group, Mr Zeidman had contacted him in relation to the Model Law and to the proposals he had submitted in Doc. 23. Following a discussion between them, Mr Zeidman had suggested that he prepare an alternative formulation to submit to the Study Group, and this was what appeared in Doc. 25. The two approaches were different, but he had felt it important to put the points across to the readers at the very beginning, which was why he had moved certain paragraphs already in the Explanatory Report to the front, and had then reformulated the points of concern to Mr Zeidman and included them at the end of his proposed preface.

Paragraphs 1 – 7 of Doc. 25 were accepted by general agreement by the Study Group. As regards **Paragraph 8**, there was general agreement on the relevance of the points raised and on the need to draw them to the attention of legislators. There was general support for the reformulation of Paragraph 8 contained in Doc. 25, as the original formulation in Doc. 23 was felt to be too blunt. One member of the Group stressed the need to give legislators the message that they should carefully consider whether there was any need for legislation and also that it was necessary for them to know the subject on which they proposed to legislate.

It was suggested that it was critical that the final document make it unmistakably clear that the addressees of the Model Law were the Governments which had decided to legislate, that it was not a general recommendation to introduce legislation. What in effect the Study Group and its members were saying to legislators with this document, was that based on their experience this document was on balance the best form of legislation and that if the legislators had decided to adopt legislation, then this was the best legislation to adopt.

As regards whether or not the Model Law could be understood as a recommendation to introduce legislation, the Secretary-General indicated that it flowed from the very nature of a Model Law that it did not have to be implemented, that Governments were free to decide whether or not to adopt it at all, and to decide also whether or not they wanted to retain all the proposed provisions, or which they wanted to retain. It flowed from the definition of a model law that it was only for those legislators who had decided that they wanted legislation.

It was further pointed out that Paragraph 1 of the propose Preface stated very clearly that “[t]he Model Law is intended to provide national legislators *who have decided that legislation specifically aimed at franchising should be introduced into their legal system* with a source of inspiration, with an instrument that they may consult and use as a model or blueprint should they deem it appropriate” (italics added). It could hardly be stated more clearly or more bluntly than that.

A question examined by the Study Group in relation to the list of points in Paragraph 8, was the reaction that might be expected from Governments. One view was that Governments would be likely

to be offended to be given a document that to all intents and purposes asked them if they knew what they were doing, that told them that they should consider the economic implications of the proposed legislation, and so on. Another view was that the way Paragraph 8 was formulated Governments would not feel insulted. To soften the formulation somewhat it was decided to use wording such as “may wish to take into consideration” and to avoid more imperative formulations such as “should” or “will”.

In the end, with the softening of the formulation decided upon, the proposal submitted in Doc. 25 was accepted.

ARTICLE 1

A query submitted in Doc. 22 related to Paragraph 32 of the Explanatory Report, in particular to international franchising, i.e. whether the parties should be able to exclude the application of the law by selecting the legislation of a country which had not introduced the Model Law as the law applicable to their agreement, or whether that possibility should be excluded and the law be made mandatory for anyone operating in a country that had introduced legislation based on the Model Law.

Although hesitations were expressed as to whether the text of the Model Law should deal with this matter, which it was felt did not come within the scope of the Model Law, in the end it was decided that the Explanatory Report should indicate that States that adopt the Model Law may wish to consider introducing a provision to the effect that parties should not be able to exclude the application of the law by agreement.

ARTICLE 2

A number of proposals were put forward in relation to the definitions in Article 2. A first proposal (Doc. 26) was to delete the definitions of “**franchisor**” and “**franchisee**”. These definitions were in square brackets as the terms were defined indirectly through the definition of “franchise”. This proposal was rejected by the Group, which decided to retain the definitions without square brackets.

In relation to the definition of “**development agreement**” the question was raised whether the reference to the “franchise system” should not be a reference to the “franchise network”. The Group however felt that “franchise system” was correct.

It was observed that the interaction of the term “**franchised business**”, defined as the business conducted by the franchisee under a franchise agreement, and the reference to “franchise business of the franchisor” in Article 5(2) was problematic. This question was discussed in relation to Article 5 (see below).

As regards the definition of “**material fact**”, a possible discrepancy between the definition in Article 2 and Paragraph 45 of the Explanatory Report was noted (Doc. 22). The Explanatory Report seemed to indicate that the test employed was a subjective test, as it indicated that the materiality was judged by considering the question “would *the* franchisee have acquired the franchise even if he or she had been aware of the information?”, i.e. it was the behaviour of the franchisee in question that mattered. It was suggested that an objective test might be employed instead, by replacing the question to be asked with another one, that is, “would a reasonable franchisee under the same circumstances have acquired the franchise even if he or she had been aware of the information?”.

While one view was that a subjective test was indeed involved and was the one that should be adopted, another was that an objective test would be more appropriate. It was however observed that inserting the word “reasonable” would place an extraordinary burden on the franchisor and it was therefore decided to leave the text as it stood, but to state in the comments “whether or not a certain item of information is considered to be material will therefore depend on the answer to the question whether a reasonable franchisee in the same circumstances would have acquired the franchise even if he or she had been aware of the information”.

ARTICLE 3

A suggestion (Doc. 26) to change the order of Articles 3, 4 and 5 by moving the present Article 3 to after Article 4 renumbering it Article 5, and to move the present Article 5 to before Article 4 renumbering Article 3, was accepted by the Group.

Doc. 26 further proposed the deletion of all exemptions except **Sub-paragraph (F)**. This suggestion was not accepted by the Group. Doc. 22 also queried the necessity of the exemption included under **Sub-paragraph (H)**, which it was suggested might be covered by Sub-paragraphs (D) or (E). A distinguished Japanese academic (Prof. Ouchida) had provided an example which would speak against retaining (H) as an exemption, namely that a not big local enterprise which was eager to become the franchisee of a large world-wide franchise network might neglect to discuss the transaction in detail, with the result that a few years later problems emerged. Considering that such cases might occur, the exemption contained in Sub-paragraph (H) might be unjustified.

It was explained that the reason behind the exemption in Sub-paragraph (H) was that it was not necessary to require disclosure in situations in which a franchise was granted for a whole jurisdiction. The law of the State of New York had what it called an "isolated sales transaction" exemption which covered the same point. The reasoning was that if a person was engaged in the business of selling franchises in large numbers, then preparing the disclosure document was simply a cost of doing business. If, on the other hand, the entrepreneur went into a continent or country and sold only one franchise, the cost of preparing the disclosure document was simply out of all proportion to the entrepreneur's other costs of doing business. It might in some cases be covered by Sub-paragraph (D) or (E), but it might not, as the nature of the franchise might be such that either there was not the need for a franchisee who was very wealthy or resourced, or in which a large investment was not required. Furthermore, most of the agreements concerned were master franchise or development agreements and by their nature those agreements were not franchise agreements. The agreements entered into pursuant to those agreements were true franchise agreements.

ARTICLE 4

No observations were made in relation to Article 4.

ARTICLE 5

It was recalled that the proposal in Doc. 26 to change the order of Articles 3, 4 and 5 had been accepted (see above, under Article 3).

A problem raised concerned the use of the term "franchise" in **Paragraph (1)(A)** and **(B)**, and of the term "franchise business of the franchisor" in **Paragraph (2)**, as "franchised business" was defined in Article 2 as the business conducted by the franchisee under a franchise agreement.

A proposal for a reformulation of Article 5 was presented by Mr MENDELSON and read as follows:

"(1) A franchisor must give every prospective franchisee a disclosure document, to which the proposed franchise agreement must be attached, at least fourteen days before the earlier of

(A) the signing by the prospective franchisee of the franchise agreement, with the exception of agreements covered by Article 7; or

(B) the payment to the franchisor or an affiliate of the franchisor by the prospective franchisee of any money prior to entering into a franchise agreement.

(2) The disclosure document must be updated within [X] days of the end of the franchisor's fiscal year. Where there has been a material change in the franchisor's business, the disclosure document must be updated within [Y] days of the occurrence of that material change."

This proposal for reformulation was to be accompanied by a definition in Article 2 stating that “franchisor’s business means that part of the business of the franchisor, or an affiliate of the franchisor as relates to the franchise”.

As regards the proposed modification of **Sub-paragraph (1)(A)**, it was pointed out that the intention with the original formulation was not to refer to the franchise agreement proper, but to any agreement that related to the franchise, such as, for example, a lease agreement for premises that the prospective franchisee rented only with a view to entering into the franchise relationship. It was therefore felt that the proposal would be too limitative. The proposal was therefore not accepted.

As regards the proposed modification of **Sub-paragraph (1)(B)** (“the payment to the franchisor or an affiliate of the franchisor by the prospective franchisee of any money prior to entering into a franchise agreement” instead of “the payment by the prospective franchisee of any fees relating to the franchise”), the proponent explained that the proposal was being put forward because “franchise” was defined as “the rights granted by a party” and therefore described the subject-matter of the franchise agreement rather than the franchise agreement. The proponent in other words concentrated on the franchise agreement and saw the signing of the franchise agreement as the crucial moment in time.

It was suggested that the intention was to have a provision that was broader than the one proposed, and that cases such as where the prospective franchisee pays a sum of money for an exclusive right to negotiate for a certain period of time should also be covered.

In order to solve the problem of the definition, it was suggested that the proposal be changed to read “any fee relating to the acquisition of the franchise”. This proposal was accepted by the Group.

As regards the proposed modifications to **Paragraph (2)**, Mr Mendelsohn felt that the modifications were only of a drafting nature (“where there has been a material change in the franchisor’s business” instead of “where there has been a material change in the franchisor or relating to the franchise business of the franchisor”).

This was however disputed by members of the Group, who felt that the obligation to disclose information that related to the franchisor himself and to the franchise network disappeared. It was clarified that the intention was not to exclude the obligation to disclose information on changes relating to the franchisor, and the reference to the franchisor that had been deleted was therefore reinserted in the proposal.

As regards the question of the obligation to disclose information on developments that took place in the franchise network, it was suggested that the phrase “the franchisor’s business” limited the obligation to the franchisor’s personal business, whereas “the franchise business of the franchisor” covered also the franchise network. Mr Mendelsohn clarified that the intention with the proposal was indeed to exclude the members of the network as they were franchisees and as such were not part of the franchisor’s business. On the other hand the reference to the franchisor’s affiliates had been inserted as franchisors often used subsidiaries or sister or brother companies to provide certain services to their franchisees.

It was objected that information relating to the franchise network might be highly relevant to a prospective franchisee. If, for example, a franchisor had a network with franchisees in Argentina, Uruguay and Chile, and some of the franchisees in Uruguay went bankrupt because of the conditions of the market or for reasons that related to the contract, for misunderstandings between the franchisor and the franchisees, the original text obliged the franchisor to disclose this information, the proposed text did not. This was felt to be very limitative. The proponent suggested that such events would be disclosed because the bankruptcy of the franchisees would have a negative effect on the income of the franchisor. It was however objected that other events might not be traced through some adverse effects as these might not have taken place yet, but might still be of importance, such as if twenty-five law suits had been filed against the franchisor.

It was suggested that it might not be necessary to be specific and that the problem might be solved by requiring updating if there had been a material change in the information that was required to be disclosed under Article 6. If this proposal were accepted, there would then be no need to introduce a definition of “franchisor’s business”. This suggestion was accepted by the Group.

A second problem related to **Paragraph (2)** and the updating of the document. Two different situations were considered: the first was the updating of a disclosure document that was going to be handed over to a prospective franchisee for the first time, the second when a disclosure document had been handed over, after which a material change occurred. The question was whether both these situations were covered by the provision. It was generally felt that both situations were intended to be covered, and that if this was not clear it should be made so.

It was observed that Paragraph (1) dealt with the relationship of the franchisor with a particular franchisee, as it provided for the moment in time when the disclosure document had to be handed over. Paragraph (2), on the other hand, dealt with disclosure documents in general, as it provided that disclosure documents had to be updated within a certain period of time after the end of the franchisor's fiscal year. It had nothing to do with the actual negotiation. However, in relation to Paragraph (2) the question was raised whether, if during the negotiations there was a material change that warranted a material change to the disclosure document, the franchisor had to give a copy of the new disclosure document to the prospective franchisee. It was suggested that the franchisor would have to give a new disclosure document to the prospective franchisee if the transaction had not been completed within [Y] days of the material change. It depended on the value given to [Y]. If, as was the case in Australia, [Y] was 60 days, it was possible for the relationship to be truly underway by the time the updating came through, with the consequence that the franchisee would not benefit from the information contained in the new disclosure document before the franchise agreement was entered into.

It was suggested that this question would in some countries fall under the general anti-fraud provisions or statutes, whereas in others it would come under the general law of the country, i.e. if a prospective franchisee received a disclosure document and a material change occurred subsequently but before the franchise agreement was concluded, the prospective franchisee would be entitled to receive a new disclosure document under the general law of the country. This obligation did not however necessarily flow from the provisions of Article 5. A related question concerned whether the waiting period would begin to run again after the updated disclosure document had been handed over.

In the end, it was agreed that the question should be mentioned in the Explanatory Report, but not in the Model Law itself. Thus, the Explanatory Report should state that in the case of material changes occurring in the franchisor's business at the negotiation stage, after the disclosure document has been handed over to the prospective franchisee but before the conclusion of the contract, the question of if, and the extent to which, these changes should be disclosed to the prospective franchisee was left to national law.

A question that was raised was whether if a franchisor became insolvent he had to disclose this, whether, under general contract law, courts might interpret non-disclosure as misrepresentation notwithstanding the fact that there may only be an obligation 60 days hence to complete the actual disclosure document, and whether a franchisee in such cases could rely on the misrepresentation. It was suggested that in such cases the franchisee might have a remedy under Article 10(2).

An objection was raised as concerns the need to specify an amount of time in Paragraph (1), and a proposal was put forward to replace the specific time requirements by "as soon as reasonably possible". This suggestion did not, however, gain the support of the Group.

The formulation "a franchisor must give every prospective franchisee a disclosure document to which the proposed franchise agreement must be attached" was queried, in that it was suggested that the disclosure document might be attached to the agreement. It was however pointed out that the agreement would be an exhibit to the disclosure document, so the phrase was correct.

ARTICLE 6

It was observed that the Model Law used a number of different concepts to express the same idea, namely "State", "country", "jurisdiction" or "national territory". It was suggested that one concept be selected and used throughout the text. With reference to "jurisdiction", it was observed that attention should be paid both to the case of federal States, and to the fact that even in unitary States

specific jurisdictions might be indicated. It was decided that the Secretariat should examine existing international instruments and should select the appropriate formulation. A definition of the term selected should then be inserted into Article 2.

Doc. 26 proposed including a general sentence at the beginning of Article 6 reading as follow: "The franchisor shall provide all appropriate information to the franchisee in order to allow him a reasonable appreciation of the franchise proposed, in particular ..."

It was pointed out that the proposal reflected a philosophy different from the one adopted in the Model Law and that the standard "all appropriate information" had been rejected from the beginning, as to have the franchisor subject to what someone in some country might think appropriate created uncertainty. The proposal received no support and was therefore rejected.

In relation to **Paragraph (1)**, a proposal was submitted (Doc. 26) to merge **Sub-paragraphs (A) and (D)**¹ and to have the new Sub-paragraph (A) read "the legal name, address and form of the franchisor". This proposal was accepted by the Group, which also decided to qualify the words "address" and "form" by the word "legal".

In relation to **Sub-paragraph (C)** and to Paragraph 66 of the Explanatory Report, the question was raised (Doc. 22) whether there was not a certain discrepancy between the text and the comments. The text referred to "the address of the principal place of business of the franchisor if different from that indicated in lit. (A)". The Explanatory Report indicated that the provision had relevance when the franchisor came from a country different from the country of the franchisee and that the "principal place of business" meant a branch or subsidiary in the country of the franchisee. As presently drafted the text might be taken to refer to the case where the franchisor was incorporated in Country A, but in fact had its centre of business activity in Country B. It was suggested that the Sub-paragraphs (A) and (C) might be merged to read "the legal name, legal form and legal address of the franchisor and the address of the principal place of business of the franchisor" and that a new Sub-Paragraph (C) be included reading "the address of the franchisor's principal place of business in the [State or national territory] where the prospective franchisee is located". This suggestion was accepted by the Group. It was however pointed out that in some countries under corporate law the term "registered office" was taken to mean the principal place of business.

The question was raised whether the purpose of the proposed new Sub-paragraph (C) was to tell the franchisee where in the country of the franchisee the franchisor was to be found if the franchisee wanted to sue him. As this intention was confirmed, it was suggested that this be stated clearly, a possible formulation being "the legal name and address for service of the franchisor". This proposal was not accepted by the Group, as it was observed that it was possible to opt for a certain address for the purpose of service only, but that the franchisor might not have any assets at that place and the franchisee would want to know with whom he was doing business. Furthermore, the place of service was typically dealt with in the contract and should therefore not be dealt with in a disclosure law.

In relation to **Sub-paragraph (G)** the question was raised why the *chapeau* contained the words "involved in franchises or other businesses". It was recalled that the Study Group had decided on this formulation following a long discussion on whether or not the requirement should be limited to the particular franchise being considered by the franchisee. The majority of the Group had however felt that a prospective franchisee would want to know whether or not the franchisor was an honest person, and it was for this reason that "other businesses" had been included. The reason the provision specified "franchises or other businesses" was to avoid disclosure having to be provided in relation to other aspects of the franchisor's life, such as family matters.

A proposal was submitted according to which the *chapeau* of Sub-paragraph (G) should read "[r]elevant details relating to any criminal conviction or finding of liability in a civil action involving franchises relating to fraud, misrepresentations or similar acts or practices", instead of "relating to misrepresentation, unfair or deceptive acts or practices or comparable actions".

¹ Doc. 26 contained a misprint, in that it proposed to merge Sub-paragraph (B) and (A), but the new formulation clearly referred to Sub-paragraph (D).

It was suggested that a distinction should be made between actions that related to franchising and actions that related to other activities, disclosure where franchising was concerned being required of both civil and criminal actions, and where other activities were concerned of only criminal actions. This proposal gave rise to some discussion, in that some members of the Group were troubled by the fact that information relating to civil actions, albeit in areas different from franchising, would not be disclosed, as they considered such information to be highly relevant and indicative of the honesty of the franchisor. Such information would therefore be extremely interesting to the prospective franchisee. Others felt that a civil action in an area totally different from franchising should not be of interest to a prospective franchisee. It was pointed out that the scope of the provision was already limited, as the information that had to be disclosed had in any event to relate to misrepresentation, unfair or deceptive acts or practices or comparable actions.

In the end, it was decided to modify the text to read “relevant details relating to any criminal convictions or any finding of liability in a civil action involving franchises or other businesses relating to fraud, misrepresentation, or similar acts or practices”.

A proposal was submitted (Doc. 26) to delete **Sub-paragraph (G)(ii)**.² The reason for the proposal, as indicated by the author in a telephone conversation with the Secretariat, was that in the case of large conglomerates it would be both difficult and onerous for franchisors to provide the information required. If, for example, a holding company had three or four subsidiaries and something went wrong in any one of those subsidiaries, the question was whether the other three subsidiaries should disclose what had gone wrong in the first subsidiary to their own prospective franchisees. There might also be cases of very small franchisors who were hiding behind different corporations trying to avoid liability. Despite these considerations, the proposal was not accepted by the Group.

In relation to **Sub-paragraph (J)** the question was raised whether it might not be too broad in scope. The term “contiguous countries” raised problems, because it was possible for a franchisor to have sub-franchisors in a number of countries and the franchisor might therefore not have this information. If the franchisor did have this information, the question was to what extent the way in which the sub-franchisees had been treated by their sub-franchisors would affect the way in which the franchisor would deal with them.

A second question concerned data protection legislation and the possibility that it might restrict the ability of the franchisor to pass on the information that related to the contiguous countries.

The observer from the WORLD FRANCHISE COUNCIL pointed out that from their point of view the problems the provision gave rise to were essentially three: the specification of 50 franchisees, the mention of contiguous countries and the providing of phone numbers. Considering that in practice franchisors simply listed all their franchisees, he suggested that the requirement should be for a list of franchisees, without any specification of number. He suggested deleting the reference to contiguous countries as it might mean that Australian franchisors had to give the names and addresses of franchisees in Japan. Lastly, the requirement to disclose the phone number might be against the privacy and data screening requirements.

As regards the phone numbers, it was decided to limit the requirement to business telephone numbers. As regards the requirement to provide information on 50 franchisees, it was suggested that the provision might say “[...] not more than 50 franchisees but not beyond the country itself”, as it was felt that the franchisee would not get sufficient information once it went beyond the franchisee’s own country.

It was however recalled that the reference to “contiguous countries” had been inserted at the insistence of the European members of the Group in particular, as information relating to one European country was often highly relevant also to franchisees in another. “Contiguous” meant “sharing a common border”, so in any event it would not be necessary for franchisors in Australia to give information on their franchisees in Japan. Other options (“nearest”, “neighbouring”, “joint”) had been discussed and discarded before “contiguous” had been chosen as a compromise.

² Again, there was an evident misprint in Doc. 26, which referred to Sub-paragraph (F) which however did not have a *litera* (ii). The Group therefore concluded that the proposal related to Sub-paragraph (G).

The possibility that information from countries that were close but not adjacent (e.g. as between Spain and Belgium) might be highly relevant was considered. It was suggested to add “or beyond that if it seems reasonable” to “contiguous countries”. It was however decided that that would introduce an element of uncertainty, as it would be left to the judgement of the single judges to decide whether or not it was reasonable for a franchisor to provide information from such other countries, or for a franchisee to demand such information, in particular after an agreement had been concluded and in the case of controversy. The Group consequently decided not to modify the text of the draft Model Law, but that the Explanatory Report should point out that information from contiguous countries might not be enough, that information also from other countries might be interesting, in particular in areas such as Europe or Latin America where the reality was the same or very similar, even if the countries were not contiguous.

It was pointed out that there was an inconsistency in Paragraph 76 of the Explanatory Report, which referred to instances in which there were “no franchisees in countries close to the country of the prospective franchisee” whereas it should instead refer to “if there are no contiguous countries”. This error was corrected.

As regards the data protection legislation, the Group decided not to enter into a discussion of such questions as Governments were familiar with the issues involved.

In relation to **Sub-paragraph (K)**, a proposal was submitted (Doc. 26) to modify it to read as follows: "Information about the franchisees that have ceased to be franchisees of the franchisor during the three fiscal 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 franchisees of the franchisor, such as: refused renewal by the franchisor; terminated by the franchisor; not renewed or terminated by the franchisee; reacquired by purchase by the franchisor; otherwise reacquired by the franchisor".

The proposal was opposed on the grounds that it removed the degree of certainty that the present draft provided, as it left open the possibility that someone at a later stage could claim that what had been given was not an adequate description of the reasons for which the franchisee was no longer a franchisee. It was therefore decided to reject the proposal.

A proposal submitted in Doc. 26 in relation to **Sub-paragraph (L)(i)** to invert the component parts of the sentence to read "[t]he registration and/or the application for registration, if any, and [...]" was accepted by the Group.

As regards **Sub-paragraph (M)**, it was pointed out that the provision required disclosure of information as at the time of the disclosure document, but that in franchising goods and services changed over the life-time of a franchise agreement. The question was therefore whether there was an implied obligation to provide on-going information on changes in products, supplies or pricing policies. It was observed that the Model Law dealt with pre-contractual disclosure, and this was made clear in Article 5, which indicated when the disclosure document had to be handed over. There was no obligation to continue disclosure during the relationship.

As regards **Sub-paragraph (N)(i)(a)**, it was pointed out that requiring “estimates of the franchisee’s total investments and the minimum working capital required for the first year of operation” in effect required the franchisor to make some form of profit forecast for the first year, because otherwise it would not be possible for him to estimate the minimum working capital. This would, it was felt, make life difficult for franchisors, many of which would probably not want to do more for franchisees than say that this was what they had achieved and what some of their franchisees had achieved. This was recognised in Sub-paragraph (N)(ii)(b), which required the franchisor to point out that the levels of performance of the prospective franchisee’s outlet might differ from those contained in the information provided by the franchisor. It was added that giving or estimating the minimum working capital might be tantamount to guaranteeing performance by a franchisee, which it was virtually impossible to do. It was also pointed out that the “any” at the beginning of the *litera* might indicate that such an estimate should be given only if there was one, whereas what was intended was that it should always be given, which would be attained by changing the “any” to “an”. The original intention had been to leave the franchisor to decide the manner in which the estimate should be presented. In the end, it was agreed that the provision should read “an estimate of the franchisee’s

total initial investment". It was also decided that the Explanatory Report should indicate that the manner in which the estimate was given would be left to the franchisor to decide.

In relation to **Sub-paragraph (N)(i)(c)** the observer from the WORLD FRANCHISE COUNCIL suggested that the effects of requiring unaudited statements in this manner was that the franchisor would have to keep a running set of unaudited financial statements. For example, in year one the franchisor had an audit that lasted for 80 days. He then had to produce unaudited statements running for the next 90 days, then others yet again, and this was a very onerous burden to place on the franchisor. He suggested that the time-limit for unaudited statements to be prepared should be three months: within three months of the end of the financial year. Thus the financial statements would be current as up to three months after the last financial year and there would be no need to produce accounts intra-year. The proposal was therefore that the accounts should be produced on an annual basis and up-dated and completed within three months of the end of the last financial year. Although the three months was a shorter period than the 180 days specified in the draft, the idea was that no unaudited statements should have to be produced.

It was observed that the provision in the Model Law was a standard provision. What it was saying was that if the financial statement was more than six months old, the franchisor would not have to go through an audit, but would have to produce unaudited information that was not as stale as that six months old. If a person was being asked to invest a life's savings in a franchise system, the least one could ask a franchisor was to prepare unaudited statements if audited statements were stale.

The proposal did not receive sufficient support and was therefore rejected.

A further question relating to Sub-paragraph (N)(i)(c) concerned the electronic disclosure of financial statements, audited or unaudited. Reference was made to the fact that in some countries there were moves to set up web sites or data bases that were specially authorised or managed by Governments and to permit the disclosure of financial statements electronically through these sites. The disclosure document would therefore merely contain a reference to the relevant web site. It was however suggested that such official or authorised web sites were still in their infancy and that in any event if the information was available electronically, it would not be difficult for the franchisor to print it out and to hand the prospective franchisee a paper copy. A problem with electronic disclosure was furthermore the question of proof. Information stored electronically was easily modified. It would therefore be difficult to prove what information a prospective franchisee had been given at any one time. It was however pointed out that with an official data base, authorised and managed by a Government, it would be possible to trace the modifications made as the successive versions of the documents would be stored. The Group decided not to include a reference to such data bases or web sites.

In relation to **Sub-paragraph (N)(ii)(a)** a question that was raised concerned the fact that in order to provide the information required the franchisor would be relying on information provided to him by third parties, and the question was whether or not he could be held liable if the information provided to him turned out not to be accurate. It was proposed that the law should state that the franchisor should not be liable for inaccurate information provided to him.

It was objected that if that logic were applied, it would have to be applied to all the sub-categories or sub-paragraphs. It was further observed that Sub-paragraph (N)(ii)(a)(aa) required a "reasonable basis" for the information, so it would not be possible for the franchisor to disclaim liability. Another view was that precisely the "reasonable basis" requirement freed the franchisor from liability, as if the information came from a third party (which it did when it came from the franchisees) the franchisor would logically not be able to vouch for its accuracy and should be free from liability if he stated that the information came from third parties and that he had not been able to verify it. To this it was objected that if it were not possible for the franchisor to vouch for the accuracy of the information, he would not be able to use it as he would not be able to check that it had a reasonable basis. Furthermore, a court might decide that the "reasonable basis" requirement overrode any such disclaimer.

It was suggested to leave the text as it stood, but to add in the Explanatory Report words to the effect that "as to the degree to which the franchisor must obtain the information needed for purposes

of this representation from third parties such as franchisees, the national legislature may wish to provide for the franchisor being able to avoid liability for incorrect information”.

Attention was however drawn to the fact that a franchisor’s liability arose only when there was a misrepresentation in the disclosure document, and misrepresentation was defined in Article 2 as a statement of fact that the person making the statement knew or ought to have known to be untrue. The issue was therefore whether the franchisor ought to have known that the information provided by the franchisee or other third party was untrue. The issue had therefore already been dealt with in the definition.

The question of the distinction between “reasonable basis” and “material assumptions” was raised. It was agreed that it would not be possible to have the “reasonable basis” without the “material assumptions”, but *litera* (bb) required those assumptions to be revealed.

As regards **Sub-paragraph (N)(ii)(a)(bb)**, a suggestion (Doc. 26) to delete it was rejected by the Group. It was stressed that the material assumptions underlying the historical or projected financial performance of the outlets owned by the franchisor, its affiliates or franchisees were critical.

A question concerning **Sub-paragraph (N)(ii)(cc)** was the meaning of “actual results” and the difference between actual results and historical data. It was recalled that the provision was based on the US “earnings claims” which were projections of what the franchisee might earn. Those projections might be based on anything the franchisor chose, even the performance of competitors. The requirement was simply that the franchisor should indicate if they were based on the performance of existing outlets. Most franchisors based the earnings claims on historic performance of outlets rather than on pure projections.

ARTICLE 7

No observations were made in relation to Article 7.

ARTICLE 8

No observations were made in relation to Article 8.

ARTICLE 9

In relation to Article 9, the proposals contained in Docs. 22 and 26 both suggested the deletion of the requirement that the disclosure document be in the mother-tongue of the franchisee. This proposal was accepted and the requirement consequently deleted.

ARTICLE 10

It was observed that the first line of **Paragraph (1)** contained the two options “if the disclosure document is not delivered at all or is not delivered within the period of time established in Article 5” and the question was raised whether the second did not in fact include the first. It was recalled that at the meeting of the Drafting Committee the question had arisen whether the case when the disclosure document was not delivered on time also covered the case when it was not delivered at all, and the conclusion had been that it might not. It was for this reason that the two options had been included. The majority of the Group however agreed that the case of the disclosure document not being delivered on time would suffice, and it was therefore decided to delete the case of a disclosure document not being delivered at all. It was also decided that the Explanatory Report would explain that the intention was to cover both cases.

In relation to **Paragraph (2)**, it was observed that the reference to “a material fact” should qualify both the misrepresentation and the omission and that if this was not clear the text should be modified to include “of a material fact” after “misrepresentation”. It was however pointed out that the

definition of “omission” already stated that it referred to a material fact and that it therefore was not necessary to repeat it. So as to harmonise the texts, it was decided to omit the word “material” in the definition of “omission” in Article 2, and to insert “of a material fact” in Article 10(2). The wording of Article 10(2) would therefore be “if the disclosure document contains a misrepresentation of a material fact or if there is an omission of a material fact”.

In relation to **Paragraph (3)(A)**, a proposal had been submitted (Doc. 26) for the shortening of the two-year period to one year. This proposal was accepted. It was pointed out that the consequence would be that Sub-paragraph (B) would no longer be necessary. The Group agreed with this analysis and therefore decided to delete Sub-paragraph (B).

The observer from the EUROPEAN FRANCHISE FEDERATION informed the Group of the fact that, in the course of its consultations with its members, the French Franchise Federation had welcomed the existence of Article 10, but had indicated that they were under the impression that it gave the franchisee too easy an opt-out of the contract on the basis of non-disclosure. They had indicated that they would prefer that a franchisee be obliged to have recourse to the courts, rather than be permitted simply to opt out of the contract. It was however not felt that a modification of the text was warranted. As formulated, the text did not specify whether or not court intervention was necessary, leaving that to be decided by each State.

**TEXT OF THE DRAFT MODEL FRANCHISE DISCLOSURE LAW
AS MODIFIED AT THE FIFTH SESSION OF THE UNIDROIT STUDY GROUP ON FRANCHISING
ROME, 7 DECEMBER 2000**

**ARTICLE 1
(SCOPE OF APPLICATION)**

This law applies to franchises granted for the operation of one or more franchised businesses [within the national territory of the State adopting this law].

**ARTICLE 2
(DEFINITIONS)**

For the purposes of this law:

affiliate of the franchisor means a legal entity which 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 acquire more than one franchise of the same franchise system;

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

franchise means the rights granted by a party (the franchisor) authorising and requiring another party (the franchisee), in exchange for direct or indirect financial compensation, to engage in the business of selling goods or services under a system designated by the franchisor which includes know-how and assistance, prescribes in substantial part the manner in which the franchised business is to be operated, includes significant and continuing operational control by the franchisor, and is substantially associated with a trademark, service mark, trade name or logotype designated by the franchisor. It 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;

**ARTICLE 1
(CHAMPS D'APPLICATION)**

La présente loi s'applique [sur le territoire national de l'État qui l'adopte] aux franchises concédées pour l'exploitation d'une ou plusieurs activités commerciales franchisées.

**ARTICLE 2
(DEFINITIONS)**

Aux fins de la présente loi :

un **affilié du franchiseur** se définit comme toute entité légale qui exerce un contrôle direct ou indirect sur le franchiseur, ou est contrôlée directement ou indirectement par celui-ci, ou se trouve 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 d'acquérir plus d'une franchise au sein du même système de franchise ;

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

une **franchise** correspond aux droits concédés par une partie (le franchiseur) qui autorise et engage une autre partie (le franchisee), en échange de contreparties financières directes ou indirectes, à se livrer à une activité commerciale de vente de marchandises ou de services dans le cadre d'un système élaboré par le franchiseur qui comprend son savoir-faire et son assistance, qui règle les modes essentiels d'exploitation incluant l'exercice par le franchiseur d'un contrôle permanent et approfondi des opérations et qui est associé de manière significative à une marque de commerce, une marque de service, une dénomination commerciale ou un logo prescrit par le franchiseur. 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) the rights granted by a franchisor to a party under a development agreement

For the purposes of this definition “direct or indirect financial compensation” shall not include the payment of a bona fide wholesale price for goods intended for resale;

franchisee includes a sub-franchisee in its relationship with the sub-franchisor and the sub-franchisor in its relationship with the franchisor;

franchise agreement means the agreement under which a franchise is granted;

franchised business means the business conducted by the franchisee under a franchise agreement;

franchisor includes the sub-franchisor in its relationship with its sub-franchisees;

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 decision to acquire the franchise;

misrepresentation means a statement of fact that the person making the statement knew or ought to have known to be untrue at the time the statement was made;

omission means the failure to state a fact of which the person making the statement was aware at the time the statement ought to have been made;

State includes the territorial units making up a State which has two or more territorial units, whether or not possessing different systems of law applicable in relation to the matters dealt with in this law;

and

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

ARTICLE 3

(DELIVERY OF DISCLOSURE DOCUMENT)

(1) A franchisor must give every prospective franchisee a disclosure document, to which the proposed franchise agreement must be attached, at least fourteen days before the earlier of

C) les droits concédés par un franchiseur à une autre partie dans le cadre d'un contrat de développement ;

Aux fins de la présente définition, le paiement à un prix préférentiel des biens destinés à la revente ne peut être assimilé aux « contreparties financières directes ou indirectes » ;

le terme **franchisé** désigne également le sous-franchisé dans ses relations avec le sous-franchiseur et le sous-franchiseur dans ses relations avec le franchiseur ;

un **contrat de franchise** s'entend de tout accord par lequel une franchise est concédée ;

une **activité franchisée** est une activité commerciale conduite par le franchisé dans le cadre d'un contrat de franchise ;

le terme **franchiseur** désigne également le sous-franchiseur dans ses relations avec ses sous-franchisés ;

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 essentiel** s'entend de tout renseignement qui peut raisonnablement être considéré comme ayant une incidence certaine sur la décision d'acquiescer une franchise ;

une **déclaration tendant à induire en erreur**, s'entend de l'exposé d'un fait dont son auteur savait ou aurait dû savoir au moment où il l'a formulée, qu'il n'était pas véridique ;

une **omission** s'entend de l'absence de déclaration d'un fait essentiel, dont son auteur était conscient au moment où cette déclaration aurait du être faite ;

le terme **État** inclut les unités territoriales formant un État qui comprend deux ou plusieurs unités territoriales, qu'elles possèdent ou non des systèmes de droit différents applicables dans les matières régies par la présente loi ;

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 3

(REMISE DU DOCUMENT D'INFORMATION)

1) Un franchiseur doit délivrer à tout candidat à la franchise le document d'information accompagné de la proposition de contrat de franchise au moins quatorze jours avant la date de survenance du premier des deux événements suivants :

(A) the signing by the prospective franchisee of any agreement relating to the franchise, with the exception of agreements covered by Article 7; or

(B) the payment to the franchisor or an affiliate of the franchisor by the prospective franchisee of any fees relating to the acquisition of a franchise.

(2) The disclosure document must be updated within [X] days of the end of the franchisor's fiscal year. Where there has been a material change in the information required to be disclosed under Article 6, the disclosure document must be updated within [Y] days of the occurrence of that material change.

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
(EXEMPTIONS FROM OBLIGATION TO DISCLOSE)

No disclosure is required:

(A) in case of the grant of a franchise to a person who has been an officer or director of the franchisor or of an affiliate of the franchisor for at least six months immediately before the signing of the franchise agreement;

(B) in case of the assignment or other transfer of a franchisee's rights and obligations under an existing franchise agreement, where the assignee or transferee is bound by the same terms as the assignor or transferor;

(C) in case of the grant of a franchise to sell goods or services to a person who has been engaged in the same or a similar business for the previous two years, if the sales of the franchise, as reasonably anticipated by the parties at the time the franchise agreement is entered into, will not during the first year of the relationship exceed 20% of the total aggregate sales of the franchisee's combined business;

(D) in case of the grant of a franchise pursuant to which the franchisee commits to a total investment in excess of [X];

A) la signature par le candidat franchisé de tout contrat ayant trait à la franchise à l'exception des contrats soumis aux dispositions de l'article 7 ; ou

B) le paiement au franchiseur ou un affilié du franchiseur par le candidat à la franchise de toute somme en relation avec l'acquisition d'une franchise.

2) Le document d'information doit être actualisé dans les [X] jours suivant la fin de l'exercice fiscal du franchiseur. En cas de survenance d'une modification importante parmi les informations qui doivent être divulguées en vertu de l'article 6, le document d'information doit être actualisé dans les [Y] jours suivant la survenance de cette modification importante.

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.

ARTICLE 5
(DISPENSES DE L'OBLIGATION DE DIVULGATION D'INFORMATION)

Aucune délivrance d'information n'est requise :

A) dans l'hypothèse d'une franchise consentie à une personne qui a été un dirigeant ou un administrateur du franchiseur ou de l'un de ses affiliés pendant au moins les six mois qui précèdent immédiatement la signature du contrat de franchise ;

B) dans l'hypothèse d'une cession ou toute autre forme de transfert des droits et obligations du franchisé dans le cadre d'un contrat de franchise en cours, lorsque le cessionnaire est lié par les mêmes conditions que le cédant ;

C) dans l'hypothèse d'une franchise de vente de biens ou de services, consentie à une personne déjà engagée depuis 2 ans dans une exploitation commerciale identique ou similaire, dans la mesure où le chiffre d'affaires réalisé pendant la première année d'activité et raisonnablement prévisible à l'entrée en vigueur du contrat de franchise, ne dépasse pas 20 % du total du chiffre d'affaires cumulé réalisé par cette même personne pendant cette période, toutes activités confondues ;

D) dans l'hypothèse d'une franchise consentie à un franchisé, par laquelle celui-ci s'engage à réaliser un investissement total supérieur à [X] ;

(E) in case of the grant of a franchise to a franchisee who together with its affiliates has a net worth in excess of [Y];

(F) in case of the renewal or extension of a franchise on the same conditions;

(G) where the total of the payments contractually required to be made every year by the franchisee to the franchisor is less than [Z]; or

(H) if the transaction is pursuant to an offer directed by the franchisor to only one person or entity for the entire State.

ARTICLE 6
(INFORMATION TO BE DISCLOSED)

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

(A) the legal name, legal form and legal address of the franchisor and the address of the principal place of business of the franchisor;

(B) any name other than the legal name under which the franchisor carries on or intends to carry on business;

(C) the address of the franchisor's principal place of business in the State where the prospective franchisee is located;

(D) a description of the business experience of the franchisor, including:

(i) the length of time during which the franchisor has run a business of the type to be operated by the franchisee; and

(ii) the length of time during which the franchisor has offered franchises for the same type of business as that to be operated by the franchisee;

(E) the names, business 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;

(F) relevant details relating to any criminal convictions or any finding of liability in a civil action involving franchises or other businesses relating to fraud, misrepresentation, or similar acts or practices of:

(i) the franchisor;

(ii) any affiliate of the franchisor who is engaged in franchising; and

(iii) any of the persons indicated in lit. (E)

for the previous five years, as well as the relevant details relating to any pending actions of the same nature;

E) dans l'hypothèse d'une franchise consentie à un franchisé, dont l'actif net du bilan, cumulé avec celui de ses affiliées, est supérieur à [Y] ;

F) dans l'hypothèse du renouvellement ou de l'extension d'une franchise aux mêmes conditions ;

G) lorsque la somme totale des contributions financières annuelles et contractuellement prévues, est inférieur à [Z] ; ou

H) si la franchise a été consentie à la suite d'une offre présentée à une seule personne ou entité sur tout l'État concerné.

ARTICLE 6
(CONTENU DES INFORMATIONS FOURNIES)

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

A) la raison sociale, la forme juridique et l'adresse légale du franchiseur et l'adresse du lieu principal d'activité du franchiseur ;

B) toute autre dénomination sous laquelle le franchiseur exerce ou a l'intention d'exercer son activité ;

C) l'adresse du lieu principal d'activité du franchiseur dans l'État du candidat à la franchise ;

D) une description de l'expérience commerciale du franchiseur, incluant :

i) l'ancienneté du franchiseur dans la conduite d'opérations commerciales du type de celles devant être exploitées par le franchisé ; et

ii) l'ancienneté du franchiseur dans la gestion d'un réseau de franchise dans le même type d'activité que celles devant être exploitées par le franchisé ;

E) les noms, adresses professionnelles, fonctions exercées, expérience commerciale et qualifications professionnelles de toute personne qui a des responsabilités de direction dans la conduite des activités commerciales du franchiseur en relation avec la franchise ;

F) tout détail approprié relatif à des condamnations pénales ou à des constatations de responsabilité civile concernant des franchises ou d'autres activités commerciales, mettant en cause une fraude, une déclaration tendant à induire en erreur ou tout autre comportement similaire impliquant :

i) le franchiseur ;

ii) tout affilié du franchiseur qui est engagé dans la franchise ; et

iii) toute personne mentionnée au sous-paragraphe E) ci-dessus ;

intervenus dans les cinq dernières années, de même que les procédures judiciaires de même nature encore pendantes ;

(G) relevant details concerning any bankruptcy, insolvency or comparable proceeding involving the franchisor and/or the legal entities and persons indicated in lit. (E) for the previous five years;

(H) the total number of franchisees in the network;

(I) the names, business addresses and business 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 in the State of the franchisee and/or contiguous States, or, if there are no contiguous States, the State of the franchisor;

(J) information about the franchisees that have ceased to be franchisees of the franchisor during the three fiscal 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 franchisees of the franchisor. Disclosure of the following categories would fulfil the disclosure requirement: voluntarily terminated or not renewed; reacquired by purchase by the franchisor; otherwise reacquired by the franchisor; refused renewal by the franchisor; terminated by the franchisor;

(K) the following information regarding the franchisor's intellectual property relevant for the franchise, in particular trademarks, patents, copyright and software:

(i) the registration and/or the application for registration, if any, and

(ii) litigation or other legal proceedings, if any, which could have a material effect on the franchisee's legal right, exclusive or non-exclusive, to use the intellectual property under the franchise agreement

in the State in which the franchised business is to be operated;

(L) information on goods and/or services that the franchisee is required to purchase or lease, indicating

(i) which, if any, have to be purchased or leased from the franchisor, affiliates of the franchisor or from a supplier designated by the franchisor;

(ii) those for which the franchisee has the right to recommend other suppliers for approval by the franchisor;

(G) tout détail approprié 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 au sous-paragraphe E) ci-dessus ;

(H) le nombre total de franchisés appartenant au réseau ;

(I) les noms, adresses et numéros de téléphones professionnels des franchisés dont les unités d'exploitation sont situées le plus près de l'unité d'exploitation proposée au candidat à la franchise, sans que les coordonnées ne doivent être données, en toute hypothèse, pour plus de 50 franchisés dans l'État du franchisé ou dans les États contigus, ou, en l'absence d'État contigus, dans l'État du franchiseur ;

(J) tout renseignement concernant les anciens franchisés qui ont cessé d'être franchisés au cours des trois dernières années fiscales précédant la date de conclusion du contrat, en précisant les motifs de la cessation. Les catégories de renseignements suivants pourront satisfaire aux exigences d'informations : résiliation ou non-renouvellement volontaire, ré-acquisition par le franchiseur par rachat, ré-acquisition par le franchiseur autrement que par rachat, refus de renouvellement par le franchiseur ou résiliation par le franchiseur ;

(K) les informations suivantes ayant trait aux droits de propriété intellectuelle du franchiseur se rapportant à la franchise, et en particulier aux marques, brevets, droits d'auteurs, et droits de protection logicielle :

i) l'enregistrement et/ou la demande d'enregistrement le cas échéant ; et

ii) les procédures judiciaires ou toute autre procédure légale engagées le cas échéant qui pourraient avoir des effets significatifs sur l'utilisation, exclusive ou non exclusive, par le franchisé des droits de propriété intellectuelle résultant du contrat de franchise,

dans l'État où l'activité commerciale franchisée doit être exploitée ;

(L) les informations sur 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 ;

ii) ceux pour lesquels le franchisé a le droit de soumettre d'autres fournisseurs de son choix à l'agrément du franchiseur ;

(iii) information on pricing practices with regard to those goods and/or services; and

(iv) information as to the treatment of revenue or other benefits that may be directly or indirectly received by the franchisor or any of the affiliates of the franchisor from any supplier of goods and/or services to the franchisee;

(M) financial matters, including:

- (i) (a)** an estimate of the franchisee's total initial investment;
- (b)** financing offered or arranged by the franchisor, if any;

(c) audited or otherwise independently verified 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) (a)** 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:

- (aa)** have a reasonable basis at the time it is made;
- (bb)** include the material assumptions underlying its preparation and presentation;
- (cc)** state whether it is based on actual results of existing outlets;
- (dd)** state whether it is based on franchisor-owned and/or franchisee-owned outlets; and
- (ee)** indicate the percentage of those outlets that meet or exceed each range or result.

(b) If the financial information referred to in the preceding sub-paragraph is provided, the franchisor must state that the levels of performance of the prospective franchisee's outlet may differ from those contained in the information provided by the franchisor.

iii) toute information concernant les pratiques de prix, au regard de ces marchandises et/ou services ; et

iv) les information concernant le traitement de toute source de revenus ou avantages que le franchiseur ou ses affiliés peuvent recevoir directement ou indirectement en provenance de tout fournisseur de marchandises et/ou de services à destination du franchisé ;

M) tout élément d'information financière incluant :

- i) a)** une évaluation du montant total de l'investissement initial du franchisé ;
- b)** les modes de financements proposés ou facilités par le franchiseur le cas échéant ;

c) les états financiers du franchiseur, audités ou autrement vérifiés de manière indépendante, et notamment les bilans, comptes d'exploitation et de pertes et profits pour les trois années précédentes. Si le plus récent état financier audité est antérieur de plus de 180 jours à la date de délivrance du document d'information, une situation financière non auditée devra être fournie, établie moins de 90 jours avant la date de la délivrance du document d'information ;

- ii) a)** Si une information est délivrée au candidat à la franchise, par le franchiseur ou en son nom, concernant les résultats financiers passés ou les projections financières d'unités exploitées en propre par le franchiseur, ses affiliés ou ses franchisés, cette information doit :

- aa)** reposer sur une base raisonnable au moment où elle est établie ;
- bb)** inclure les hypothèses importantes ayant permis sa préparation et fondé sa présentation ;
- cc)** préciser si elle est basée sur des résultats effectifs d'unités d'exploitation existantes ;
- dd)** spécifier si elle est basée sur des unités d'exploitation appartenant au franchiseur et/ou aux franchisés ; et
- ee)** indiquer le pourcentage d'unités d'exploitation dont les résultats correspondent à l'éventail de ceux cités par comparaison, ou qui les dépassent.

(b) Si l'information financière visée dans le précédent sous-paragraphe est fournie, le franchiseur doit spécifier que les niveaux de performance effectivement atteints par l'unité d'exploitation proposée au candidat à la franchise, peuvent être différents de ceux qui se trouvent énoncés par comparaison dans l'information fournie par le franchiseur.

(2) The following information shall also be included in the disclosure document. However, where the information is contained in the franchise agreement, the franchisor may in the disclosure document merely make reference to the relevant section of the franchise agreement:

(A) a description of the franchise to be operated by the franchisee;

(B) the term and conditions of renewal of the franchise;

(C) a description of the initial and on-going training programmes;

(D) the nature and extent of exclusive rights granted, if any, including exclusive rights relating to territory and/or to customers;

(E) the conditions under which the franchise agreement may be terminated by the franchisor and the effects of such termination;

(F) the conditions under which the franchise agreement may be terminated by the franchisee and the effects of such termination;

(G) the limitations imposed on the franchisee, if any, in relation to territory and/or to customers;

(H) in-term and post-term non-compete covenants;

(I) any reservation by the franchisor of the right

(i) to use, or to license the use of, 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;

(J) the initial franchise fee;

(K) other fees and payments, including any gross-up of royalties imposed by the franchisor in order to offset withholding tax;

(L) restrictions or conditions imposed on the franchisee in relation to the goods and/or services that the franchisee may sell; and

(M) the conditions for the assignment or other transfer of the franchise.

(3) Where the franchise is a master franchise, the sub-franchisor must, in addition to the items specified in paragraphs (1) and (2), disclose to the prospective sub-franchisee the information on the franchisor that it has received under paragraphs (1)(A), (D), (G), and (2)(D), (G) and (I) of this article, as well as inform the prospective sub-franchisee of the situation of

(2) Le document d'information comprendra également l'information suivante ; toutefois, lorsque cette information est contenue dans le contrat de franchise, le franchiseur peut simplement, dans le document d'information, renvoyer aux sections pertinentes du contrat de franchise :

A) une description de la franchise qui doit être exploitée par le franchiseé ;

B) la durée et les conditions de renouvellement de la franchise ;

C) une description des programmes de formation initiale et continue ;

D) la nature et l'étendue de tout droit d'exclusivité accordé, le cas échéant, en incluant les droits d'exclusivité relatifs au territoire et/ou à la clientèle ;

E) les conditions dans lesquelles le franchiseur peut mettre fin au contrat de franchise et les effets d'une telle résiliation ;

F) les conditions dans lesquelles le franchiseé peut mettre fin au contrat de franchise et les effets d'une telle résiliation ;

G) toute restriction imposée, le cas échéant, au franchiseé, relative au territoire et/ou à la clientèle ;

H) toute clause de non-concurrence applicable pendant la durée du contrat de franchise, ou post-contractuelle ;

I) tout droit réservé que le franchiseur peut s'accorder à lui même

i) d'utiliser ou d'accorder une licence d'utilisation des 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 franchiseé, directement ou indirectement à travers le même réseau de distribution ou tout autre, que ce soit sous les marques prévues dans le contrat de franchise ou toute autre marque ;

J) la redevance initiale de franchise ;

K) toute autre rémunération ou tout autre règlement incluant toute majoration de redevances, imposée par le franchiseur à l'effet de compenser l'impôt retenu à la source ;

L) les restrictions ou conditions imposées au franchiseé concernant les marchandises et/ou les services que le franchiseé a le droit de vendre ; et

M) les conditions requises pour la cession et toute autre forme de transfert de la franchise.

3) Si la franchise est une franchise principale, le sous-franchiseur devra fournir au sous-franchiseé, outre les informations prévues aux dispositions des paragraphes 1) et 2), les informations concernant le franchiseur qui sont stipulées aux paragraphes 1) A), D), G), et 2) D), G) et I) du présent article, de même qu'il devra informer le candidat sous-franchiseé de la

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 relating to the franchise or to the franchisor.

**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 principal place of business of the prospective franchisee.

**ARTICLE 10
(REMEDIES)**

(1) If the disclosure document is not delivered within the period of time established in Article 3, the franchisee is entitled to terminate the franchise agreement and/or any pre-contractual arrangement, 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 or if there is an omission of a material fact required to be disclosed under Article 6, the franchisee is entitled to terminate the franchise agreement unless the franchisor can prove that the franchisee did not rely on the misrepresentation

situation des contrats de sous-franchise dans l'hypothèse d'une résiliation du contrat de franchise principale et de son contenu.

**ARTICLE 7
(CLAUSE DE CONFIDENTIALITE)**

Le franchiseur peut exiger du candidat à la franchise la signature d'un engagement par lequel ce dernier s'engage à préserver la confidentialité de l'information concernant le franchiseur ou la franchise qui lui sera concédée.

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

Le franchiseur peut exiger du candidat à la franchise, à titre de condition déterminante de la signature du contrat de franchise par le franchiseur, que ce dernier lui accuse réception par écrit de la bonne réception du document d'information.

**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 du lieu principal d'activités du candidat à la franchise.

**ARTICLE 10
(VOIES DE RECOURS)**

1) Si le document d'information n'est pas délivré dans les temps requis par l'article 3 de la présente loi, le franchisé aura le droit de demander la résiliation du contrat de franchise et/ou de tout autre accord pré-contractuel, 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 déclaration tendant à induire en erreur et portant sur un fait essentiel, ou s'il y a une omission d'un fait essentiel requis par l'article 6, le franchisé a le droit de demander la résiliation du contrat de franchise, à moins que le franchiseur n'apporte la preuve que le franchisé ne s'était pas fondé sur cette déclaration

or that the investment decision of the franchisee was not influenced by the omission.

(3) The right to terminate the franchise agreement in accordance with paragraphs (1) and (2) of this article must be exercised no later than the earlier of:

(A) one year of the act or omission constituting the breach upon which the right to terminate is based; or

(B) within 90 days of the delivery to the franchisee of a written notice providing details of the breach accompanied by the franchisor's then current disclosure document.

(4) 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 11

(TEMPORAL SCOPE OF APPLICATION)

This law applies with respect to a franchise agreement entered into after the entering into force of this law, as well as to the renewal or extension of a franchise agreement entered into before the entering into force of this law.

tendant à induire en erreur ou que l'omission n'a pas influencé de manière certaine la décision du franchisé de s'engager.

(3) Le droit de demander la résiliation d'un contrat de franchise en application des paragraphes 1) et 2) du présent article, doit être exercé au plus tard à la date de survenance du premier des deux événements suivants :

A) un an suivant l'acte ou l'omission caractérisant le manquement sur lequel est basé le droit de demander la résiliation du contrat ; ou

B) dans les 90 jours qui suivent la délivrance au franchisé d'une notification écrite indiquant les détails du manquement, accompagnée du document d'information tel que rétabli alors par le franchiseur.

4) Le droit de demander la résiliation du 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 dont il peut disposer aux termes de la loi applicable.

ARTICLE 11

(CHAMP D'APPLICATION TEMPOREL)

La présente loi s'applique à tout contrat de franchise conclu après son entrée en vigueur. Elle s'applique également au renouvellement ou à l'extension d'un contrat de franchise conclu avant son entrée en vigueur.

FIFTH SESSION OF THE UNIDROIT STUDY GROUP ON FRANCHISING

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