

The UNIDROIT Guide to International Master Franchise Arrangements : An Introduction and a Perspective

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I. – BACKGROUND

Readers of this *Review* have been told¹ of the origin and preparation by the International Institute for the Unification of Private Law (UNIDROIT) of *A Guide to International Master Franchise Arrangements*. Now that the *Guide* has been published, it may be useful to place it in the context of what has been occurring in this rapidly evolving field of commercial law and business, and to suggest some of the uses to which it may most usefully be put by a variety of audiences.

When the Study Group was first convened by UNIDROIT, the subject of franchising had been addressed periodically since 1985 by its Governing Council, by its staff, and by groups of experts consulted by the Institute. In 1993, the Governing Council established a Study Group on Franchising, calling for recommendations and other appropriate action “as soon as practically possible”.

The *Guide* is the product of that mandate. Completing it “as soon as practically possible” required not only accommodating the schedules of active practitioners, academics and government officials, pressed into service as a volunteer army, but also recognition of the changes taking place in international franchising itself. It is worth pausing to examine some of those changes.

In 1985, franchising was largely the province of American companies, with developments elsewhere most evident in more limited activities in Canada, Western Europe, Japan and Australia. The intervening years have seen:

- slow but continuing growth in those areas, especially in Western Europe and Japan;
- the emergence of indigenous franchising in almost every area of the world;
- rapid growth of international or cross-border franchising, with its attendant and inevitable complexities;

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¹ Cf. L. PETERS, “The Draft UNIDROIT Guide to Franchising – How and Why”, *Uniform Law Review* 1996, 694; see also M. MENDELSON, “Franchising”, *Uniform Law Review* 1996, 679.

- the beginnings of franchise activity in countries and regions where it would have been unthinkable only a few years earlier – in China and Russia and India; in the Middle East; in South Africa and Morocco and elsewhere in Africa; in many parts of the former Soviet Union;
- the creation of associations of franchise companies, dedicated to the sound development of franchising, in countries throughout the world;
- some progress toward regional groupings of these associations, especially in Europe, and the beginnings of a world-wide structure;
- changes in the nature of what is franchised. While food service operations, hotels and other businesses associated with catering and tourism continue to be in the vanguard of franchising, rapid development is now occurring in service industries generally, including business services and other activities responding to economic, demographic and social changes;
- that, while the largest franchisors continue to dominate the economic scene, franchisors are appearing everywhere, reflecting the capacity of franchising to leverage the resources of retail operators to augment the contributions by the originators of the concepts;
- that, although franchising remains an attractive option for the small business person, or an employee seeking to become a business owner, cross-border franchising has prompted the emergence of considerably larger franchisees -- in some cases, larger than their franchisors;
- increasingly, franchising revealed as a fertile source of opportunity for groups not previously fully participating in entrepreneurship – for example, women. At the same time, it has become a significant employer of women; of minority groups; of the young, the elderly and the handicapped.
- the continued proliferation of variations on the theme of franchising – perhaps most significantly, “conversion franchising”, the placing of an existing business under the “umbrella” of a franchising organization;
- political as well as economic and social changes which have had repercussions in franchising. As the former command-and-control societies struggle to adapt to a world operating by principles of market economy, franchising has opened up opportunities for new entrepreneurs and demonstrated its utility as a vehicle for privatization. In some socialist economies, elements of the government itself have become franchisees.

These changes have been accompanied by a growth in the attention paid to franchising by the legal system: laws, regulations, codes of conduct, private litigation, the formation of bar association groups, the publication of books and periodicals, the holding of conferences and symposia. As economic developments have changed the face of contemporary franchising, legal activity has revealed a wide disparity in the understanding of franchising, and in the approach to the legal principles governing the franchised relationship. Nowhere is this more apparent than in international franchising.

II. – CONCERNS ADDRESSED BY THE STUDY GROUP

As the Study Group pursued its discussions, it emerged that:

- there is a dearth of written material of true quality on the subject, so that less experienced practitioners too often rely on information of dubious value, or on limited contractual experience which is inadequate to comprehend the special features and nuances of franchising;
- there is a tendency to seize upon an available franchise agreement as a model for use in any franchised relationship, without understanding the differences existing from one industry to another, from one country to another and in a wide range of other circumstances which may render the “model” inappropriate or even legally dangerous to use;
- just as undue weight may be accorded to an agreement (however little is known of its provenance or applicability), so too can inappropriate credibility be given to operators claiming some experience in the field. In the land of the blind, goes the saying, the one-eyed man is king. We have all been confronted with situations in which one party or both relied upon an “expert” whose experience of franchising arrangements was in fact limited in range and variety, or in the industries to which he had been exposed, or in the cultural setting in which the transaction was negotiated. Frequently, the person upon whom reliance is being placed, whether or not he is referred to as a consultant, is in fact a matchmaker, thus exacerbating the problem: his motive is to see that a transaction is consummated, whether or not it is on appropriate terms;
- in many developing countries there is an almost total lack of true understanding of franchising. In such societies, the appearance of a Western-style legal document may trigger a slavish and indiscriminating “follow the leader” response or, conversely, one of hostility: its length and complexity may render it suspect, especially in the eyes of those who have inadequate experience to appreciate the motivations which led to its drafting. Thus there is too often either a vacuum or a pattern of confusion and cultural conflict. In either case, the result is likely to be the absence of any recognized standard of “best practices” in franchising;
- in franchising as in other commercial and legal arrangements, society benefits when counsel for both parties are well qualified to advise their clients. That is however unlikely to occur except in limited circumstances, and principally in highly developed societies.

III. – THE STUDY GROUP’S APPROACH

Confronted with these manifestly unsatisfactory conditions afflicting the process of international franchising, what could a Study Group such as ours do? It could not, after all, require that all contracting parties be rendered equal, or all consultants ethical, or all lawyers wise and experienced. It could not prohibit reference to inappropriate models, or banish suspicion of documents emanating from other countries. It could but try to make a contribution to “leveling the playing field”. In the end, that was the course the Group set for itself.

The very diversity of the Group's composition, while occasionally a stumbling block to full understanding of the various perspectives, ultimately served us well. Membership was a mix of private practitioners, government officials, academics and representatives of bar associations and franchising bodies from nine countries in four continents, schooled in both common and civil law systems.

Through numerous face-to-face sessions and extensive circulation of drafts, the group worked its way toward common ground. It discovered that there were few issues which were totally black or white, and began – sometimes grudgingly – to recognize that, even when agreement was reached on the end to be achieved, there could be a wide variety of approaches to reach that end. While the objective throughout was to identify “best practices” in international franchising, and to communicate in a meaningful way with an audience of lay persons as well as lawyers, the discussions helped to identify a much broader array of factors which must be addressed. In the final analysis, it concluded, the employment of best practices first and foremost requires just that: the ability to ask the right questions.

IV. – THE ESSENTIALS

The opening chapter of the *Guide* provides an introduction to some of the *fundamental concepts of the franchising relationship* and the elements necessary for the formation of a franchising arrangement. It begins with a discussion of the master franchise agreement and other commercial agreements relevant to a franchising arrangement, including a brief description of the parties involved -- the franchisor, the sub-franchisor and the sub-franchisees. It describes what are essentially two agreements: the international agreement between franchisor and sub-franchisor (the master franchise agreement) and the domestic franchise agreement between sub-franchisor and each sub-franchisee (the sub-franchise agreement). It discusses the duties of each party and their respective relationships, and the benefits of, and common problems associated with, master franchising (e.g., the franchisor's limited control over the franchise network once an agreement is signed, problems associated with terminating the master franchise agreement, and the necessity of sharing income derived from fees).

Certain elements of a franchising agreement may cause it to be identified with other types of legal agreements (a problem especially acute in countries lacking a franchising law, thus compelling the courts to draw parallels between franchise agreements and other commercial arrangements), such as commercial agency, distribution, license and transfer of technology, as well as other, less common methods of expanding internationally (e.g., joint ventures and area representation).

The *Guide* goes on to discuss factors that should be considered when selecting the appropriate method of expanding internationally, and to provide some pointers on how to negotiate a master franchise agreement. It addresses a number of objective factors pertinent to a decision to expand internationally (the market which the franchisor is proposing to enter, including the state of the economy, sources of available financing, inflation and interest rates; the culture of the host country, which necessitates an evaluation of local traditions, religion and legislation; the legal framework of the host country, including registration requirements, governmental approval for the business, import or export controls and tax considerations, etc.).

It addresses subjective factors to be considered by the franchisor when selecting the proper expansion vehicle (the nature of the business, which may or may not make franchising the appropriate vehicle; whether franchising is the most cost-effective method of expansion given, perhaps, high training costs or the cost of complying with government regulations; the experience of the parties, the division of responsibilities among the parties and consequently, the revenue to be allocated to each, the control to be exercised by each party, and any relevant risk factors, both internal and external). It also notes the factors to be considered in selecting partners.

The opening chapter concludes with a discussion of the factors involved in negotiating and drafting international franchise agreements, including circumstances which make a "standard" contract unsuitable, with particular emphasis on problems created by language differences and on factors that should be considered by the franchisor when attempting to adapt a franchise system to a foreign market.

V. – KEY FEATURES OF THE MASTER FRANCHISE AGREEMENT

Chapter 2 on *the nature and extent of the rights granted* in a typical master franchise arrangement includes a description of the System and sets out ways in which licensed assets may be used and where the franchise is to be operated. It highlights the inherent tension in this area (the franchisor will want to limit the sub-franchisor's right to an area which can be realistically developed and managed, while the sub-franchisor often wants the rights to a territory greater than its resources would permit it to develop) and suggests possible solutions. The critical issue of exclusivity of rights granted to the sub-franchisor, including the considerable variations which may be adopted, is dealt with in detail, as are the treatment of sub-franchised units, including issues of consent, reporting and the like, and issues of direct contractual relationships between franchisor and sub-franchisee (pinpointing differences among jurisdictions which may dictate such arrangements), including the protection of intellectual property and the techniques for reaching this objective.

Chapter 3 discusses the *term of the agreement and conditions of renewal*, treating the principal arguments for and against longer terms, and the impact of three-party sub-franchise arrangements on this decision. It sets out the conditions usually required by franchisors for renewal and points out that the common requirement in the domestic context -- that the sub-franchisor execute its new form of franchise agreement -- may not in fact be practical in the international context.

Turning to the *sources of income* derived from the franchise relationship, beginning with an initial master franchise fee, the *Guide* considers a number of factors to be considered by the parties. While noting that there are no precise guidelines for calculating initial franchise fees, it cautions that high fees are generally justified in cases where the sub-franchisor can reasonably hold out high expectations of the value of the system in the host territory. Means of calculating a reasonable level of continuing or ongoing franchise fees from the sub-franchisor are discussed in detail, emphasizing that the appropriate level cannot be determined apart from what the sub-franchisor is able to collect from sub-franchisees. The chapter also notes some alternative fee structures, such as sliding scale fees, fixed fees, etc., before proceeding to a discussion of sources of income for sub-franchisors: initial and continuing fees, profits on the sale of products to the sub-franchisee (as in a distribution arrangement), a percentage of gross

income, or lump sum payments negotiated in advance. Other sources of income may include revenue derived by the sub-franchisor for the manufacture of products; in that context the *Guide* discusses income which may be received from designated producers or suppliers.

One section deals with the *calculation of payments and related procedures*. Among the issues discussed are the timing of payments; relevant accounting periods; whether the sub-franchisor must pay the continuing fees due to the franchisor if the sub-franchisees have not yet made payment to the sub-franchisor; banking delays; conversion of currency; the currency of payment; exchange permission; fiscal considerations; tax issues in both the host country and the franchisor's home country; differing definitions of royalty payments; double-tax treaties; and "gross up" provisions.

Chapter 8 addresses the issue of *advertising* and its control, stressing the need to balance the desire to control with the difficulty of managing an international network, as well as the fact that the franchisor will be less familiar with the legal and cultural environment in the territory to be developed and will therefore need to rely more on the sub-franchisor to police the local advertising of sub-franchisees. Among the issues discussed are whether the franchisor will provide all advertising material or merely approve the sub-franchisor's proposed material, and certain variations; language differences; the provision of guidelines or standards; and the submission of marketing plans. Detailed attention is devoted to the host of issues surrounding financial considerations with regard to advertising (methods of calculation; who bears what costs; appropriate purposes of the expenditures; issues related to local, regional and national funds; the decision-making process; contributions by manufacturers and suppliers; and some of the special concerns arising out of cross-border advertising).

An entire chapter (Chapter 9) surveys the often thorny issue of *supply* of equipment, products and services essential to the operation of the franchised business, dealing separately with (1) products distinctive to the franchise system and which are offered for sale to customers of the business and (2) capital products necessary to the operation of the franchised business, noting a number of differences in treatment which may be accorded to the two categories. It contemplates some of the special considerations arising from cross-border agreements and the coverage of these arrangements by various bodies of law which may be applicable (competition laws, United Nations Conventions, etc.).

The subject of *intellectual property*, especially trademarks and the related subject of *know-how and trade secrets*, would warrant an entire volume. In the context of the *Guide*, it merits two chapters (Chapters 10 and 11) which should prove valuable to experienced practitioners as well as neophytes. These cover the provisions typically included, the treatment of infringement and problems arising from difficulties experienced in obtaining protection. Special attention is given to the different views taken in different countries in respect of certain practices (sub-licenses, registered user agreements, etc.) and to the effect of international conventions, the regulation of trademarks, the right of priority, etc.

The chapter on know-how and trade secrets dwells on terminology and to the difference between assignment and licensing of know-how, with the latter typical of franchising arrangements. It notes that a license may be granted without any exclusivity, with limited exclusivity or with absolute exclusivity, and considers the various methods by which know-how is usually communicated in the franchising context, the protection of the know-how in master franchise agreements (including techniques such as confidentiality clauses, non-competition clauses, grant-back clauses and post-term agreements), the different legal treatment

which different countries will afford to such provisions – the European Union being of particular importance in that regard – as well as the different treatment which may be accorded to know-how developed independently.

For perhaps the first time in any treatise, the *Guide* addresses the issue of *changes to the system* (Chapter 12). It notes the inherent tension (the franchisor wishing to retain the flexibility to modify the system as it gains experience, sub-franchisors and sub-franchisees preferring clearly specified obligations set down in an agreement that does not permit change) and the different circumstances under which the need for change to the system will arise, *e.g.*, how the circumstances of a new franchise system are likely to differ from those of more mature franchise systems. Some of the changes include adding or deleting entire product lines; changing the system's image; stepping up advertising and promotional activities; increasing payments due to the advertising fund; changing operating standards. Particular attention is given to those aspects of the relationship most likely to require change: the location and nature of the facility; territorial rights; target customers; products and services offered; methods of marketing and delivery; trademarks and trade dress; renovation; contributions to advertising funds; institution of new marketing programs or of higher standards. Suggestions are offered on various techniques for effecting change more palatable to members of the system. The chapter closes with a discussion of various legal constraints which may limit the capacity to impose changes.

Sale, assignment and transfer of master franchise agreements are increasingly important as franchising matures, and receive detailed treatment. Chapter 13 addresses the most common requirements imposed by franchisors as a condition for granting approval to proposed transfers, analyzing the reasons for each as well as alternative approaches.

Vicarious liability, indemnification, and insurance all relate generally to the franchisor's desire to limit its exposure to third parties, discussing how to limit the likelihood of such claims; drafting techniques; and the conduct of ongoing relationships, so as to avoid liability for the acts of omission or commission by sub-franchisees. A variety of indemnification and insurance techniques are outlined.

An entire chapter (Chapter 15) is devoted to *remedies for non-performance*, breaking down the two key areas of non-performance by sub-franchisors into development obligations and the sub-franchisor's function as "franchisor" in the host country. It begins by discussing remedies short of termination which may serve to salvage the relationship between the parties, pointing to such issues as the dangers of excessively general language and approaches to periods of notice and opportunities to cure. Finally, it suggests a wide range of possible remedies, noting the benefits and imperfections of each. This chapter, which draws heavily upon the authors' own experiences, may prove one of the most valuable to readers.

Termination itself, and its consequences, is the subject of Chapter 16 of the *Guide*. The variety of ways in which an agreement may come to an end is substantially greater than is generally realized. Each requires treatment in the agreement, and each may be affected differently by legal considerations. For example, the consequences of expiration or termination for the sub-franchisor may include the loss of future development rights, cessation of operations as franchisor of the sub-franchisees, discontinuance of use of the franchisor's

intellectual property (including trademarks, copyright materials, systems, know-how, and confidential information), de-identification of any sub-franchisor-owned units, transfer of all sub-franchise agreements to the franchisor, a non-competition period, and the sale of certain assets to the franchisor.

VI. – MATERIAL NOT AVAILABLE ELSEWHERE

The *Guide* contains a number of features which may prove invaluable because there are few, if any, other sources for the information they provide in the context of international franchising. These discuss, for example:

- some important clauses that can be found in a master franchise agreement, alerting the reader to the need to consider the effectiveness of each clause when assessed against the relevant applicable laws. In addition to a discussion of the importance of the preamble, the clauses discussed include those dealing with severability; “entire agreement”; waivers; *force majeure* and hardship; cumulative rights; notice provision; and damages;
- the use of ancillary documents to record obligations imposed on the parties but which have not been incorporated into the master franchise agreement. The ancillary document may precede the master franchise agreement (*e.g.*, joint venture agreements or letters of intent) or follow its execution (*e.g.*, a transfer agreement). Some may only be necessary in certain circumstances (*e.g.*, letters of credit and financing agreements). An ancillary document may also be used to separate out negotiated, one-time terms from the terms central to the master franchise agreement, or to bind a party which may not be bound by the terms of the master franchise agreement (*e.g.*, employees who execute a non-competition agreement). Changes to the parties’ relationship may also be documented through ancillary agreements; and an ancillary document can be used to comply with the laws of a particular jurisdiction.
- ancillary documents commonly used with a master franchise agreement (dealing with, *e.g.*, confidentiality, non-competition, guarantee and indemnity, transfer, termination, and release); those required for the franchised business (dealing with, *e.g.*, supply, equipment purchase or lease, and software license); those required by the structure of certain transactions (dealing with, *e.g.*, letters of intent, joint venture, methods of payment, evidencing financing arrangements); and those required by local law (dealing with, *e.g.*, trademark license and registered users);
- certain legislative requirements which a franchisor may encounter when executing an international agreement, and which may not be applicable in the execution of a domestic agreement. This could prove to be an invaluable checklist. The chapter concludes with a discussion of the allocation of responsibilities for meeting these requirements.

Finally, the *Guide* contains several annexes which set out information in a more usable fashion than if contained in the body of the *Guide* itself:

- Annex 1 includes a summary of the different forms that franchising may take, with special focus on business format franchising; and a discussion of the advantages and disadvantages of franchising for the parties involved in the agreement;
- Annex 2 opens with a discussion of the economic relevance of franchising. The authors present statistical data to illustrate the impact which franchising has had on the economies of various countries. This annex also discusses the benefits of franchising to a national economy, with special attention to developing countries, and lists the wide variety of commercial activities that have been franchised;
- Annex 3 is concerned with the laws and regulations to which franchise arrangements are subject, in addition to those laws regulating commercial contracts or intellectual property rights. It includes a recitation of branches of law relevant to franchising (including general contract law; agency law; laws regulating distribution contracts; laws applicable to leases and security interests; legislation dealing with financial investments; intellectual property laws; competition laws; fair practices laws; corporate law; tax law; property law; legislation on consumer protection and product liability; insurance law; labor law; laws regulating the transfer of technology; legislation regulating foreign investments, currency control regulations, import restrictions and quotas; legislation regulating joint ventures and industry-specific laws or regulations).
- Annex 3 goes on to discuss specific legislation regulating franchising in the United States, Canada, France, Spain, Brazil, Mexico, Indonesia, Japan, the Republic of Korea, the Russian Federation, Australia, and the European Union. The Annex concludes with a presentation of the European Code of Ethics for Franchising adopted by the European Franchise Federation and various codes of ethics adopted by federal associations. This material will be supplemented by updates on the UNIDROIT website.

VII. – SPECIAL FEATURES OF MASTER FRANCHISE ARRANGEMENTS

Much of the *Guide* applies equally to a wide variety of franchise arrangements but, since it is directed principally at master franchising – the technique most commonly used in cross-border agreements –, it devotes special and detailed attention to this vehicle. Each of the substantive chapters contains a discussion of how the subject being treated is affected by the peculiar features of master franchising, and two chapters are devoted entirely to this technique.

These two chapters (Chapters 5 and 6) discuss the obligations of the franchisor and the sub-franchisor in master franchise arrangements, including those which, by their nature, are performed by one or the other, and those which are usually allocated between the franchisor and the sub-franchisor as a result of negotiation. The authors point out the duality of the responsibilities of the sub-franchisor resulting from responsibilities to the franchisor, on the one hand, and to the sub-franchisee on the other, and the friction this may create. While wanting to obtain the advantages of independent action by sub-franchisors, franchisors nevertheless feel they must reserve particular matters for themselves, and the rights to control those areas of the arrangement are set out in the master franchise agreement. The text leads the reader through the allocation of rights and obligations, including the necessary allowance for the influence of local laws and custom on such allocations.

The chapter also includes a discussion of the obligation of the franchisor to provide information to the sub-franchisor, both in the initial launch of the franchise system and subsequently as the territory is developed, and training, both initial and ongoing, as well as obligations that arise as a result of unsuccessful training. The function of the manuals and the adaptation of the manuals to changing circumstances, as well as other types of assistance by the franchisor, including the supply of goods to the sub-franchisor and the sub-franchisees, promotion of the franchisor's system, and protection of the trademarks, are also included. The special characteristics of master franchising in the international context are noted. For example, the authors point out that, with respect to initial information, the sub-franchisor will as a rule have the knowledge of local requirements and markets necessary to evaluate any modifications to the system that will be needed. The authors suggest the use of a sub-franchisor's manual to cover the functions of the sub-franchisor in its role as recruiter of sub-franchisees, franchisor to the sub-franchisees, and promoter of the system.

The *Guide* observes that some of the obligations of the franchisor set out in the master franchise agreement not only impose an obligation but also provide the franchisor with necessary controls over the system. An example is visits by the franchisor to the sub-franchisor and to outlets of the sub-franchisor and the sub-franchisees. Such inspections are aimed not only at promoting better operating performance, but also enable the franchisor to understand local markets. A second example is the supply of goods by the franchisor.

Another chapter (Chapter 6) examines the role of the sub-franchisor in master franchise relationships. It includes discussions of pilot operations, the functions of a development schedule and its attendant problems, and the operational obligations of the sub-franchisor. The discussion of pilot operations points out the desirability of having an initial prototype unit, both to test the market and to serve as an example for sub-franchisees. In addition, the authors note that sub-franchisors may be required to open several units before they are allowed to sub-franchise to assure that they have sufficient experience in the operation of units to support the sub-franchisees appropriately.

The discussion of the negotiation of a development schedule addresses the possibility of measuring the sub-franchisor's obligations either by the number of units or by volume of sales. The required annual rate of growth in number of units and the cumulative rate of growth are usually highly negotiated points in arriving at the role of the sub-franchisor in developing the territory. The grant of exclusive rights during the development period is an important aspect of most master franchise agreements. The authors note the concern of sub-franchisors that development obligations may hinder their ability to carry out other responsibilities in the operation of the units. The discussion recites some of the dangers of a highly optimistic development schedule, such as causing the sub-franchisor to accept sub-franchisees who would not otherwise meet the sub-franchisor's standards. The authors suggest that a sub-franchisor should have a business plan before entering into the arrangement, and that the pace of proposed development should be an integral part of any business plan developed by the sub-franchisor.

Further difficulties in determining an appropriate development schedule are those inherent in introducing an unknown name and an untried system into the territory of the sub-franchisor. Additional complications are introduced by development schedules which include the development of satellite outlets, varying in the service provided to customers. Specifying a development schedule for any renewal period in the master franchise agreement when it is initially signed is, of course, even more difficult because the further out in time projections are

made, the more uncertain they become. The authors suggest several ways of resolving these uncertainties – none of them, admittedly, completely satisfactory.

Another group of obligations of sub-franchisors in sub-franchise arrangements discussed includes application of sub-franchisee qualification criteria, procedures for training franchisees, and the length of the term of sub-franchise agreements. The authors note that the sub-franchise agreement will necessarily impose on sub-franchisees financial and reporting obligations. Some or all of such reports and information, initially provided by sub-franchisees to the sub-franchisor, must also as a rule be communicated to the franchisor by the sub-franchisor. Sub-franchisors will also be required to verify the accuracy of financial information received from sub-franchisees. The authors further discuss the responsibility of the sub-franchisor for ensuring compliance with trademark laws and supervision of the sub-franchisee's use of these marks.

Important problems and drafting choices with respect to the preparation of a sub-franchise agreement are discussed as well. The authors note that the master franchise agreement usually deals with the obligation to prepare the form of sub-franchisee agreement to be used between sub-franchisor and sub-franchisee. Ordinarily, the sub-franchisor is required to use a standard form of franchise agreement provided by the franchisor or, as an alternative, the sub-franchisor may be required to prepare the form of sub-franchise agreement, the terms of which are to be approved by the franchisor. In the former case, latitude is usually offered to the sub-franchisor to suggest changes that are appropriate, considering the market and legal requirements in the sub-franchisor's territory. In either case, the domestic franchise agreement used by the franchisor in its own country may be a starting point. Difficulties in using domestic agreements may be encountered if master franchising is not the structure used by franchisors in their own country.

Finally, the authors note that, when a prescribed standard form contract is used, there are usually numerous restrictions imposed on the sub-franchisor as to any variations. The sub-franchisor's obligation to enforce the sub-franchise agreements is usually stated. Practices differ among franchisors as to the approval of individual franchisees and the provisions of individual sub-franchise agreements. However, departure from the agreed form usually requires prior approval of the franchisor. The authors in general disapprove of the retention of these rights by the franchisor, citing cumbersomeness and the increase of potential liability of the franchisor, and favor placing the responsibility for drafting sub-franchise agreements on the sub-franchisor, with the possibility that the franchisor will provide the language for certain mandatory provisions. Examples include a description of the franchise system, the scope of the rights granted, and the geographical and/or political boundaries of the territory. A selection of individual provisions which a franchisor may require is also included.

Of particular importance is the warning included by the authors that sub-franchise agreements must contain provisions stating what will happen if the master franchise agreement is terminated or expires (*e.g.*, will the sub-franchise agreements also terminate?) An acknowledgment by the sub-franchisee that the rights of the sub-franchisor may be assumed by the franchisor is particularly helpful if that is the case.

The authors suggest that it should be the obligation of the sub-franchisor to point out to the franchisor any clauses of a standard form sub-franchise agreement which are not permissible in view of local laws, since any provision which is inconsistent with local law will be unenforceable and in extreme cases, may render the entire agreement void. The problems associated with providing for enforcement of the sub-franchise agreement are discussed, with suggestions for addressing those problems effectively.

VIII. – HOW TO USE THE GUIDE; SOME CAVEATS

While the *Guide* was, of necessity, written principally by practitioners with experience representing franchisors and sub-franchisors, a rigorous effort has been made to render it useful to a wide range of prospective audiences. The *Guide* may prove valuable to franchisors, prospective master licensees, prospective sub-franchisees, practitioners representing any of those parties, government officials, the general and business and, in an academic setting, by teachers and students.

As with any such document, a word of caution is in order. While the authors have sought to set out what they view as “best practices”, they are keenly aware that “best” does not mean “only”. Moreover, the rapidly evolving nature of franchising and of the laws governing it – legislation, regulation, case law – strongly suggests that the *Guide*, like Annex 3 itself, may be in need of periodic updating. Just as “standard contracts” and “model laws” assume a static body of law and practice, so too does any discussion of “best practices”. Yet we know that there is virtually nothing about franchising which is static.

That qualification notwithstanding, the *Guide* will certainly take its place in the very limited list of “must have” documents for those who wish to understand international franchising. In libraries in developing countries, one suspects, it may well be destined to be the sole volume on the subject.

