

UNIDROIT 2000
Study LXVIII - Doc. 20
(English Only)

U N I D R O I T
I N T E R N A T I O N A L I N S T I T U T E F O R T H E U N I F I C A T I O N O F P R I V A T E L A W
=====

STUDY GROUP ON FRANCHISING

Fourth Session,
Rome, 9 – 10 December 1999

REPORT
(prepared by the Secretariat)

Rome, June 2000

The fourth session of the **Study Group on Franchising** was held in Rome, at the seat of UNIDROIT, on 9 and 10 December 1999. A list of participants in the session appears as Annex 2 to this Report. The document under discussion was Study LXVIII – Doc. 19 (Text of the Preliminary Draft as adopted by the Drafting Committee at its First Session, held in Rome from 14 to 16 January 1999, with Comments prepared by the UNIDROIT Secretariat).

Opening the meeting, Mr Herbert KRONKE, Secretary-General of UNIDROIT, stated that franchising was one of the priority items on the Work Programme of the Institute. He thanked the members of the Study Group for their commitment to the project, without which it would not have reached such an advanced stage, and conveyed the profound appreciation of the Governing Council to the Group. He stated that it was a tradition of UNIDROIT that its Study Groups and Working Groups were chaired by a member of the Governing Council. Following the election of the new Council that had taken place in 1998, Mr Alan Rose, who had chaired the Study Group until then, was no longer a member of the Council and a new Chairman had therefore to be appointed. Mr Arthur HARTKAMP, Advocate-General at the Supreme Court of the Netherlands and Professor at the University of Utrecht, as well as member of the UNIDROIT Governing Council, had accepted to serve as Chairman.

The first item on the Agenda was a consideration of the decision to proceed with the preparation of a Model Law.

Two members of the Study Group requested clarifications as regards the procedure followed when the decision was taken, considering that the Study Group had only examined the question at its first meeting. At the time there had not been sufficient support for the preparation of an international instrument and the Group had decided to opt for the preparation of a Guide instead. They expressed doubts as to whether the preparation of model legislation was the correct approach, one of them expressing the fear that the mere existence of the Model Law might encourage legislators to adopt legislation even if there was no need. Furthermore, if the purpose of model legislation was to achieve uniformity, this purpose might be defeated, as the mere fact that it was a model meant that national legislators could deviate from the model and the end result might be as many variations on the theme as without the model. Both stressed that the problem was that there was a lack of understanding of franchising among legislators and those who prepared laws and that this had led to the adoption of legislation in a number of countries that regulated the relationship between the parties in a manner that had a very severe impact on franchising. It would therefore be better for UNIDROIT to provide guidance and education, to make sure that when Governments considered whether or not they needed to legislate about franchising, they had the right level of understanding, that they addressed the right issues and they produced the right legislation. In order to do this, they suggested that a guide be prepared, which would be shorter than the *Guide to International Master Franchise Arrangements* that UNIDROIT had already published and that would be produced in a shorter period of time, that discussed the pros and cons of legislation as such, and in particular the pros and cons of disclosure legislation. This guide should indicate what Governments interested in legislation should be concerned about, what they should be reluctant to do, what they should be seeking by way of evidence of the need for particular types of provisions.

Other members of the Group expressed their strong support for the preparation of a Model Law. It was suggested that the Study Group had the opportunity to lend its experience to the preparation of a Model Law that could be used by countries all over the world. It was pointed out that whereas it might be correct to say that many of those involved in legislating franchising did not have sufficient knowledge of the phenomenon, it was equally certain that what they did understand clearly was bad franchising, the horror stories, system failures and loss. The reaction of politicians faced with such events was to adopt harsh legislation, with the inevitable consequences. A Model Law prepared by an international organisation such as UNIDROIT was therefore of paramount importance. It was also pointed out that the role of the Study Group was advisory, that the Governing Council of UNIDROIT had taken a decision to go ahead with the preparation of a Model Law and that it was not the role of the Study Group to question that decision. It was stressed that it was preferable for experts who knew something about franchising to prepare a Model Law rather than for this task being left to civil servants. The situation of the European Union was also referred to, as the expiration of the Franchising Block Exemption Regulation had as a consequence that there would be no legal definition of franchising in Europe in the future. A Model Law prepared at international level could therefore fill this void.

The Secretariat recalled that at its first meeting the Study Group had not decided against legislation, it had decided to postpone the question.¹ In the course of the years that had passed since that first meeting, developments had taken place. In particular, a number of States had adopted franchise legislation that members of the Group considered to be at best inadequate and at worst dangerous for the development of franchising. This had led some members of the Group to urge the Institute to proceed with the preparation of a Model Law. They had felt that the preparation of such an instrument would help ensure that sensible laws were adopted. There was also a sense of urgency, considering the speed with which legislators were turning their attention to franchising, and this had led the Secretariat to submit a proposal to the Council for work to begin on a Model Law. The Council had decided to adopt this proposal. Convening a Study Group meeting would have meant delaying the preparation of the Model Law by at least six months, if not a year. In order to speed up work, it had been decided to convene a Drafting Committee to prepare a first draft to submit to the Study Group in Plenary. This Drafting Committee had met in January 1999 and had produced the draft before the Group at this meeting. The composition of the Drafting Committee, which had included two new members of the Study Group, Messrs Olivier Binder and Michael Brennan, had been dictated by the need to prepare the English and French language versions in parallel, as this was an absolute requirement for the preparation of a legal text as opposed to the preparation of a publication such as a guide. A number of other experts who had not been members of the Study Group in its original composition had been asked to join the Group first of all to bring the experience of a number of other jurisdictions to the attention of the Group, and secondly to ensure that the English and French texts that were prepared corresponded and proceeded in parallel, as the new members would be able to comment on texts in both languages.

Support was expressed for the suggestion that information and materials be provided as regards the pros and cons of legislation, both independently and in the context of the preparation of a Model Law. Opinions were however divided as regards how much information should be provided. It was observed that if an examination of the pros and cons of legislation on franchising as such, and of different types of legislation, were to be undertaken, it would mean examining all private law, all commercial law and all other connected matters, which would be far too extensive a research.

It was suggested that the Explanatory Report that would be accompanying the Model Law could provide an analysis of the pros and cons of the possible different types of legislation, explaining why the Study Group had opted for disclosure legislation and, with reference to each single provision of the Model Law, indicating why a certain option had been selected rather than another.

As regards the scope of the Model Law, while voices were raised for the inclusion of also other aspects of franchising relationships in addition to disclosure, especially termination and its consequences, others were clearly against such a broadening of the scope of the Model Law. Moreover, it was suggested that the calls for items other than disclosure showed that merely dealing with disclosure would not suffice, that presenting a Model Law which only dealt with disclosure as a solution suitable for all cases was inappropriate and that therefore the guide approach was to be preferred. A majority however stressed the vital importance of disclosure. It was indicated that in an estimated 90% of cases allegations of misrepresentation were made by franchisees, although the observation was made that the number of cases in which such allegations were substantiated were considerably fewer.

Considering the number of States that were presently contemplating legislation for franchising (Philippines, Puerto Rico, Argentina, Bolivia, Peru, Sweden, Italy and Tunisia), it was suggested that a Model Law would be a useful document for the States in question.

A lengthy and lively discussion on the possibility of individual members of the Group issuing a dissenting opinion as to the instrument that would be the outcome of the work of the Group ensued. While the two members of the Group who had expressed doubts as to the preparation of a Model Law

¹ "In relation to domestic franchising [the Study Group] reached a lesser degree of consensus on the question of whether anything should be done in addition to the preparation of the guide for international franchising, although there was consensus on the fact that the information gathered in the process of the preparation of this legal guide would be of considerable assistance in clarifying the issues involved with a view to deciding the approach to be followed. It was decided that for the time being this question should be deferred" (Study LXVIII – Doc. 9, Study Group on Franchising, Report on the first session (Rome, 16 to 18 May 1994), p. 22).

being the most appropriate manner in which to provide assistance to Governments contemplating the introduction of franchise legislation felt that they should be free to decide once work had been completed, others instead distinguished between an opposition to the principle of the adoption of a Model Law, which they felt not to be legitimate on the part of a member of the Group, and opposition to any of the single provisions, which they instead felt would be legitimate. In the end, no member of the Group having stated clearly that he or she was opposed to the adoption of a Model Law in principle, it was decided that the Group should proceed with its work and that the report on the meeting of the Study Group should reflect the points of view expressed in the course of the discussion.

GENERAL QUESTIONS

Prior to proceeding with the examination of the draft articles of the Model Law, the Study Group discussed a number of general questions that had been submitted to it in Study LXVIII – Doc. 19.

(i) Franchising only or also other relationships?

A general question concerned whether the Model Law should be limited to franchising or whether it should cover also other relationships, which were similar to franchising even if the parties did not refer to them as franchising.

There was general opposition to this suggestion as it was feared that the law might thereby extend also to agency and other distribution relationships, which were essentially different, the only thing they had in common with franchising being that they concerned the distribution of goods and services. The control that a franchisor exercised over the day to day running of the franchised business was totally absent from the other relationships. Furthermore, no legislature was proposing to adopt legislation dealing with disclosure in licensing or distribution agreements. On the contrary, there was a tendency for States with technology transfer licensing legislation to disband it, rather than to implement it. It was suggested that extending the Model Law to make it apply also to other types of agreement would ensure the rejection of the Model Law by Governments.

The proponent explained that his intention was not to broaden the scope of the Model Law to include agency agreements or other distribution agreements. The proposal was born of the consideration that franchising was understood differently in, for example, Europe and the United States, the concept being much broader in the United States than in Europe. The question was therefore whether it would not be appropriate to cover also systems which worked like franchising without necessarily being denominated franchising.

The proposal was not accepted. It was observed that the States that took the Model Law into consideration would decide whether or not to broaden the scope of the law, irrespective of what the actual text of the law stated.

In this context the question of whether the Model Law should cover only pre-contractual disclosure, or also disclosure during the relationship was raised. It was decided that the law should cover only pre-contractual disclosure.

(ii) Are all types of franchising that the Model Law is intended to cover covered adequately?

The Study Group decided that traditional unit franchising, master franchising and development agreements were adequately covered. It was suggested that if it was felt that a particular addition had to be made for any specific type of agreement, this should be dealt with in the context of the particular provision concerned.

(iii) Are the provisions of the Model Law sufficient to cover types of agreement that will be developed in the future?

This question reflected an awareness of the fact that new, hybrid types of franchise agreements were being developed constantly. The Group felt that the provisions of the Model Law would be sufficient to cover also any type agreement that might be developed in the future.

(iv) International and/or domestic franchising?

A fundamental question concerned whether or not the Model Law should apply to both international and domestic franchising, or whether it should apply only to either one or the other.

It was observed that some existing statutes exempted international arrangements, and it therefore did not make sense to limit the application of the law to international franchising.

It was pointed out that the Model Laws adopted by the *United Nations Commission on International Trade Law (UNCITRAL)* contained a clause that specifically permitted States to limit the application of the law to either domestic or international transactions. Objections were however raised to such an approach, in that the *raison-d'être* of the Model Law was the need to protect the individual franchisee in a country, irrespective of whether the franchise originated within the country or abroad. If the possibility to limit the scope of the law to international transactions were given, the whole exercise would be futile. If in addition it were possible to opt out of the law of a country, then it would be possible to select the law of a country which did not have this legislation, with the consequence that the international transaction would not be covered at all. Several members of the Group therefore suggested that the Model Law should say nothing about States deciding whether or not the law should apply to both domestic and international franchising or to only one of them.

(v) Should franchisees be required to disclose under the Model Law?

It was observed that this question had been discussed extensively in the Drafting Committee, but had been rejected, the reason being that franchisors did not need to be protected. Some members of the Group however felt that franchisees had to accept that they also had a responsibility in the transaction. The concern was expressed that if nothing were indicated it might be understood as an indication that franchisor did not need information, that to all intents and purposes the information went in one direction only. It was however observed that as a matter of good business practice a franchisor would request information, indeed franchisors regularly did request information from franchisees, often as a condition for granting the franchise.

In the end it was decided that the Explanatory Report should indicate that although the Study Group did not deal with the question of disclosure by franchisees, it was normal practice for franchisors to require information from prospective franchisees and for franchisees to provide such information.

(vi) Effects of the new EU Vertical Restraints Block Exemption

The Group decided that the effects of the new European Vertical Restraints Block Exemption Regulation on franchising did not have to be considered in the context of the Model Law.

(vii) The use of electronic means for disclosure

The Group decided not to deal with the use of electronic means for disclosure in the context of the Model Law.

PREAMBLE – PURPOSE OF THE LAW

The text submitted for discussion was the following:

**PREAMBLE
(PURPOSE OF THE LAW)**

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

The use of the word “necessary” was felt to give rise to some difficulties. It was suggested that it be substituted by either “relevant” or “material”.

The concept “material” was felt to correspond to what was effectively intended, as “relevant” was too broad and might be abused by franchisors who would be able to bury franchisees in information that was relevant, in that it had some connection with the franchise, but which was not material. “Material” furthermore carried with it the meaning that if the person had known the information it would have affected the decision and this meaning was not conveyed by “accurate” or “relevant”. A considerable problem with “material” was however the impossibility to translate it into other languages. It was observed that it was this consideration that had led to the adoption of the word “necessary”, which was capable of being translated into languages such as French and Spanish. Considering these difficulties, it was suggested that the term closest to “material” would be “indispensable”, and that “necessary” might therefore be substituted by “indispensable”. This suggestion was accepted by the Group (6 votes in favour, as opposed to 5 votes in favour of retaining “necessary”).

A discussion took place on the opportuneness of retaining the Preamble as a Preamble, or of including it among the articles of the Model Law. It was observed that domestic legislation did not normally contain preambles, and that consideration had therefore to be given to how the presence of one would be interpreted by courts. While in some countries the courts would go straight to the articles and ignore the preamble unless there was uncertainty as to the meaning of some provisions, in others the preamble would be seen as the *causa* of the articles that followed. If on the other hand the text of the preamble were included as an article of the law, courts would interpret it as a specific obligation placed upon the franchisor to give all necessary and accurate information. Furthermore, it was observed that in common law jurisdictions, if the Preamble became an article and thus became a part of the body of the law, it could be used by courts to extend the reach of the law beyond what was intended.

A third alternative that was briefly considered was the possibility of the Preamble being transformed into a long title of the Model Law. This suggestion was however not accepted.

In the end, it was decided to delete the Preamble from the text of the Model Law and to place its contents at the beginning of the Explanatory Report.

ARTICLE 1 - DEFINITIONS

The text submitted to the Study Group was the following:

ARTICLE 1 (DEFINITIONS)

For the purposes of this law:

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

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

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

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

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

franchisee means the party to whom a franchise is granted;

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

franchised business means the business run under a franchise agreement;

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

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

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

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

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

It was observed that at present, to facilitate comparison, the English and French texts had been placed side by side following the English alphabetical order in the Annex to Doc. 19. Once the Model Law had been adopted by the Study Group also the French text would follow alphabetical order.

Affiliate

It was observed that the definition of “affiliate” corresponded to the standard definition of “affiliate” used for corporate law purposes. This was however not suitable for the purposes of, for example, Article 6(g)(ii), according to which relevant details had to be provided “relating to any finding of liability in a civil action involving franchises or other businesses relating to misrepresentation, unfair or deceptive acts or practices or comparable actions, as well as relating to any criminal convictions of ... (ii) any affiliate of the franchisor”. The franchisor might have affiliates which were merely sister companies controlled by the same holding but active in a totally unrelated business. The actual definition of “affiliate” in Article 1 was acceptable if Article 6(g)(ii) were modified so as to restrict it to affiliates offering franchises under the franchisor’s trademarks. It was however observed that a restriction to cases where the affiliate offered franchises under the franchisor’s trademarks was too limitative considering the case of master franchising, and that therefore the restriction should be to affiliates offering franchises in general. The wording suggested for Art. 6(g)(ii) was “any affiliate of the franchisor who is engaged in franchising”. This proposal was accepted by the Group.

Development Agreement

As regards the definition of development agreement, it was agreed to delete the four last words (“within a specified territory”). It was also agreed to change the words “the right to enter into multiple franchise agreements” to “the right to acquire more than one franchise of the same franchise system”.

Franchise

It was pointed out that the present definition of “franchise agreement” contained what in effect was a definition of “franchise”. Those parts of the definition of “franchise agreement” that referred to “franchise” should therefore be moved into the definition of “franchise”.

It was observed that the inter-relationship between the definition of “franchise” and “franchisee” was circular, in that each of the definitions depended on the other with neither being defined by itself. It was suggested that this problem might be solved by stating that “franchisee means the party to whom a franchise is granted” and that then the definition of “franchise” should be modified. The definitions of “franchisee” and “franchisor” could however be omitted, as it would be sufficient to

include the words in parenthesis and to state that “franchise means the right granted by a party (the franchisor) to another party (the franchisee) under the franchise agreement”. On the other hand it was suggested that the definitions of “franchisor” and “franchisee” might be used to indicate that the sub-franchisor and sub-franchisee were included under the definition. It was decided that two of the members of the Drafting Committee should submit a revised draft to the Study Group.

Franchise Agreement

As regards the definition of “franchise agreement”, it was observed that the specification “designated by the franchisor” might not achieve what it was intended to achieve, i.e. the coverage of those cases where the franchisor was not the legal owner of the trademark or distinctive sign. It was suggested that “trademark or logotype of which the franchisor has the exploitation right” or “trademark or logotype which the franchisor has the right to use” might be better. Yet another alternative suggested was “which the franchisor has the right to grant”. To this last suggestion it was however objected that the franchisor should have a duty to disclose even if it turned out that he had granted something he had no right to grant. Furthermore, the definition stated that a franchise meant a right granted by a franchisor to do such and such, and one of the rights granted would be the right to use the trademark. The different situations were therefore covered. In the end, no agreement having been reached on a revised text, it was agreed to leave the words “designated by the franchisor”.

In view of the fact that in some countries a franchisor had to operate one or more pilot units before engaging in franchising, it was suggested that the phrase “under a system determined by the franchisor” be modified to read “experimented by the franchisor”. This was however not accepted. It was pointed out that in many countries there was no requirement for pilot operations and that if such a requirement were introduced, all such franchises would be excluded from the application of the law.

It was suggested that the phrase “in substantial part prescribes the manner in which the franchised business is to be operated” could refer also to trademark licensing and that therefore a reference to, for example, the know-how of the franchisor should be added to limit the scope of the definition. It was pointed out that the language which followed the phrase cited (“which includes significant and continuing operation controls by the franchisor”) already did limit the scope of the definition, as such controls were not part of a typical licence arrangement. It was suggested that it might be made clear in the Explanatory Report that the controls referred to were not simply the controls exercised over the use of the marks, but were controls exercised over the nature of the business, i.e. controls over hours of operation and the like. It was suggested that the word “significant” was too limiting, and that it would be sufficient to refer to “operation controls”. As regards “operation controls”, it was suggested that if it was not clear that “operation” referred to “business operations”, the word “business” might be added.

One element to which a number of the members of the Study Group felt that a reference should be added was that of the assistance provided by a franchisor to a franchisee. One of the members of the Drafting Committee explained that what had been uppermost in the mind of the Drafting Committee had been the need to ensure that the definition did not include trademark licences or technology transfer agreements. The essence of a franchise, as opposed to that of the other two types of agreement, was that the franchisor determined in substantial part the manner in which the business was operated, as opposed to the manner in which the product was produced or advertised. Furthermore, there were many franchise systems where there was no on-going assistance, so the fact that a franchisor did not provide on-going assistance but exercised on-going controls should be sufficient for him to be covered by the definition. If a requirement for assistance were added, the risk was that there would be numerous franchisors who would studiously avoid providing on-going assistance in order to circumvent the definition. In the end, it was however decided that the concept of “assistance” should be included in the definition.

Another concept which was considered to be fundamental and which was not present in the definition was that of “know-how”. It was objected that “know-how” was an essential element of a franchise system, but not of a franchise, and that the Drafting Committee had avoided including a definition of “system”. If “know-how” were included, it would be necessary to define it, as had been the case in the European Block Exemption Regulation, and that would give rise to numerous problems. It was therefore suggested that it was preferable to leave matters at that what was being offered was a

system, and that the system was the way in which the business was run and that was the know-how. It was observed that this should then be stated clearly in the Explanatory Report.

It was objected that leaving out know-how would contradict the approach taken by the Group when it had prepared the *Guide to International Master Franchise Arrangements*, in which it had placed a considerable emphasis on the presence of know-how in franchise arrangements.

In the end, the Group decided to include both the concept of “know-how” and the concept of “assistance” in the definition of “franchise”, but decided that the concept of “assistance” should be left general and should not specify whether it referred to initial or on-going assistance. This was to cover the initial assistance that was usually present at the beginning of the franchise relationship, and to take account also of the fact that in many franchises the franchisor did not offer on-going assistance.

A further point raised concerned the word “financial” which qualified “compensation”, as it was suggested that it was redundant. In view of the fact that there might be instances of non-monetary compensation and the intention here was to indicate that monetary compensation was referred to, it was decided to leave the term “financial”.

As regards the reference to “selling, offering for sale or distributing goods or services”, it was suggested that it be modified to read “selling goods or providing services”. It was however objected that it had to be made clear that the intention was to refer to instances where also services were sold, i.e. provided against financial compensation, and not provided free of charge.

It was agreed that to facilitate the reader, the definition of franchise would be divided into sub-paragraphs.

Franchised business

It was suggested that the definition of “franchised business” should be modified to read “franchise business means the business conducted by the franchisee under a franchise agreement”. This suggestion was accepted.

Master franchise

The need for a definition of “master franchise” was queried. It was suggested that at the end of the definition of “franchise”, a point (d) should be added stating “the rights granted by a sub-franchisor to a sub-franchisee under a master franchise agreement”. As there was no definition of “master franchise agreement”, it was however decided to leave the definition of “master franchise” as it stood.

Material fact

The phrase in the definition of “material fact” which read “can reasonably be expected to have a significant effect on the value or price [...]”, was found to be vague, as it was not clear to what it referred, whether to the initial franchise fee or to the total set up costs. Furthermore, a clarification was requested as to the difference between price and value.

One of the members of the Drafting Committee stated that the price was the price paid, whereas the value was the value attributed to something, irrespective of what price had been paid.

It was observed that the phrasing seemed to imply that the franchisor had an obligation to provide the franchisee with a financial analysis of the value of the investment, whereas the concern was the information needed to make the investment decision.

The observation was made that there was a distinction to be made between an objective test that a court could use and a subjective test. A subjective test would be whether the decision of the franchisee to acquire the franchise was affected, whereas the price or value of the franchise was an objective test. It was however observed that the court would always have to try to decide whether, if the franchisee had known X, he would have done Y.

A proposal was made for the deletion of the words “on the value or price of the franchise to be granted or”. This proposal was accepted.

Misrepresentation

It was observed that reference to “misrepresentation” was made in Article 6(1)(g) and in Article 10(2). A general question concerned whether “misrepresentation” covered also omissions. With reference to Article 10(2), it was suggested that the formulation be changed to “misrepresentation or omission of a material fact”. This suggestion was accepted. It was also decided that “omission” should be defined along the lines of the definition of “misrepresentation”.

It was furthermore suggested that the concept “ought to have known” be added to that of “known”. This was also accepted, the formulation reading “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”.

The final text of Article 1, which following the new numbering of the articles became Article 2, reads as follows:

ARTICLE 2 (DEFINITIONS)

For the purposes of this law:

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

development agreement means an agreement under which a franchisor in exchange for direct or indirect financial compensation grants to another party the right to 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;

(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 material fact of which the person making the statement was aware at the time the statement ought to have been made;

and

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

ARTICLE 2 – SCOPE OF APPLICATION

The text of the draft as submitted to the Study Group read as follows:

ARTICLE 2 (SCOPE OF APPLICATION)

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

It was suggested that, contrary to what had been proposed by the Drafting Committee, the application of the law should be restricted to the national territory within which the franchise was to be operated. Alternative formulations proposed were “within the national territory” and “within the particular jurisdiction”.

The Group agreed that the concept of a territorial limitation to the application of the Model Law should be introduced. As the formulations that the national legislatures would adopt would differ depending on local tradition, it was decided to leave the indication of the territorial limitation in brackets, and to give full explanations in the Explanatory Report.

It was suggested that the word “only” should be inserted, in order to specify that the Model Law only applied to franchises and not also to other types of agreement, and also to indicate that franchisors were not bound by the law when they sold franchises abroad, but only when they sold franchises in the territory of a country that had adopted the law. No decision was taken on this point.

A third point concerned the application in time of the law. It was suggested that the words “with respect to a franchise agreement entered into after the coming into force of this law, as well as to the renewal or extension of a franchise agreement entered into before the coming into force of this law” be added. This suggestion was accepted, but it was decided to move the provision to the end of the Model Law. The suggested wording therefore became Article 11.

A question was raised as to the exemption for cases of renewal that the draft originally submitted to the Drafting Committee had contained. It was explained that the Drafting Committee had decided to delete that exemption, as all too often a new contract was masked under the guise of a renewal. It was however agreed that if there were no modifications, and the renewal simply consisted in an extension of the term of the franchise, then disclosure should not be necessary.

It was decided to move the article to the front of the Model Law, and to make it Article 1.

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

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 3 – EXEMPTIONS FROM THE OBLIGATION TO DISCLOSE

The draft submitted to the Study Group read as follows:

ARTICLE 3
(EXEMPTIONS FROM OBLIGATION TO DISCLOSE)

No disclosure is required in case of:

- (a) *the grant of a franchise to a person who has been an officer or director of the franchisor or of its affiliate for at least six months immediately before the delivery of the disclosure document;*
- (b) *the assignment or other transfer of a franchisee's rights and obligations under an existing franchise agreement, unless as a condition for the assignment or transfer the assignee or transferee is required to enter into a new franchise agreement;*
- (c) *the grant to a person of a franchise to sell goods or services within that person's existing business, if the sales of the franchise, as anticipated by the parties or as should reasonably be anticipated by the parties at the time the franchise agreement is entered into, will not exceed 20% of the total aggregate sales of the franchisee's combined business;*
- (d) *the grant of a franchise pursuant to which the franchisee commits to a total investment in excess of [X]; or*
- (e) *the grant of a franchise to a franchisee who has a net worth in excess of [Y].*

A general question that was raised in relation to Article 3 concerned its relationship with Article 5. It was suggested that it might be more logical to state the general principle first, and then to state the exceptions. It was however objected that readers would want to know immediately whether or not the law applied to them, and that it was therefore better to give the exceptions first. As there were a number of proposals for the re-arranging of the order of the articles, it was decided to postpone the discussion and to discuss the order of all the provisions at the end of the examination of the draft.

Paragraph (a)

In relation to paragraph (a), it was suggested that the phrase “before the delivery of the disclosure document was illogical, and that it should be modified to read “before the signing of the franchise agreement”. This proposal was accepted.

Paragraph (b)

A discussion took place on what was intended by “required to enter into a new franchise agreement”. A concern was expressed that this formulation would require a franchisor to provide an entirely new disclosure document even if the only change was the franchisee who signed the franchise agreement. It was therefore suggested that a formulation be adopted such as “unless the franchisee is required to enter into a new franchise agreement which has different terms than the one that is being transferred” or “on substantially different terms”.

It was objected that the burden of proving that the agreement he had to sign was different should not be transferred to the franchisee, that it was the choice of the franchisor whether the agreement should be a new agreement or a straightforward assignment of the old agreement, and that it was not a heavy burden for the franchisor to provide disclosure. If the new franchisee had to sign a

40 or 50 page document it should not be the franchisee who had to try to discover whether any of the terms were different.

It was stressed that if the assigning franchisee, for whatever reason, was not in a position to provide information, then the franchisor should provide information. Against this it was objected that if the franchisee was not in a position to provide information, for example in the case of death, then there was no guarantee that the franchisor would be able to provide information. He should therefore not be required to do so. There were other instances in which it was suggested that the franchisor should not be required to provide disclosure, for example if the purchasing franchisee was a limited company and the agreement that had been entered into with the out-going franchisee was designed for a sole trader, or if the franchise agreement was expressed to be non-assignable but the business could be transferred under the terms of the new agreement. There were in these instances some terms that were different, but they were not substantially different and the franchisor should therefore not be required to disclose. Furthermore, it was pointed out that the new terms that were inserted into the agreements that were assigned were often favourable to the new party, such as when the term of the agreement was extended to a whole new term, rather than just to the remaining part of the term of the first franchisee.

Yet another point of contention concerned the case where the franchisor no longer granted franchises. While there were members of the Group who suggested that in such cases the franchisor should not have to provide a new disclosure document, others instead suggested that the need was particularly strong in such cases, as if the franchisor no longer granted franchises then the information his disclosure document provided would be totally out of date. The consideration that the information that the franchisor provided the first franchisee with would be out of date was just as valid in cases where the franchisor continued to grant franchises: after four, five or six years, was the franchise operation still the same or was it different?

The meaning of the concept "assignment" in the civil law and common law legal systems was examined. It was pointed out that in the civil law an assignment did not involve a new contract, it was merely a continuation of the old contract, provided that the other party agreed, in which case all the obligations and rights of the first party passed to the new party. As regards the common law, although the possible existence of differences between the common law systems was referred to, it was stated that it was possible to assign the benefits of a contract but not the burden, with the consequence that another document had to be brought into existence. This meant that a new agreement between the incoming franchisee and the franchisor had to be created. This was known as "novation".

Reference to a study that had been conducted and that indicated that franchisees were troubled when they were told that the only way in which they could sell, transfer or assign their franchise agreement was to a party who executed the then current agreement. It was however pointed out that it was a standard technique by which franchisors brought new people entering the system up to the standards of franchises being issued at that moment in time, as opposed to franchises issued 15 or 20 years earlier.

The proposal to insert the words "on significantly different terms" after "franchise agreement" was accepted by 7 votes in favour and 5 against. Re-examining the wording as adopted, the Study Group however decided to change type of formulation and to state specifically that no disclosure would be required where the assignee or transferee was bound by the same terms as the assignor or transferor.

Paragraph (c)

It was pointed out that the exemption dealt with in paragraph (c) concerned what were known as "fractional franchises", i.e. situations where the franchisee was not really new to the process, but had been in the business, or a similar business, for some time, and where the franchise he was intending to take over would represent no more than a certain percentage of his business. In other words, when the franchisee was simply taking on another line of products. It was however pointed out, that the formulation omitted a time-frame of reference. The normal time-frame was one year. The formulation suggested was "will not during the first year of the relationship exceed 20%". This proposal was accepted.

The formulation “within that person’s existing business” gave rise to problems, as the business might not be the same or identical with the franchise, but rather similar to. It was therefore suggested that the wording be changed to “to a person who has been engaged in the same or a similar business during the previous two years”. As a whole, the paragraph would read “the grant of a franchise to sell goods or services to a person who has been in the same or similar business for the previous two years, if the sale of the franchise, as reasonably anticipated by the parties at the time the franchise 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”. This proposed wording was accepted.

Paragraph (e)

With reference to paragraph (e), it was suggested that the words “on a consolidated basis” should be added to “the grant of a franchise to a person who has a net worth”, as what was intended was consolidated with the franchisee’s affiliates. The whole paragraph would then read “the grant of a franchise to a franchisee who has a net worth on a consolidated basis according to its most recent financial statements in excess of [Y]”.

It was however objected that “consolidation” was a technique adopted to prepare annual accounts, and the franchisor might have a net worth together with its affiliates even if it did not have a consolidated balance sheet. It was therefore suggested that the idea be conveyed by the words “together with its affiliates”. Furthermore, it was pointed out that financial statements were prepared according to principles that reflected book values and historical values rather than true, present values. For example, in the case of real estate, if someone acquired something for US\$ 100,000 and five years later it was worth US\$ 1,000,000, which value should be taken into consideration for net worth purposes? The first or the second? It was pointed out that the purpose of the provision was to exempt people who were of substance, and the net worth referred to should therefore be the real net worth of that person according to principles of accounting that were relevant in his own country.

A point raised concerned the quantities referred to in paragraphs (d) and (e) which had been left blank, the intention of the Drafting Committee being that the Explanatory Report should specify that what the Group had in mind were large quantities, such as for example one or two million US dollars. It was however pointed out firstly, that what in one country was a large investment might be a small investment in another, and secondly, that the same might be true depending on trade sector: a large investment in a retail outlet might be a small investment in the hotel business. The Group therefore felt that it was not possible to specify an amount, and that the Explanatory Report should provide explanations. It should indicate that the total investment aimed at was one which would suggest a person of such level of sophistication and knowledge that he would be likely to have access to the advice of legal counsel and would not require the protection of the law. Secondly, that the person considered was one who by virtue of his net worth could be assumed to have such a level of sophistication and prior business experience that he would not require the protection of the law.

Renewal

It was suggested that a number of other exemptions be added to the list in Article 3. The first of these was an exemption for the case of renewal without any modifications to the conditions. It was agreed that renewal should be added to the exemptions.

Bona Fide Wholesale Price Sales

A second proposed exemption concerned remuneration, which currently was covered by the phrase “direct or indirect financial compensation”. The question was whether “financial” might not be redundant. It was suggested that as formulated, a payment, a flow of revenue from a franchisee to the franchisor, could be viewed as direct or indirect financial compensation for the right to do something simply because a cheque was written. The consequence was that it could cover also large numbers of people who simply sold goods, as long as there was some kind of identification with the process. For example when the franchisor let the other party put the franchisor’s name above the door, provided him with assistance or exercised a form of control over how the outlet was operated, and all that was required was that the other party bought a certain quantity of goods for resale at *bona fide* wholesale price. For this reason existing legislation often contained an exemption designed to avoid that that kind of arrangement might be swept in under the law. It was suggested that such an exemption might be

introduced by a formulation stating that “direct or indirect financial compensation in [the definition of franchise] in Article 1 shall not include the purchase of a reasonable quantity of goods at a *bona fide* wholesale price for resale”.

Doubts were expressed as to the appropriateness of including such a provision under “direct or indirect financial compensation”, as the sale of something was not direct or indirect financial compensation for the franchise, it was a clarification that the scope of application did not cover those types of arrangements. This point should therefore be solved in the context of Article 1, and not of Article 3. Furthermore, how such a provision could constitute an exemption from the obligation to disclose was questioned. Another point concerned the additional services that a franchisor might provide even in such cases, as it was pointed out that the more services that a franchisor provided, the less likely it would be that a court would consider that it was a matter of a *bona fide* wholesale price.

It was recalled that the introduction of such an exemption in Canada had been a consequence of the proliferation of brand merchandising. In brand merchandising there were degrees of control over the operation of the business, but it was not franchising. It was a distribution method and there was no remuneration that was paid to the franchisor. As long as the franchisor did not try to disguise a franchise by getting no up-front fee and no royalty and instead increasing prices, then the operation was viewed as not being a franchise and it was felt that it should be expressly exempted.

It was decided to draft a provision within the ambit of Article 1 to the effect that *bona fide* wholesale type arrangements were excluded from the application of the law.

Minimum Payments

A third exemption that it was suggested should be added to Article 3 concerned very small arrangements, i.e. where before the relationship was entered into, or for a certain amount of time thereafter (such as six months), the franchisee was not obliged to pay more than a certain minimum amount to the franchisor. Concern was expressed that the franchisor would be able to charge what he wanted once the period of time indicated had come to an end, in effect recovering all that he had forfeited at the beginning of the relationship. The fear was expressed that such an arrangement might be subject to abuse. It was therefore suggested that the provision should refer to payments made every six months or year, which would prevent the provision being abused. It was suggested that the Explanatory Report should explain what was intended. In particular a similar problem to that faced in relation to paragraphs (d) and (e), i.e. the impossibility to provide a specific sum, would require explanation.

In this connection an issue raised concerned the time-limit within which the investment had to be made. If, for example, a franchisee committed to a total investment of US\$ 5,000,000 by agreeing to open ten outlets at US\$ 500,000 each in one year, but only opened one, then the problem arose whether or not that could be considered a US\$ 5,000,000 investment. It was suggested that this might be inserted in the Explanatory Report when illustrating the meaning of the words “commits to a total investment of”. It was suggested that the Federal Trade Commission Proposed Rules might provide inspiration for such a comment (see Misc. 1 pp. 156 and 157).

It was also suggested that the concept should be expressed in a way similar to that adopted for (c), as if it were phrased “where the total of the payments to be made every year by the franchisee to the franchisor is less than [Z]” as suggested, the consequence would be that every year a determination had to be made of what the payments were after which a decision had to be taken as to whether or not disclosure had been required years before. This was because payments were often a percentage of the franchisee's revenue. It was therefore suggested that a formulation such as “where the total of the payments contractually required to be made every year” be adopted.

Large Franchisor Exemption

Another exemption that existed in the United States, but to avoid registration rather than to avoid disclosure, was what was known as the “large franchisor” exemption. In a number of states in the US, if the franchisor had a very large net worth (for example US\$ 15,000,000) it was possible for the franchisor to avoid registration (in some cases even disclosure).

It was recalled that the Drafting Committee had considered the possibility of introducing a large franchisor exemption, but that it had felt that for a large franchisor to provide the information that was required by the law would not be that onerous. Furthermore, there had recently been a number of instances in which very significant franchisors had become very abusive in their dealings and very aggressive, for which reason the Drafting Committee had felt that it would be appropriate to require disclosure also on their part. It was recalled that the Model Law under preparation concerned disclosure, and not registration. It was objected that it would be onerous for a large franchisor to disclose, as it had to provide information also on affiliates and litigation and bankruptcy, long lists of directors etc.

In the end, in view of the fact that the large franchisor exemption was primarily conceived for cases where registration was required, the proposal to add such an exemption was withdrawn.

Isolated Sales Transaction

An exemption that one of the members of Group felt to be particularly relevant for international sales was the isolated sales transaction exemption. Under this exemption, if a franchisor entered into one agreement, and one only, as a one-off, perhaps because he usually did not franchise, then he would be exempt from disclosure. The reason for this was that in such cases the franchisor was not a company which used franchising as its method of doing business. In international sales this was a situation that arose where the franchisor offered only one franchise which covered a whole country to a developer or to a sub-franchisor. At times there were companies that acted as franchisors abroad, but did not franchise internally and therefore had no experience preparing disclosure documents. To demand that the franchisor prepare a whole disclosure document for just one franchise in, for example, Korea, was a burden that some members of the Group felt should not be placed upon a franchisor. It was pointed out that the Australian Code of Conduct contained such an exemption.

It was pointed out that the Drafting Committee had considered this possible exemption, but had decided that such situations would be covered by the exemption for large investments. Furthermore, the situation might change, a franchisor might initially have no intention to grant more than one franchise, but then decide that he would. It was also suggested that the situation was different if the rights granted were for a single, unit franchise, or if they were for a whole country. While agreement was expressed on the suitability of exempting the latter case, hesitations were expressed as concerns the former. It was pointed out that the exemption in Australia was limited to a situation where there was a one-off franchise or master franchise in a situation where onerous or comprehensive disclosure requirements were imposed in circumstances in which there was only one operation and the cost imposed on the franchisor was disproportional to the benefit to that one franchisee. It was observed that this provision in the Australian Code was due to be revised, and that Australia should therefore not be taken as an example.

It was objected that the single franchise might not always fall under the large exemption investment. There might, for instance, be cases in which the territory was too small for more than one franchise to be granted, for instance a small island, where the investment would not qualify as a large investment. Also in such instances, it was suggested, a franchisor should be exempted from the need to disclose. To this, it was however objected that most franchise systems that failed were systems in which the franchisor did not make a commitment internationally, where the franchisor went into a country and granted a franchise to an individual, and that that was therefore what should be avoided.

Considering that a franchisor might grant one franchise in a number of different countries, the question was asked why it would be difficult for the franchisor to prepare a disclosure document. The reply was that each one of the franchises was a one-off, each one was different and in many cases the franchisor did not franchise in its own country and therefore did not have a basis upon which to prepare the document.

A certain difference was also perceived between a situation in which it was the franchisor who approached the prospective franchisee and one in which it was the franchisee who approached the franchisor requesting to be a franchisee. Whereas a disclosure requirement placed on the franchisor was considered to be justified in the first case, it was not felt to be so in the second.

A formulation which it was proposed might serve as an example was that of Section 684 paragraph 3, sub-paragraph (c) of the *New York Franchises Law*, which read “shall be exempted if the transaction is pursuant to an offer directed by the franchisor to not more than two persons”. It was of course clearly possible to limit the offer to one person, rather than two.

It was suggested that this was a case in which the franchisee needed to be protected more than ever. He needed to know that he was going to be the only franchisee, because in an isolated transaction no franchisor could afford to provide the types of services that one would normally expect a franchisor to supply in a foreign country. Furthermore, if a company chose to engage in franchising when it went abroad, that was its choice. Nobody was forcing it to do so, if it did so it was because it thought that it was in its best interest to do so and the disclosure required would not affect the decision one way or the other. A provision such as the one suggested was too open to abuse. It was pointed out that of all the items of information that the law required to be disclosed, there were only three or four that were troublesome, such as the appreciation of the investment that would be required of the franchisee in the foreign country.

It was objected that if a businessman did not produce disclosure documents because he did not engage in franchising domestically, it was a burden for him to produce a disclosure document for one single location somewhere in the world. It was a question of balancing between an ideal world where everyone was provided with disclosure and one in which an evaluation had to be made of whether or not particular categories did not have the level of abuse potential to justify disclosure and in which the burden was sufficiently great to outweigh that.

It was observed that if a company granted one single franchise in a country, then the operation might not be franchising at all, as the definition of franchising stated that it was “to engage in the business of selling goods or services under a designated system in which” etc.

It was observed that a consequence of a provision such as the one proposed would be that it would be possible for a franchisor to grant one franchise in a great number of countries and, as the granting of one franchise was exempt, the franchisor would never need to disclose.

The explanation for this, it was stated, was that most of the information that a franchisor would be required to disclose to a prospective franchisee in a jurisdiction would concern that jurisdiction, about which the franchisor would know very little. The franchisee was clearly entitled to know that the franchisor had not previously franchised and did not intend to do more franchising in that jurisdiction, and the consequence might be that the franchisee would not want to enter into a relationship with that franchisor because there would not be the kind of sub-structure and plans for development in that jurisdiction that the franchisee would normally want. There were of course situations in which later on the franchisor went into another jurisdiction and the same circumstances applied, but, it was stated, the fact that that might happen at some point in the future was not a good enough reason not to do something which you would otherwise do.

In the end it was agreed that a franchise granted for an entire jurisdiction should be exempt from the disclosure requirement, but not if there was one franchise and there might be a chance of others being granted in the future. The following wording was accepted: “If the transaction is pursuant to an offer directed by the franchisor to only one person or entity for the entire jurisdiction”.

The text of Article 3 as adopted by the Study Group read as follows:

ARTICLE 3
(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];

(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 jurisdiction.

ARTICLE 4 – FORMAT OF DISCLOSURE DOCUMENT

The text of Article 4 as submitted to the Study Group read as follows:

ARTICLE 4 (FORMAT OF DISCLOSURE DOCUMENT)

(1) Disclosure must be provided in writing.

(2) The franchisor may use any format for the disclosure document, provided that the information contained therein meets the requirements imposed by this law.

In the context of Article 4, The question of the need to include a provision on the use of electronic means for disclosure or contracting was raised. It was however not felt to be necessary to include a specific provision in this respect.

A second question concerned oral statements. It was pointed out that there were instances in which a franchisor or an employee of the franchisor orally stated something different from what had been disclosed in the disclosure document, and that franchisees tended to rely on oral statements rather than on the printed document.

It was suggested that this situation might be covered by paragraph (2). Furthermore, the non-validity of oral statements was apparent from Article 1, although a sentence might be required stating clearly that only the written document would be considered.

The suggestion that a separate provision be added on oral statements did not receive support and was therefore not accepted.

Article 4 was adopted without modification.

ARTICLE 5 – DELIVERY OF DISCLOSURE DOCUMENT

The text of Article 5 as submitted to the Study Group read as follows:

ARTICLE 5 (DELIVERY OF THE DISCLOSURE DOCUMENT)

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

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

In relation to Article 5, it was suggested that allowance should be made for the signing of a confidentiality agreement without this triggering the duty to disclose. Two parties who wanted to enter into negotiations for the purchase of a franchise should be able to sign a confidentiality agreement in advance, before triggering the disclosure requirement.

As regards the phrase “whichever is earlier” at the end of the article, it caused a certain number of problems. It was therefore suggested that the proviso be moved to the beginning of the article and that it be modified to read “must be exercised no later than the earlier of”.

The phrase “must be exercised” was also queried, formulations such as “time-barred from” (which corresponded to the civil law “prescription”) or “the right to sue expires” being suggested. It was pointed out that “must be exercised” was stronger than “prescription”, because in the case of prescription the term could be extended, whereas in this case that was not possible. More than “prescription”, it was “preclusion”.

The relationship between Article 5 and Article 7 was discussed. It was pointed out that Article 7 merely indicated that the franchisor “may require” a confidentiality agreement, it said nothing about when. Furthermore, Article 7 only dealt with the confidentiality of the information contained in the disclosure document, not with the information transmitted orally or otherwise.

It was suggested that Article 7 should be modified to make it clear that it was not limited to the information contained in the disclosure document, and that the franchisee might be required to sign a confidentiality agreement as a condition for receiving the disclosure document. If this suggestion were accepted, it was suggested that Article 5 (a) should read “with the exception of agreements covered by Article 7”.

Answering a question regarding the types of agreement that the Drafting Committee had had in mind when it referred to “any agreement relating to the franchise” in (a), one of the members of the Committee replied that the intention was to refer to any document that made the franchisee commit to an investment related to the franchise.

In the end, it was decided to refer to “information relating to the franchise or the franchisor” in Article 7, and to include an exception relating to the agreements referred to in Article 7 in Article 5(a). Furthermore, it was decided to specify that the proposed franchise agreement should be attached to the disclosure document.

A point raised concerned whether it would be necessary to disclose a draft that both parties had agreed upon before they signed the agreement. Considering that this might trigger an unlimited chain of negotiation and waiting periods, it was felt not to be necessary and that it would be better simply to say that the proposed franchise agreement should be attached to the disclosure document. It was suggested that the Explanatory Report should examine this question. It was suggested that the negotiations that take place were invariably favourable to the franchisee, as the franchisee negotiated concessions to the franchisor’s standard form document. It should therefore clearly not be necessary to provide additional disclosure information and another waiting period to advise the franchisee of what he already knew. It was agreed that the Explanatory Report should state this.

Following the discussion on Article 6(1)(k), it was decided that a second paragraph should be added, dealing with the up-dating of the disclosure document, and that the Explanatory Report relating thereto should indicate that the provision also applied before the entering into of any agreement if there had been a material change between the end of the fiscal year and the signing of the agreement.

The text of Article 5 as adopted reads as follows:

ARTICLE 5
(DELIVERY OF THE 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

- (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 by the prospective franchisee of any fees relating to the franchise.

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

ARTICLE 6 – INFORMATION TO BE DISCLOSED

The text of Article 6 as submitted to the Study Group read as follows:

ARTICLE 6
(INFORMATION TO BE DISCLOSED)

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

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

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

- (h) *relevant details concerning any bankruptcy, insolvency or comparable proceeding involving the franchisor and/or the legal entities and persons indicated in lit. (f) for the previous five years;*
- (i) *the total number of franchisees in the network;*
- (j) *the names, addresses and phone numbers of the franchisees whose outlets are located nearest to the proposed outlet of the prospective franchisee, but in any event of not more than 50 franchisees;*
- (k) *information about the franchisees that have ceased to be members of the network during the three years before the one during which the franchise*

agreement is entered into, with an indication of the reasons for which the franchisees have ceased to be members of the network;

- (l) a description of the franchise to be operated by the franchisee;
- (m) goods and/or services which the franchisee is required to purchase or lease, indicating
 - (i) which, if any, have to be purchased or leased from the franchisor, its affiliates or from a supplier designated by the franchisor; and
 - (ii) those for which the franchisee has the right to recommend other suppliers for approval by the franchisor;
- (n) information on pricing practices with regard to the goods and/or services indicated in lit. (m), including information as to the treatment of revenue or other benefits that may be received by the franchisor or any of its associates from any supplier of goods and/or services to the franchisee;
- (o) a brief description of the initial training programme;
- (p) exclusive rights granted, if any, including exclusive rights relating to territory and/or to customers;
- (q) limitations imposed on the franchisee, if any, in relation to territory and/or to customers;
- (r) any reservation by the franchisor of the right
 - (i) to use the trademarks covered by the franchise agreement;
 - (ii) to sell or distribute the goods and/or services authorised for sale by the franchisee directly or indirectly through the same or any other channel of distribution, whether under the trademarks covered by the agreement or any other trademark;
- (s) information regarding
 - (i) the registration, if any, and
 - (ii) litigation or other legal proceedings, if any,
 in the national territory or territories in which the franchised business is to be run concerning the franchisor's intellectual property relevant for the franchise, in particular trademarks, patents, copyright and software;
- (t) the initial franchise fee;
- (u) other fees and payments, including any gross-up of royalties imposed by the franchisor in order to offset withholding tax;
- (v) other financial matters, including:
 - (i) (aa) estimates of the franchisee's total initial investment and of the minimum working capital required for the first year of operation;
 - (bb) financing offered or arranged by the franchisor, if any;
 - (cc) audited financial statements of the franchisor, including balance sheets and statements of profit and loss, for the previous three years. If the most recent audited financial statements are as of a date more than 180 days before the date of delivery of the disclosure document, then unaudited financial statements as of a date within 90 days of the date of delivery of the disclosure document;
 - (ii) (aa) If information is provided to the prospective franchisee by or on behalf of the franchisor concerning the historical or projected financial performance of outlets owned by the franchisor, its affiliates or franchisees, the information must:
 - have a reasonable basis at the time it is made;
 - include the material assumptions underlying its preparation and presentation;
 - state whether it is based on actual results of existing outlets;
 - state whether it is based on franchisor-owned and/or franchisee-owned outlets; and
 - indicate the percentage of those outlets that meet or exceed each range or result.
 - (bb) If the financial information referred to in the preceding subparagraph is provided, the franchisor must state that the levels of performance of the proposed franchisee's outlet may differ from those contained in the information provided by the franchisor.

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

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

A general problem raised concerned the length of Article 6. The way it was drafted was clearly more in the common law tradition of drafting, which tended to include all that the legislation was intended to cover, whereas the civil law tradition was rather to leave out details and to be more flexible in the application of the provisions. A number of members of the Study Group from civil law jurisdictions therefore indicated that they would prefer to have a shorter provision, and suggested that it was likely that also their Governments would be of the same opinion. However, a single general sentence was judged not to be sufficient. The experience of the European Franchise Federation was referred to, in that it had started out with a general requirement for disclosure in the Code of Ethics. This had however not proved sufficient, and a list of nine bullet points indicating information to be disclosed had subsequently been added. At the time, franchisors had objected to even such a short list, so it was to be expected that they would object even more strongly to a list such as the one in Article 6. It was however pointed out that the Model Law was not addressed to the franchise associations, but to Governments, and that it was therefore necessary to show Governments that the Study Group had given careful consideration to the items to be included in the list of disclosure requirements.

A second general question concerned the extent to which the list in Article 6 should require the disclosure document to repeat the contents of the agreement, considering that the Group had now decided that the agreement should be annexed to the disclosure document.

A difference in approach was perceived in this respect. Whereas the Drafting Committee had opted for the approach that the disclosure document should provide information on matters which were not, or not sufficiently, dealt with in the franchise agreement, the purpose being that there should be as little duplication as possible, other members of the Group felt that the disclosure document should provide information on all matters which might be of relevance to the franchisee when he decided whether or not to franchise, irrespective of whether or not it was dealt with in the franchise agreement. It was however pointed out that a number of the items listed in Article 6 (Sub-Paragraphs (l) to (u)) were actually normally dealt with in the franchise agreement as there would be no binding contract if they were not. Furthermore, in order to avoid being accused of leaving out anything important, lawyers tended to repeat the wording of the agreement when they came to dealing with the same issue in the disclosure document. The result was that the disclosure document ended up being at least as long as the contract, if not more so, as it contained not only everything that the agreement contained, but in addition everything that the agreement did not, and it was highly unlikely that a franchisee would read everything. A certain difficulty was furthermore perceived as to the determination of which items warranted a double disclosure. If the items that warranted double disclosure were those that were most subject to litigation, this raised a problem, as the items most subject to controversy varied from year to year.

It was suggested that a second paragraph might be added, indicating that to the extent that the items listed in what would be Paragraph (1) were contained in the franchise agreement, the disclosure document could limit itself to a reference to the clauses in the agreement in which they were dealt with. This proposal was well-received by the Study Group, the members however being divided as to how to structure the two paragraphs, a number of alternatives being discussed.

The first alternative was a first paragraph with a full list of items and a second paragraph indicating that if any of those items were dealt with in the agreement, the disclosure document did not have to deal with them. This proposal did not however gain much support, in that some members of the Study Group stressed the need to ensure that the prospective franchisees received the information they needed, and the items were not always adequately dealt with, even if the agreement did refer to them. A need to specify that some items of information which were fundamental to the success of the

franchise system had always to be included in the disclosure document (such as pricing policy and the supply of products) was therefore felt by some members of the Group. In connection with this alternative the proposal was made to keep the one-paragraph structure, but to insert a proviso at the very beginning of the article stating that the following items had to be disclosed in the disclosure document unless they were adequately dealt with in the franchise agreement. This suggestion did not, however, gain much support.

The second alternative was to make a distinction between those items that always had to be dealt with in the disclosure document (Paragraph (1)) and those that could be omitted from the disclosure document if they were adequately dealt with in the franchise agreement (Paragraph (2)). A problem that was perceived in this connection concerned the definition of “adequately” or “clearly”, and who should decide whether something had been dealt with adequately or clearly. It was suggested that the franchisor would be the one to have the burden of proving that an item had been dealt with clearly. If he were unable to do so, he would be unable to enforce the provision. It was furthermore pointed out that the franchisor in any event had the same burden in relation to the disclosure document, which had to deal with the issues in a clear and adequate manner.

In the end, the Group decided to opt for a division of the items to be disclosed into two separate paragraphs, the first specifying the items that always had to be contained in the disclosure document and the second specifying those that could be omitted from the disclosure document if the agreement dealt with them adequately.

Another general question concerned the proviso “if any” inserted into several sub-paragraphs. It was suggested that rather than have the proviso appear in some sub-paragraphs and not in others, it should be placed at the beginning of the paragraph and should be understood as referring to all the sub-paragraphs. This suggestion did not, however, receive any support, as it was felt that it might cause more problems than it solved.

The Study Group then proceeded with an examination of Article 6 paragraph by paragraph and sub-paragraph by sub-paragraph.

PARAGRAPH (1)

Sub-Paragraph (a)

It was decided that the text should be modified to read “the legal name and address of the franchisor”.

Sub-Paragraph (b)

A question raised concerned why the provision was limited to “trade name”. In Japan and also in Germany “trade name” had a very specific meaning, it was the formal name by which a merchant was registered in a register. In this provision it instead appeared to be any sign or mark. It was explained that by “trade name” the Drafting Committee had intended the name under which the business was conducted, the designation of the business.

It was observed that what was intended was the name under which the franchisor was going to do business, the assumption being that if the franchisee wanted to research the company, and to find out for example whether it had any liens against it or not, the franchisee would know what name to look up. It was suggested that the proper term in English would be trade name, even if this were not the case in other languages.

It was observed that as what was referred to in sub-paragraph (a) was the legal name, sub-paragraph (b) should read “any name other than the legal name”. This suggestion was accepted.

Sub-Paragraph (d)

It was objected that the words “business form of the franchisor” was vague, and that what was really intended was the legal form. It was therefore decided to change the wording to read “legal form”. Similarly, a suggestion to change “to do business” to “carry on business” was accepted.

Sub-Paragraph (e)(i)

It was suggested that the formulation should be changed to read “the length of time during which” instead of “over which”. This suggestion was accepted.

Sub-Paragraph (f)

The term “senior management responsibilities” was felt to be vague. No suggestion was however put forward for a better formulation. It was observed that it was not a legal term, it was a business term indicating the people who exercised business functions. A problem raised concerned what happened if the senior management people referred to in the sub-paragraph changed between the handing over of the disclosure document and the signing of the agreement. It was however felt that this was a more general problem and that if the Group felt that it had to address it, then it had to do so for the whole document and not only for this sub-paragraph.

It was also suggested that the formulation of the sub-paragraph was too broad, as, for example, the persons with management responsibilities might object to having their private addresses become public knowledge. It was therefore suggested to specify that the address required was the “business address”. This suggestion was accepted.

Sub-Paragraph (g)

It was recalled that earlier in the course of the meeting the wording in (ii) had been changed to read “any affiliate of the franchisor who is engaged in franchising”.

A general question concerned whether or not the “finding of liability in a civil action” referred to in the provision referred also to any financial liability, e.g. if the franchisor had had to go to court to obtain payment. It was however stressed that the text referred explicitly to misrepresentation, unfair or deceptive acts or practices or comparable actions, which meant that financial liability simply for payment would not be covered.

As regards any finding of liability in relation to unfair or deceptive acts which related to businesses different from the franchise, there was a difference of opinion as to whether or not these should be disclosed. While there were those who felt that only those specifically relating to the franchise concerned in the deal should have to be disclosed, the majority felt that any finding of liability in this respect was an important indicator of the moral standard of the franchisor and that it was important for the franchisee to have this information. Consequently, a proposal to limit the information that the franchisor should disclose to that which directly concerned the franchise at hand was rejected.

With reference to the last phrase of the provision, “for the previous five years, as well as the relevant details relating to any pending actions”, it was suggested that the words “of the same nature” should be added.

Attention was drawn to the fact that according to Doc. 19 the finding of liability was intended to include also injunctions. It was however observed that not any injunction was intended to be covered. Thus, an interim injunction to freeze a situation (a temporary injunction) was not intended to be covered, whereas a finding of liability under a permanent injunction would be covered. It was stressed that this should be made clear in the Explanatory Report.

One point raised in relation to sub-paragraph (g), but also in relation to sub-paragraph (h), concerned geographic location. To the Drafting Committee's view that limiting the information to be provided to a specific geographic location would severely curtail the utility of the information provided, it was objected that the significance of cultural circumstances that might differ from country to country had not been given consideration. The further away from the geographic area or territory where the franchise was to be granted, the greater the likelihood that there would be a distortion as a consequence of what happened somewhere else. What was regarded as a crime in some countries, and would therefore be pursued, might not necessarily be viewed in the same way in other countries. In the speaker's experience it was very seldom that any disclosure regarding anything outside the place where the franchise was to be located was necessary, and he therefore urged the Group to reconsider the need, particularly in a very large corporation, of finding information on what had taken

place, perhaps in a distant part of the world where very different standards might apply as to what constituted misrepresentation or unfair and deceptive acts or practices. To this, it was objected that it was not possible for the Group to judge another culture. If an action involved liability relating to misrepresentation or deception it should be disclosed, even if it seemed strange or unusual.

As regards the “criminal convictions”, the question again arose as to whether it referred to criminal convictions in general, or to criminal convictions relating to the franchise. Considering that what constituted a criminal offence might vary considerably depending in the culture of the country, a couple of members of the Study Group opposed a broad interpretation of the term. It was explained that the Drafting Committee had intended the criminal convictions and the finding of liability to refer to the same types of information, but that as the formulation “finding of liability in a civil or criminal action” did not work, the reference to criminal convictions had been placed after the reference to the civil action. It was thereupon suggested to invert the order, and to refer to “relevant details relating to any criminal conviction, or any finding of liability in a civil action, involving franchises or other businesses relating to misrepresentation, unfair or deceptive acts or practices or comparable actions”. This suggestion was accepted.

As regards the geographic limitation, the suggestion to limit the territory for which information had to be provided to the national territory covered by the law was considered to be much too narrow. It was pointed out that frequently decisions rendered in one country influenced practice also in other countries. This was the case, for example, in Germany, where Austrian and Swiss decisions were often looked to by German courts.

It was suggested that a natural limitation might be the consequence of the definition of “material fact”, as it referred to “any information that can reasonably be expected to have a significant effect on the decision to acquire the franchise”. There would be material facts relating to distant parts of the world that had no significant effect on the decision to acquire the franchise and which therefore would not need to be disclosed.

This was felt to be correct if Article 10(2) covered also omissions, as if the franchisor did not tell the prospective franchisee about a conviction in another part of the world it would still be possible to defend the action by demonstrating that the non-disclosure of the conviction was not a material fact under Article 10(2).

It was suggested that the scope of sub-paragraph (g) might be limited by adding “any relevant finding”. It was however suggested that this might be too open-ended, as it would be necessary to say “unless it could not reasonably be expected to be of any importance to the franchisee”.

It was decided to add “omission” in Article 10(2), although disagreement was expressed by one member of the Group as Article 10 shifted the burden of proof to the franchisor. Furthermore, this question was related to whether or not Article 6 was considered to be exhaustive, as under certain circumstances a judge might feel that other material facts should have been disclosed.

As regards the exhaustiveness of Article 6 and its relationship with Article 10(2), it was suggested that there were two possibilities. The first was to consider that there was a world of facts and that Article 6 gave only some examples of what ought to be disclosed, but that in any event any material fact that could make the franchisee change his decision about buying the franchise had to be disclosed by the franchisor. The second was to consider that what was listed in Article 6 was the universe of information that had to be disclosed under the Model Law, but that it did not trigger liability under Article 10 unless it was material within that framework. It was confirmed that the second of the two alternative approaches was the one that it had been intended should be adopted and it was suggested that this had to be made clear.

Attention was drawn to the fact that an attempt was being made to cover two different situations at the same time, namely that of the national unit franchise and that of the master franchise. It was suggested that the two should perhaps be dealt with separately.

Sub-Paragraph (h)

A question relating to Sub-Paragraph (h) concerned whether the term “comparable proceeding” included all sorts of industrial reorganisation or rehabilitation, for example the appointment of a trustee.

It was explained that any State-run or State-controlled proceeding, any proceeding under the supervision of a State court, would be included, a purely private reorganisation, such as a management buy-out, would not be. It was suggested that this be made clear in the Explanatory Report.

Sub-Paragraph (j)

A concern expressed in relation to Sub-Paragraph (j) regarded territorial extension, as the fifty franchisees located nearest to the prospective franchisee might be a few in Africa, two in Japan, one in Brazil, etc., and as which were the closest might change from one moment to the next. It was therefore suggested that the franchisees should be limited to those in the territory in which the prospective franchisee was going to engage in business. It was moreover suggested that as the only reason for giving this information was to enable the prospective franchisee to contact the existing franchisees and to ask them about their experience as a franchisee of the franchisor, it was pointless to give the addresses of franchisees that the prospective franchisee would never contact.

It was explained that the Drafting Committee had had the situation in Europe in mind, where very often the outlets closest would be in a different country, and where what happened in one country would have a considerable influence on what happened in another. At the very least, the possibility of listing franchisees in contiguous countries should be admitted. Another view was that no geographic limitation should be introduced, as it would be both interesting and important for a prospective franchisee to know if, for example, the franchisor had only a few outlets in the prospective franchisee’s country or on that continent. Furthermore, in the present computerised world it should not be an excessive burden for the franchisor to provide such a list. To this last observation it was objected that that would depend on the industry concerned, as whereas it might not be a burden in the hotel industry, it would be a burden in other industries, such as a service operation or people who washed cars at their customer’s domicile. The case of Japan was referred to, as it was an insular, separated society where there probably was no franchisee within several thousand miles of the country, and where it was suggested it would not make sense to provide lists of franchisees in distant countries who did not speak Japanese.

Attention was drawn to the fact that what was really important was for the franchisee to be provided with information that was meaningful to him. A certain limitation might therefore be justified, although a limitation to the country of the prospective franchisee was too restrictive. This was also because conditions in different countries were very different, and a franchise that was successful in one country did not necessarily need to be successful in another country. If, therefore, a prospective franchisee relied totally on the information received from a franchisee in another country he might make mistakes in evaluation.

The particular situation of the master franchise was referred to, as the sub-franchisor would have to provide information only on outlets in the country he had been granted the right to develop. The case was different for direct franchising, as that would fall under sub-paragraph (j), but master franchising would not.

A proposal to limit the 50 franchisees to those of the country of the prospective franchisee and contiguous countries was accepted. In addition, it was decided to introduce a possibility for the franchisor to provide information on franchisees in his own country where there were no franchisees in contiguous countries. It was decided that the possibility for the franchisor to list all the franchisees of the network should be admitted, although it was felt that this need not be specifically stated in the text of the provision as it was always possible for the franchisor to provide more information than requested. It was instead decided that the Explanatory Report should make this clear.

Sub-Paragraph (k)

The requirement that the reasons franchisees had left the network should be given was considered problematic by some members of the Group, who suggested it might be difficult to determine the reasons.

It was observed that, following the example of the Federal Trade Commission Rule, the intention within the Drafting Committee had been to indicate three or four different categories (franchise transferred, terminated, did not renew, otherwise left the network). It was suggested that these categories might be referred to in the Explanatory Report, so that the reader understood what was intended.

Another point concerned the period of time specified in the sub-paragraph (“three years before the one during which the franchise agreement is entered into”). A suggestion was made that it should be specified that the period of time was three calendar years, but it was objected that drastic changes might occur in the months between the end of the calendar year and the signing of the agreement, and that it was important that the prospective franchisee should be informed of such changes. It might be more interesting for the franchisee to know what happened in the last seven months than three years before.

It was pointed out that this question was linked to that of the frequency of the up-dating of the disclosure document. In the United States there was an obligation to up-date the document whenever there was a material change in the information it contained. It was suggested that this example be followed, and that a second paragraph be inserted in Article 5, indicating that the disclosure document had to be up-dated every six months or year, but more often if there was a material change in the information it contained. Furthermore, it was proposed that a time-limit be introduced by stating that the document had to be up-dated within 90 or 120 days after the end of the fiscal year, as this was a natural dead-line considering that audited financial statements had to be attached to the disclosure document.

It was observed that accounting rules differed from country to country, and that in many countries small and medium-size companies (which was what many franchisors were) were not obliged to deliver their annual financial accounts until six months after the end of the financial year. Consequently, there would be quite a few franchisors who would not have new annual accounts before the end of June and they would have tremendous difficulties making up-dated documents before such time.

It was suggested that this problem might be dealt with by leaving the number of days blank and by stating in the Explanatory Report that it was intended that the up-dating would be tied to the end of the franchisor’s fiscal year, to the production of annual financial statements, but that the drafters of the **Model Law** recognised that the exact period would be different from country to country and that the intention was to avoid a burden that was disproportionate to the benefit. The second concept to introduce was that the document should be up-dated sooner if there was a material change. A source of inspiration for the wording might be the FTC Rule. This suggestion was accepted, and a second paragraph added to Article 5 as a consequence. It was further decided that the Explanatory Report to the new Article 5(2) should indicate that it applied also before the signing of a franchise agreement, when there had been a material change between the end of the financial year and the signing of the agreement.

A point raised concerned the standard of materiality to apply, as it was pointed out that what was material would differ from network to network. It was suggested that the definition was acceptable as it stood, as it gave the judge a certain flexibility in examining the situation case by case and in determining whether or not any specific change was material. It was therefore better to leave the definition as it stood, rather than to specify with any greater degree of detail what constituted materiality.

Sub-Paragraph (m)

With reference to Sub-Paragraph (m)(i) it was suggested that “its affiliates” should be “affiliates of the franchisor” as that was the term that had been defined and a certain consistency should be maintained.

Sub-Paragraph (n)

With reference to the pricing practices applied by the franchisor, one of the members of the Group observed that he had never seen an agreement (and most of the agreements he had seen were of American origin) in which the pricing practices, such as the franchisor keeping rebates, had been dealt with properly or at all. He therefore stressed the importance of explaining these practices in the disclosure document. Another member of the Group instead stressed that in his experience such practices were explained clearly.

It was suggested that the last half of the provision belonged together with Sub-Paragraph (m), as what that provision dealt with was what the franchisor was telling the franchisee that he had to buy from the franchisor, from a provider indicated by the franchisor, or from another supplier if the franchisor approved that other supplier, and then the franchisor was telling the franchisee whether or not any of the things that the franchisee was going to buy from him or other people would result in his getting a rebate from those people. The proposal to move the last part of Sub-Paragraph (n) into (m) was accepted.

Examining the part of Sub-Paragraph (n) that remained once the last part had been moved into Sub-Paragraph (m), it was decided that the two sub-paragraphs should be merged completely. It was also decided that the “associates” in the second last line should be modified to read “affiliates of the franchisor”.

It was also decided to broaden the scope of the provision by saying “received directly or indirectly”, as the franchisor might, for instance, be getting an equity interest in a business and the words “directly or indirectly” would cover also such possibilities.

Sub-Paragraph (o)

It was suggested that the scope of Sub-Paragraph (o) should be broadened to include not only the initial training programme, but also the on-going training which in many instances was more important than the initial training. An opposing view was that training should be deleted altogether, as it was normally dealt with in the agreement and there was no reason to single it out. This objection was however withdrawn in the light of the experience of some members of the Group, who stressed the fact that the franchisee was paying not only for the initial training, but also for the on-going training and should therefore have the possibility to be properly informed of what he was paying for with 20% or 30% of the on-going fees. In the end it was decided to include both initial and on-going training. It was also decided to delete the word “brief”, as it was felt that the franchisor did not need to be told how long or short a description he had to provide of the training programme.

Sub-Paragraph (p)

A question raised in relation to Sub-Paragraph (p) concerned the use of the word “exclusive”, and whether or not there would be any need to disclose to the franchisee what “exclusive” was not, for example in cases where the franchisor had reserved certain rights for himself. In reply, reference was made to Sub-Paragraph (r), which included among the items to be disclosed also any reservations made by the franchisor as to the right to use the trademark or to distribute or sell the goods.

It was suggested that Sub-Paragraph (p) might be phrased “the degree, if any, to which the franchisee receives protection against the franchisor or other selling or otherwise operating in the territory or to the customers” which would tell the franchisee whether he was entitled to any kind of exclusivity, if so whether that exclusivity was limited and whether it was limited vis-à-vis the franchisor only, or also against third persons and the degree to which it was limited.

It was suggested that a formulation that would cover the above re-phrasing of Sub-Paragraph (p) would be “the nature and extent of exclusive rights, if any”. This formulation was accepted by the Group.

Sub-Paragraph (q)

A suggestion to include other limitations, such as covenants not to compete, under Sub-Paragraph (q) brought to light the fact that also a number of other items were not dealt with, such as the right to sell or transfer the business and the termination of the agreement. The proposal to add all the items identified as missing however met with a certain resistance, as the list of item was felt to be too long as it was. It was felt that the disclosure document should contain only what was necessary and not what the agreement already contained.

It was suggested that a cross-reference might be made to the contract to guide the prospective franchisee to the clause where the non-compete covenant was dealt with, but without repeating the clause. It was stressed that there were critically important points to which the franchisee’s attention should be drawn without the text of the contract clause being repeated.

In the end it was decided that a separate provision should be added for covenants not to compete (see below).

Sub-Paragraph (r)

A question raised concerned the meaning of “the same or any other channel of distribution”. A related question was whether the franchisor would have the right to license the trademark without disclosing this, as the provision only referred to the use of the trademark. This was pertinent in this context, as the franchisor would in nearly all cases believe that it had the right to license the use of the trademark to others. It was observed that the term “use” in this case probably covered both, as in some countries a trademark would be “licensed”, whereas in others the right to use it was given. It was therefore suggested that the provision read “to use or license the use of the trademarks”. This suggestion was accepted.

Sub-Paragraph (s)

In connection with the registration of intellectual property, it was suggested that also a filing for registration should be disclosed. It was observed that the Drafting Committee had intended filing for registration to be covered by the provision. It was therefore suggested that the wording be modified to read “the application for registration and/or the registration, if any”.

As regards Sub-Paragraph (s), a question was whether “the national territory or territories in which the franchised business is to be run” referred to territories outside the national territory or whether it referred to portions of the national territory.

It was clarified that the wording intended to cover cases where the licence included several territories, such as when a franchise was granted for more than one country.

It was suggested that this provision was an extra-territorial provision, in that it obliged the franchisor to disclose information relating to a country that might not have adopted the Model Law. It was however felt that there were good reasons for this, as irrespective of the law that was chosen, the law and jurisdiction that would govern the terms of the agreement, it would always be the laws of the national territory in which the trademarks were issued that would deal with trademark matters. The intention in this provision was to oblige the franchisor to report on each individual country making up the exclusive rights. It was suggested that if the intention was merely to inform the franchisee of what his rights were going to be or of the problems that he might have where he was being licensed to run his business, it was not necessary to refer to the national territory at all.

While there were those who suggested that the provision should apply only to the national territory of the State adopting the law, i.e. that the franchisor should be obliged to disclose only information relating the registration of his trademarks in the country of the franchisee, as that country would have adopted the law or the law would not be applicable, others felt that that would be

insufficient, pointing to the inter-relationship between the registration of trademarks in countries belonging to unions such as the Benelux, or even the European Union considering the European Trademark and its registration with the European Trademark Office in Alicante. As regards trademarks, the effects of litigation in one country were no longer limited to that country. It was therefore proposed to formulate the provision "litigation or other legal proceedings affecting the marks to be used by the franchisee". It was however objected that such a formulation was too vague. It was also observed that a provision of this type could be applied to every other issue, and not only to trademark issues.

It was suggested that the United States statute might be taken as an example. It required disclosure of the effect of currently effective determinations by the trademark office or by the trademark administrator (applied to the Model Law this would be within the national territory of the franchisee), as well as any pending infringement, opposition or cancellation of the trademark registration (again, in the national territory of the franchisee), and pending material litigation involving the principal trademarks. A second, principal issue in the US statute was the disclosure of any agreements which significantly limited the rights of the franchisor to license or use the trademarks and whether the franchisor knew of any superior rights or infringing uses that could materially affect the franchisee's use of the principal trademarks in the franchisee's territory. It was however objected that the US statute dealt with the situation in which the exclusive territory fell within a jurisdiction, whereas the provision of the Model Law dealt with more than one territory. It was suggested that it was preferable to maintain the limited extra-territorial applicability currently inherent in the provision, provided it only dealt with the countries that were included within the exclusive territory.

It was suggested that "if any" be added after "which could have an effect on the franchisee's legal right to use the property in the territory". It was however pointed out that that covered only the situation in which the franchisee might be prevented from using the right, but there may also be situations that the franchisee might want to be aware of, in which the franchisor or the franchisee himself could prevent a third party from using the same trademark. That would not affect the franchisor's right to use the mark, but if someone else had the right to use the mark the franchisor's business might be affected. If the franchisor brought a proceeding against someone for trademark infringement and lost, it would not affect his right to use the trademark, it would just affect his ability to stop the other person from using it.

It was observed that if the concern was that the franchisee in a country might be affected by trademark litigation, dispute or other issue that arose in another country, it was irrelevant if that country was a country which he was also granted as part of a multiple territory. If it affected the franchisee's rights in his own territory, whatever that territory was, there was no cause for concern as regards the extra-territorial application of the law, as the franchisee would be affected wherever he was. It was consequently suggested that the formulation might be "which could have a material effect on the franchisee's right, exclusive or otherwise, to use the intellectual property in the territory", or alternatively "materially affect the franchisee's right to use the intellectual property under the franchise agreement".

A specific problem was seen in an application for registration of a trademark not being successful, as what in such cases was being licensed was not a registered trademark, but merely an application for registration. Some agreements dealt with this situation and what happened as a consequence of an unsuccessful application, others did not, but in any event it had a very serious impact on the ability of the franchisee to use that mark and to carry on its business, even if the situation became clear only five years after the franchisee had begun to operate its business. There were a variety of ways in which the franchisor might deal with such a situation in the agreement. He could limit his liability, he could say that the franchisee must change trademarks to use another of the franchisor's trademarks, in which case the franchisor would either have no liability at all, or be liable for the cost of replacing the existing mark. The franchisor would then also be liable for damages up to the amount of the royalties received. It was suggested that this issue be inserted in the Model Law, but the suggestion did not receive support.

A drafting suggestion was made to move the last line and a half of Sub-Paragraph (s) to insert it after the word "information" at the top of the sub-paragraph. The phrase would then read "the following information regarding the franchisor's intellectual property relevant for the franchise, in particular trademarks, patents, copyright and software: (i) [...] (ii) [...]". This suggestion was accepted.

Sub-Paragraph (v)

With reference to Sub-Paragraph (v)(i)(aa), it was suggested that words such as “including any material assumptions under which they [the estimates] were made [prepared]” be added. This suggestion was accepted.

With reference to the one-year time-period that had been selected, it was observed that in some US state laws the time-period was as short as 90 days, and that, in terms of the franchisor misleading the franchisee even if he were totally honest, in an international context it was even more risky to have working capital estimates for a period as long as one year.

It was explained that in the Drafting Committee it had been felt that one year was reasonable because one of the issues was the working capital, not just the out-of-pocket expenses in building, acquiring or leasing a property or building equipment, i.e. the reasonable estimates that a franchisor could make as to the working capital requirements. Unless there was a period of time that was of reasonable duration, it would not be necessary to make an estimate of working capital requirements.

It was decided to leave the time-limit at one year.

As regards the audited financial statements referred to in Sub-Paragraph (v)(i)(cc), it was recalled that in many European countries many franchisors were small or medium-size entrepreneurs and that there were those who were not obliged to make an official audit, as only undertakings on the stock market were under an obligation to have their statements audited every year. It was however observed that the aim was to make sure that the statements that were delivered to the prospective franchisee were more official than those prepared in-house.

Considering that audited annual accounts, and also statements prepared in-house, went to the tax authorities, it was suggested that reference be made to statements that were either audited or presented to the tax authorities, but this suggestion did not receive support, as it was felt that it would give the franchisor an easy way out.

A clarification was requested as to the meaning of the term “audited”, whether it meant audited by a certified public accountant or whether also other possibilities were included. In Germany, for example, corporations would have a director in charge of auditing. This was a system that was different from the American director in charge of audits, it was more like the French “*commissaire aux comptes*”. In Japan, corporations might have an official in charge, who was not an employee even if he occupied a position similar to a director of the company. This official was legally independent from the executive officers.

It was observed that the Drafting Committee had had annually audited financial statements in mind when it drafted the provision, and also more recent unaudited financial statements for the period between the audited statement and the handing over of the disclosure document. It was suggested that in this context the 90-day standard might no longer be necessary, considering the provision on the up-dating of the disclosure document. Hesitations were however expressed as to whether the updating of the disclosure document would catch the change in financial conditions of the company.

Another problem concerned companies that franchised for the first time. These companies might be new companies which did not have audited financial statements and for which it would consequently be impossible to supply statements for the previous three years. In the US the legislation included an exemption for such cases. It was decided that the Model Law should deal with this situation, as it was an oversight that it had not. The Federal Trade Commission Rule, which it was suggested might be used as a basis for a provision on this point, stated that “[s]tatements shall be prepared on an audited basis as soon as practicable, but, at a minimum, financial statements for the first full fiscal year following the date on which the franchisor must first comply with this part shall contain a balance sheet opinion prepared by an independent certified or licensed public accountant, and financial statements for the following fiscal years shall be fully audited” (§ 6120 (ii)).

In the end, it was decided that the text of the provision should refer to “audited or otherwise independently verified financial statements” and that the Explanatory Report should indicate that in certain jurisdictions audited financial statements were not required. It should also recognise that in

some cases to require audited financial statements would be particularly burdensome. Furthermore, it was suggested that the Explanatory Report should refer to the concept “audited” and the differences between different countries, such as the French system of the “*commissaire aux comptes*”.

With reference to Sub-Paragraph (v)(ii)(aa), the meaning of the terms “reasonable basis” and “material assumptions” was queried. It was explained that irrespective of the assumptions on which the information on projected financial performance had been based, they had to be reasonable. “Material assumptions”, on the other hand, was standard terminology in English. The reason behind the provision was that whatever the basis upon which the estimates had been made, the prospective franchisee was entitled to know what form of selectivity had been used, so as to place him in a position to choose whether or not to rely on, or pay attention to, the information he was provided with. For example, if the franchisor introduced a rent factor into his calculations, say 8% of gross revenue, he should state why he chose 8%: e.g. “[i]t is the figure historically paid in the United States, but we (the franchisor) make no representation as to what it may be in the foreign country”.

Sub-Paragraph (w)

It was suggested that Sub-Paragraph (w) should be placed before the provision dealing with financial information.

Non-Compete Provisions

It was suggested that information on both in-term and post-term non-compete provisions should be included under Paragraph (1), the reason being that they were among the items necessary for the prospective franchisee to make an informed decision. Furthermore, there were franchisors who failed to refer to issues such as non-competition in the agreement, and if the Model Law made their disclosure mandatory they would have to decide how best to go about it.

“In-term and post-term non-compete covenants” and “covenants against competition” were suggested as alternative formulations of the provision.

Term, Renewal and Termination

It was decided that a provision covering the term of the franchise agreement, its termination and the effects of its termination should be added. Similarly, the conditions for the renewal of the agreement should also be listed. In the end, it was decided to add two sub-paragraphs, one with the term and conditions of renewal, the other with termination and the effects of termination.

Assignment or Transfer

Another item that the Group decided to add was the assignment or transfer of the agreement. The wording suggested was “the conditions for the assignment or other transfer”.

System Changes

The last item suggested for inclusion in the list was system changes. Normally, contract clauses dealing with system changes would specify that the franchisor would not be able to make modifications without there being agreement between the parties, or that the franchisor could issue manual supplements, materials and the like to fill in the interstices that were not spelt out in detail in the document, and that he could implement those changes over a period of time.

In this connection it was stressed that it was important for the prospective franchisee to read the franchise agreement, as there were a number of issues that were going to be dealt with in the franchise agreement that would not be dealt with in the disclosure document. It was suggested that the Explanatory Report might somehow make this clear, although it was objected that the Model Law and its Explanatory Report would be addressed to Governments and not to the parties to franchise agreements.

In the end, the Study Group decided not to include system changes in the list of items in Article 6(1).

PROPOSED NEW PARAGRAPH

Turning to the question of the proposed new second paragraph, the Group decided to list in Paragraph (1) the items that had to be disclosed in the disclosure document in any event, and to list in the new paragraph those items that did not have to be disclosed in the disclosure document provided they were adequately dealt with in the agreement. Going through all the items listed in Article 6, the Study Group decided to divide the items between the paragraphs as follows:

Paragraph (1): (a) – (k), (m) and (n) merged, (s), (v),

New Paragraph: (l), (o), (p), (q), (r), (t), (u), (w), non-compete provisions, term and renewal, termination and its effects, transfer,

PARAGRAPH 2

Introducing Paragraph (2), it was explained that the Drafting Committee had wanted to avoid the franchisor having to provide a disclosure document in addition to the sub-franchisor. However, considering the modifications that had been introduced in relation to the exemptions, whereby a franchisor would no longer be obliged to provide disclosure if he granted a franchise for a whole country, it was felt that Paragraph (2) had to be reconsidered. The principle was considered to be valid, even if the wording would have to be changed.

It was suggested that Paragraph (2) might be added to Paragraph (1) as it had emerged from the decision to split the items into Paragraph (1) and a new paragraph.

The text of Article 6 as finally adopted reads as follows:

ARTICLE 6
(INFORMATION TO BE DISCLOSED)

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

- (A)** *the legal name and address 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 principal place of business of the franchisor if different from that indicated in lit. (a);*
 - (D)** *the legal form of the franchisor;*
 - (E)** *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;*
 - (F)** *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;*
 - (G)** *relevant details relating to any criminal convictions or any finding of liability in a civil action involving franchises or other businesses relating to misrepresentation, unfair or deceptive acts or practices or comparable actions of:*
 - (i)** *the franchisor;*
 - (ii)** *any affiliate of the franchisor who is engaged in franchising; and*
 - (iii)** *any of the persons indicated in lit. (f)*
- for the previous five years, as well as the relevant details relating to any pending actions of the same nature;*

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

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

(J) the names, addresses and phone numbers of the franchisees whose outlets are located nearest to the proposed outlet of the prospective franchisee, but in any event of not more than 50 franchisees in the country of the franchisee and/or contiguous countries, or, if there are no contiguous countries, the county of the franchisor;

(K) 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; the franchisor refused renewal; terminated by the franchisor;

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

(i) the application for registration and/or the 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 national territory in which the franchised business is to be operated;

(M) 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;

(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;

(N) financial matters, including:

(i) (a) any estimates of the franchisee's total initial investment and of the minimum working capital required for the first year of operation;

(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 proposed franchisee's outlet may differ from those contained in the information provided by the franchisor.

(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), (E), (H), and (2)(D), (G) and (I) of this article, as well as inform the prospective sub-franchisee of the situation of the sub-franchise agreements in case of termination of the master franchise agreement and of the content of the master franchise agreement.

ARTICLE 7 - CONFIDENTIALITY

The text of Article 7 as submitted to the Study Group read:

**ARTICLE 7
(CONFIDENTIALITY)**

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

The broadening of the scope of Article 7 that had been decided upon in the discussions on Article 5 was noted.

A query was raised as to why a law governing disclosure should deal with the fact that a franchisor might require the entire relationship to be subject to a confidentiality agreement.

It was pointed out that as originally drafted, the Article had stated that the franchisor could require the contents of the disclosure document to be kept confidential. This was a concern not so much in the United States, where disclosure documents were public documents, as in Europe, where franchisors considered the contents of their disclosure documents to be confidential. As the Model Law was a disclosure law, it had seemed appropriate to deal with this issue. Furthermore, a proviso had now been added indicating that a confidentiality agreement signed at the outset did not trigger disclosure, and that belonged in a law dealing with disclosure.

The text of Article 7 as adopted therefore read:

**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

The text of Article 8 as submitted to the Study Group read as follows:

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

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

The Article did not give rise to discussion and was accepted without modification.

ARTICLE 9 – LANGUAGE OF DISCLOSURE DOCUMENT

The text of Article 9 as submitted to the Study Group read as follows:

ARTICLE 9
(LANGUAGE OF DISCLOSURE DOCUMENT)

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

In relation to Article 9, it was suggested that a possibility for the parties to choose the language in which the disclosure document should be written should be added. There might be instances in which the prospective franchisee was from the country of the franchisor or from a third country and in which therefore the franchisee might prefer to receive the document in a language different from that of the jurisdiction in which it was to operate. This was however objected to, as it was a matter that was very much abused by franchisors. Very often the franchisor would impose the language that was to be used, as it was the franchisor who was the stronger party.

It was suggested that a reference should be added to the mother-tongue of the franchisee, but it was pointed out that a company had no mother-tongue. It was therefore decided that the provision should include a reference to the mother-tongue of the franchisee, but that the Explanatory Report should indicate that the reference to the mother-tongue in the case of a company referred to the mother-tongue of the chief operating officer or the President.

A further suggestion concerned the word "jurisdiction" which caused a certain number of problems, as there were countries such as Belgium which were one jurisdiction, but in which the use of different languages was mandatory in different territories. It was suggested that "principal place of business" be used.

The possibility of excluding master franchises, and possibly also development agreements, was discussed. It was pointed out that the Code of Ethics of the European Franchise Federation expressly excluded master franchises from the application of the language provision. This was because in a master franchise situation, or in a developer situation, the sub-franchisor or developer might in fact be more sophisticated than the franchisor and would therefore not need protection. It was however objected that developers might also be developers of a mere two units, so it should not be taken for granted that the developer or sub-franchisor was highly sophisticated. The fact was stressed that the language issue was abused constantly in jurisdictions where there were more than one language, as well as internationally.

In the end, the proposal to exclude master franchise and development agreements from the application of this article was rejected. The text of the Article as finally adopted reads as follows:

ARTICLE 9
(LANGUAGE OF DISCLOSURE DOCUMENT)

The disclosure document must be written in a clear and comprehensible manner in the official language of the principal place of business of the prospective franchisee or in the mother-tongue of the franchisee.

ARTICLE 10 - REMEDIES

The text of Article 10 as submitted to the Study Group read as follows:

**ARTICLE 10
(REMEDIES)**

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

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

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

(a) two years of the act or omission constituting the breach upon which the right to terminate is based; or

(b) one year of the franchisee becoming aware of facts or circumstances that reasonably indicate that a breach entitling the franchisee to terminate has occurred; or

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

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

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

The first point raised concerned terminology, in that the draft used "terminate" instead of "rescission". It was explained that "terminate" was the term used by UNIDROIT instruments and had therefore been adopted. Furthermore, the use of terms such as "rescind" varied from country to country and a neutral term had therefore been preferred.

It was pointed out that the article only spoke of terminating the franchise agreement, whereas there were instances in which no agreement had been signed, but money in the form of fees or otherwise had been paid. In fact, Article 5 (c) referred to precisely this. The question was whether the money that had been paid in such instances should be paid back and if this should be mentioned in the provision.

A related question concerned whether or not it should be possible to terminate pre-contractual agreements which might have been signed pending a decision as to whether or not to enter into a franchise relationship and for which sums of money might have been paid.

While one view was that the Model Law should specify that any money that had been paid should be returned, another was that that was a question that should be decided in accordance with the applicable law. In other words the Model Law should not deal with the question at all.

As regards other agreements, it was suggested that if the agreements were related to the franchise and the franchise was going to be terminated, then the franchisee should have the right to terminate also those agreements, the only exception being confidentiality agreements. It was also suggested that the matter should be left to the national court. If money had been paid as a result of a pre-contractual arrangements, then one view was that the Model Law should deal with it.

In the end, it was decided that the Explanatory Report should indicate that paragraph (1) covered also pre-contractual arrangements. It was suggested that Article 2.16 of the *UNIDROIT Principles of International Commercial Contracts* be referred to in relation to confidentiality agreements, as it stated that "[w]here information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. [...]".

Paragraph (1)

A proposal for the inclusion of “omission” in addition to “misrepresentation” had been made earlier in the discussions. It was suggested that this was linked to whether or not the items listed under Article 6 should be considered to be exhaustive, in the sense that they represented all material facts.

With reference to the addition of “omission”, the formulation was found to be problematic, as it was not possible to rely on an omission. The formulation “did not rely on this misrepresentation or his decision was not influenced by the omission” was suggested. It was pointed out that such a formulation would suggest that if the franchisee had knowledge of the misrepresentation but chose to proceed nevertheless, the franchisor would be exempted.

Whether or not Article 6 listed all material facts was disputed. Some members of the Group felt that it did, whereas others felt that it did not, that it was impossible to list all material facts, as what was material would vary depending on what the franchisee would have done had he been aware of the fact. The franchisee was not entitled to terminate as a result of the mere fact that something had been omitted, because the criterion was whether or not the franchisee would have concluded the contract had he been aware of the omission. It was pointed out that the burden of proof shifted to the franchisor, who had to prove that the franchisee had not relied on the misrepresentation or omission.

It was suggested that the Model Law spelt out what a franchisor had to disclose. There might be a number of other laws that governed the contractual relationship between the parties and under those laws a franchisee might have the right to rescind. All that Article 10 stated was what remedies the Model Law provided for a violation of the Model Law, and that it would not be possible for a judge to decide that if A had known, he would never have entered into the contract. It was necessary for it to be something which came within the framework of what was described as being required disclosure.

It was pointed out that under the FTC Rule, which was the principal source of law in this area, there was no private right of action. A private individual could not sue or terminate or get damages if the FTC Rule had been violated. By far the most significant expansion of the law of disclosure that this Model Law represented, was the fact that it was a disclosure, non-registration law with a private right of action.

It was suggested that a formulation such as “if the disclosure document contains a material misrepresentation or omission, the franchisee is entitled to terminate the franchise agreement unless the franchisor can prove the franchisee did not rely on this misrepresentation or omission” be adopted. It was however objected that under the Model Law disclosure might be required of things that the franchisee did not care about, for example financial statements, if he was not basing his decision on the financial statements of the franchisor because he felt that the franchise was a wonderful business opportunity.

One question was also what would happen if there was misrepresentation of a material fact that was not required under the law. In this case it was suggested that the franchisee’s remedies were to be found under general contract law and that this should be stated clearly in the Explanatory Report.

A question raised concerned the phrase “entitled to terminate”, in that if a franchisor had been shown that he had not provided the information he should have provided, or that the information he had provided was incomplete, the franchisor might be permitted to cure by providing the information at a later date. This would avoid the franchisor having to prove that the information was not material, or that the franchisee had not relied on it, which might be dangerous in a foreign court.

It was pointed out that the Drafting Committee had discussed this issue, and had decided that, rather than permit the franchisor to cure, the franchisor should be able to rely on paragraph (3)(c), under which he would put the onus on the franchisee by explaining the situation and giving the franchisee a short period of time under which to decide whether he wanted to terminate or not.

It was recalled that in a recent case the French *Cour de Cassation* had stated that if there was a misrepresentation of a material fact or non-disclosure, the franchisee was presumed to have relied on it and was consequently entitled to terminate, unless the franchisor could prove that the misrepresentation or non-disclosure had not determined the franchisee’s decision. It was further

pointed out that it was perfectly normal that when a party caused a mistake, that party would be liable unless he proved that the other had not relied on the mistake.

It was suggested that if omission were included in paragraph (1), Article 1 on the definitions should also include a definition of "omission", along the lines of the definition of "misrepresentation".

Paragraph (3) Sub-Paragraph (c)

As regards sub-paragraph (c), it was explained that it was designed to permit a franchisor who had blundered into an unintentional breach to inform his franchisees of the mistake and to offer them the opportunity to terminate the agreement if they so wished, or, if they decided not to terminate, to request written confirmation from them that they knew what had happened. In essence, it gave the franchisor the right not to live with a sword of Damocles over his head, as it was possible for a franchisee to discover a mistake, but not to say anything unless the relationship did not work. It was suggested that the provision, which basically gave the franchisor the right to terminate a franchisee, did not belong in a disclosure law. It was suggested that the provision should read "within 90 days of delivery to the franchisee of a written notice providing details of the breach, which must be accompanied by the franchisor's then current franchise agreement". The proposed wording was accepted with the deletion of the words "which must be".

General Questions

A general question transmitted by the Governing Council of UNIDROIT to the Study Group concerned whether a specific reference to remedies other than termination, in particular the right to damages, should be added to Article 10.

The Group considered whether the right to damages should be considered an alternative to the right to terminate, or whether it should be an additional remedy, as well as whether the right to damages should be admitted even if the franchisee chose to maintain the relationship. While there were members who felt that it would be a good idea to include also the right to damages specifically, there were others who felt that it was already covered by the indication in paragraph (5) that the right to terminate did not derogate from any other right the franchisee might have under the applicable law. There were differences of opinion as to whether or not the right to sue for damages was implied in the text as it stood.

A second question concerned whether in paragraph (1) the possibility of the franchisor not delivering the disclosure document at all should be contemplated. One of the members of the Drafting Committee suggested that the intention had been to include this possibility in the present formulation. It was decided that the formulation should start with specifying "is not delivered at all or is not delivered on time".

As regards the three categories listed in sub-paragraphs (a) to (c) of paragraph (3), it was decided that they should all be retained.

As regards termination by the franchisee, the Group considered whether or not court intervention should be necessary, or whether it should be sufficient for the franchisee to notify the franchisor of his intention to terminate. It was decided that this should be left to national law.

In relation to paragraph (3)(c), the question was raised whether the franchisor should be required to deliver his current disclosure document, as a situation might arise in which the franchisor no longer franchised and therefore either did not have a disclosure document or did not have one which was up to date. It was therefore suggested that the phrase be modified to speak of the "most recent" disclosure document, rather than "current".

Objections were raised to this proposal, in that it was felt that the franchisor should be made to suffer the consequences of having given misleading or incomplete information. Furthermore, the purpose of the provision was to ensure that the franchisor was not left in limbo, he had misled the franchisee and he now wanted to remedy that situation, but he had to bring the franchisee up to date as regards the status of the franchise system at the same time. Otherwise the franchisee would not be able to make an informed decision, considering also that he had been deceived earlier.

The proposal to change “current” to “most recent” was not accepted.

The text of Article 10 as finally adopted reads as follows:

**ARTICLE 10
(REMEDIES)**

(1) If the disclosure document is not delivered at all or is not delivered within the period of time established in Article 5, 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 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 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) two years of the act or omission constituting the breach upon which the right to terminate is based; or

(b) one year of the franchisee becoming aware of facts or circumstances that reasonably indicate that a breach entitling the franchisee to terminate has occurred; or

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

NEW ARTICLE 11 – TRANSITIONAL PROVISIONS

A new article on the applicability of the Model Law was adopted following the discussions on Article 1 (see above). The text of the new Article 11 reads as follows:

ARTICLE 11

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.

**TEXT OF THE DRAFT MODEL FRANCHISE DISCLOSURE LAW
AS REVISED BY THE STUDY GROUP AT ITS
FOURTH SESSION, 9 - 10 DECEMBER 1999**

**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 who directly or indirectly controls or is controlled by the franchisor, or is controlled by another party who controls the franchisor;

development agreement means an agreement under which a franchisor in exchange for direct or indirect financial compensation grants to another party the right to 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 aux franchises concédées pour l'exploitation d'une ou plusieurs activités commerciales franchisées [sur le territoire national de l'Etat qui l'adopte].

**ARTICLE 2
(DÉFINITIONS)**

Aux fins de la présente loi :

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

un **contrat de développement** désigne la convention aux termes de laquelle un franchiseur concède à une autre partie, en échange de contreparties financières directes ou indirectes, le droit 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** signifie les 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 de façon substantielle les modes d'exploitation de l'activité franchisée comprenant un contrôle continu sur les opérations pouvant être exercé par le franchiseur, et qui est associé de manière significative à une marque de commerce, une marque de service, une appellation 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

(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 material fact of which the person making the statement was aware at the time the statement ought to have been made;

and

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

ARTICLE 3

(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;

de sous-franchise ;

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

Aux fins de la présente définition le paiement à un prix bonifié des biens destiné à la revente ne peut être assimilé aux « contreparties financières directes et 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 commerciale** 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 important** s'entend de tout renseignement qui peut raisonnablement être considéré comme ayant une incidence certaine sur la décision d'acquiescer une franchise ;

une **représentation inexacte des faits** s'entend d'une déclaration dont l'auteur savait ou aurait dû savoir qu'elle était erronée lorsqu'elle a été faite ;

une **omission** s'entend de la non déclaration d'un fait important au moment où cette déclaration aurait dû être faite ;

et

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

ARTICLE 3

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

Aucune délivrance d'information n'est requise :

A) dans l'hypothèse d'une concession d'une franchise à une personne qui a été un dirigeant ou un administrateur du franchiseur ou de l'un de ses affiliés pendant 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

(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];

(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 jurisdiction.

ARTICLE 4

(FORMAT OF DISCLOSURE DOCUMENT)

(1) Disclosure must be provided in writing.

(2) The franchisor may use any format for the disclosure document, provided that the information contained therein meets the requirements imposed by this law.

ARTICLE 5

(DELIVERY OF THE DISCLOSURE DOCUMENT)

(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 any agreement relating to the franchise, with

the exception of agreements covered by Article 7; or

(B) the payment by the prospective franchisee of any fees relating to the franchise. que le cédant ;

(C) dans l'hypothèse de la concession d'une franchise qui permet de vendre des marchandises ou services à une personne engagée dans une exploitation commerciale identique ou similaire durant des deux années précédentes, dans la mesure où le chiffre d'affaires réalisé sur les ventes dans le cadre de cette franchise, ne dépasse pas 20 % du total cumulé de toutes les ventes de l'ensemble des activités commerciales de cette personne pendant la première année de la relation, pour autant que la proportion des ventes dans le cadre de la franchise ait pu être anticipée par les parties ou aurait dû raisonnablement être anticipée par les parties au moment où le contrat de franchise a été souscrit ;

(D) dans l'hypothèse de la concession d'une franchise conformément à laquelle le franchisé s'engage à réaliser un investissement total excédant le montant de [x] ;

(E) dans l'hypothèse de la concession d'une franchise à un franchisé dont la valeur nette avec ses affiliés dépasse [Y] ;

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

(G) lorsque la somme totale des paiements annuels prévus dans le contrat qui doit être versée par le franchisé au franchiseur est inférieure à [Z] ; ou.

(H) si la transaction fait suite à une offre du franchiseur destinée à une seule entité ou personne pour l'ensemble de la juridiction.

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

(REMISE DU DOCUMENT D'INFORMATION)

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

A) la signature par le franchisé éventuel de tout contrat ayant trait à la franchise à

l'exception des contrats soumis aux dispositions de l'article 7 ; ou

B) le paiement par le franchisé éventuel de toute somme, compensation, indemnité de

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

ARTICLE 6
(INFORMATION TO BE DISCLOSED)

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

(A) the legal name and address 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 principal place of business of the franchisor if different from that indicated in lit. (a);

(D) the legal form of the franchisor;

(E) 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;

(F) 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;

(G) relevant details relating to any criminal convictions or any finding of liability in a civil action involving franchises or other businesses relating to misrepresentation, unfair or deceptive acts or practices or comparable actions of:

(i) the franchisor;

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

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

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

dédit ou de toute sorte d'honoraires en relation avec la franchise.

2) Le document d'information doit être actualisé dans les [X] jours suivant la fin de l'année fiscale du franchiseur. En cas de survenance d'une modification importante relative à la personne du franchiseur ou relative à son activité commerciale franchisée, le document d'information doit être actualisé dans les [Y] jours suivant la survenance de cette modification importante.

ARTICLE 6
(CONTENU DES INFORMATIONS FOURNIES)

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

A) la raison sociale et l'adresse du franchiseur ;

B) tout autre nom sous lequel le franchiseur exerce ou a l'intention d'exercer son activité ;

C) l'adresse de localisation principale de l'activité du franchiseur si elle est différente de celle indiquée à l'alinéa a) ci-dessus ;

D) le statut légal du franchiseur ;

E) 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 l'offre de franchises dans le même type d'activités que celles prévues comme devant être exploitées par le franchisé ;

F) les noms, adresses, positions tenues, expérience commerciale et qualifications de toute personne qui a des hautes responsabilités de direction dans la conduite des activités commerciales du franchiseur en relation avec la franchise ;

G) tout détail utile au sujet de condamnations pénales et de procédures judiciaires ayant trait à une représentation inexacte des faits, un comportement malhonnête ou une pratique déloyale ou toute action analogue impliquant la franchise ou d'autres activités commerciales dans lesquels se sont trouvés concernés,

i) le franchiseur ;

ii) tout affilié du franchiseur qui est engagé en franchisage ; et

iii) toute personne mentionnée à l'alinéa f) ci-dessus ;

et ce dans les cinq dernières années, ainsi que tout détail utile relatif à toute action encore pendante de la même nature ;

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

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

(J) the names, addresses and phone numbers of the franchisees whose outlets are located nearest to the proposed outlet of the prospective franchisee, but in any event of not more than 50 franchisees in the country of the franchisee and/or contiguous countries, or, if there are no contiguous countries, the county of the franchisor;

(K) 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; the franchisor refused renewal; terminated by the franchisor;

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

(i) the application for registration and/or the 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 national territory in which the franchised business is to be operated;

(M) 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;

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

H) tout détail utile concernant toute procédure de faillite, d'insolvabilité, ou tout autre procédure comparable intervenue pendant les cinq dernières années ayant impliqué le franchiseur et/ou les entités légales ou les personnes mentionnées à l'alinéa f) ci-dessus ;

I) le nombre total de franchisés appartenant au réseau ;

J) les noms, adresses, et numéros de téléphones des franchisés dont les unités d'exploitation sont situées le plus près de l'unité d'exploitation proposée au franchisé éventuel, sans que les coordonnées ne doivent être données, en toute hypothèse, pour plus de 50 franchisés dans le pays du franchisé ou de pays contigus, ou, en l'absence de pays contigus, du pays du franchiseur. ;

K) tout renseignement concernant les franchisés qui ont cessé d'être franchisés du franchiseur au cours des trois années fiscales précédant la conclusion du contrat, en précisant les motifs pour lesquels les franchisés ont cessé d'être franchisés du franchiseur; Pour satisfaire aux exigences d'information, les types d'informations suivantes pourront être fournies: résiliation ou non-renouvellement volontaire, ré-acquisition par rachat de la part du franchiseur, autre forme de ré-acquisition par le franchiseur, refus de renouveler de la part du franchiseur, résiliation par le franchiseur ;

L) les informations suivantes ayant trait aux droits de propriété intellectuelle du franchiseur en relation avec la franchise, et en particulier aux marques, brevets, droits d'auteurs, et droit de protection logicielle :

i) la demande d'enregistrement et/ou l'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 le droit, exclusif ou non exclusif, du franchisé d'user les droits de propriété intellectuelle en vertu du contrat de franchise,

sur le territoire national dans lequel l'activité commerciale franchisée doit être entreprise ;

M) 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) toute information concernant les pratiques de prix, au regard de ces

(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;

(N) financial matters, including:

(i) (a) any estimates of the franchisee's total initial investment and of the minimum working capital required for the first year of operation;

(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 proposed franchisee's outlet may differ from those contained in the information provided by the franchisor.

marchandises et/ou de ces services ; et

(iv) information concernant le traitement de toute source de revenus ou d'autres bénéfices que le franchiseur ou ses associés peuvent recevoir directement ou indirectement en provenance de tout fournisseur de marchandises et/ou de services à destination du franchisé ;

(N) tout élément d'information financière incluant :

i) a) toute estimation du montant total de l'investissement initial du franchisé et du fonds de roulement minimum requis pour la première année d'exploitation ;

b) les modes de financements offerts ou organisés par le franchiseur le cas échéant ;

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

ii) a) Si une information est délivrée au franchisé éventuel, par le franchiseur ou en son nom, concernant les résultats financiers historiques ou les projections financières prévisionnelles d'unités exploitées en propre par le franchiseur, ses affiliés ou ses franchisés, cette information doit :

aa) reposer sur une base raisonnable au moment où elle est établie ;

bb) inclure les hypothèses importantes ayant donné lieu à sa préparation et sa présentation,

cc) préciser si elle est basée sur des résultats actuels d'unités existantes ;

dd) spécifier si elle est basée sur des unités appartenant au franchiseur et/ou aux franchisés ; et,

ee) indiquer le pourcentage d'unités d'exploitation correspondant à chaque éventail de chiffres ou à chaque résultat affiché, ou qui les dépasse.

b) Si l'information financière à laquelle il est fait allusion dans le précédent paragraphe a) est fournie, le franchiseur

doit déclarer que les niveaux de performance de l'unité d'exploitation proposée au franchisé éventuel peuvent être différents des informations fournies

(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 par le franchiseur.

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 franchisé ;

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 aux termes desquelles le franchiseur peut mettre fin au contrat de franchise et les effets d'une telle résiliation ;

F) les conditions aux termes desquelles le franchisé peut mettre fin au contrat de franchise et les effets d'une telle résiliation ;

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

H) toute clause de non-concurrence pendant la durée du contrat de franchise ou toute clause de non-concurrence ayant des effets postérieurs à la fin du contrat de franchise ;

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

i) d'utiliser ou de céder 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 franchisé, directement ou indirectement à travers le même réseau de distribution ou tout autre, que ce soit 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 imposé par le franchiseur comme compensation pour l'impôt retenu à la source ;

L) les restrictions ou conditions imposées au franchisé au sujet des marchandises et ou des services que le franchisé a le droit de vendre ; et

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

3) Si la franchise est une franchise principale, le sous-franchiseur, en plus des informations à fournir au titre des dispositions des paragraphes 1) et 2), devra fournir au sous-franchisé l'information concernant le franchi-received under paragraphs (1)(A), (E), (H), and (2)(D), (G) and (I) of this article, as well as inform the prospective sub-franchisee of the situation of the sub-franchise agreements in case of termination of the master franchise agreement and of the content of the master franchise agreement.

**ARTICLE 7
(CONFIDENTIALITY)**

The franchisor may require the prospective franchisee to sign a statement acknowledging the confidentiality of the information 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 or in the mother-tongue of the franchisee.

**ARTICLE 10
(REMEDIES)**

(1) If the disclosure document is not delivered at all or is not delivered within the period of time established in Article 5, 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 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 or that the investment decision of the franchisee was not influenced by the franchisor as required by paragraphs 1)A), E), H), and 2)D), G) et I) du présent article, de même qu'il devra informer le sous-franchisé éventuel du contenu du contrat de franchise principale et de la situation de tous les contrats de sous-franchise dans l'hypothèse où le contrat de franchise principal viendrait à se terminer.

**ARTICLE 7
(CLAUSE DE CONFIDENTIALITE)**

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

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

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

**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 des activités commerciales où le franchisé éventuel sera situé ou dans sa langue maternelle.

**ARTICLE 10
(VOIES DE RECOURS)**

1) Si le document d'information n'est pas délivré ou n'est pas délivré dans les temps requis par l'article 5 de la présente loi, le franchisé aura le droit de mettre fin au contrat de franchise et/ou à 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 représentation inexacte ou s'il y a une omission d'un fait essentiel requis par l'article 6, le franchisé a le droit de mettre fin au contrat

de franchise, à moins que le franchiseur n'apporte la preuve que le franchisé n'avait pas pris en considération cette représentation inexacte des faits ou que l'omission n'a pas

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) two years of the act or omission constituting the breach upon which the right to terminate is based; or

(b) one year of the franchisee becoming aware of facts or circumstances that reasonably indicate that a breach entitling the franchisee to terminate has occurred; or

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

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.

influencé de manière certaine la décision du franchisé de s'engager.

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

a) deux ans après l'acte ou l'omission constitutive de la violation sur laquelle le droit de mettre un terme au contrat est basé ; ou

b) un an à compter du moment où le franchisé a pris conscience de faits ou de circonstances qui conduisent raisonnablement à une violation autorisant le franchisé à mettre un terme au contrat de franchise ; ou

(c) doit être exercé dans les 90 jours qui suivent la délivrance au franchisé d'un avis écrit indiquant les détails de la violation accompagné du document d'information du franchiseur tel qu'il existe alors.

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

ARTICLE 11

Cette loi s'applique à un 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 l'entrée en vigueur de la loi.

UNIDROIT STUDY GROUP ON FRANCHISING

Fourth Session, Rome, 9 - 10 December 1999

LIST OF PARTICIPANTS

MEMBERS

Mr Arthur HARTKAMP	Advocate-General, Supreme Court of the Netherlands Professor of Law, University of Utrecht Member of the UNIDROIT Governing Council The Hague, <i>Chairman</i>
Mr Olivier BINDER	CEJEF, Société d'avocats, Paris
Mr Michael G. BRENNAN	Rudnick & Wolfe, Chicago Secretary, Committee on International Franchising of the Section on Business Law (IBA)
Mr Andrzej CALUS	Professor of Law Director Institute of International Law Faculty of Foreign Trade of the Warsaw School of Economics, Warsaw
Ms Nicole van CROMBRUGGHE	Lafili van Crombrugghe & Partners, Bruxelles
Mr Aldo FRIGNANI	Professor of Law University of Turin Frignani e Associati, Turin
Mr Franklin C. JESSE Jr.	Gray Plant Mooty & Bennett, Minneapolis
Mr István KISS	Secretary-General and Chief Executive Officer Hungarian Franchise Association, Budapest
Mr Alexander S. KONIGSBERG, Q.C.	Goodman Lapointe Ferguson, Montreal Former Chairman of the Committee on International Franchising of the Section on Business Law (IBA)
Mr Souichirou KOZUKA	Associate Professor of Law Sophia University, Faculty of Law, Tokyo
Mr Martin MENDELSON	Eversheds, London Professor of Franchising City University Business School, London Former Chairman of the Committee on International Franchising of the Section on Business Law (IBA)
Mr Horacio ROITMAN	Professor of Law, University of Córdoba (Argentina)

Mr Albrecht SCHULZ	CMS Hasche Sigle Eschenlohr Peltzer, Stuttgart, Former Chairman of the Committee on International Franchising of the Section on Business Law (IBA)
Mr B. SEN	Senior Advocate at the Supreme Court of India Member of the Unidroit Governing Council New Delhi
Mr John VERNON	Strasburger & Price, L.L.P., Dallas
Mr Frank ZUMBO	Senior Lecturer, University of New South Wales School of Business Law and Taxation Faculty of Commerce and Economics Sydney

ADVISERS

International Franchise Association (IFA)

Mr Philip F. ZEIDMAN	Legal Counsel, Piper Marbury Rudnick & Wolfe, Washington, Former Chairman of the Committee on International Franchising of the Section on Business Law of the IBA
----------------------	---

Federación Iberoamericana de Franquicias (FIAF)

Mr Jordi RUIZ de VILLA JUBANY	Arimany Manubens & Asociados, Barcelona
-------------------------------	---

UNIDROIT

Mr Herbert KRONKE	Secretary-General
Ms Lena PETERS	Research Officer, <i>Secretary to the Study Group</i>