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STUDY GROUP ON FRANCHISING

Model Franchise Disclosure Law

Proposal for a Preface to the Model Law submitted by
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1. The International Institute for the Unification of Private Law (UNIDROIT) is pleased to place the *Model Franchise Disclosure Law* presented in this document at the disposal of the international community. The Model Law is intended to provide national legislators who have decided that legislation specifically aimed at franchising should be introduced into their legal system with a source of inspiration, with an instrument that they may consult and use as a model or blueprint should they deem it appropriate. It is a model, and therefore in no way binding. Should the legislators of a State decide to make use of this Model Law, they will be completely free to decide which provisions to adopt. They may omit those that they deem incompatible with their legal system or inappropriate in their country, and they may modify those that they feel require modification to be acceptable. The text of the Model Law is accompanied by an Explanatory Report which explains what the purpose of each provision is, and in some cases explain how the provision should be interpreted, with a view to assisting the legislator in evaluating whether or not the provision in question is necessary and/or suitable in the particular national context. Where a provision is self-explanatory, no comment has been provided.

2. The instrument opted for is a Model Law and not an international convention. Of the different types of instrument that are possible, international conventions are the most rigid. The intention with an international convention is that it more or less as it stands should become part of the national law of the Contracting States. The possibility to vary the contents of conventions is very limited, as States will only be able to make reservations to specific provisions, and even that may not be possible if the provisions of the convention itself specify that no reservation is possible. How international conventions are incorporated into the national legislation will vary from country to country, as will the position of international conventions in the hierarchy of laws. The main advantage of stringent instruments such as international conventions is the fact that they provide for as great a legal certainty as is reasonably possible precisely because the texts adopted are incorporated into the legislation of the Contracting States essentially without modification. The other face of the medal is that States may consider certain modifications to be imperative, and that as Contracting States they would not be able to make these changes to the text. The result may be that instead of ratifying or acceding to the convention, they take inspiration from it, just as if it were a model law, and introduce the changes they need.

3. Model laws are more flexible than international conventions. In this case the intention is from the beginning to permit States to make the changes they consider to be necessary to cater for the specific needs of the country. A further advantage is that it is possible to include in a model law a number of provisions that the experts preparing the law deem to constitute the most appropriate solution to a specific problem, even if some States may want to modify the suggested provision when they take inspiration from it for their national legislation. Whether or not a State does modify a model law, and the extent to which it does so, will depend on the reasons for which it has decided to introduce legislation. The price to pay for this greater flexibility is of course less uniformity, as a number of provisions will differ from country to country. The underlying principles should however remain the same.

4. The different instruments that may be adopted have different addressees. Model laws, as international conventions, are clearly addressed to legislators. The *Model Franchise Disclosure Law* is in the first instance designed to assist the legislators of countries that have decided to adopt legislation for the first time. However, it cannot be excluded that it may eventually replace or integrate existing legislation, should the national legislator decide that

the law of his or her country is unsatisfactory for any particular reason and that the regulation proposed by the Model Law is to be preferred.

5. There is one further use that the Model Law might have, which is additional to the main purpose but which may still be of considerable importance, and that is that it may serve as a point of reference when an evaluation has to be made as to whether or not a franchisor has provided adequate information. The model law lists a considerable number of items that are of importance to a prospective franchisee in the evaluation of the franchise it is considering buying, and the fact that the Model Law lists these items draw them to the attention of the judges that have to evaluate whether or not adequate disclosure has been made. It will thereafter be up to the judge to evaluate whether, in the particular case at hand, one or other of the items should have been disclosed.

6. The requirements of the Model Law as presently drafted, in particular Article 6, are listed in great detail. How detailed the law should be was discussed at length by the UNIDROIT Study Group which prepared the Model Law, the members from the civil law countries having a distinct preference for a shorter text. In the end, the importance of each single item that was discussed was such that the text of Article 6 remained rather longer than a uniform law text would normally be. As indicated above, the Explanatory Report to the Model Law illustrates the purposes of the single provisions and explains the reasons for which the Study Group considers disclosure of a certain item important. The legislator of each individual country will decide whether or not it is necessary to include a particular item, or whether it is for instance already adequately covered by other legislation applicable in the country.

7. It is not always easy to identify exactly why a particular subject-matter is the subject of attention on the part of the national legislator. The most obvious reason for the introduction of legislation is a desire to take care of problems that have arisen, to redress the balance between the parties to an agreement where the necessary balance either does not exist or has been distorted, and of course to make sure that abuses either do not occur or, where they have occurred, that they do not occur again. Other motivations cannot however be excluded, such as economic motivations (the desire to protect domestic industry or to levy fees or taxes, for instance).

8. In the legislative process the national legislators will naturally weigh a number of different elements, including

- whether it is clear that there is a problem, what its nature is, and what action, if any, is necessary;
- whether there is a pattern of widespread abusive conduct, or whether this conduct is isolated or limited to particular industries;
- what the nature of the evidence of abuse is, whether it is empirical or only anecdotal;
- whether existing laws address the concerns and whether they are adequately applied;
- whether a system of self-regulation exists and if so whether or not it is sufficiently effective to address the concerns;
- what financial burden the new legislation will place upon franchisors and the extent to which this financial burden will be passed on to franchisees and ultimately to consumers;

- whether the proposed legislation will constitute a barrier to entry to small and new franchisors, including foreign franchisor, and if so what the effects may be in terms of job-creation and investment;

and

- what the views of the national franchise association are.