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U N I D R O I T

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A
MODEL FRANCHISE DISCLOSURE LAW

Second session
(Rome, 8 - 12 April 2002)

Comments submitted by the United States

Rome, March 2002

REFERENCES

“Draft Articles” means Part I of Doc. 37, the draft Model Law as revised at the June 2001 session;

“Draft Explanatory Report” or “ER” means Part II of Doc. 37, the draft Explanatory Report as revised at the June 2001 session;

“Doc. 36” means the Secretariat’s report on the June 25-29, 2001 session.

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The United States thanks the UNIDROIT Secretariat for its excellent work in preparing the Draft Articles and Draft Explanatory Report. We have no new proposals to offer at this time, as all of our major proposals are included in the draft documents. Of course, if there are proposals from other delegations, we may have responses to them. In our view, the three major substantive unresolved issues are:

- Exemptions (Article 5)
- Information To Be Disclosed (Article 6)
- Remedies (Article 9).

Two other important unresolved issues are:

- Whether the franchisor’s financial statements have to be “audited or otherwise independently verified” (Article 6(1)(N)(i)(c))
- Language of Disclosure Document (Article 8).

We offer our general and specific comments on these issues.

GENERAL COMMENTS

Issues that were decided at the last session must not be reopened. There was a full and lengthy discussion of the entire instrument in June, and the Committee was able to reach a consensus on many provisions.

It cannot be overemphasized that this is a Model Law, not a Convention. National legislatures will naturally modify it to suit their individual requirements. Many of the countries participating in the UNIDROIT project already have franchise disclosure laws, and are unlikely to change them to adopt the new Model Law. The intended audience for this Model Law is countries that are new to franchising. They need as much useful information as possible. It should not be a problem to include in the Model Law more or different information than some countries require or allow under their existing laws, as there is no need for those countries to change their laws.

The UNIDROIT Study Group, composed of franchise law experts, has been working on this project since the Study Group was set up in 1993. As the Draft Explanatory Report makes clear, the Study Group carefully considered during its nearly 10 years of work on this subject every one of the arguments raised during the June 2001 meeting on every one of the unresolved issues listed above. Therefore, the U.S. starting position is to presume that the Study Group's unanimous choices were well-considered and intended to encourage the growth of franchising as a vehicle for conducting business and a means of increased economic development for both franchisors and franchisees. This presumption is, of course, rebuttable, and there may be situations where the interests of the governments and the industry are not the same. But in our experience, the views of the industry experts deserve considerable weight.

In particular, the Study Group, which was composed of members from both common and civil-law countries, debated at length the issue of whether the disclosure requirements in the Model Law should be illustrative or exhaustive. The consensus of the Study Group was that in this key area, the Model Law needed to be clear and unambiguous. The ER should explain that the Model Law is intended to provide maximum flexibility for legislators, as they can pick and choose which items of disclosure to include in domestic legislation. However, whichever items they include, the list itself should be exhaustive, so as to provide a secure and predictable legal environment for both franchisors and franchisees.

SPECIFIC COMMENTS

Article 5 – Exemptions

The issue of whether the Model Law should include a provision on exemptions was decided at the last session, and that discussion cannot be reopened. However, the bracketed language of Article 5 should be reexamined. There was also a proposal from one delegation concerning Article 5(G), which should be discussed.

Article 6 - Information To Be Disclosed

As explained above, the U.S. strongly supports a closed list of mandatory disclosures. An open list would not offer national legislatures meaningful guidance, would invite litigation, and would undermine the security and predictability that is a goal of the Model Law.

Article 9 - Remedies

There was great confusion at the last session over the use of the word "termination," as it apparently means different things in different languages and legal systems. It appears from the discussion in Doc. 36 (paras 270 – 285) and in the ER (para 128) that the Study Group went through a similar debate, and concluded that the word "termination" was the best choice, especially since it is the term used in a similar context in the UN Convention on Contracts for the International Sale of Goods. The Study Group advised that national legislators should consider which term is most appropriate in their language and system as a translation for "termination" as used in the Model Law.

Many alternatives were proposed and rejected during the June session. Three options now appear in the Draft Articles:

- Delete the Remedies Article completely;
- Include the article, with the word “termination” in brackets, and with the proviso that proof that the non-disclosure or misrepresentation caused no injury to the franchisee would exonerate the franchisor;
- Include the article, with the term “termination” in brackets, and no proviso.

The U.S. supports option 2, which is substantially similar to the Study Group’s proposal. Given the lengthy debate over the word “termination,” which ended with no more appropriate word having been suggested, the U.S. supports the Study Group’s recommendation that any possible problems of misinterpretation be addressed in the ER.

Audited or otherwise independently verified financial statements (Article 6)/language of disclosure document (Article 8)

These are important unresolved issues, but not as essential as the others discussed here. The requirement that the franchisor’s financial statements be audited or otherwise verified is bracketed, because some delegations thought the requirement might place too heavy a burden on franchisors. The U.S. view is that this concern should be addressed in the ER (see para 216 of Doc. 36).

All of Article 8 is bracketed, as some delegations thought the issue of the language of the disclosure document should not be dealt with in the Model Law. The U.S. believes that this an important provision that should be included in the Model Law; concerns can be expressed in the ER (see paras 261-269 of Doc. 36).