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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
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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 European Franchise Federation

Rome, March 2002

The EFF is satisfied that the UNIDROIT draft has made sufficiently clear at the onset the exact nature of the Model Law as an international legal instrument, and the liberty that national legislators have in adopting, or amending and adopting this instrument after due consideration has been made of its appropriateness to their national circumstances.

The EFF is likewise satisfied, that whatever the governmental experts agree to in the end in terms of format of this Model law – either a very detailed closed list of provisions or a shorter list of categories of provisions to disclose, either choice accompanied or not by cases of exemptions – the actual text of the Model Law be accompanied by detailed Explanatory Notes which reflect both the strengths and weaknesses of the provision being explained. The Model Law and its Explanatory Notes must form one document for the benefit of national legislators.

One of the major concerns of some of the members of the Working Group on this Model Law was that the existence of such an instrument, in the hands of legislators unfamiliar with franchising, and in countries where franchising is still a new means of distribution, might (more than probably would) lead to the wholesale, because poorly informed, adoption of this Model Law.

Full, even contradictory, explanation in the Notes of the pro's and sometimes con's of certain provisions of this Model Law might ease both its adoption in respect of its current general lines, and at the same time reassure those who may still have reticences with regard to some provisions that their concern is reflected in the UNIDROIT document.

Having said this, the EFF with regard to Disclosure in general (and not only with regard to the UNIDROIT Model Law) is in favour of self-regulatory disclosure in countries where the nature of franchise development, as well as the strength of national franchise associations which actively promote and defend disclosure for their members, allow this. This position is expressed through the EFF's Code of Ethics for franchising. A majority of countries still are not considering either legal disclosure or any other form of legislation on franchising.

At the same time, and when the conditions warrant it, the EFF is in favour of promoting legislation on Disclosure.

Self-regulatory or legal pre-contractual Disclosure is the first step to a balanced, frank, transparent and long-lasting franchise relationship.

Any list of disclosure provisions must be reasonable, relevant, clear, practical and ultimately efficient for the purpose sought.

If practicality or circumstantial needs call for categories of exemption from disclosure to be included in a Model Law, then their justifications and conditions must be made very clear. (see details below).

To underline further the realistic, pragmatic and therefore efficient nature that this Disclosure Model law must have, the EFF suggests including a new general provision which states that where a franchisor realistically and honestly believes that a certain piece of information to be provided exists but cannot be provided, that he should be able to

say so, whilst at the same time providing the other party with the adequate, reasonable and verifiable justification for not doing so.

Such a provision respects the spirit of the principles for Disclosure without giving this principle a “straight-jacket” or “non-disclosure = presumption of guilt” undertone.

Such a provision would not take away from the clarity or security of the provisions offered in the Model Law.

On specific provisions of the Model Law, the EFF has the following comments:

ARTICLE 5: CATEGORIES OF EXEMPTIONS FROM THE OBLIGATION TO DISCLOSE:

- 5A: The EFF agrees to list this exemption, and finds the Explanatory notes sufficient.
- 5B: This provision is based on a presumption that a transferor or assignor franchisee would pass on all the relevant information to a prospective transferee or assignee franchisee (see Explanatory Notes # 67 and 68). The EFF is not convinced this would necessarily be the case, in particular in the situation in which, as stated by the WFC in its comments, the transferor/assignor is seeking to pull out of a problematic franchise contract and is eager to find a replacee. In such conditions, the transferor/assignor may well be tempted not to disclose relevant material information.
- The EFF would like the Explanatory Notes to be a lot more explicit – for the benefit of future legislators – on the weakness of this presumption. Furthermore, this presumption, if accepted per se, exonerates the franchisor from any disclosure responsibility in his future relationship with the transferee/assignee franchisee. Ultimately, the franchisor cannot be exonerated of the obligation of full disclosure to a future partner, or of its consequences, under the pretext that he is not in the forefront of the negotiations with the transferee or assignee franchisee.
- 5C: The EFF agrees to list this exemption, and has no comments to add to the Explanatory Note.
- 5D and E: This provision is offered for cases in which the corporate sophistication of the buying party, and the presumably heavy (and transparent) negotiation that goes on between investors of this calibre, may warrant an exemption from disclosure as defined in the Model Law. The EFF finds the Explanatory Notes sufficiently clear on this question.
- 5F: The EFF agrees to list this exemption, and finds the Explanatory notes sufficient.
- 5G: The EFF agrees with UNIDROIT’s stated purpose that the Model Law is to help promote and protect franchising in the countries considering adopting this Model law. In many countries, franchising is still new. Franchising enters new markets both through the large sophisticated investor (master franchising, area developer, etc. for which 5D and E foresees exemption from disclosure) and then starts spreading at grass-roots level through the unit franchisees, whose investments are on the lower

end of the investment scale. These investors are the staple bread of franchising and constitute its largest portion of franchisees across the world. The purpose of Disclosure, surely, is to protect this level of investors.

Offering exemption for this category of franchisee is to take the bottom out of the whole idea of Disclosure.

The EFF is of the opinion that if the majority of Governmental experts wish to maintain this category of exemption, then the Explanatory Notes must be totally clear on the role of small franchisees in the development of franchising, and recognise the importance of their protection in the national circumstances under consideration.

5H: If the presumption of this provision is the same as that of 5D and E, and satisfactory to the majority of Governmental experts, then the EFF has nothing to add.

ARTICLE 9: REMEDIES: "TERMINATION"

The EFF would like to see article 9 modified to express the concerns below:

The EFF is of the opinion, contrary to what is stated in # 130 of the Explanatory notes, that a franchisee cannot of his own free will or unilaterally invoke termination of the contract for alleged non compliance by the franchisor of disclosure.

The allegation must be:

- determined by a formalised procedure: either mediation, arbitration or a judicial procedure;
- furthermore, if termination is the outcome, it must be termination under the conditions of the agreement which means that all the effects of the agreement can't simply disappear.
- If, for example, the contract had post-term non compete clauses, these must be recognised and they must produce their full legal effects.
- More generally, the EFF is of the opinion that termination for non-respect of disclosure only makes sense if the franchisee can prove that the non-respect carried on an essential element determining his will to contract.

This is an important specification to add to Article 9 itself. It complements the concepts of misrepresentation or omission on "material facts".

OTHER ARTICLES:

For comments relating to other articles, the EFF subscribes to the comments made by the WFC.