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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 Italy

Rome, April 2002

The text of the draft Model Law accompanied by the Explanatory Report as resulting from the Last meeting of the Study Group in 2000, which was submitted to *the Committee of Governmental Experts* in summer 2001 and revised following the first session of the *Committee* itself in June 2001, will now be discussed during the second session in Rome from 8 to 12 April 2002.

There are still quite a great number of issues to be approached, but I will mainly focus on the following major substantive unresolved issues.

Art. 2 - Definitions. In the definition of "franchise" it is suggested to specify that "operational control" is aimed at preserving the performance by the franchisee of its obligations and the unity of the network's image only.

Art. 5 - Exemptions. An issue left open to be discussed at the second session concerns the exemption from disclosure in case of an assignment of contract. The two options proposed under art. 5. B) both relate to the absence of an obligation to disclose, but the Italian delegation deems it preferable the second option which excludes disclosure if the assignee or transferee is bound by *substantially* the same terms. In a great number of legal cultures adverbs (for instance *substantially)* have to be interpreted by judges, which does not mean that a "grey area" will be introduced in the text of the Model Law, but simply that by avoiding to stick to a strict definition, a major flexibility relating to single cases will be possible.

Regarding the proposed deletion of paragraph G), to my opinion this paragraph has to be maintained. It is true that the aim of the Model Law is to protect the franchisees, which in general terms are considered the weaker party, but it is all the most true that we must think at a rational law in terms of efficiency: if we put on the franchisor a too expensive burden (in relation to the expected income), this would refrain from offering franchises to small points of sale, thus from one side, preventing the franchisor to further expand on the territory and, from the other side, constituting a barrier to entry for a lot of new small prospective franchisees. Cost-benefits analysis would consequently lead to maintain such exemption.

Art. 6 - Information to be disclosed. The main question to be decided in relation to art. 6 is whether the list of items to be disclosed should be exhaustive or illustrative. It is a question of philosophy underlying the rule. An exhaustive list gives more certainty or predictability, the opposite would be the result if we choose an illustrative list, since there would be a lot of franchisees claiming that other documents or information outside the list ought to be disclosed.

In general terms I share the French observations, with the following comments. If the Model Law will list only few essential elements, a general clause saying that any other "material facts should be disclosed" in relation to the circumstances is acceptable. On the contrary, if the choice favours the long and detailed list as in the present draft, it should be exhaustive.

As far as the proposed insertion of a new sub-paragraph (state of the market) under art. 6 is concerned, I would simply draw the attention on the fact that it is not always so easy for the franchisor to provide the franchisee with a state of the local market, which may be better known to the local franchisee.

Art. 9 - Remedies. There is a consensus on the principle that noncompliance with disclosure obligations should be sanctioned and that the most suitable remedy is not the "absolute" nullity, is not submitted to any statutory limitation.

For what concerns the other remedies the various remedies familiar to each jurisdiction differ so much and are so deeply rooted in each legal culture, that it is difficult to formulate a commonly accepted uniform rule. Therefore the Italian delegation suggests, as a first choice, to leave to the applicable national law to specify what kind of remedies shall be given to the franchisee and therefore state that " .... the *franchisor will undergo any consequences according to the national law ....".*

If the above solution is not retained, a subsidiary proposal is offered by the Italian delegation, namely that "termination of the contract for non-performance has retroactive effect, as between the parties, except in the case of contracts for continuous or periodic performance, with respect to which the effect of termination does not extend to performances already made".

To our knowledge such solution, besides existing in a lot of countries that have civil codes, has a *rationale* because in every contract of duration, total restitution is not physically possible.

Regarding in particular the entrance fee, the rule that it should be wholly returned is reasonable only when the termination takes place very soon after the running of the contract, but if the contract has already lasted for - let's say - three years. In the latter case and insofar as the entrance fee in consideration of the license to use franchisor's distinctive signs and/or know-how, there is no reason why it should be wholly returned, since the franchisee has never benefited from the use of such industrial property rights.

Last but not least, the Model Law should not make any specific reference to the right of the franchisee to file the claim for release from any damages suffered by the franchisee due to non-compliance with disclosure obligations, because art. 9 sub-paragraph 4 already covers the problem.