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COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A  
MODEL FRANCHISE DISCLOSURE LAW

Second Session  
(Rome, 8 - 12 April 2002)

***REPORT***  
(prepared by the Secretariat)

Rome, June 2002

1. The Second Session of the **Committee of Governmental Experts** convened to examine the **Draft Model Franchise Disclosure Law** was held in Rome, at the seat of UNIDROIT, from 8 to 12 April 2002. A list of participants appears as Annex 3 to this Report, whereas the text of the black-letter rules of the Model Law as finally adopted by the Committee appears as Annex 1.

2. The documents before the Committee were the following:

- Study LXVIII - Doc. 36: Report on the First Session of the Committee, held in Rome from 25 to 29 June, 2001;
- Study LXVIII - Doc. 37: Draft Articles for a Model Franchise Disclosure Law with Draft Explanatory Report as revised by the Committee of Governmental Experts at its First Session;
- Study LXVIII - Doc. 38: Comments submitted by the People's Republic of China;
- Study LXVIII - Doc. 39: Comments submitted by France;
- Study LXVIII - Doc. 40: Comments submitted by the People's Republic of China;
- Study LXVIII - Doc. 41: Comments submitted by the United States;
- Study LXVIII - Doc. 42: Comments submitted by the World Franchise Council;
- Study LXVIII - Doc. 43: Comments submitted by the European Franchise Federation;
- Study LXVIII - Doc. 44: Comments submitted by Germany;
- Study LXVIII – CGE – II/Misc. 1: Text in English and French of the Draft Model Franchise Disclosure Law as modified at the First Session of the Committee of Governmental Experts on Franchising; and
- Study LXVIII – CGE – II/Misc. 2: Issues left open to be discussed at the Second Session.

3. In the course of the meeting, the following documents were distributed:

- Study LXVIII - Doc. 45: Comments submitted by Italy;
- Study LXVIII - Doc. 46: Comments submitted by the Republic of the Philippines; and
- Study LXVIII – CGE – II/Misc. 3 - 15: Proposals submitted by the various delegations on the single provisions under discussion;
- Study LXVIII – CGE – II/Misc. 16: Text in English and French of the Model Franchise Disclosure Law as modified at the Second Session of the Committee of Governmental Experts on Franchising (see Annex 1); and
- Study LXVIII – CGE – II/Misc. 17: List of Points to be dealt with in the Explanatory Report (see Annex 2).

4. Opening the meeting, **Ms Hernany VEYIA (Mexico)**, Chairperson, welcomed back the delegations that had participated in the first session, and warmly welcomed the delegations that were participating for the first time, namely Austria, Bulgaria, Greece, Hungary, Poland and Turkey, as well as the delegations that were participating as observers (Thailand and the Philippines).

5. **Mr Herbert KRONKE**, Secretary-General of the organisation, extended a cordial welcome to delegates on behalf of the President and Governing Council of the Institute. In his introductory statement, the Secretary-General stressed the importance of disclosure for the coming into being of a franchise. He stated that although disclosure might appear to be limited as a scope of legislation, it was crucial if prospective franchisees were to be able to take an informed decision as to whether or not to enter into a franchise arrangement. The vast majority of disputes to be resolved in courts and by arbitral tribunals arose out of insufficient or inaccurate information, or at least of the franchisee's perception that the information was ambiguous or inaccurate. Disclosure could therefore be considered to be the core area of this type of relationship. He recalled that the instrument being created was a Model Law, and would therefore only have persuasive force by reason of its intrinsic technical quality.

6. Introducing the documents before the Committee, **Ms Lena PETERS**, Research Officer and Secretary to the Committee, recalled that the text of the draft Model Law and Explanatory Report under review was reproduced in document Study LXVIII – Doc. 37, and that documents 38 to 44 contained comments submitted by delegations. Furthermore, document Study LXVIII – CGE-II/Misc. 1

contained the black-letter rules of the draft Model Law side by side in English and French, and Study LXVIII – CGE-II/Misc. 2 contained a review prepared by the Secretariat of the open issues that were on the table. In document Misc. 1, the terms defined in Article 2 followed the English alphabetical order for ease of comparison, whereas in the final version of the Model Law the terms would follow the alphabetical order of the language used. Also available to the Committee for reference purposes was the Report on the First Session (Study LXVIII – Doc. 36).

7. With a view to reviewing the French version of the draft Model Law, which several delegations felt not to correspond fully to the English version, a Drafting Committee specifically for the French text was set up. All interested delegations were invited to attend, and the delegations of Belgium, Canada, France, Switzerland and Tunisia took part in the deliberations of the Committee. **Mr Bruno POULAIN**, Associate Research Officer, served on the Committee on the part of the Secretariat.

8. In examining the draft, those parts of the text of the provisions that were in brackets were examined first, the written proposals submitted by delegations before the meeting second, and the written proposals prepared in the course of the meeting last. Decisions were taken by majority vote. On the final day the Committee examined the text of the black-letter rules as approved by the Committee during the week, and endorsed that the text before them corresponded to the text approved (see Misc. 16). It also approved a list of the items that it had decided should be dealt with in the Explanatory Report (see Misc. 17). In view of the need envisioned by the Committee to further review the French text from a linguistic point of view, it was decided that the French-speaking members of the Committee should have a period of time to submit comments and proposals for review to the Secretariat. It was decided that the Secretariat would send the revised text and Explanatory Report to the members of the Committee for final endorsement before submission to the Governing Council of the Institute.

9. Although the procedure for the review of the text was such that a number of provisions were examined more than once and at different times, this Report will deal with all aspects of each provision together, in the order in which they appear in the draft.

## PRELIMINARY QUESTIONS

**Documents:**            *Comments by France (Doc. 39 p. 1)*  
                               *Comments submitted by the European Franchise Federation (Doc. 43 p. 1)*  
                               *Issues left Open (Misc. 2 p. 1)*

10. A preliminary question concerned the nature of the instrument under preparation and consequently the title it should be given. In its comments, the **FRENCH** delegation (see Doc. 39) indicated that the title “Model Law” tended to substantiate the idea that the text, because it presented itself as a model, must be followed point by point. Both versions of the proposed Preamble however indicated clearly that the text was not mandatory. The delegation therefore suggested that for the title of the instrument to be consistent with its non-mandatory nature, it should be changed to “Guide”. This proposal was subsequently re-proposed by the French delegation in its proposal for a Preamble (Misc. 12 - see the Report on the discussion of the Preamble below).

11. A further preliminary question concerned the French translation of the term “Model Law”. The term chosen by the Study Group had been “*Loi modèle*”, but the term more commonly used, for example by UNCITRAL, was “*Loi type*”. The Secretariat therefore proposed in document Misc. 2 that this latter terminology be used. This proposal was accepted by the Committee.

## PREAMBLE

**Documents:** *Doc. 36 paras. 21 – 24;*  
*Doc. 37 Alternative 1 in the text on p. 9, Alternative 2 paras. 1 – 40 on p. 1 - 8;*  
*Comments submitted by Germany (Doc. 44 p. 1)*  
*Comments submitted by the World Franchise Council (Doc. 42 p. 1)*  
*Issues left Open (Misc. 2 p. 1)*  
*Proposal submitted by Japan (Misc. 3),*  
*Proposal submitted by France (Misc. 12)*  
*Proposal submitted by Japan (Misc. 14)*  
*Proposal submitted by USA (Misc. 15)*

12. At the First Session of the Committee it had been decided that a Preamble should be added to the text. Two alternatives were submitted to the Committee. The first alternative consisted in including a provision along the lines of those in other Model Laws, such as the *UNCITRAL Model Laws on Cross-border Insolvency (1997)*, on *Procurement of Goods, Construction and Services (1994)* and on *Procurement of Goods and Construction (1993)*. Such a provision would be placed immediately before the actual text of the articles of the Model Law. The Secretariat had made a proposal to illustrate what might be put into a preamble, taking into consideration the points raised in Alternative 2. Alternative 2 consisted in moving parts of the beginning of the Explanatory Report to before the text of the Model Law and in the addition of a number of paragraphs (paragraphs 2 to 3 and 5 to 9 on p. 1 *et seq.* of document 37). Paragraph 8 had been moved from another position in the Explanatory Report. In their comments, **GERMANY** expressed a preference for Alternative 1 (see Doc. 44) and the **WORLD FRANCHISE COUNCIL (WFC)** for Alternative 2 (see Doc. 42).

13. A discussion on the nature and importance of preambles and on their role in national and international legislation took place. It became clear that their importance varied from system to system. Their importance was far greater in countries such as the United States, in which they often appeared as a set of findings or conclusions reached by the drafters and reflected the drafters' sense of what was most important, than in countries of a civilian tradition where legislation in most cases had no preamble at all. Furthermore, the preambles to international instruments contained either solemn declarations of conviction on the part of the body adopting the instrument, or very short statements.

14. The Committee by majority vote decided to proceed on the basis of Alternative 2.

15. The delegation of **JAPAN** submitted a proposal in Misc. 3 as follows:

*“The International Institute for the Unification of Private Law (UNIDROIT),*  
*Recognising that franchising is to be encouraged as a vehicle for conducting business,*  
*Believing that State legislators may wish to consider a number of different elements in the legislative process,*  
*Recalling that State legislators may want to modify suggested provisions, especially with regard to the enumerated disclosure items, in response to specific circumstances of, or established methods of legislation in, each State,*  
*Finding that experiences with disclosure legislation has on the whole been positive,*  
*is pleased to place the Model Franchising Disclosure Law presented in this document at the disposal of the international community*  
*as an example that is not compulsory for States legislators and*  
*as an instrument not intended to be a recommendation that there is a need for a particular State to adopt franchise specific legislation”.*

16. Introducing this proposal, the Japanese delegate stated that it was intended to take the place of paras 1 – 3 of Alternative 2. This proposal had been prompted by the fear that Alternative 2 might be too long, and that readers would therefore not examine the whole text. He suggested that what was necessary to encourage readers was a summary of the contents of the Preamble at the very beginning. The proposed text was intended to serve as such a summary.

17. A suggestion to use the word “adapt” instead of “modify” in the Japanese proposal was accepted by the Committee.

18. The **FRENCH** delegation also submitted a proposal (Misc. 12) which read as follows:

*“The International Institute for the Unification of Private Law (UNIDROIT),*  
*Recognising* that franchising constitutes one of the forms of business in networks which is to be encouraged as a vehicle for conducting business,  
*Believing* that national legislators may wish to consider a number of different elements in the legislative process,  
*Recalling* that national legislators may want to modify suggested provisions, or select only some of them, especially with regard to the list of enumerated disclosure items which might appear to be too long for most countries, in response to specific circumstances of, or established methods of legislation in, each State,  
*Finding* that experiences with disclosure legislation has on the whole been positive,  
 is pleased to place the *Model Franchising Disclosure Law* presented in this document at the disposal of the international community  
 as an example that is not compulsory for State legislators and  
 as a guide which is not intended to be a recommendation that there is a need for a particular State to adopt franchise specific legislation”.

19. Introducing its proposal, the French delegation indicated that it had merely wanted to complete the Japanese proposal by making three additions. Firstly, a statement to the effect that franchising is only one of the forms of business in networks that should be promoted, as it was not the only one, secondly, a statement stressing that national legislators might want to modify suggested provisions or select only some of them, especially with regard to the list of enumerated disclosure items which might appear to be too long for most countries, and thirdly, the replacing of the word “instrument” by “guide” to underline that the Model Law was not a mandatory instrument. In submitting the proposal, the proponent recalled that a number delegations had stressed that the list was too long and consequently involved considerable expenditure for the franchisor, that it indeed constituted an obstacle to the development of small franchisors at both national and international level.

20. While the French suggestion of referring in the Preamble to the fact that the list enumerating the items to disclose might be felt to be too long in most countries received a certain support, it was opposed, firstly, because it was suggested that this would indicate a lack of confidence in the Model Law by the Committee adopting it, and secondly because it might happen that the list was too short, rather than too long. Furthermore, it was not felt necessary to change the word “instrument” to “guide”, as a model law was non-mandatory by nature.

21. The Committee decided to use the Japanese proposal as a basis for its deliberations. Following the debate, the **JAPANESE** delegation introduced a number of modifications to its proposal, and submitted it in revised form in document Misc. 14. The distributed version contained a number of mistakes. The corrected version of the proposal read as follows:

*“The International Institute for the Unification of Private Law (UNIDROIT),*  
*Recognising* that franchising is playing an ever greater role in a wide range of national economies,  
*Believing* that State legislators may wish to consider a number of different elements in the legislative process,  
*Recalling* that State legislators may want to adapt suggested provisions, especially with regard to the enumerated disclosure items, in response to specific circumstances of, or established methods of legislation in, each State,  
*Finding* that experiences with disclosure legislation has on the whole been positive,  
 is pleased to place the *Model Franchising Disclosure Law* presented in this document at the disposal of the international community

as an example that is not compulsory for States legislators and as an instrument intended to be a recommendation for States that have decided to adopt franchise specific legislation”.

22. Having decided to use the Japanese proposal as a basis for its deliberations, the Committee considered the fate of paras 4 – 40 of Alternative 2. One proposal was to transfer paras 4 – 40 to the Explanatory Report, another to transfer only paras 10 - 40, as the nature of paras 4 - 9 appeared to differ from that of paras 10 – 40. Yet another proposal was to retain the Japanese proposal as the Preamble, and to move paras. 4 – 9 into the Preface and paras. 10 – 40 into the Explanatory Report.

23. In this connection the **UNITED STATES** presented a proposal (Misc. 15) intended to integrate the Japanese proposal by adding to the Japanese proposal in Misc. 14 the contents of para. 4 of Alternative 2, slightly redrafted, as follows:

“4. In the legislative process, State legislators may wish to consider 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 prospective investors are more likely to protect themselves against fraud if they have access to truthful, important information in advance of their assent to any franchise agreement;
  - whether the nation’s economic and social interests are best served by legally requiring a balance of information between the parties to a franchise agreement;
  - whether there is a pattern of abusive conduct, or whether this conduct is isolated or limited to particular industries;
  - the nature of the evidence of abuse;
  - whether existing laws address the concerns and whether they are adequately applied;
  - whether an effective system of self-regulation exists
  - the financial burden the new legislation will place upon franchisors and investors as compared to the benefits of legally-required disclosure;
  - whether the proposed legislation inhibits or facilitates entry to franchisors, and its affect on job-creation and investment;
- and
- the views of interested organisations, including national franchise associations”.

24. The USA further proposed that paras 5 – 40 be moved to the Explanatory Report. It stressed the importance it attached to the contents of para. 4 being in the Preamble itself, and not in the Explanatory Report. It indicated that the previous version of para. 4 had not reflected the main concern of the US delegation, i.e. the protection of investors and of consumers. For this reason it proposed adding two very important points, namely whether prospective investors were more likely to protect themselves against fraud and whether the nation’s economic and social interests were best served by a legal requirement for balance in the information availability. If the proposed wording were adopted, the opening line would need to be modified to conform to the other paragraphs of the Preamble.

25. The list of questions contained in para. 4 raised a number of doubts, an objection being that legislators would naturally have to consider the impact of the legislation they were proposing, and that it was difficult to imagine how a legislator could decide that an investor should not have access to truthful and important information. It was therefore suggested that it was not necessary to put these questions in the Model Law. It was also pointed out that of the original points contained in para. 4 which were no longer included in the US proposal, one which was of particular importance was whether the proposed legislation would constitute a barrier to entry to small and new franchisors. Other delegates instead supported the US proposal to retain the contents of para. 4 in the Preamble itself, even if it was not necessary in all legal systems.

26. In the end, the Committee decided to adopt the Japanese proposal contained in Misc. 14 in place of paras. 1 – 3 of Alternative 2, to integrate the Japanese formulation with the US proposal for a revised para. 4 and to move paras. 5 – 40 to the Explanatory Report. To the beginning of para. 4 the words “[b]eing mindful of the fact that” were added.

27. A proposal to introduce the concept of the cost of the disclosure to small franchisors by stating “[s]tressing the fact that the list of the disclosure information can be dramatically shortened to take into consideration the cost of the disclosure for small franchisors” was rejected by the Committee.

28. As regards para. 13 of Alternative 2, one delegation proposed deleting it, as it appeared to be addressed to judges, and he felt that the Model Law, which was addressed to national legislators, should not address judges. While some delegations agreed with this analysis of the paragraph, one delegation pointed out that judges would in any event be using the Model Law as a point of reference when in doubt and concluded that the paragraph might be maintained, even if slightly reworded. In the end, the Committee decided to delete para. 13.

29. As regards para. 14, it was suggested that it, too, be deleted, as the fact that national legislators were free to decide which provisions to include in the legislation they were drafting was stated repeatedly in the Explanatory Report and was now stated also in the Preamble itself. This proposal was accepted by the Committee.

30. Finally, as regards para. 15, which dealt with the Explanatory Report, it was suggested that its contents, albeit abbreviated, be transferred to the Preamble. This proposal was also accepted by the Committee.

31. In the course of the final adoption of the text of the Model Law, a question was raised as regards the translation of the English word “including” in the Preamble, which had been omitted in the French version which merely referred to “the following” elements. It was proposed that the concept “including” should be rendered by “*notamment*” in French. While there was opposition to this, as it was felt to add nothing, in the end it was decided to accept this proposal. Another question that arose in relation to the French text concerned the rendering of the English “State legislators” by “*législateur étatique*” in French, which it was felt to be inappropriate. Considering the context in which the English term “State legislators” was used, it was suggested that the appropriate French rendering of that concept would be either “*législateur national*”, or in fact the omission of the reference to the State. In the end the Drafting Committee convened for the review of the French text decided to opt for this second solution.

## ARTICLE 1

**Documents:**        *Doc. 36, paras. 27 – 33*  
                           *Doc. 37 Explanatory Report paras. 35 – 38*  
                           *Comments submitted by Germany (Doc. 44, p. 1)*  
                           *Issues left Open (Misc. 2 p. 1)*

32. At the First Session, following a discussion on whether the Model Law should apply only if franchise agreements were actually concluded at the end of negotiations or also in cases where no agreement was concluded at the end of negotiations, the Committee had decided to include both options in Article 1 by stating that the law “applies to franchises [to be] granted [...]”. It was further recalled that the words in the second set of square brackets (“State adopting this law”) were intended to be left in square brackets, as they were merely intended to permit States, in particular federal States, introducing the Model Law into their legislation to specify the territory to which they intended the law to apply by using the formulation they commonly used for such purposes.

33. In the comments it had submitted in Doc. 44, the **GERMAN** delegation had proposed a rewording of Article 1, as well as the addition of a second paragraph as follows (proposed modifications and additions in italic):

“(1) This law applies *whenever a franchise agreement is entered into or renewed and according to which the franchised business shall be operated* within the [State adopting this law].

(2) *Except as otherwise expressly provided in this law it is not concerned with the validity of the franchise agreement or any of its provisions”.*

34. Introducing its proposal, the German delegation explained that in going through the text prior to the meeting, it had re-examined the issue of the agreements to which the law should apply, and had decided that it should apply also to cases of renewal. Furthermore, it had felt that it would be necessary to reformulate the provision in order to bring it in line with Article 10, which also dealt with scope of application and which had been adopted at the First Session. Secondly, an issue which had been a source of concern at the First Session was that of cases in which a franchise agreement might turn out not to be a valid agreement or might not be recognised to be a valid franchise agreement. It therefore proposed to add a second paragraph inspired by the corresponding provision of the 1980 *United Nations Convention on Contracts for the International Sale of Goods (CISG)* stating clearly that the Model Law was not concerned with the validity of the franchise agreement or any of its provisions.

35. As regards the modifications to the present text of Article 1 (paragraph (1) in the German proposal), while there was agreement that the law should apply also in cases of the renewal of franchise agreements, provided the exemption in Article 5(F) for very particular cases of renewal were maintained, the proposed reformulation of the text did not meet with the favour of the Committee. It was considered to be less clear than the present wording, which stated that the law applied to franchises to be granted, therefore clearly to the pre-contractual stage of negotiations, which was what the Committee had agreed upon. In the re-formulation this was ambiguous in the English version, even if the French version was clearer and appeared to indicate that the law should apply to agreements that had already been concluded (“*a été conclu ou renouvelé*”). One delegation however observed that in practice, unless the agreement was entered into, there could be no damage to anyone. This was contested by another delegation, which recalled that Article 9, which dealt with remedies for the non-performance of the obligations under the Model Law, provided for termination as remedy, and that paragraph (4) of that article provided that other remedies available under national law were also available in case of non-performance, with the consequence that they would be available also in cases in which the franchise agreement had not been concluded at the end of the negotiations.

36. In the end, a proposal to add renewal to the original formulation of Article 1 was adopted, the provision consequently reading “[t]his law applies to franchises to be granted or renewed [...]”. The German proposal to add a second paragraph did not give rise to any opposition and was consequently adopted by the Committee.

## ARTICLE 2

### DEFINITION OF A “FRANCHISE”

**Documents:**        **Doc. 36 paras. 51 – 67**  
                           **Doc. 37 Explanatory Report paras. 42 – 51**  
                           **Comments submitted by France (Doc. 39 p. 2)**

37. The definition of the term “franchise” in the present text contained the words “on its own behalf” in square brackets. The addition of these words had been proposed to ensure that the notion of the independence of the franchisee were maintained. The Committee agreed to maintain the words “on its own behalf” and the square brackets were consequently deleted.

38. In Doc. 39 the **FRENCH** delegation expressed its concern that the definition in the draft altered the notion of the independence of the franchisee as, by specifying that the franchisor exercised “significant and continuing operational control” without specifying the extent of the control, it opened the possibility of the franchisee being dominated by the franchisor, as the latter would have no obstacles to its domination of the former. The French delegation therefore proposed that the present definition of a franchise be deleted, the notion of control consequently being deleted, and that it be replaced by a definition of the term “franchise agreement” as follows:

“a franchise agreement is a contract for distribution which associates an enterprise, owner of a trade mark or sign, the franchisor, with one or more independent tradesmen, the franchisees.

Franchise agreements consist in licenses for intellectual property rights concerning trade marks, distinctive signs or know-how for the sale and distribution of goods or services.

In exchange for direct or indirect compensation the franchisor puts at the disposal of the franchisee its trade mark and/or its sign, its products, its know-how and technical assistance.”

39. It also proposed that the present text of para. 50 of the Explanatory Report be replaced by the following:

“The franchisor must be able to make sure of the quality of the running of the franchise. It falls to the national legislator to make sure that the control that is instituted does not affect the independence of the franchisees and that under the labour law applicable in the country in question it is not possible to redefine the agreement as an employment contract”.

40. While one delegation suggested that a compromise might be reached by specifying the limits of the operational control, the proposal to eliminate the notion of control did not receive the support of the Committee, although one delegation expressed the concern that a franchisor might escape application of the law by claiming that the extent of his control was not sufficient, or not sufficiently efficient, to qualify as “significant and continuing”. In order to draw attention to these concerns, the Committee decided that they should be considered in the Explanatory Report.

**DEFINITION OF “PREDECESSOR OF THE FRANCHISOR”**

**Documents:**        *Doc. 36 paras. 153 - 164*  
                               *Doc. 37 Explanatory Report para. 57*  
                               *Issues left Open (Misc. 2 p. 1)*

41. At the First Session a discussion had taken place on the inclusion of the predecessor of the franchisor under Article 6(1)(G) and on the consequent inclusion of a definition of the predecessor of the franchisor in Article 2. Doc. 37 included such a definition in square brackets, and also a commentary thereto, again in square brackets. The Committee decided to examine the proposed definition after examining Article 6(1)(G). As the reference to the predecessor of the franchisor was deleted from the text of Article 6(1)(G), even if it was decided to consider the question of the predecessor of the franchisor in the Explanatory Report, there was no longer a need for a definition in the text, and it was consequently deleted.

**NEW DEFINITION OF AN “AFFILIATE OF THE FRANCHISEE”**

**Documents:**        *Proposal submitted by Japan (Misc. 4)*

42. In the course of the examination of Article 2, the delegate from Japan pointed out that the draft did not contain a definition of an affiliate of the franchisee despite the fact that Article 5(C) and (E) referred to the affiliates of the franchisees. He therefore submitted a proposed definition as follows:

“**affiliate of the franchisee** means a natural or legal person who directly or indirectly controls or is controlled by the franchisee, or is controlled by another party who controls the franchisee;”

43. This proposal was accepted by the Committee without debate.

## ARTICLE 3

**Documents:** *Doc. 36 paras. 72 – 75 and 247 – 255*  
*Doc. 37 Explanatory Report para. 37*  
*Comments submitted by Germany (Doc. 44 p.1)*

44. A general point regarding Article 3 concerned the Explanatory Report, in that the draft contained two versions of para. 58. The difference between them was the insertion in the second version of the sentences starting with "However, the phrase "any fees relating to the franchise [...]" and ending with "proposes to operate the franchise" instead of the phrase beginning "i.e. fees that are not refundable [...]". The committee decided to retain the second of the two versions.

### ARTICLE 3(1)

45. In Article 3(1)(B) the word "conclusion" was in square brackets in the English version of the text. The reason for this was that at the First Session a proposal to modify the word "conclusion" to "execution" to avoid confusion with the ending of the agreement had been accepted. However, as the word generally used in international conventions, such as the CISG, was "conclusion", it was suggested that it might be more appropriate to use "conclusion" also in the Model Law. This proposal was accepted by the Committee.

46. In Doc. 44 the **GERMAN** delegation had made a number of proposals for the redrafting of Article 3(1). The proposed text read as follows (proposed modifications in italic):

**(A)** the signing by the prospective franchisee *and by the prospective franchisor* of any *financially binding* agreement relating to the franchise, with the exception of agreements relating to confidentiality of information delivered or to be delivered by the franchisor; or

**(B)** the payment *on demand* of the franchisor or an affiliate of the franchisor by the prospective franchisee *to any of these persons* of any fees relating to the acquisition of a franchise that are not refundable or the refunding of which is subject to such conditions as to render them not refundable, with the exception of a security (bond or deposit) given on the execution of a confidentiality agreement."

47. Introducing the proposed modifications, the German delegation indicated that it had found what it considered to be a structural problem, and that was the fact that the Model Law created obligations for the franchisor, but did not allow the franchisor any control over the fulfilment of the obligations. Thus, the franchisor had to deliver a disclosure document at least fourteen days before the signing by the prospective franchisee of any agreement relating to the franchise or the payment of any fees relating to the acquisition of the franchise. It was however possible for a prospective franchisee, who received the disclosure document with the agreement attached and was told that he had fourteen days to examine the documents before signing, to sign the agreement ahead of time and then, when he wanted to get out of the agreement, to claim that he had a right to terminate because the disclosure document had not been given to him fourteen days before he had signed the agreement. For this reason it proposed adding a requirement in Sub-paragraph (A) that the agreement be signed also by the franchisor, and not only by the prospective franchisee. Secondly, it proposed adding a requirement that the agreements the signature of which would trigger the disclosure requirement be only those which were financially binding, as there were a number of agreements which did not have financial implications, but which a prospective franchisee would be required to sign, such as, for example, options to reserve a certain territory for a certain period of time, and of course confidentiality agreements which were however already excluded from the application of the provision. Similarly, a prospective franchisee might on its own initiative make a payment in advance of the required time, and subsequently file for termination on the grounds that the payment had been made less than the required fourteen days after the delivery of the disclosure document. For this reason, the proposal introduced in Sub-paragraph (B) the requirement that the payment should be made "on demand of the franchisor".

48. The proposals were opposed on a number of grounds. First of all, it was pointed out that the intent of the Model Law was to safeguard the franchisee from being under any obligation to make payments or to sign any document prior to receiving the disclosure document that the law envisaged,

and that consequently there was no room for the franchisor's involvement in the trigger provisions. One delegation also suggested that if a franchisee chose to sign an agreement ahead of time, he renounced his rights, but this interpretation was opposed on the grounds that Article 11 specifically stated that any waiver by the franchisee of a right given by the law was void.

49. Secondly, the proposed addition of "financially binding" was opposed as it was feared that it might limit the protection that would be provided the prospective franchisee as it would in effect limit the occasions on which the Model Law would come into play. Furthermore, a concept would be introduced which would have to be judicially interpreted. A definition of "financially binding" would also have to be added to Article 2.

50. In the end, the Committee decided to reject the German proposal for modification of the text of Article 3.

51. In Doc. 44 the German delegation also had a proposal for modification of the sentence starting "[a]t the very least, the time selected [...]" of para. 61 of the Explanatory Report, which it proposed should read as follows (proposed modifications in italic):

*"At the very least, the time period selected should not be shorter than the time period required for the disclosure of the annual account or financial statement under the applicable accounting or tax law."*

52. The reason this modification was proposed was that Article 3(2) did not provide for any specific time-periods and the German delegation felt that some guidance should be offered legislators. The present formulation of para. 61 merely stated that the time-period should be "reasonable", without indicating what was reasonable. Furthermore, it would be unreasonable to oblige a franchisor to give information before he had completed his annual accounts. All countries had deadlines for the preparation of such accounts, and it would not be very reasonable to fix a "reasonable" deadline in the Model Law that might be shorter than the dead-line set under commercial or company law for the preparation of the annual accounts. For this reason the proposal stated that the time period selected should not be shorter than the time period required for the disclosure of the annual account or financial statement under the applicable accounting or tax law.

53. The proposal did not give rise to any debate and was rejected by the Committee.

## ARTICLE 4

**Documents:** *Doc. 36 paras. 92 – 98*  
*Doc. 37 Explanatory Report paras. 63 - 64*

54. No issues having been raised, and no proposals having been made, in relation to Article 4, it was adopted by the Committee as it stood.

## ARTICLE 5

### ARTICLE 5(A)

**Documents:** *Doc. 36 paras. 106 – 107*  
*Doc. 37 Explanatory Report para. 66*  
*Comments submitted by Germany (Doc. 44 p. 2)*  
*Comments submitted by the European Franchise Federation (Doc. 43 p. 2)*

55. In Doc. 44 the **GERMAN** delegation submitted the following proposal for the re-drafting of Article 5(A) (proposed additions in italic):

*"(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 one year*

immediately before the signing of the franchise agreement *or to any other person who is familiar with all the information to be disclosed according to article 6;*"

56. Introducing its proposal, the German delegation stated that, comparing the text of the provision with the explanations in the Explanatory Report, it had felt that the intention of the provision was not always reflected in the text. The intention was to exempt the franchisor from the obligation to disclose if the prospective franchisee was a person who had all the information he needed. The practitioners consulted by the German delegation had indicated that not all those who had such information were listed in Article 5(A), as often those who really knew everything about the franchise were not directors, but merely collaborators. To cover also collaborators the German delegation therefore proposed the addition of the phrase "or to any other person who is familiar with all the information to be disclosed according to Article 6".

57. The Committee decided not to accept this proposal.

#### **ARTICLE 5(B)**

**Documents:**        *Doc. 36, paras. 108 – 113*  
                           *Doc. 37 Explanatory Report para. 67*  
                           *Comments submitted by France (Doc. 39 p. 3)*  
                           *Comments submitted by Germany (Doc. 44 p. 3)*  
                           *Comments submitted by the World Franchise Council (Doc. 42 p. 1)*  
                           *Comments submitted by the European Franchise Federation (Doc. 43 p. 2)*  
                           *Issue left Open (Misc 2 p. 1)*  
                           *Proposal submitted by Poland (Misc. 5)*

58. It was recalled that the draft contained two alternative versions for Article 5(B). The first alternative provided for an exemption from the obligation to disclose in the case of an assignment or other transfer of a franchisee's rights and obligations where the assignee or transferee was bound by the same terms as the assignor or transferor, i.e. exactly the same terms, where only the name on the agreement differed. The second alternative instead provided for an exemption in cases where the assignee or transferee was bound by substantially the same terms, i.e. where the terms did not differ in relation to any substantive issue. Furthermore, yet another condition was added to this second alternative, namely that the franchisor had not had a significant role in the sale other than approval (including qualification and training). The rationale behind Alternative 2 was that as the franchisor was not involved in the transfer, the franchisor should not be required to disclose.

59. In their written comments, the delegations of France (Doc. 39) and Germany (Doc. 44) expressed a preference for Alternative 1.

60. It was pointed out that the rationale behind Alternative 2 was completely different from that behind Alternative 1. In the case of Alternative 1, the idea that had prompted the Study Group was that if the agreement transferred or assigned was identical with that of the transferor, with the exception of the signature it bore, the transferee would acquire the information it needed from the transferor, information that had originally been provided by the franchisor and would thus conform to the disclosure requirement. Considering that in actual fact part of the information that the assignor or transferor would be passing on relating to the franchisor would have changed over time, this alternative did not match reality. In the case of Alternative 2 the question was instead what obligations the franchisor should have, whether or not the franchisor himself should have an obligation to disclose if he had not played a significant role in the assignment or transfer.

61. Whereas a number of delegations favoured Alternative 2, which they considered to be more flexible and to reflect reality more than Alternative 1, others instead felt that it introduced greater uncertainty, as the judge would have to evaluate whether or not the terms were substantially the same. Furthermore, the risk was that the assignee or transferee would receive no up to date information from or relating to the franchisor, as the franchisor would be exempt from the disclosure obligation if the terms of the agreement were merely "substantially the same". While some delegations saw this as a way to facilitate the assignment or transfer of franchises and therefore to be favourable to franchisees, other delegations, including the observer from the European Franchise Federation which had raised the issue also in its written comments (see Doc. 43), as indeed had the World Franchise Council (see

Doc. 42), asked which franchisees the law was intended to protect, as the proposed Alternative 2 facilitated the assignment or transfer also on the part of franchisees who for one reason or another wanted to exit the relationship, perhaps because they were unsatisfied with it, and there was no guarantee that the transferor or assignor would be providing the assignee or transferee with all the information the assignee or transferee was entitled to receive. Alternative 2 therefore in the view of these delegations did not favour the transferee or assignee, who ultimately was the one who actually had to invest and run the business.

62. A question concerned the extent of the franchisor's involvement in Alternative 2, as it spoke of the franchisor not having played a "significant role", whether, in actual fact, the franchisor might, for example, suggest changes to the terms and conditions of the agreement. It was confirmed that the franchisor might indeed do so, as long as the role the franchisor played was not significant.

63. Considering the difficulty in defining the franchisor's involvement, it was suggested that the last four words ("including qualification and training") be deleted, as they would in any event be part of the normal duties of the franchisor also in the case of an assignment or transfer, and spelled out in this manner they might cause confusion.

64. The Committee decided to adopt Alternative 2 as modified, i.e. without the four final words. It consequently also decided to adopt the version of para. 67 of the Explanatory Report that related to Alternative 2 of the text. Furthermore, to cater for the concerns expressed in relation to the accuracy or completeness of the disclosure of the assignor or transferor to the assignee or transferee, it was decided that this question should be considered in the Explanatory Report.

65. The **POLISH** delegation submitted a drafting proposal in document Misc. 5, consisting in the addition of the words "of the transfer" at the end of the paragraph, so that the provision would read as follows (proposed addition in italic):

**(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 substantially the same terms as the assignor or transferor, and the franchisor has not had a significant role in the sale other than approval *of the transfer*".

66. This proposal was accepted by the Committee, with one small change to the original text: the term "sale" was replaced by the term "transaction", which the Committee felt to be more appropriate.

#### **ARTICLE 5(D)**

**Documents:** **Doc. 36 para. 122**  
**Doc. 37 Explanatory Report para. 69**  
**Comments submitted by Germany (Doc. 44 p. 3)**  
**Comments by the European Franchise Federation (Doc. 43 p. 2)**

67. In Article 5(D) the words "financial investment" had been placed in square brackets as an alternative to "financial requirement" to draw the attention of the Committee to the problem of defining what was intended by "financial requirement", also for the purposes of the Explanatory Report.

68. In its written comments the **GERMAN** delegation had proposed that "financial investment" be deleted. It indicated that in contracts the financial requirement usually stipulated more or less clearly how much the other side had to pay, whereas to a certain extent the "financial investment" was determined by the party making the investment, as it was that party that decided how much it considered appropriate to invest. Another delegation added that the notion of "financial investment" was more limited than that of "financial requirement", which for example included also what the prospective franchisee would have to pay for his first stocks, which was not an investment from the point of view of the balance sheet.

69. The Committee decided to retain the expression "financial requirement" and to delete "financial investment".

70. The **POLISH** delegation submitted a proposal to clarify the meaning of Article 5(D) by making the following addition (proposed addition in italic):

“(D) in case of the grant of a franchise pursuant to which the prospective franchisee commits to a total financial requirement *under the franchise agreement* in excess of [X];”

71. One delegation opposed this proposed addition, as it stated that there were requirements that were required of the franchisee even if their need did not appear in the agreement or in other documents.

72. The Committee decided to adopt the Polish proposal.

#### **ARTICLE 5(E)**

**Documents:** *Doc. 36 paras. 123 – 125*  
*Doc. 37 Explanatory Report para. 69*  
*Comments submitted by Germany (Doc. 44 p. 3)*

73. In its written comments the **GERMAN** delegation reiterated a proposal it had originally made at the First Session, namely that of adding the notion of “turnover” to that of “net worth”, with the provision reading as follows (proposed addition in italic):

“(E) in case of the grant of a franchise to a prospective franchisee who together with its affiliates has a net worth in excess of [Y] *or turnover in excess of [Z]*.”

74. It explained that “turnover” was one of the two items that were shown in the annual accounts, the other being the balance sheet. At present Article 5(E) only spoke of the net worth, which was only one of the elements in the balance sheet which was a compilation of the assets and the liabilities. The turnover was a very clear figure which the annual accounts started with. Furthermore, in many European regulations the alternative “and/or turnover” was to be found.

75. One delegation wondered whether what the German delegation intended was not the annual sales, rather than the turnover, and the Chair observed that in many countries there were tax benefits if acquisitions were made with the turnover, that there were exceptions in tax laws in many countries around the world, and in particular in bilateral tax treaties.

76. In the end, there being no opposition, the proposal was accepted.

#### **ARTICLE 5(G)**

**Documents:** *Doc. 36 paras. 127 – 131*  
*Doc. 37 Explanatory Report para. 71*  
*Comments submitted by China (Doc. 38)*  
*Comments submitted by France (Doc. 39 p. 4)*  
*Comments submitted by Germany (Doc. 44 p. 3)*  
*Comments submitted by the World Franchise Council (Doc. 42 p. 1)*  
*Comments submitted by the European Franchise Federation (Doc. 43 p. 2)*

77. Article 5(G) exempted the franchisor from the duty to disclose where the prospective franchisee made a very small investment, as evidenced by the fact that the total of the payments contractually required to be made any year by the franchisee to the franchisor was less than [Z], i.e. when it was very small. This provision was however contested on the grounds that small investors were even more likely to need information than large investors. Indeed, the written comments of China, France, Germany, the WFC and the EFF all proposed to delete the provision.

78. One delegation objected to the deletion, on the grounds that small franchisors would suffer if this exemption were deleted, as they would need to incur considerable expenses to provide the disclosure required and they would be the ones likely to turn to small investors for their expansion.

This view was however not shared by the other delegations, and the provision was consequently deleted.

#### **ARTICLE 5(H)**

**Documents:** *Doc. 37 para. 72*  
*Comments submitted by Germany (Doc. 44 p. 3)*  
*Comments submitted by the European Franchise Federation (Doc. 43 p. 3)*

79. Introducing its written comments, the **GERMAN** delegation indicated that it had a problem with the wording of the provision, as binding offers were usually made to only one person and not to a group of people. Consequently, in all cases in which a franchisor made a binding offer he would not need to disclose. As the Explanatory Report appeared to indicate that the provision was aimed at master franchise agreements, which were intensely negotiated and in the negotiation of which the contracting parties were on a par and did not need protection, it suggested that the provision be reformulated to read as follows (proposed modifications in *italic*):

**(H)** *if the agreement is reached after detailed negotiations.*

80. It was recalled that Article 5(H) addressed the specific case of what was known as the "isolated transaction". This was explained in para. 72 of the Explanatory Report, which stated that it was intended to cover cases where companies that do not franchise in their country of origin decide to do so when they expand abroad and decide to grant just one franchise in a State, irrespective of whether it is a unit franchise or a master franchise. The Explanatory Report further stated that the exemption was not applicable if there was a chance that other franchises might be granted in the future, and added that the reason for this exemption was that transactions of this nature, particularly master franchises, were normally intensely negotiated. The provision was therefore clearly not intended to relate only to master franchises. The problem appeared to be the term "offer". The provision therefore required re-wording.

81. It was further explained that the provision was a recognition of the fact that to require disclosure was to place a disproportionate burden on a franchisor when he was simply going to make one deal, and that the notion of not having him do the same thing he would have to do if he were going to make hundreds of deals, was appealing in terms of the enforcement of the law. Furthermore, a problem with the German proposal was that these deals might not be heavily negotiated at all, and therefore the proposed text would not capture the cases the provision was intended to capture.

82. A question raised concerned what would happen if the franchisor did grant a second franchise, whether he would then have to disclose also to the first franchisee. How was it possible to make sure in the text that a second franchise would never be granted?

83. It was observed that the fact that a second franchise was granted would not have any effect on the first franchise, as it would not be able retroactively to disqualify the qualification of the first transaction. Clearly, the franchisor would be under an obligation to disclose for the second transaction.

84. A further question related to the specification that the franchise was granted for a single State, which it was felt not to be appropriate in a world of globalisation. Often franchises were granted for more than one country, or for parts of countries.

85. In the end, the Committee decided to delete the provision.

#### **ARTICLE 6**

##### **ARTICLE 6(1) CHAPEAU**

**Documents:** *Doc. 36 paras. 132 – 143*  
*Doc. 37 Explanatory Report para. 76*  
*Comments submitted by the USA (Doc. 41 p. 2)*

**Comments submitted by Germany (Doc. 44 p. 3)****Issues left Open (Misc. 2 p. 2)****Proposal submitted by France (Misc. 8)****Proposal submitted by France, Argentina, United States, Poland, Canada and Greece (Misc. 9)**

86. The first question to be decided in relation to Article 6(1) concerned whether or not the list of items to disclose should be an open or closed list. The draft in Doc. 37 therefore contained two alternatives, the second including two alternatives within itself. The first set of brackets, which would indicate that the list was a closed list, contained the wording “the franchisor shall provide the following information in the disclosure document”. The second set of brackets, which would indicate that the list was an open list, contained the words “the disclosure document shall contain all material facts [such as] [including] the following”. The first alternative “such as” indicated that the list was illustrative and that not all items had to be disclosed, whereas “including” indicated that the items listed should in any event be disclosed even if there might be additional items not listed that should also be disclosed.

87. A number of delegations preferred a closed list, as they felt that this offered both parties more protection: the franchisor because what items had to be disclosed would be certain, and it would be possible for the franchisor to prepare one document for all prospective franchisees; and the franchisees because the costs that the extensive disclosure required represented, and which would ultimately be borne by the franchisees, would be limited, and also because franchisees would be able to compare disclosure documents of different franchisors with greater ease, as they would all contain the same categories of information. Some delegations also preferred to have a shorter list, with less information being required, as it was feared that it might be misleading for the franchisee to receive so much information, a lot of which might not be necessary in the particular case. Furthermore, there were a number of what could be classified as “general clauses” in the text, which required disclosure of, e.g. “relevant details” or “business experience”, which were not defined and which might therefore create confusion. The list should then be illustrative, with the “such as” formula being used.

88. A distinction was made between the list being a closed list for the franchisors which had to comply with it, and open for the legislators who were able to choose what they wanted to include in the legislation they were preparing for their own country from the items listed in the article. One delegation proposed that the Chapeau say “[t]he disclosure document shall contain the essential information that each State chooses from the following list”. This suggestion was however opposed, as it was felt that it might be misleading, considering that the Preamble already contained a reference to the fact that legislators could decide what, if anything, to include in the legislation they were preparing for their own countries. This was a consequence of the nature of model laws. If it were specified also in the chapeau of Article 6(1), legislators would wonder why it were specifically mentioned only in connection with this paragraph and not in connection with the other articles of the Model Law.

89. Other delegations preferred an open list, which would permit other items of information also to be disclosed, in particular as there might be information that was of importance in the single case but the disclosure of which was not required in Article 6, such as the fact that the franchisor was about to sell his network, or that an important competitor was about to enter the market in the territory that the prospective franchisee was to develop, or a key-employee was about to leave. It was felt to be important to ensure that also such information, which was more subjective in nature, would be disclosed to prospective franchisee, as it might seriously impact upon their decision to franchise, and it might otherwise even be hidden from the prospective franchisee. So as to cover these cases, it was proposed that a general, catch-all clause be added at the end, requiring the disclosure of any other items of relevance. While this idea was supported by some delegations, one delegation objected, stating that many legal systems had general clauses, such as good faith, which might be used to cover these cases, even if other countries might require a general clause such as the one proposed.

90. The **FRENCH** delegation submitted a proposal for the chapeau of Article 6(1) which read as follows (see Misc. 8):

“The information document shall contain all material facts determined by local law in the following list.”

91. One delegation stated that it found the proposal problematic, as it was very narrow and suggested that the list in Article 6(1) was a menu from which there was no departure, that the legislator could pick and choose only from the list contained in the Model Law. In reply, the French delegation suggested that if it were to prove necessary, national legislators could always amend the list, but another delegation indicated that procedures for amendment were often very complicated, so to have recourse to amendments would not solve the problem.

92. A proposal was submitted jointly by Argentina, Canada, France, Greece, Poland, and the USA (see Misc. 9). This proposal contained two options, and read as follows:

“Option 1 -

In the disclosure document the franchisor shall provide the following information, unless the state legislators require more, less, or different information:

Option 2 –

In the disclosure document the franchisor shall provide the following information\*

\* Unidroit stresses the attention that the majority of experts having participated in drafting this model law, have expressed the opinion that national legislatures to whom this Model Law is proposed, have the possibility to shorten or to lengthen the above list by excluding some of the information or by adding to this list other information to be disclosed.”

93. Introducing the joint proposal, the delegation of the **UNITED STATES** indicated that although the proponents had agreed on the concept, there were those who did not agree with including the reference to the State legislators in the actual text of the Model Law. For this reason Option 2 had been added, which transferred the reference to the legislators to a footnote to the text of the Model Law. Necessary for both options was the addition of a new Sub-paragraph (O), which was part of the proposal and read as follows:

“(O) and anything else necessary to prevent any statement in the document from being misleading to a reasonable prospective franchisee”.

94. It was observed that having a footnote in the text might be strange, and that the contents of the footnote might instead be placed in the Explanatory Report. There were therefore three options: Options 1 and 2 as specified in Misc. 9, and Option 3 which was to place the contents of the footnote in the Explanatory Report.

95. Option 1 was opposed by some delegations for the reason that what the reference to the State legislator stated was self-evident, as the instrument being prepared was a model law.

96. An observation made concerned the relationship of this provision with Article 9, which provided for sanctions in case of material facts not being disclosed or being misrepresented. In the proposal the words “material facts” were not used, as the requirement was to disclose “the following”. Thus, if a franchisor did not disclose an item listed, which was not a material fact, there was no sanction.

97. In the end, the Committee decided to adopt the third option, i.e. to place the contents of the footnote in the Explanatory Report.

98. The **FRENCH** delegate thereupon made a declaration for the Report on the session to the effect that the Committee had voted in favour of a Model Law text which obliged franchisors to observe a non-limitative list which contained a score of obligations. He stated that he thought that the Committee had a serious responsibility in bringing the countries that would use the Model Law to an impasse which would considerably increase the cost of the franchise and which would dissuade small franchisors from establishing abroad.

**ARTICLE 6(1)(B)**

**Documents:**        **Doc. 36 para. 146**  
                           **Doc. 37 Explanatory Report para. 7**  
                           **Comments submitted by Germany (Doc. 44 p. 4)**

99. The German delegation had submitted a proposal for the redrafting of Article 6(1)(B) in their written comments (see Doc. 44). The Sub-paragraph, as proposed, read as follows (proposed modifications and additions in italic):

***(B) the trademark, trade name, business name or similar name, under which the franchisor carries on or intends to carry on business in the state in which the prospective franchisee will operate the franchise business;***

100. Introducing its proposal, the German delegation stated that the first proposed modification was intended to make more precise the wording that was currently in the draft, namely “any name other than the legal name”. The second proposed modification was instead intended to limit the information to be given to the prospective franchisee to information relating to the country in which the prospective franchisee would be active, as it felt that it was not relevant for the prospective franchisee to have information relating to other countries, in particular if on other continents.

101. While there were delegations that agreed with the proposal and felt that it was not useful for the prospective franchisee to be given information that was not material to its activity, others felt that there was no need to limit information in order to avoid an overly burdensome or meaningless disclosure requirement. Concern was expressed that if a franchise system was new in a State, there might be no information from that State. In the experience of the speaker information about the experience of franchisees in other States could be highly relevant and useful to investors. By accepting the proposal, the investors interested in an area where a franchisor was just expanding were not going to receive any information. It was important for the prospective franchisee to be informed of the track-record of the franchisor also in other countries.

102. The proponent disagreed with this last point, as the information the prospective franchisee would receive would be that the franchisor had not until then been active in the country of the prospective franchisee, and also this was important information. Furthermore, in the case of master franchising, paragraph (3) provided that information received by the sub-franchisor from the franchisor had to be passed on to the prospective franchisee, so the prospective franchisee would receive information relating to the track-record of the franchisor in other countries.

103. Attention was drawn to a problem with the language of the French version of the proposal. The French text referred to “*dénominations commerciales*” in the plural, whereas a company could have only one “*dénomination commerciale*”. Furthermore, the inclusion of the trademark together with the trade name raised some doubts, as the trademark related to the product or service and not to the company, to which instead the trade name related.

104. The observer from the **International Bar Association (IBA)** observed that the “all material facts” approach did not solve the problem, because any disclosure document that was drafted in response to what amounted to an open list involved a subjective compilation of information which was always incomplete, because it always omitted some information. The result would be the crippling of the ability of the prospective investors to evaluate the franchise offerings that were placed before them. In his view even long, prescriptive lists such as the ones required in the United States were not unduly burdensome and had not been a barrier to entry. Furthermore, a negative disclosure concerning the State in which the franchisee was to operate, would effectively conceal from the investor the entire track-record of that company or the people running it in other States. At worst, the people involved might be crooks or felons who had embezzled in other States or who had a record of commercial failure, and no information relating to this would be forthcoming. It was however recalled that Article 6(1)(B) related only to the trademark and trade name, and not to other categories of information.

105. In the end, the Committee decided to accept the German proposal.

**ARTICLE 6(1)(E)**

**Documents:** *Doc. 36 paras. 147 – 149*  
*Doc. 37 Explanatory Report para. 80*  
*Comments submitted by France (Doc. 39 p. 1)*  
*Comments submitted by Germany (Doc. 44 p. 4)*

106. In Article 6(1)(E) the word “granting” was in square brackets. The reason was that at the First Session there had been a proposal to replace the word “offering” by “granting”. This had been accepted in principle at the time, and the Committee was now requested to confirm that this modification should be introduced also in Article 6(1)(E). The Committee decided to accept this modification.

107. Two proposals were before the Committee in relation to Article 6(1)(E), one submitted by France (Doc. 39) and one by Germany (Doc. 44). The Committee decided to examine the German proposal first. The **GERMAN** proposal was for a rewording of the provision as follows (proposed modifications and additions in italic):

*“(E) the length of time during which the franchisor*  
*(i) has run a business of the type to be operated by the prospective franchisee and*  
*(ii) has granted franchises for the same type of business as that to be operated by*  
*the prospective franchisee*  
*in the state in which the prospective franchisee shall operate the franchise*  
*business;”*

108. Introducing its proposal, the German delegation indicated that it had three parts: the first was to replace the reference to the business experience of the franchisor by a reference to the length of time during which the franchisor had been engaged in the activities indicated in (i) and (ii), as the general reference to the business experience was too imprecise and went too far; the second to delete the reference to the affiliates of the franchisor, as what was crucial for the prospective franchisee was information on the franchisor; and the third to restrict the information required to the State in which the prospective franchisee would be active.

109. One delegate expressed doubts and wondered whether the proponent really felt that information relating to neighbouring countries, or information on the affiliates of the franchisor when it was the affiliate who offered the franchise, was not relevant for a prospective franchisee. The proponent stated that information relating to neighbouring countries might certainly be of interest, but the problem was where to draw the line. Furthermore, if a franchisor had no information to offer as he had not been active in the country of the prospective franchisee, he would most certainly of his own accord offer information about his affiliates, because he would want to make a good impression on the prospective franchisee. The question was whether the providing of such information should be made compulsory.

110. Another delegation indicated that the information currently required in Article 6(1)(E) was highly material to prospective investors and the provision should therefore not be modified.

111. In the end the Committee decided to reject the German proposal.

112. As the German proposal had contained the French proposal for a deletion of the reference to the affiliates of the franchisor, and the German proposal had been rejected, the French delegation felt that there was no need to reopen the discussion.

**ARTICLE 6(1)(F)**

**Documents:** *Doc. 36 paras. 150 – 151*  
*Doc. 37 Explanatory Report para. 81*  
*Comments submitted by Germany (Doc. 44 p. 5)*

113. In Doc. 44 the German delegation submitted a proposal for the re-wording of Article 6(1)(F) as follows (proposed modifications and additions in italic):

**(F)** with regard to the executive director, chief executive officer or any other person in a similar position who has senior management responsibilities for the franchisor's business operations in relation to the franchisee

**(i)** the names, business addresses and positions held, and

**(ii)** the length of time during which each has, in the state in which the prospective franchisee shall operate the franchise business,

**(a)** run a business of the type to be operated by the prospective franchisee and

**(b)** granted franchises for the same type of business as that to be operated by the prospective franchisee;"

114. Introducing its proposal, the **GERMAN** delegation stated that here again, it had tried to make the wording more precise by replacing "person who has senior management responsibilities" by a list of those who were intended, as specified in the Explanatory Report, namely the Executive Director, Chief Executive Officer or any other person in a similar position. Secondly, as had been the case with Article 6(1)(E), the proposal aimed at doing away with the expression "business experience", which was imprecise, and at replacing it with what the delegation understood it to be referring to. Thirdly, a limitation to the State in which the prospective franchisee was to operate was introduced.

115. One delegation objected to the proposed modifications. It felt that the notion of "senior management" better captured what was intended and did not limit the people involved. In addition to the Executive Director and Chief Executive Officer, the Financial Officer might be very important, or in some systems the Training Director or some other senior person who had very direct involvement and whose involvement bore very significantly on the likelihood of the success of the franchise. It furthermore objected to the limitation of the information to the State of the prospective franchisee and did not feel that literas (a) and (b) were necessary.

116. In the end, the Committee decided to reject the German proposal.

#### **ARTICLE 6(1)(G)**

**Documents:** *Doc. 36 paras. 153 – 164*  
*Doc. 37 Explanatory Report paras. 82 – 85, at para. 82*  
*Comments submitted by France (Doc. 39 p. 5)*  
*Comments submitted by Germany (Doc. 44 p. 5)*  
*Comments submitted by the World Franchise Council (Doc. 42 p. 2)*  
*Issues left Open (Misc. 2 p. 2)*  
*Proposal submitted by the United States (Misc. 6)*

117. There were four sets of square brackets in Article 6(1)(G). The first contained the words "or arbitration", the second in Sub-paragraph (1)(G)(i) contained the words "or predecessor of the franchisor", the third included both Sub-paragraph (1)(G)(ii) and Sub-paragraph (1)(G)(iii) and the fourth included the reference to the "relevant details relating to any pending actions of the same nature". It was pointed out that in the second set of brackets the reference should be to "and" and not "or" the predecessor of the franchisor, or there might be a risk of the franchisor not disclosing about himself, and that in Doc. 37 the fourth bracket erroneously included also the reference to the five-year time-period, which had not been questioned.

118. The proposal to include information about the finding of liability in an arbitral proceeding had been made at the First Session by reason of the fact that many agreements provided for mandatory arbitration, and if information as to the fact that there had been an arbitration, as to the fundamental grounds for the dispute and its resolution were not available, future investors might be left unaware of very significant problems between franchisees and franchisors.

119. The Committee considered a number of issues in connection with this proposal. First, the meaning of "relevant details", how much information should be provided, whether merely the fact that the arbitration had occurred, or also information as to the facts of the case and as to the contents of the decision. The fact that arbitration proceedings were confidential was seen by some delegates as a

possible obstacle to the retention of the reference to arbitral proceedings, whereas others pointed out that in most cases the arbitral award would have to be rendered enforceable by a court, and that at that point it would no longer be confidential. In general, it was agreed that not every detail should be provided. It was a matter of balancing the usual confidentiality of the arbitral proceedings with the need to provide information to the prospective franchisee. It was recalled that the franchisor might in any event protect himself by means of a confidentiality agreement covering the information relating to the arbitral proceedings. One advantage in having the reference to arbitral proceedings was seen as the putting of pressure on the franchisor to be more flexible in mediation proceedings, which would often precede arbitral or court proceedings.

120. Attention was drawn to differences between the English and French texts, the French being considered to be broader than the English. The role of the Explanatory Report was also recalled.

121. In the end, the Committee decided to retain the reference to arbitration in Article 6(1)(G).

122. As regards the second set of brackets, it was recalled that at the First Session it had been proposed that the predecessor of the franchisor be added to the list of people about whom information on this point had to be disclosed, as often individuals or corporations reorganised and created new entities that sold franchises after some difficulties during the previous business venture. It had therefore been felt to be important that, if there had been instances of fraud, criminal acts and so on, the prospective franchisee be informed of this.

123. A number of delegations perceived a major problem, in that the franchisor would be giving information about a third person and in a number of countries that would give rise to constitutional problems, as well as be against the legislation on privacy and personal integrity, in particular as regards information on criminal convictions. This was even more problematic in relation to proceedings which had not yet been concluded. It was recalled that the European Union had adopted a Directive on the protection of personal data, and that this Directive was strictly observed in the fifteen European Union countries. Furthermore, there was no guarantee that the predecessor of the franchisor would provide the franchisor with all the required information, in particular if he had been guilty of dishonesty, and if this were the case, the question of the liability of the franchisor vis-à-vis the prospective franchisee came into play, as the franchisor would have to be able to prove the accuracy of the information he was providing. Would the franchisor then be forced to conduct investigations to find the required information, or even to set up offices devoted to the finding of this information? It was pointed out that the law did not oblige the predecessor of the franchisor or any of the other persons specified in the provision to provide the franchisor with the required information. The provision moreover did not specify how many predecessors the information had to relate to, even if a time-limit of five years was given. Considered together with all the other persons the provision specified that the franchisor had to provide information about, the burden placed on the franchisor by this proposal was felt to be considerable.

124. The role of the constitutional courts was drawn to the attention of the Committee, it being suggested that the constitutionality of a provision such as the one discussed would first as a matter of course be considered by the legislators, and that failing this, the constitutional courts would have the task of trying the compatibility of the law being introduced with the constitutional norms applicable in the country concerned. To this, one delegation however objected that it did not feel that it could recommend a law which it felt to be unconstitutional or unacceptable in other ways to other countries for adoption.

125. Another factor which some delegations felt to be very important, and which evidenced different cultural attitudes to the information that it was required to be disclosed, was the potentially damaging effect, especially in relation to proceedings that were still in course, that the fact of being under investigation in some way might have on the reputation of a person or company. While in some countries it was clear that being under investigation in no way meant that the person or company concerned would automatically be considered to be guilty of the crime or misdemeanour ascribed to him or it, in other countries the mere fact of being under investigation was considered dishonourable and was consequently extremely damaging. On the other hand, the prospective franchisee's need to be informed of the investigation was accepted by delegates.

126. It was suggested that the information to be provided should relate only to final judgments, but considering the at times considerable time necessary for a judgment to become final, the importance for prospective investors of receiving information also on pending actions was stressed, as was the fact that the provision already required the providing of information on pending actions. It was suggested that it might be stated in the Model Law that information on pending actions might be required unless prohibited by the applicable law, but this was opposed on the grounds that it was a condition that applied to the Model Law as a whole, and not only to this provision.

127. The definition of a “predecessor” that was proposed for inclusion in Article 2 also gave rise to problems, in that it referred to “any legal entity from whom the franchisor acquired directly or indirectly the major portion of the franchisor’s assets”. In many cases the franchisor’s major asset was the trademark, with the consequence that if the franchisor merely bought the trademark from someone who had happened to register it first, he would still need to disclose all the information required, even if he had nothing to do with the previous owner of the trademark, who might indeed never have used it. The definition was therefore too broad.

128. One suggestion was to leave the predecessor in the text in square brackets, but this was opposed by a majority of the members of the Committee, as it was felt to open up the possibility that square brackets be used also in other instances where complete agreement had not been reached.

129. In the end, the Committee decided to delete the reference to the predecessor of the franchisor in the text of the provision, but to refer to the predecessor in the Explanatory Report. Similarly, the definition of the predecessor of the franchisor that had been proposed for Article 2 was considered not to be necessary in the text, but to be necessary for the Explanatory Report, and was consequently transferred to the Explanatory Report where the necessary modifications would be introduced.

130. As regards the reference under Sub-paragraph (ii) of any affiliate of the franchisor, a proposal to refer also to this category of people in the Explanatory Report, as had been decided for the predecessor of the franchisor, was objected to on the grounds that there was a substantial difference between an affiliate and a predecessor, in that an affiliate had an actual current relationship with the franchisor. If also this requirement were transferred to the Explanatory Report, it was feared that the Model Law would be so watered down that it no longer constituted a guide to legislators. The reference in Sub-Paragraph (iii) to any of the persons indicated in Sub-Paragraph (F) was objected to on constitutional and privacy grounds.

131. It was recalled that an affiliate of the franchisor was defined as one who directly or indirectly controlled, or was controlled by the franchisor or who was controlled by another party who controlled the franchisor, and this definition made it clear who was to be included in the disclosure requirement. It was however objected that the definition was less clear than it seemed, as the notion of control differed considerably from one country to another.

132. In the end, the Committee decided to leave the reference to the affiliates of the franchisor in the text. It also decided not to include the reference to persons listed in Sub-paragraph (F) in the text of the provision.

133. A request to refer in the Explanatory Report to the persons listed in Sub-paragraph (F) was opposed on the grounds that they were employees of the franchisor, persons who were tied to the franchisor by a labour contract. The franchisor was therefore liable for these people as he was for all his employees, it was up to the franchisor to ensure that the persons he employed had no criminal or other record. It would be even more unnatural to authorise the franchisor to search the past of his employees and to require the franchisor to inform the prospective franchisee of his findings. The majority of the Committee however decided that such a reference should be inserted in the Explanatory Report.

134. The fourth set of square brackets included the words “as well as the relevant details relating to any pending actions of the same nature”. Recalling the remarks that had been made earlier on this point, one delegation stressed the importance it attached to information on pending actions being provided to prospective franchisees, indicating that information on pending actions was public information, as was information on final decisions, that it was highly material for prospective investors

to know that the company or that the principals of the company or affiliates of the company were under a cloud, that charges had been brought against them for fraud, or misrepresentation, i.e. matters that really went to the essence of the character of the company or the individuals and their capability to carry out their fiduciary duties to the franchisee.

135. The arguments raised relating to the constitutional problems of revealing information relating to third persons were reiterated in relation to pending actions. The right of individuals to a good reputation until found liable was stressed. Furthermore, the possibility that competitors might bring fake charges to damage the reputation of franchisors was also brought to the attention of the Committee. In effect, it was pointed out that revealing such information would be against the more or less universal European standard concerning the prohibition of dissemination of defamatory information about third parties, and under the majority of European unfair competition laws revealing such information would constitute unfair competition even if the information was true.

136. Some delegations felt that their position might differ depending on whether the information on the pending actions concerned only the franchisor or also others such as affiliates, and depending also on who exactly were intended by "affiliates", whether only affiliates who were engaged as franchisors or also affiliates who were franchisees in their activities, and on what information was to be disclosed. It was suggested that the term "affiliate" might be qualified by referring to "managing control" in the definition.

137. The fact that the provision did not concern all civil law actions or all suits directed against the franchisor, but only a restricted number of cases, was stressed. Having such information relating to the franchisor might therefore be very relevant for a prospective franchisee who perhaps already had doubts about the honesty of the franchisor.

138. One delegation however felt the definition to be far too broad, as it included also other businesses and not only franchises, which the delegation took to mean that also consumer disputes were included. It was sufficient, it stated, for a consumer to be dissatisfied because a product it had received did not correspond to what it desired for this provision to come into play.

139. One delegation suggested that a compromise might be reached if the words "relevant details" were replaced by "whether". If the franchisor offered the information that an action was pending, it would then be up to the prospective franchisee to request more information, and if the franchisor did not provide more information the prospective franchisee would be able to draw his own conclusions. Another delegation observed that offering this information on the part of the franchisor could be seen as the building of confidence between the parties, and might therefore have a positive effect.

140. A proposal for wording to replace the current wording "for the previous five years, as well as the relevant details relating to any pending actions of the same nature" was submitted by the United States (Misc. 6) and read as follows:

"for the previous five years; and whether any such action is pending against the franchisor or its subsidiary".

141. One delegation felt that it did not represent a compromise as it still referred to pending actions, whereas it felt that only final judgments should be referred to. Others instead were satisfied with the proposal, but wondered why the proposal used the term "subsidiary" instead of "affiliate", considering that "affiliate" was a defined term and "subsidiary" was not. The US delegation indicated that "subsidiary" had a narrower meaning than "affiliate", as it only referred to daughter-companies and "grand" daughter-companies, whereas "affiliates" referred also to companies on the same level and to parent companies. It indicated that "subsidiary" would refer only to legal persons, whereas for example a franchisor could be both a natural and a legal person.

142. The Committee considered whether or not a definition of the term "subsidiary" should be included in Article 2. The US delegation proposed that the term be defined as follows: "subsidiary means a legal entity which is owned or controlled by another legal entity". The exact meaning of the term "owned" was questioned, as one delegation felt that even a mere 5% ownership might suffice, and suggested that it be deleted, as what was important was the control factor. It was however pointed

out that in many instances a mere 12 – 20 % share-holding presence was sufficient to control an enterprise. Furthermore, the question of whether or not partnerships might be included under the term “legal entity” was raised.

143. It was suggested that the franchisor should be under an obligation to disclose information about itself and also about the legal entities it controlled, about acts that it could foresee as it was in control, but not about physical persons. One delegation felt the proposal not to be logical, as the result was that information on pending actions had to be given only in relation to subsidiaries and not to affiliates, so for subsidiaries all the information had to be provided, but for the parent company only some of the information, and this difference was difficult to explain.

144. In the end, the proposal submitted by the United States was accepted by the Committee. It was however subsequently decided to modify it slightly, to align it with the formulation adopted for Article 6(1)(H), which referred to the “court or other citation” (see the section of this Report dealing with Article 6(1)(H) below). The formulation adopted consequently read as follows:

“for the previous five years and whether any such action is pending against the franchisor or its subsidiary, and the court or other citation thereof”.

145. In the course of the final adoption process it was decided to place the reference to the citation on a new line and to modify it to read “and the court or other citation of any of the above” to make it clear that it referred to all the categories of information in the provision.

146. Similarly, the Committee decided to delete the opening words “relevant details relating to”, again to conform to a decision to this effect taken in relation to Article 6(1)(H) (see the section of this Report dealing with Article 6(1)(H) below).

147. The Committee further decided not to include a definition of “subsidiary” and to leave the exact meaning of the term to national legislation, and to explain this in the Explanatory Report.

148. The Committee also briefly examined the proposals that had been presented by France (Doc. 39) and Germany (Doc. 44). The **FRENCH** proposal was to replace the whole of Article 6(1)(G) by the following:

“relevant details relating to any criminal convictions or any finding of liability in a civil action involving the franchisor in the exercise of its activity for the previous five years”.

149. In view of the discussions that had taken place, and the decisions that had already been taken, the French delegation decided not to reopen the discussion.

150. The **GERMAN** delegation had proposed in the first hand to delete Article 6(1)(G), and if this proposal were not accepted, to add the following wording to the existing provision:

“or the assurance of good conduct of the prospective franchisor and the persons indicated in lit. (F); such assurance shall, on request of the prospective franchisee, be proven by a police certificate of good conduct;”

151. Also in this case, and for the same reasons, it was decided not to reopen the discussions.

#### **ARTICLE 6(1)(H)**

**Documents:**        **Doc. 36 paras. 165 – 174**  
                           **Doc. 37 Explanatory Report para. 86**  
                           **Comments submitted by France (Doc. 39 p. 6)**  
                           **Comments submitted by Germany (Doc. 44 p. 5)**  
                           **Issues left Open (Misc. 2 p. 2)**

152. The first question to be decided in relation to Article 6(1)(H) was whether or not the words “natural and”, which were in square brackets, should be retained.

153. While there were delegations that felt that they were no longer necessary as natural persons were no longer referred to in Article 6(1)(G), others pointed out that Sub-paragraph (H) referred also to Sub-paragraph (F) and the persons mentioned in that sub-paragraph were natural persons, as the affiliates referred to in Sub-paragraph (G) might also be. A decision had therefore to be taken as to whether or not natural persons should be referred to in Sub-paragraph (H).

154. The **GERMAN** delegation referred to the proposal it had made in Doc. 44 for a re-wording of the provision as follows (proposed modification in italic):

*“(H) whether the franchisor or affiliate of the franchisor who is engaged in franchising was involved in any bankruptcy, insolvency or comparable proceeding for the previous five years;”*

155. The proposal first of all limited the people it referred to, and, secondly, replaced the notion of “relevant details”, which it felt to be vague, by “whether”. While agreeing with the contents of the German proposal, some delegations felt that it would be more acceptable to them to modify the original text of the provision by deleting the opening words that referred to “relevant details” and simply to start the provision with “any bankruptcy, insolvency or comparable proceeding [...]”. It was also suggested that a reference to the court citation be introduced to cover what had originally been covered by the reference to “relevant details”.

156. The United States submitted a proposal reading as follows (see Misc. 7):

*“any bankruptcy, insolvency or comparable proceeding involving the franchisor and/or its affiliate(s) for the previous five years and the court citation thereof.”*

157. A question raised concerned why information relating to pending bankruptcy proceedings against the subsidiaries of the franchisor was not required to be disclosed, when the disclosure of information about pending actions against the subsidiaries of the franchisor was required under Article 6(1)(G). It was observed that bankruptcy proceedings were different from other proceedings, in that in litigation the proceedings were aimed at determining whether or not there was liability, whereas bankruptcy proceedings were a way to reach consensus among interested parties, and were a part of the liquidation process. In any event the text proposed would cover also pending proceedings.

158. In the end, the Committee decided to adopt the proposal submitted by the United States.

#### **ARTICLE 6(1)(I)**

**Documents:** *Doc. 36 paras. 175 – 178*  
*Doc. 37 Explanatory Report para. 87*  
*Comments submitted by Germany (Doc. 44 p. 6)*  
*Issues left Open (Misc. 2 p. 2)*

159. In relation to Article 6(1)(I) the **GERMAN** delegation had submitted a proposal in its written comments (Doc. 44) modifying the drafting of the provision as follows (proposed modifications in italic):

*“(I) the total number of franchisees and company-owned outlets*  
*(i) of the franchisor and*  
*(ii) of affiliates of the franchisor granting franchises under substantially the*  
*same trade name*  
*in the state in which the prospective franchisee will operate the franchised*  
*business;”*

160. Introducing its proposal, the German delegation stated that as presently drafted the provision required the providing of information on the size of the network, and therefore on the success of the system, without specifying where the franchisees and company-owned outlets were located. It considered it to be crucial for the prospective franchisee to know what the situation was in

the country in which it was going to operate, and therefore the proposal restricted the information to be provided to information concerning that State.

161. The Committee decided not to accept the proposal submitted by the German delegation.

**ARTICLE 6(1)(J)**

**Documents:**        *Doc. 36 paras. 179 – 188*  
                           *Doc. 37 Explanatory Report para. 88*  
                           *Comments submitted by Germany (Doc. 44 p. 6)*  
                           *Issues left Open (Misc. 2 p. 2)*

162. The first question to be decided in relation to Article 6(1)(J) concerned whether or not the words in brackets (“and of franchisees of any affiliates of the franchisor which are offering franchises under substantially the same trade name”) should be kept.

163. The Committee decided to keep these words, but to replace the word “offering” by the word “granting” to conform the wording to that of other provisions.

164. The second question concerned the number of franchisees specified in the provision. It was pointed out that this was the only place where an actual figure was given, in all other places the figures had been left unspecified.

165. It was recalled that the decision to specify the number 50 was a decision of the Study Group, which had felt 50 to be a reasonable number. The instances in which no figures had been given generally related to sums of money, and as what was considered to be a large or small sum of money varied considerably from country to country, the Group had decided to leave those figures unspecified.

166. A proposal not to specify the number of franchisee, but simply to refer to the number by an “X” as had been done in other provisions, was accepted by the Committee.

**ARTICLE 6(1)(K)**

**Documents:**        *Doc. 36 paras. 189 – 198*  
                           *Doc. 37 Explanatory Report para. 89*  
                           *Comments submitted by Germany (Doc. 44 p. 6)*  
                           *Issues left Open (Misc. 2 p. 3)*

167. The first question to be addressed by the Committee related to whether or not the words in the first set of square brackets (“of the franchisor and about franchisees of affiliates of the franchisor that offer franchises under substantially the same trade name”) should be kept.

168. The **GERMAN** delegation indicated that it was not clear what was intended by “information about the franchisees”, whether the information should be extensive or not. To add more people about whom information had to be provided meant increasing the burden of the franchisor. It had therefore in the proposal it had submitted in writing proposed to delete the words “about the franchisees”, but to add instead a requirement to disclose the total number of franchisees as follows (proposed modifications in italic):

*“(K) the total number of the franchisees of the prospective franchisor and of affiliates of the franchisor granting franchises under substantially the same trade name during the three fiscal years before the one during which the franchise agreement is entered into; such number does not need to cover franchisees of affiliates of the franchisor that are not located in the state in which the prospective franchisee will operate the franchised business;*

*(K1) an indication of the reasons for which the franchisees which have been taken into consideration according to lit. (K) have ceased to be franchisees, such as “terminated due to bankruptcy or insolvency”; “terminated by a decision of a court or arbitrator”; “terminated by the franchisor”;*

169. The examination of this proposal at this stage was opposed by one delegation which observed that only the language in square brackets was at issue. It strongly urged the adoption of the bracketed language because there were many instances in which affiliates of the franchisor who had terminated for various reasons were themselves selling franchises to franchisees, and that information was important to prospective investors and should be included. There could be real harm to prospective investors in a situation in which it was the affiliate that had done most of the marketing in a particular market where the franchisor was now granting a franchise, and the fact that there had been a large number of terminations in that situation would not be disclosed to the prospective investor even though it was an affiliate.

170. The Committee decided to retain the words in brackets, with the exception of “offering” which it decided to replace by “granting”.

171. The German delegation indicated that it would like to place on record that it regretted that the approach adopted in the proceedings of sticking to the procedural rules first adopted without considering whether in a given case it might be more appropriate to deviate from the procedure in order to take care of the concerns of delegations, made it very difficult to reach a consensus. It had been unable to vote in favour of the words in brackets as it had had problems with the opening words, and the proposal it had submitted would have made it possible for it to vote in favour of the provision.

172. Voting on the German proposal to replace the opening words of Article 6(1)(K) (“information about the franchisees”) by “the total number of the franchisees”, the Committee decided not to accept the proposed modification.

173. Turning to the second sentence of the provision, it was observed that three options were given in Doc. 37. All three options were in brackets, and contained further square brackets with the words “bankruptcy or insolvency; terminated by a decision of a court or arbitrator” which it had been proposed at the First Session should be added to the reasons to be given for franchisees no longer being franchisees of the franchisor. The three main options were first, to maintain the sentence as it had originally been proposed, which in essence was a closed list, second, to make the list an illustrative list by beginning the sentence “[s]uch reasons may include”, and third, to place the contents of the second sentence in the Explanatory Report. The Committee decided to opt for the third option and to place the contents of the second sentence, including the additional wording, in the Explanatory Report.

#### **ARTICLE 6(1)(L)**

**Documents:**        *Doc. 36 paras. 200 – 204*  
                           *Doc. 37 Explanatory Report paras 90 – 92*  
                           *Comments submitted by Germany (Doc. 44 p. 7)*  
                           *Issues left Open (Misc. 2 p. 3)*

174. The **GERMAN** delegation had in its written comments (see Doc. 44) relating to Article 6(1)(L), which enumerated categories of intellectual property about which disclosure had to be made, queried the inclusion of software, which it considered to be very imprecise.

175. One delegation suggested that as the list of categories enumerated was illustrative, it might not be necessary to include software at all. Another however stated that there were cases in which the software used in a franchise was what was most valuable, and that it should therefore be included in the list.

176. The Committee decided to retain the reference to software in Article 6(1)(L).

177. It was observed that the French version of the text contained brackets which were not in the English text. The reason for this was that the Committee should decide the terminology it wished to use, some international conventions opting for the solution reproduced in the first set of bracket, others opting for the solution reproduced in the second.

**ARTICLE 6(1)(M)**

**Documents:** *Doc. 36 paras. 205 – 210*  
*Doc. 37 Explanatory Report paras. 93 – 96*  
*Comments submitted by France (Doc. 39 p. 6)*  
*Comments submitted by Germany (Doc. 44 p. 7)*  
*Comments submitted by the World Franchise Council (Doc. 42 p. 2)*

178. Article 6(1)(M) concerned the information relating to the supply of goods and/or services that the franchisor should provide the prospective franchisee with. Two proposals had been submitted in the written comments submitted to the Committee. The first proposal had been submitted by **FRANCE** (Doc. 39) and was a proposal for the deletion of the Sub-paragraph as a whole.

179. Introducing its proposal, the French delegation stated that the provision related to both the acquisitions policy and the supply policy of the franchisor, and information on these policies was strategic information, information that went to the heart of the franchise system, was indeed part of the franchisor's know-how, and that the franchisor therefore should not have to disclose it. It deemed there to be a risk to the franchisor in such disclosure, in particular at a pre-contractual stage when there was no guarantee that a contract would be concluded, as the prospective franchisee would have in its possession strategic information which might constitute a competitive advantage. Furthermore, competitors might pretend to be prospective franchisees merely to obtain this information, in order to gain a competitive advantage over the franchisor.

180. One delegation stressed the importance for the prospective franchisee of information on the supply policy of the franchisor. Without such information franchisees might seriously miscalculate their costs in operating the business. Situations had been known in which franchisees were not able to go into the market place to negotiate the best price for a particular item that was necessary in the operation of the business and if they had not known that, they might mistakenly have believed in advance that they were going to be able to obtain the necessary supply at the best price, and then their assumptions about their operating costs, and ultimately the possibility for net profit, would be mistaken.

181. The observer from the **WORLD FRANCHISE COUNCIL** indicated that a differentiation had to be made between the information that should be given at a pre-contractual stage, and the information that should be given when the contract had been entered into. It was normal for there to be transparency during the performance of the contract as regards the conditions for the acquisition of supplies from the franchisor, and for the franchisees to be informed of how the franchisor might be remunerated. This was however information that was strategic, and should not be disclosed before the contract had been signed. The WFC therefore proposed that Sub-paragraphs (M)(i) and (ii) be retained, as it was normal for the prospective franchisee to be informed of any exclusivities as regards the supply of products or services so as to know what he would be up against, but that Sub-paragraphs (iii) and (iv) be deleted, as they dealt with information of a strategic nature. As regards the possibility of franchisees obtaining goods at the best price, the WFC indicated that at least in Europe this problem would be covered by competition law.

182. The observer from the **INTERNATIONAL BAR ASSOCIATION** admitted that the concern raised by the French delegation as regards the protection of proprietary rights and trade secrets was legitimate, but stressed that it was vital for a prospective franchisee to know whether or not it would be able to access competitive sources of goods and services, or whether it would be restricted to a single source, often the franchisor. What was important was knowledge of the existence of restrictions on free sourcing, on competitive sourcing, there was no need to provide details. Similarly, as regards the pricing practices under Sub-paragraph (iii) and (iv), what was interesting was that the franchisee be told whether or not the franchisor was receiving rebates or other income streams from vendors, as such income streams inevitably increased the franchisee's costs, the price the franchisee paid for those goods or services, as part of that income stream would be flowing back to the franchisor. It was not necessary to reveal the details, the exact sums involved.

183. The **GERMAN** delegation thereupon referred to the written proposal it had submitted in Doc. 44 for a redrafting of the provision which would ensure that the information was given, but without

the need to provide details. The proposal retained Sub-paragraphs (i) and (ii) and combined Sub-paragraphs (iii) and (iv) into one sub-paragraph. It read as follows (proposed modifications in italic):

“(M) information on the categories of goods and/or services that the franchisee is required to purchase or lease, indicating  
 (i) *whether any of these* have to be purchased or leased from the franchisor, affiliates of the franchisor or from a supplier designated by the franchisor;  
 (ii) *whether* the franchisee has the right to recommend other suppliers for approval by the franchisor; and  
 (iii) *whether any* revenue or other benefit 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, *such as rebates, bonuses, or incentives with regard to those goods and/or services, shall be passed on to the prospective franchisee or, if not, whether a price mark-up will be made by the franchisor or the supplier recommended by the franchisor;*”

184. One delegation indicated that it did not find the proposal satisfactory. It stressed the need to differentiate the pre-contractual stage from the contractual stage and indicated that the information required to be disclosed under the proposed Sub-paragraph (M)(iii) was information which varied over time. Information on rebates was typically information that could be given during the contractual relationship, when there was a relationship that extended over a longer period of time.

185. The Committee decided to reject the French proposal to delete Article 6(1)(M) and decided to accept the German proposal for its reformulation.

186. Attention was drawn to differences between the French and English texts, in particular, the English phrase “if not whether a price mark-up will be made by the franchisor or the supplier recommended by the franchisor” which had been rendered as “*augmentation des prix*” in French, whereas the intention was to indicate whether either or the two persons mentioned would make a profit on the price.

#### **ARTICLE 6(1)(N)**

**Documents:** *Doc. 36 paras. 214 – 221*  
*Doc. 37 Explanatory Report paras. 99 – 103*  
*Comments submitted by France (Doc. 39 p. 7)*  
*Comments submitted by the USA (Doc. 41 p. 3)*  
*Comments submitted by Germany (Doc. 44 p. 7)*  
*Comments submitted by the World Franchise Council (Doc. 42 p. 3)*  
*Issues left Open (Misc. 2 p. 3)*

187. The discussion centred around Article 6(1)(N)(i)(c). The present draft contained three options. The first retained the formulation originally proposed in Doc. 30; the second placed in brackets the words “audited or otherwise independently verified” that qualified the words “financial statements” and the following references to “audited”, with the consequence that if this option were adopted these qualifying words would be deleted; the third reproduced a proposal by the Drafting Committee set up at the First Session. The Committee had to decide whether the financial statements to be given to the prospective franchisee should be audited or not, and how recent the statements should be, considering also the burden this placed on the franchisor. It was recalled that the words “otherwise independently verified” had originally been adopted by the Study Group in recognition of the fact that requirements varied from country to country and to ensure that authoritative statements were given to prospective franchisees.

188. The Committee decided to adopt the third option.

189. The **FRENCH** delegation and the observer from the **WORLD FRANCHISE COUNCIL** drew attention to a proposal they had both made to make special provision for new franchisors, who did not have the information to be provided. The proponents felt that in these cases it would be important for prospective franchisees to be made aware of the fact that the franchisor was not able to provide information for three years, and that it was also important that despite this, some information be made

available to the prospective franchisee. The French delegation therefore proposed adding the following wording to the provision:

“Franchisors, the creation of which goes back less than three years, are under an obligation to disclose the same documents prepared since they began their activity”.

190. This proposal was accepted by the Committee.

**ARTICLE 6(1) NEW SUB-PARAGRAPH ON THE STATE OF THE MARKET**

**Documents:        *Comments submitted by France (Doc. 39 p. 4)***

191. The **FRENCH** delegation had submitted a proposal in its written comments (Doc. 39) to add a provision requiring to disclose information on the state of the market. The proposal read as follows:

“The franchisor must present the prospective franchisee with:

- the state of the general market of the products or services that are the subject of the contract;
- the state of the local market of the products or services that are the subject of the contract;
- the prospects for development of the market”.

192. Introducing its proposal, the French delegation indicated that it felt information on the state of the market to be indispensable for the prospective franchisee to be able to evaluate whether or not the franchise would be economically viable. It drew attention to the fact that the Model Law did not otherwise require economic information to be provided to the prospective franchisee. It stressed that a presentation of the market did not mean that a full market study had to be conducted, it was a matter of providing simple information.

193. One delegate stressed the fact that particularly in international franchising it would be difficult for the franchisor to provide information on the market of a foreign country, that the prospective franchisee would be in the best position to provide information. Franchisors were often approached at fairs by people who were interested in becoming franchisees, and frequently they came from countries into which the franchisor had never thought to expand. Another delegation wondered on what basis the information would be provided if there were no market study, in particular as the information provided could be subjective and might serve no purpose at all.

194. The French delegation clarified that the information provided would, for example, relate to specific qualifications that were necessary in a particular field of activity, such as the qualifications pastry makers had to have in France, it would be a minimal presentation of the market such as the turnover of the business sector, the number of enterprises in that sector, and the legal rules that were applicable. This information would be particularly important in countries where the franchisor had not previously been active, for which the franchisor therefore did not have any information to provide the prospective franchisee with relating to the franchise business.

195. The Committee decided to adopt the proposal submitted by France. In the course of the final adoption of the text, it was however pointed out that the opening of the provision did not fit into the paragraph as a whole, considering that it began with a chapeau. It was suggested to delete the opening words, but this was also considered not to be totally satisfactory. A proposal made subsequently was for the inclusion of the words “The franchisor must present the prospective franchisee with a description of”, which were inserted into the revised text pending final decision by the Committee.

196. It was also decided that the meaning of the provision should be further clarified in the Explanatory Report by giving examples of what was intended, so as to make it clear that a brief description and not a full market study was necessary.



204. At the First Session the Committee had decided to include two options for Article 8, the first of which was the deletion of the article, the second of which was to permit reconsideration of the article by placing it in square brackets. Proposals were submitted by France and Germany in their written comments.

205. Introducing its proposal (see Doc. 39), the **FRENCH** delegation indicated that its purpose was to protect the prospective franchisee, and in particular the small prospective franchisee, as the present wording did not ensure that prospective franchisees would receive the disclosure document in their own language, as the franchisor was permitted to present the disclosure document in the language principally used by the franchisor in its business. The proviso that this was possible unless the franchisee opposed it was a façade, as it would not be possible for a franchisee to oppose the franchisor in relation to the language that should be used because of its independence as an entrepreneur. The proposal was therefore to distinguish between franchisees and sub-franchisors, who were included among the franchisees for the purposes of the Model Law, as sub-franchisors would be used to having relations in an international language whereas the small franchisees would not. The text proposed read as follows:

“The disclosure document and prospective franchise agreement shall be written in a clear and comprehensible manner in the official language of the principal place of business of the prospective franchisee. However, a disclosure document and a franchise agreement addressed to a sub-franchisor may, if the sub-franchisor agrees, be written in the language principally used by the franchisor or by the sub-franchisor in their respective businesses”.

206. Introducing its proposal (see Doc. 44), the **GERMAN** delegation indicated that it went further than the French proposal. Its concern related to the phrase starting “unless, where not prohibited by applicable law”, which the legislator would have to delete in any event. The provision appeared to be very theoretical, in practice the parties negotiated and it was not so clear who made the request, it was usually the franchisor who was interested in keeping his disclosure document in his own language. As the Model Law intended to protect the franchisee, the language of the disclosure document should be the language of the franchisee, and it therefore proposed that the second half of the article, starting with the words “unless, where not prohibited by applicable law [...]” be deleted.

207. The extended discussions that this article had given rise to at the First Session were recalled, including the doubts that had been expressed, in particular as regards the accuracy of translations and the problems that resulted from at times incomprehensible translations. Considering these doubts, the proposal to delete the article was reiterated. This proposal was accepted and the article consequently deleted.

## ARTICLE 9

**Documents:**

- Doc. 36 paras. 270 – 285***
- Doc. 37 Explanatory Report paras, 127 – 134***
- Comments submitted by France (Doc. 39 p. 8)***
- Comments submitted by China (Doc. 40)***
- Comments submitted by the USA (Doc. 41 p. 2)***
- Comments submitted by Germany (Doc. 44 p. 8)***
- Comments submitted by the World Franchise Council (Doc. 42 p. 3)***
- Comments submitted by the European Franchise Federation (Doc. 43 p. 3)***
- Issues left Open (Misc. 2 p. 4)***
- Proposal submitted by Argentina, Greece, Poland, Russia and the United States (Misc. 10)***
- Proposal submitted by France (Misc. 11)***
- Proposal submitted by Poland (Misc. 13)***

208. It was recalled that the discussions at the First Session had centred around the concept of “termination”. There had been uncertainty as to its exact meaning, as to whether or not it should be retroactive, i.e. whether the agreement should be annulled (“*ex tunc*”) or merely terminated for the

future (*ex nunc*). The importance of deciding whether the termination should be *ex tunc* or *ex nunc* had been stressed by the **GERMAN** delegation in its written comments (see Doc. 44).

209. The draft included three options for Article 9, the first being a general invitation to reconsider the article, as a proposal to delete it had been made at the First Session, and which therefore placed the whole article in square brackets, the second of which placed the word “terminate” in square brackets, pending a decision on the exact meaning of that term, and the third of which in addition to placing the word “terminate” in square brackets placed also the proviso beginning “unless the franchisor [...]” in paragraphs (1) and (2) in square brackets.

210. Two proposals for a reformulation of Article 9 were submitted at the beginning of the discussion on Article 9: the first was a proposal submitted by **ARGENTINA, GREECE, POLAND, RUSSIA,** and the **UNITED STATES** (Misc. 10), the second a proposal submitted by **FRANCE** (Misc. 11).

211. The proposal submitted by **FRANCE** read as follows:

“If:

I.

1- the disclosure document has not been delivered within the period of time established in article 3

2- the disclosure document contained a misrepresentation of a material fact;

3- the disclosure document omitted a material fact;

then the franchisee is entitled to pursue appropriate legal recourses.

II. The fact is considered material, unless the franchisor can prove this fact is not”.

212. Furthermore, it proposed that the Explanatory Report should specify that “[t]he appropriate recourse will be determined by local law”.

213. Introducing its proposal, the French delegation stated that its preference was actually to delete the article as a whole. The reason for this was that it risked interfering with the law of obligations of the countries adopting the Model Law, and it was not the purpose of the Model Law to re-write the law of obligations of the different countries. Moreover, it would create special rules for a specific sector (i.e. franchising) and it was difficult to imagine how the States that would adopt the Model Law would be able to accept having special rules for the franchising sector only.

214. This proposal however did not receive the support of the Committee and was consequently rejected.

215. The proposal submitted by **ARGENTINA, GREECE, POLAND, RUSSIA** and the **UNITED STATES** (Misc. 10) read as follows:

“(1) If the disclosure document or notice of material change:

(A) has not been delivered within the period of time established in Article 3;

(B) contains a misrepresentation of a material fact; or

(C) omits a material fact;

then the franchisee may on 30 days prior written notice to the franchisor terminate the franchise agreement and/or claim against the franchisor for damages suffered from the conduct described in (A) – (C), unless the franchisee had the information required to be disclosed through other means, did not rely on the misrepresentation, or termination is a disproportionate remedy in the circumstances.

(2) The remedies granted to the franchisee pursuant to this article must be exercised no later than the earlier of:

(i) one year after the act or omission constituting the breach upon which the right to terminate is based;

- (ii) three years after the act or omission constituting the breach upon which the right to claim for damages suffered is based;
  - (iii) one year after the franchisee becomes aware of facts or circumstances reasonably indicating that it may have a right to claim for damages suffered; or
  - (iv) 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.
- (3) The rights provided by paragraph (1) of this Article do not derogate from any other right the franchisee may have under the applicable law.”

216. Each of the delegations sponsoring the joint proposal submitted oral comments for the consideration of the Committee. The delegation of the **UNITED STATES** introduced the proposal by illustrating its operation. It stated that the first part of the proposed Article 9(1) defined the triggering events, the conduct that would give rise to some sort of cause of action or claim by the franchisee relating to an improper disclosure or failure to disclose. If one of those events had occurred, thus giving rise to a remedy, the franchisee would have the right on 30 days prior written notice to the franchisor, to elect to terminate the franchise agreement and/or to claim against the franchisor for damages. Damages were an additional remedy, the current draft providing for termination only. The proposal also provided that the termination, or the claim for damages, had to be a result of the conduct described in (A), (B) or (C) of the triggering events in para. (1). It continued by listing some of the exceptions or defences that would be available. Firstly, “unless the franchisee had information required to be disclosed though other means” which was already in Article 9, secondly, that the franchisee did not rely on the misrepresentation, which was also currently in Article 9, thirdly, that termination would be a disproportionate remedy in the circumstances. As regards para. (2), the proposal changed the period of time within which a claim had to be asserted, and introduced a differentiation between a claim for damages and a claim for termination. As a claim for termination was drastic, it had to be asserted relatively soon after the events giving rise to the claim had occurred, i.e. within one year after the act or omission constituting the breach upon which the right to terminate was based. On the other hand, a claim for damages would have to be asserted within 3 years. There was no differentiation between the claims that had to be asserted if the franchisor called to the attention of the franchisee the mistakes that had been made, and the time period also remained the same. Para. (3) of Article 9 also remained unvaried.

217. The **RUSSIAN** delegation indicated that it had decided to sponsor the proposal even if the problems it would face as regards its introduction into the Russian legal system were similar to those of the French delegation. In its view a Model Law without a provision on remedies would be meaningless. The national legislator had to be given guidance as to what the consequences of non-compliance with the disclosure obligations introduced by the law would be. In effect, the problems that the article gave rise to were easily avoided as a result of the third paragraph, because a national legislator would see that the remedies provided for in paras. (1) and (2) were not the only ones, that they could be amended or changed so as to fit into the national legal system. The word “terminate” in the first two paragraphs should be interpreted in a broad sense, so as to ensure that it include all different ways of ending the contract, such as unilateral termination on prior notice, legal action in resignation of the contract, and legal action for the invalidity of the contract, which could be nullity and annulment or avoidance of the contract.

218. The **POLISH** delegation stated that it was more optimistic as to the possibility of incorporating the proposed solution into civil law systems. However, it had doubts regarding para. (2)(iv), which was very specific. In effect, both proposals interfered with existing rules and regulations concerning breach of contract. The difference was that the French proposal was very general, whereas the joint proposal was far more specific. The joint proposal had the advantage that it was balanced, it was concrete, and it dealt with only two remedies: termination and the right to sue for damages. There was nothing unusual, judging from the civilian perspective, in there being a special regulation of remedies which dealt with a particular named contract. Thus, for instance, in the law of sales there was a special regulation of breach of warranty, in addition to the general remedies for breach of warranty, so in this respect it did not share the opinion that there was a legal impossibility to introduce such a system into any civil law system. The problems which remained open were the consequences of termination and the timing of termination, because these were regulated in a variety of ways in the different legal systems. It therefore suggested, in addition to changing the language of

Paragraph (2)(iv) to make it more clear, to add a paragraph stating that the moment of the termination of the franchise agreement and the consequences thereof were to be governed by the applicable law. It was however not only a problem of the timing of the end of the legal relationship, it was also a problem of the consequences of termination, whether or not it would be necessary to repay the performances done depending on whether termination was *ex nunc* or *ex tunc*. It would be very difficult not to deal with the consequences of termination.

219. The **ARGENTINIAN** delegation indicated that it was not worried about the difference between the solutions embodied in the proposal vis-à-vis the rest of the legal system, as what would be incorporated into the legal system would be a totally different system, and the **GREEK** delegation stressed the importance of aligning the two language versions, and also of having internal coherence in the French version, as both the expression "*mettre fin à l'exécution*" and the word "*résiliation*" were used in the same article.

220. One delegation felt that the proposal mixed different issues and that it would therefore be easier to retain the original draft, possibly with the addition of a paragraph such as the one suggested by Poland. What was new in this proposal was the addition of the possibility to claim damages, whereas the original text only referred to termination. The provision however stated nothing about whether the possibility to claim damages was fault based or not, or whether it would be necessary to make a reference to national law also here, as it would be national law that determined when damages could be claimed. Furthermore, as regards the references to termination being disproportionate in certain circumstances, did that mean that it was not possible to claim damages? Lastly, one year after the omission should instead be one year after the moment when a disclosure document should have been delivered.

221. Another delegation stated that it shared the concerns relating to the incorporation of the remedies into the civil law system, but felt that issues such as the consequences of termination, the procedure for termination, whether or not negligence was required for damages, should all be left to national legislation. One drafting point was that Article 9(1)(C) used the verb to "omit", whereas the defined term was the noun "omission" and not the verb. This should therefore be changed.

222. One delegation raised the issue of the period of time before the termination of the agreement on the part of the franchisee took effect, or until the franchisor cured its defective performance, and suggested that the franchisee should be able to suspend performance. This point had already been raised in the written comments submitted by **CHINA** (see Doc. 40), in which the addition of other remedies such as disciplining by professional associations and administrative and judicial sanctions was proposed.

223. A second issue raised in relation to Article 9 at the First Session had concerned whether the franchisee should be able to terminate the agreement simply by notice to the franchisor, or whether the involvement of a court or other judicial or administrative authority was necessary.

224. This issue was raised again at the Second Session in relation to the joint proposal, and the solution proposed by the **FRENCH** delegation in its written comments in Doc. 39 was re-proposed. In this document the French delegation had stated clearly first, that termination should not have retroactive effects, and secondly, that it should not be possible for the franchisee to declare termination without this termination having previously been submitted to the franchisor or to a judge, a position that echoed the position of the French legal system. As it felt that the English version of the article was ambiguous on this point, whereas the French text was not as it stated clearly that the franchisee was entitled to ask for the termination of the agreement, the French delegation had proposed that "entitled to terminate" be replaced by "entitled to ask for the termination of" in the English text of paras. (1) – (3) and this was echoed in the proposal it presented at the beginning of the discussion. The written comments of the World Franchise Council (see Doc. 42) and the European Franchise Federation (see Doc. 43) agreed with the French position that a franchisee should not be able to terminate the agreement itself, that a decision of a court or an agreement with the franchisor should be necessary.

225. It was observed that the term "termination" had a specific meaning in common law countries and the problem was to find something which corresponded to this meaning in French. Furthermore, the remedies were inserted in the framework of a special system instead of being part of

the law commonly applied, and the deadlines that were given in the different provisions might at times be justified, whereas at others they were too short.

226. The importance of having a provision on remedies was reiterated, and the fact that if there were no such provision many legal systems would have no remedy for failure to disclose was stressed.

227. The Committee accepted the joint proposal as a basis for its discussion and allowed delegations some time to submit proposals for modifications or additions.

228. The **POLISH** delegation submitted a proposal for a paragraph that was to be added to the joint proposal, the other provisions remaining the same (see Misc. 13). This proposed additional paragraph read as follows:

“(4) All matters regarding termination and damages, which have not been expressly regulated in this Article 9, shall be governed by the applicable law.”

229. Introducing its proposal, the Polish delegation indicated that by stating that all matters not dealt with in the article were governed by the applicable law it intended to cover also the points raised in the course of the discussion, namely the question of whether the remedy of damages was based on strict liability or liability based on the principle of fault, when the termination should occur, whether it was *ex tunc* or *ex nunc* termination, whether it required the intervention of a court or whether the termination was triggered simply by a notice of the terminating party. Thus, if French law were the applicable law, the consequences of the termination of the agreement would be governed by French law, it would be French law that decided such issues as whether the termination had *ex tunc* or *ex nunc* effects, or whether the termination was subject to the approval of a judge. The term “termination” was used in a very general manner so that it would not prejudice the consequences of termination, whether it had *ex tunc* or *ex nunc* effects, and whereas the English term “termination” appeared to be appropriate for this purpose, an adequate term would have to be found for the French version.

230. The proposal received general support, one delegation indicating that it was the most balanced solution possible. Another delegation had some doubts as to whether or not the remedy of damages should be covered by the provision. It was however pointed out that a consequence of the joint proposal was that in some instances the franchisee had two remedies available, termination and damages, and in others only damages, so it was useful also in this respect to deal with damages.

231. In the end, the Committee decided to adopt Article 9 as submitted in the joint proposal with the addition proposed by Poland.

232. It was suggested that the Explanatory Report should explain clearly that the English term “termination” and its French equivalent were used in a very generic manner, with the clear intention that the effects of the franchisor putting an end to the contract was to be governed by the applicable law, that the provision did not intend to regulate the procedure for termination or its effects. Furthermore, the Explanatory Report should also illustrate the remedy of damages in Article 9. This proposal was accepted by the Committee.

233. A question raised concerned what body or which person should act as supervising authority as to the observance of the disclosure obligation, and whether or not the Model Law should deal with this question (see also the comments submitted by China, Doc. 40). It was explained that, in view of the differences between the different countries, it was not possible for the Model Law to take a stand on which body or authority should act as supervisory authority, each State would decide what was most appropriate in its case.

234. Finally, in the course of the review of the provision for its final adoption, the Committee decided to modify the beginning of para. (1)(C) to read “makes an omission of a material fact” instead of “omits a material fact”, as “omission” was a defined term and “omits” was not.

## ARTICLE 10

**Documents:**        *Doc. 36 paras. 286 – 297*  
                              *Doc. 37 Explanatory Report para. 135*

235. No issues having been raised, and no proposals having been made, in relation to Article 10, it was adopted by the Committee as it stood.

## ARTICLE 11

**Documents:**        *Doc. 36 paras. 289 – 300*  
                              *Doc. 37 Explanatory Report para. 136*  
                              *Comments submitted by Germany (Doc. 44 p. 9)*

236. In relation to Article 11, the German delegation proposed a slight modification, which was a drafting point and concerned only the English version, namely to change “the” to “this”, so that the provision would read as follows (proposed modification in italic):

“Any waiver by a franchisee of a right given by *this* law is void”.

237. This proposal was accepted by the Committee.

238. The meeting adjourned at 11.15 a.m. on Friday, 12 April 2002.

**TEXT OF THE DRAFT MODEL FRANCHISE DISCLOSURE LAW AS ADOPTED  
BY THE COMMITTEE OF GOVERNMENTAL EXPERTS AT ITS  
SECOND SESSION,  
ROME, 8 – 12 APRIL 2002<sup>1</sup>**

**PREAMBLE**

The *International Institute for the Unification of Private Law (UNIDROIT)*,

*Recognising* that franchising is playing an ever greater role in a wide range of national economies,

*Being mindful of* the fact that in the legislative process, State legislators may wish to consider 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 prospective investors are more likely to protect themselves against fraud if they have access to truthful, important information in advance of their assent to any franchise agreement;
- whether the nation's economic and social interests are best served by legally requiring a balance of information between the parties to a franchise agreement;
- whether there is a pattern of abusive conduct, or whether this conduct is isolated or limited to particular industries;
- the nature of the evidence of abuse;
- whether existing laws address the concerns and whether they are adequately applied;
- whether an effective system of self-regulation exists
- the financial burden the new legislation will place upon franchisors and investors as compared to the benefits of legally-required disclosure;
- whether the proposed legislation inhibits or facilitates entry to franchisors, and its effect on job-creation and investment;

and

- the views of interested organisations, including national franchise associations.

*Recalling* that State legislators may want to adapt suggested provisions, especially with regard to the enumerated disclosure items, in response to specific circumstances of, or established methods of legislation in, each

**PREAMBULE**

*L'Institut international pour l'unification du droit privé (UNIDROIT)*,

*Reconnaissant* que la franchise joue un rôle croissant dans un grand nombre d'économies nationales,

*Etant conscient* du fait que dans la procédure législative, le législateur pourrait considérer divers éléments, et notamment :

- s'il existe un problème réel ; quelle est sa nature et quelle action serait, le cas échéant, nécessaire ;
  - si les futurs investisseurs peuvent mieux se prémunir contre la fraude s'ils ont accès à une information importante et sincère avant d'exprimer leur consentement à tout contrat de franchise ;
  - si l'exigence légale d'une information équilibrée entre les parties au contrat de franchise sert mieux les intérêts économiques et sociaux nationaux ;
  - s'il s'agit de conduites abusives généralisées ou s'il s'agit de conduites isolées ou limitées à des secteurs particuliers ;
  - la nature de la preuve de l'abus ;
  - s'il existe des lois qui traitent de ces préoccupations et si elles sont appliquées de façon adéquate ;
  - s'il existe un système d'auto-réglementation efficace ;
  - les rapports entre les bénéfices de la nouvelle législation et les coûts qu'elle engendre pour les franchiseurs et les investisseurs ;
  - si la législation proposée constitue une entrave à l'entrée des franchiseurs et si elle a des effets sur la création d'emploi et les investissements ;
- et
- l'avis des organisations intéressées y compris les associations nationales de franchise.

*Rappelant* que les législateurs pourraient vouloir adapter les dispositions suggérées, notamment celles concernant les éléments devant être divulgués, pour tenir compte des circonstances spécifiques et des procédures législatives qui leur

<sup>1</sup> The French text reproduced in this Annex incorporates the modifications decided by the French Drafting Committee on 12 April 2002.

State,

*Recalling* that the text of the Model Law is accompanied by an Explanatory Report which, with a view to assisting legislators, explains the purpose of the provisions,

*Finding* that experiences with disclosure legislation has on the whole been positive

is pleased to place the *Model Franchising Disclosure Law* presented in this document at the disposal of the international community

as an example that is not compulsory for States legislators and

as an instrument intended to be a recommendation for States that have decided to adopt franchise specific legislation.

sont propres,

*Rappelant* que le texte de la Loi type est accompagné d'un Rapport explicatif qui, pour aider les législateurs, explique l'objectif poursuivi par chaque disposition,

*Constatant* que les législations sur la divulgation des informations constituent dans leur ensemble une expérience positive,

a l'honneur de mettre à la disposition de la communauté internationale la présente *Loi type sur la divulgation des informations en matière de franchise*,

exemple qui n'est pas obligatoire pour les législateurs et

instrument qui est une recommandation pour les Etats ayant décidé d'adopter une législation spécifique en la matière.

## ENGLISH TEXT OF THE MODEL LAW

## TEXTE FRANÇAIS DE LA LOI TYPE

### ARTICLE 1 - (SCOPE OF APPLICATION)

### ARTICLE 1 - (CHAMP D'APPLICATION)

(1) This law applies to franchises to be granted or renewed for the operation of one or more franchised businesses within the [State adopting this law].

1) La présente loi s'applique aux franchises devant être concédées ou renouvelées pour l'exploitation d'une ou plusieurs activités commerciales franchisées sur le territoire de [l'État qui l'adopte].

(2) Except as otherwise expressly provided in this law it is not concerned with the validity of the franchise agreement or any of its provisions.

2) Sauf disposition contraire de la présente loi, celle-ci ne concerne pas la validité du contrat de franchise ou de l'une de ses clauses.

### ARTICLE 2 - (DEFINITIONS)

### ARTICLE 2 - (DEFINITIONS)

For the purposes of this law:

**affiliate of the franchisee** means a natural or legal person who directly or indirectly controls or is controlled by the franchisee, or is controlled by another party who controls the franchisee;

**affiliate of the franchisor** means a natural or legal person 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

Aux fins de la présente loi :

un **affilié du franchisee** est une personne physique ou morale qui exerce un contrôle direct ou indirect sur le franchisee, ou est contrôlée directement ou indirectement par celui-ci, ou se trouve sous le contrôle d'un tiers qui contrôle le franchisee ;

un **affilié du franchisor** est une personne physique ou morale qui exerce un contrôle direct ou indirect sur le franchisor, ou est contrôlée directement ou indirectement par celui-ci, ou se trouve sous le contrôle d'un tiers qui contrôle le franchisor ;

un **contrat de développement** est une convention aux termes de laquelle un franchisor 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** correspond aux droits concédés par une partie (le franchisor) qui autorise et engage une autre partie (le franchisee), en échange de contreparties financières directes ou indirectes, à

engage in the business of selling goods or services on its own behalf 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;

**franchise agreement** means the agreement under which a franchise is granted;

**franchised business** means the business conducted by the franchisee under a franchise agreement;

**franchisee** includes a sub-franchisee in its relationship with the sub-franchisor and the sub-franchisor in its relationship with the franchisor;

**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 change** in the information required to be disclosed means a change which can reasonably be expected to have a significant effect on the prospective franchisee's decision to acquire the franchise;

**material fact** means any information that can reasonably be expected to have a significant effect on the prospective franchisee's 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 fact of which the person making the statement was aware at the time the statement ought to have been made;

**State** includes the territorial units making up a State which has two or more territorial units,

se livrer à une activité commerciale de vente de marchandises ou de services en son propre nom et pour son propre compte dans le cadre d'un système élaboré par le franchiseur qui comprend son savoir-faire et son assistance, qui règle les modes essentiels d'exploitation incluant l'exercice par le franchiseur d'un contrôle permanent et approfondi des opérations et qui est associé de manière significative à une marque de commerce, une marque de service, une dénomination 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 de sous-franchise ;

**C)** les droits concédés par un franchiseur à une autre partie dans le cadre d'un contrat de développement.

Aux fins de la présente définition, le paiement à un prix préférentiel des biens destinés à la revente ne peut être assimilé aux « contreparties financières directes ou indirectes » ;

un **contrat de franchise** s'entend de tout accord par lequel une franchise est concédée ;

une **activité franchisée** est une activité commerciale conduite par le franchisé dans le cadre d'un contrat de franchise ;

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 ;

le terme **franchiseur** désigne également le sous-franchiseur dans ses relations avec ses sous-franchisés ;

une **franchise principale** s'entend du droit concédé par un franchiseur à une autre partie (le sous-franchiseur), de concéder lui-même des franchises à de tiers (les sous-franchisés) ;

une **modification importante** parmi les informations qui doivent être divulguées s'entend d'une modification pouvant raisonnablement être considérée comme ayant un effet significatif sur la décision du futur franchisé d'acquiescer la franchise ;

un **fait essentiel** s'entend de tout renseignement qui peut raisonnablement être considéré comme ayant un effet significatif sur la décision du futur franchisé d'acquiescer une franchise ;

une **déclaration tendant à induire en erreur**, s'entend de l'exposé d'un fait dont son auteur savait ou aurait dû savoir au moment où il l'a formulée, qu'il n'était pas véridique ;

une **omission** s'entend de l'absence de déclaration d'un fait essentiel, dont son auteur était conscient au moment où cette déclaration aurait du être faite ;

le terme **État** inclut les unités territoriales formant un État qui comprend deux ou plusieurs unités

whether or not possessing different systems of law applicable in relation to the matters dealt with in this law;

and

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

**ARTICLE 3 - (DELIVERY OF 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 relating to confidentiality of information delivered or to be delivered by the franchisor; or

**(B)** the payment to the franchisor or an affiliate of the franchisor by the prospective franchisee of any fees relating to the acquisition of a franchise that are not refundable or the refunding of which is subject to such conditions as to render them not refundable, with the exception of a security (bond or deposit) given on the conclusion of a confidentiality agreement.

**(2)** The disclosure document must be updated within [X] days of the end of the franchisor's fiscal year. Where there has been a material change in the information required to be disclosed under Article 6, notice in writing of such change should be delivered to the prospective franchisee as soon as practicable before either of the events described in subparagraphs (1)(A) or (1)(B) has occurred.

**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 is presented as a single document at one time and meets the requirements imposed by this law.

**ARTICLE 5 - (EXEMPTIONS FROM OBLIGATION TO DISCLOSE)**

No disclosure document 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 one year immediately before the

territoriales, qu'elles possèdent ou non des systèmes de droit différents applicables dans les matières régies par la présente loi ;

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 - (REMISE DU DOCUMENT D'INFORMATION)**

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

**A)** la signature par le futur franchisé de tout contrat ayant trait à la franchise à l'exception des contrats relatifs à la confidentialité des informations remises ou à remettre par le franchiseur ; ou

**B)** le paiement au franchiseur ou un affilié du franchiseur par le futur franchisé de toute somme en relation avec l'acquisition d'une franchise qui ne soit pas remboursable ou dont la restitution est soumise à de telles conditions qu'elle ne soit pas remboursable, à l'exclusion d'une sûreté (caution ou dépôt) octroyée lors de la conclusion d'un contrat de confidentialité.

**2)** Le document d'information doit être actualisé dans les [X] jours suivant la fin de l'exercice fiscal du franchiseur. Lorsque survient une modification importante des informations devant être divulguées conformément aux dispositions de l'article 6, le franchiseur doit notifier par écrit toute modification au futur franchisé dès que possible et avant la survenance d'un des événements décrits aux sous-paragraphe 1(A) et 1(B).

**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 qu'il soit présenté sous la forme d'un document unique délivré en une seule fois et que les renseignements qu'il contient soient conformes aux prescriptions imposées par la présente loi.

**ARTICLE 5 - (DISPENSES DE L'OBLIGATION DE DIVULGATION D'INFORMATION)**

Aucun document d'information n'est requis :

**A)** dans l'hypothèse d'une franchise concédée à une personne qui a été un dirigeant ou un administrateur du franchiseur ou de l'un de ses affiliés pendant au moins l'année qui précède

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 substantially the same terms as the assignor or transferor, and the franchisor has not had a significant role in the transaction other than approval of the transfer.

**(C)** in case of the grant of a franchise to sell goods or services to a natural or legal 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 combined business of the franchisee and its affiliates;

**(D)** in case of the grant of a franchise pursuant to which the prospective franchisee commits to a total financial requirement under the franchise agreement in excess of [X];

**(E)** in case of the grant of a franchise to a prospective franchisee who together with its affiliates has a net worth in excess of [Y] or turnover in excess of [Z];

**(F)** in case of the renewal or extension of a franchise on the same conditions;

#### **ARTICLE 6 - (INFORMATION TO BE DISCLOSED)**

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

**(A)** the legal name, legal form and legal address of the franchisor and the address of the principal place of business of the franchisor;

**(B)** the trademark, trade name, business name or similar name, under which the franchisor carries on or intends to carry on business in the state in which the prospective franchisee will operate the franchise business;

**(C)** the address of the franchisor's principal place of business in the State where the prospective franchisee is located;

**(D)** a description of the franchise to be operated by the prospective franchisee;

**(E)** a description of the business experience of the franchisor and its affiliates granting franchises under substantially the same trade name, including:

**(i)** the length of time during which each has run a business of the type to be operated by the prospective franchisee; and

**(ii)** the length of time during which each has

immédiatement la signature du contrat de franchise ;

**(B)** dans l'hypothèse d'une cession ou tout autre forme de transfert des droits et obligations du franchisé dans le cadre d'un contrat de franchise en cours, lorsque les conditions qui lient le cessionnaire ou le bénéficiaire sont substantiellement les mêmes qui lient le cédant, et que le franchiseur n'a pas eu de rôle important dans la transaction autre que l'approbation du transfert.

**(C)** dans l'hypothèse d'une franchise de vente de biens ou de services, concédée à une personne physique ou morale déjà engagée depuis 2 ans dans une exploitation commerciale identique ou similaire, dans la mesure où le chiffre d'affaires réalisé pendant la première année d'activité raisonnablement prévisible à l'entrée en vigueur du contrat de franchise, ne dépasse pas 20 % du total du chiffre d'affaires des activités combinées du franchisé et de ses affiliés pendant cette période ;

**(D)** dans l'hypothèse d'une franchise concédée à un futur franchisé, par laquelle celui-ci s'engage à réaliser conformément au contrat de franchise un apport financier total supérieur à [X] ;

**(E)** dans l'hypothèse d'une franchise concédée à un futur franchisé, dont l'actif net du bilan, cumulé avec celui de ses affiliés, est supérieur à [Y] ou un chiffre d'affaires supérieur à [Z] ;

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

#### **ARTICLE 6 - (CONTENU DES INFORMATIONS FOURNIES)**

**1)** Le franchiseur fournit dans le document d'information les renseignements suivants :

**A)** la raison ou la dénomination sociales, la forme juridique et l'adresse légale du franchiseur et l'adresse du lieu principal d'activité du franchiseur ;

**B)** les marques de commerce, les dénominations commerciales, le nom commercial ou similaire, sous lesquels le franchiseur exerce ou a l'intention d'exercer ses activités commerciales dans l'Etat où le franchisé exploitera son activité ;

**C)** l'adresse du lieu principal d'activité du franchiseur dans l'État où le futur franchisé est situé ;

**D)** une description de la franchise qui doit être exploitée par le futur franchisé ;

**E)** une description de l'expérience commerciale du franchiseur et de ses affiliés qui concèdent des franchises ayant substantiellement la même dénomination commerciale, incluant :

**i)** l'ancienneté de chacun dans la conduite d'opérations commerciales du type de celles

devant être exploitées par le futur franchisé ; et

**ii)** l'ancienneté de chacun dans la concession de

granted franchises for the same type of business as that to be operated by the prospective franchisee;

**(F)** the names, business addresses, positions held, and business experience of any person who has senior management responsibilities for the franchisor's business operations in relation to the franchise;

**(G)** any criminal convictions or any finding of liability in a civil action or arbitration involving franchises or other businesses relating to fraud, misrepresentation, or similar acts or practices of:

**(i)** the franchisor; and

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

for the previous five years, and whether any such action is pending against the franchisor or its subsidiary, and

the court or other citation of any of the above;

**(H)** any bankruptcy, insolvency or comparable proceeding involving the franchisor and/or its affiliate(s) for the previous five years and the court citation thereof;

**(I)** the total number of franchisees and company-owned outlets of the franchisor and of affiliates of the franchisor granting franchises under substantially the same trade name;

**(J)** the names, business addresses and business phone numbers of the franchisees, and of the franchisees of any affiliates of the franchisor which are granting franchises under substantially the same trade name whose outlets are located nearest to the proposed outlet of the prospective franchisee, but in any event of not more than [X] franchisees, in the State of the franchisee and/or contiguous States, or, if there are no contiguous States, the State of the franchisor;

**(K)** information about the franchisees of the franchisor and about franchisees of affiliates of the franchisor that grant franchises under substantially the same trade name 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.

**(L)** the following information regarding the franchisor's intellectual property to be licensed to the franchisee, in particular trademarks, patents, copyright and software:

franchises dans le même type d'activité que celles devant être exploitées par le futur franchiseé ;

**F)** les noms, adresses professionnelles, fonctions exercées et expérience commerciale de toute personne qui a des responsabilités de direction dans la conduite des activités commerciales du franchiseur en relation avec la franchise ;

**G)** toute condamnation pénale ou toute constatation de responsabilité dans le cadre d'une action civile ou d'un arbitrage concernant des franchises ou d'autres activités commerciales, mettant en cause une fraude, une déclaration tendant à induire en erreur ou tout autre comportement similaire impliquant :

**i)** le franchiseur ; et

**ii)** tout affilié du franchiseur qui est engagé dans la franchise

intervenues dans les cinq dernières années, et si le franchiseur ou une de ses filiales font encore l'objet de telles procédures, et

copie de l'assignation devant la juridiction ou tout autre acte équivalent relatif à ce qui précède ;

**H)** toute procédure de faillite, d'insolvabilité, ou procédure comparable ayant impliqué le franchiseur et/ou un ou plusieurs de ses affiliés au cours des cinq dernières années ainsi que l'assignation devant la juridiction y relative ;

**I)** le nombre total des franchiseés, des filiales de distribution et des affiliés du franchiseur qui concèdent des franchises ayant une dénomination commerciale qui est substantiellement la même ;

**J)** les noms, adresses et numéros de téléphones professionnels des franchiseés, et des franchiseés de tout affilié du franchiseur qui concèdent des franchises ayant en grande partie la même dénomination commerciale, dont les unités d'exploitation sont situées le plus près de l'unité d'exploitation proposée au futur franchiseé, sans que les coordonnées ne doivent être données, en toute hypothèse, pour plus de [X] franchiseés dans l'État du franchiseé ou dans les États contigus, ou, en l'absence d'État contigus, dans l'État du franchiseur ;

**K)** tout renseignement concernant les franchiseés du franchiseur et les franchiseés de tout affilié du franchiseur qui concèdent des franchises ayant en grande partie la même dénomination commerciale qui ont cessé d'être franchiseés au cours des trois dernières années fiscales précédant la date de conclusion du contrat, en précisant les motifs de la cessation.

**L)** les informations suivantes ayant trait aux droits de propriété intellectuelle du franchiseur dont une licence est octroyée au franchiseé, et en particulier, aux marques, brevets, droits d'auteurs, et droits de protection logicielle :

- (i) the registration and/or the application for registration, if any;
- (ii) the name of the owner of the intellectual property rights and/or the name of the applicant, if any;
- (iii) the date on which the registration of the intellectual property rights licensed expires; and
- (iv) 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 State in which the franchised business is to be operated;

**(M)** information on the categories of goods and/or services that the franchisee is required to purchase or lease, indicating

- (i) whether any of these have to be purchased or leased from the franchisor, affiliates of the franchisor or from a supplier designated by the franchisor;
- (ii) whether the franchisee has the right to recommend other suppliers for approval by the franchisor; and
- (iii) whether any revenue or other benefit 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, such as rebates, bonuses, or incentives with regard to those goods and/or services, shall be passed on to the prospective franchisee or, if not, whether a price mark-up will be made by the franchisor or the supplier recommended by the franchisor;

**(N)** financial matters, including:

- (i) **(a)** an estimate of the prospective franchisee's total initial investment;
- (b)** financing offered or arranged by the franchisor, if any;
- (c)** the financial statements of the franchisor and when available audited or otherwise independently verified financial statements, including balance sheets and statements of profit and loss, for the previous three years. Franchisors, the creation of which goes back less than three years, are under an obligation to disclose the same documents prepared since they began their activity;
- (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

- i) l'enregistrement et/ou la demande d'enregistrement le cas échéant ;
- ii) le nom du titulaire des droits de propriété intellectuelle et/ou celui de la personne demandant l'enregistrement, le cas échéant ;
- iii) la date à laquelle s'éteint l'enregistrement des droits de propriété intellectuelle faisant l'objet de la licence ;
- iv) les procédures judiciaires ou toute autre procédure légale engagées le cas échéant qui pourraient avoir des effets significatifs sur l'utilisation, exclusive ou non exclusive, par le franchisé des droits de propriété intellectuelle résultant du contrat de franchise,

dans l'État où l'activité commerciale franchisee doit être exploitée ;

**(M)** les informations sur les catégories de marchandises et/ou les services que le franchisé est tenu d'acheter ou louer, en indiquant :

- i) si certaines d'entre elles doivent être achetées ou louées auprès du franchiseur, de ses affiliés, ou auprès d'un fournisseur désigné par le franchiseur ;
- ii) si le franchisé a le droit de soumettre d'autres fournisseurs de son choix à l'agrément du franchiseur; et
- iii) si toute source de revenus ou avantages que le franchiseur ou ses affiliés peuvent recevoir directement ou indirectement en provenance de tout fournisseur de marchandises et/ou de services à destination du franchisé, tels que les rabais, bonifications, ou autres remises au regard de ces marchandises et/ou services, sont complètement transmis au futur franchisé ou, si tel n'est pas le cas, si le franchiseur ou le fournisseur recommandé par le franchiseur font une marge de profit ;

**(N)** tout élément d'information financière incluant :

- i) **a)** une évaluation du montant total de l'investissement initial du futur franchisé ;
- b)** les modes de financements proposés ou facilités par le franchiseur le cas échéant ;
- c)** les états financiers du franchiseur et, lorsque disponibles, les états financiers audités ou autrement vérifiés de manière indépendante, et notamment les comptes d'exploitation et de pertes et profits pour les trois années précédentes. Les franchiseurs, dont la création remonte à moins de trois ans, sont tenus de divulguer les mêmes documents, élaborés depuis qu'ils sont en activité. ;
- ii) **a)** Si une information est délivrée au futur franchisé, par le franchiseur ou en son nom, concernant les résultats financiers passés ou les projections financières 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

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

**O)** The franchisor must present the prospective franchisee with a description of:

**(i)** the state of the general market of the products or services that are the subject of the contract;

**(ii)** the state of the local market of the products or services that are the subject of the contract;

**(iii)** the prospects for development of the market.

**(P)** and anything else necessary to prevent any statement in the document from being misleading to a reasonable prospective franchisee.

**(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. Where the following items of information are not included in the proposed franchise agreement, that fact shall be stated in the disclosure document:

**(A)** the term and conditions of renewal of the franchise, if any;

**(B)** a description of the initial and on-going training programmes;

**(C)** the extent of exclusive rights to be granted, if any, including exclusive rights relating to territory and/or to customers and also information on 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

permis sa préparation et fondé sa présentation ;

**cc)** préciser si elle est basée sur des résultats effectifs d'unités d'exploitation existantes ;

**dd)** spécifier si elle est basée sur des unités d'exploitation appartenant au franchiseur et/ou aux franchisés ; et

**ee)** indiquer le pourcentage d'unités d'exploitation dont les résultats correspondent à l'éventail de ceux cités par comparaison, ou qui les dépassent.

**(b)** Si l'information financière visée dans le précédent sous-paragraphe est fournie, le franchiseur doit spécifier que les niveaux de performance effectivement atteints par l'unité d'exploitation proposée au futur franchisé, peuvent être différents de ceux qui se trouvent énoncés dans l'information fournie par le franchiseur.

**O)** Le franchiseur est tenu de présenter au candidat à la franchise une description de :

**i)** l'état général du marché des produits ou services faisant l'objet du contrat ;

**ii)** l'état local du marché des produits ou services faisant l'objet du contrat ;

**iii)** les perspectives de développement du marché.

**P)** et toute autre information pouvant empêcher que le document d'information puisse tromper un futur franchisé normalement avisé.

**(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. Le fait de ne pas inclure les points d'information suivants dans le contrat de franchise proposé sera mentionné dans le document d'information :

**A)** la durée et les conditions de renouvellement de la franchise, le cas échéant;

**B)** une description des programmes de formation initiale et continue ;

**C)** l'étendue de tout droit d'exclusivité à être accordé, le cas échéant, en incluant les droits d'exclusivité relatifs au territoire et/ou à la clientèle, ainsi que l'information sur tout droit que le franchiseur se réserve

**i)** d'utiliser ou d'accorder 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 ou tout autre réseau de distribution, que ce soit sous les marques prévues dans le contrat

any other trademark;

**(D)** the conditions under which the franchise agreement may be terminated by the franchisor and the effects of such termination;

**(E)** the conditions under which the franchise agreement may be terminated by the franchisee and the effects of such termination;

**(F)** the limitations imposed on the franchisee, if any, in relation to territory and/or to customers;

**(G)** in-term and post-term non-compete covenants;

**(H)** the initial franchise fee, whether any portion of the fee is refundable, and the terms and conditions under which a refund will be granted;

**(I)** other fees and payments, including any gross-up of royalties imposed by the franchisor in order to offset withholding tax;

**(J)** restrictions or conditions imposed on the franchisee in relation to the goods and/or services that the franchisee may sell; and

**(K)** the conditions for the assignment or other transfer of the franchise;

**(L)** any forum selection or choice of law provisions, and any selected dispute resolution processes.

**(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)(C) and (F) 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 - (ACKNOWLEDGEMENT OF RECEIPT OF DISCLOSURE DOCUMENT)**

The prospective franchisee shall at the request of the franchisor acknowledge in writing the receipt of the disclosure document.

**ARTICLE 8 - (REMEDIES)**

**(1)** If the disclosure document or notice of material change:

**(A)** has not been delivered within the period of time established in Article 3;

**(B)** contains a misrepresentation of a material fact; or

**(C)** makes an omission of a material fact;

then the franchisee may on 30 days prior written notice to the franchisor terminate the franchise agreement and/or claim against the franchisor for damages suffered from the

de franchise ou toute autre marque ;

**D)** les conditions dans lesquelles le franchiseur peut mettre fin au contrat de franchise et les effets d'une telle résiliation ;

**E)** les conditions dans lesquelles le franchisé peut mettre fin au contrat de franchise et les effets d'une telle résiliation ;

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

**G)** toute clause de non-concurrence applicable pendant ou après le contrat de franchise ;

**H)** la redevance initiale de franchise, si une part de la redevance est remboursable et les termes et conditions dans lesquelles le remboursement sera effectué ;

**I)** toute autre rémunération ou tout autre règlement incluant toute majoration de redevances, imposée par le franchiseur à l'effet de compenser l'impôt retenu à la source ;

**J)** les restrictions ou conditions imposées au franchisé concernant les marchandises et/ou les services que le franchisé a le droit de vendre ; et

**K)** les conditions requises pour la cession et toute autre forme de transfert de la franchise.

**L)** toute clause relative au choix de la loi applicable et à l'élection du for ainsi que tout mode de résolution des litiges sélectionné.

**3)** Si la franchise est une franchise principale, le sous-franchiseur devra fournir au sous franchisé, outre les informations prévues aux dispositions des paragraphes 1 et 2, les informations concernant le franchiseur qui sont stipulées aux paragraphes 1(A), (E), (H), et 2 (C), et (F) du présent article, de même qu'il devra informer le candidat sous-franchisé de la situation des contrats de sous-franchise dans l'hypothèse d'une résiliation du contrat de franchise principale et de son contenu.

**ARTICLE 7 - (ACCUSE DE RECEPTION DU DOCUMENT D'INFORMATION)**

Sur demande du franchiseur, le futur franchisé devra confirmer par écrit la réception du document d'information.

**ARTICLE 8 - (VOIES DE RECOURS)**

**1)** Si le document d'information ou la notification d'une modification importante :

**A)** n'a pas été délivré dans le délai fixé à l'article 3 ;

**B)** contient une déclaration d'un fait essentiel tendant à induire en erreur ; ou

**C)** présente l'omission d'un fait essentiel ;

le franchisé peut, 30 jours après avoir notifié par écrit son intention au franchiseur, mettre fin au contrat de franchise et/ou demander au franchiseur de l'indemniser du préjudice subi du

conduct described in (A), (B) and (C), unless the franchisee had the information required to be disclosed through other means, did not rely on the misrepresentation, or termination is a disproportionate remedy in the circumstances.

**(2)** The remedies granted to the franchisee pursuant to this article must be exercised no later than the earlier of:

**(A)** one year after the act or omission constituting the breach upon which the right to terminate is based;

**(B)** three years after the act or omission constituting the breach upon which the right to claim for damages suffered is based;

**(C)** one year after the franchisee becomes aware of facts or circumstances reasonably indicating that it may have a right to claim for damages suffered; or

**(D)** 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.

**(3)** The rights provided by paragraph (1) of this Article do not derogate from any other right the franchisee may have under the applicable law.

**(4)** All matters regarding termination and damages, which have not been expressly regulated in this article, shall be governed by the applicable law.

**ARTICLE 9 - (TEMPORAL SCOPE OF APPLICATION)**

This law applies whenever a franchise agreement is entered into or renewed after the law enters into force.

**ARTICLE 10 - (WAIVERS)**

Any waiver by a franchisee of a right given by this law is void.

fait des comportements décrits aux sous-paragraphes A, B et C, à moins que le franchisé n'ait obtenu par d'autres moyens l'information devant être divulguée, ou bien qu'il ne se soit pas fondé sur une telle déclaration, ou encore que mettre fin au contrat constitue au regard des circonstances une mesure disproportionnée.

**2)** Les voies de recours dont dispose le franchisé conformément à cet article doivent être exercées au plus tard :

**A)** un an après l'acte ou l'omission constituant le manquement sur lequel est basé le droit de mettre fin au contrat ;

**B)** trois ans après l'acte ou l'omission constituant le manquement sur lequel est basé le droit de demander la réparation du préjudice subi ; ou

**C)** un an après le moment où le franchisé a connaissance des faits ou des circonstances indiquant raisonnablement qu'il est en droit de demander réparation du préjudice subi ;

**D)** 90 jours après la remise au franchisé d'un écrit rectificatif indiquant les détails du manquement accompagné du document d'information du franchiseur révisé.

**3)** Les droits conférés par le paragraphe 1 du présent article ne privent pas le franchisé de tout autre droit dont il peut disposer selon la loi applicable.

**4)** Toute question relative à la fin du contrat et aux dommages et intérêts qui n'est pas expressément réglée au présent article est régie par la loi applicable.

**ARTICLE 9 - (CHAMP D'APPLICATION TEMPOREL)**

La présente loi s'applique à un contrat de franchise qu'il soit conclu ou renouvelé après son entrée en vigueur.

**ARTICLE 10 - (RENONCIATIONS)**

La renonciation par le franchisé d'un droit conféré par la présente loi est nulle.

**LIST OF POINTS TO BE DEALT WITH IN THE EXPLANATORY REPORT**

The paragraphs of the Explanatory Report illustrating provisions that have been modified will in turn be modified to take into account the modifications made. In addition, the Explanatory Report will deal with the following:

Article 2: relating to the definition of a “franchise”, the issue of control and the concerns expressed by Canada and France

Article 5(B): the concerns expressed by the EFF in Doc. 42 p. 2 as to the weakness of the presumption that a transferor or assignor would pass on all relevant information

Art. 6(1) Chapeau: the footnote in Misc. 9 should be included in the Explanatory Report

Article 6(1)(G): the Explanatory Report should indicate that States may limit disclosure to final decisions

Article 6(1)(G)(i): the issue of the predecessor, including also the definition proposed for Article 2, should be included in the Explanatory Report

Article 6(1)(G)(iii): the reference to the persons indicated in lit. (F) should also be included in the Explanatory Report and the issue of privacy of data and the problem of disclosing information relating to third parties explained

Article 6(1)(K): the second sentence of Option 3 in Doc. 37 should be included in the Explanatory Report

Article 6(1)(O): indicate that what is required is not a full market analysis, but a simple statement

Article 8: Insert the explanation provided by Poland for its proposal in Misc. 13 relating to both the neutrality of the term “termination” and its French equivalent, and to damages.

**COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION  
OF A MODEL FRANCHISE DISCLOSURE LAW**

**COMITE D'EXPERTS GOUVERNEMENTAUX CHARGE D'ELABORER  
UNE LOI MODELE SUR LA DIVULGATION DES INFORMATIONS  
EN MATIERE DE FRANCHISE**

**SECOND SESSION / DEUXIÈME SESSION**

Rome, 8 – 12 April 2002 / Rome, 8 – 12 avril 2002

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