for them to calculate the exact sum of damages.

SUMMARY

We allow the appeal of Mark's on the quantum of damages and dismiss all other appeals of all parties. In the result Mark's must pay Parks West Mall damages in the amount finally calculated by counsel. Should the parties be unable to agree, leave is granted to return to the court.

Unless written submissions are received within 30 days from the date of this judgment, the appellant Mark's Work Wearhouse Ltd., having met with substantial success in its appeal, will have costs against Parks West Mall Ltd. Parks is entitled to costs of the appeal against Jennett and Slavik. With respect to the third party proceedings, Jennett and Slavik will have their costs against Mark's Work Wearhouse Ltd. and are entitled to contribution for their costs in the main appeal from Mark's Work Wearhouse.

[¶ 7347] Exclusive Supply Clause Held Valid under French, EEC Competition Law

Back reference: ¶ 1900.

Article by Olivier Gast of Gast International, Paris, written for the CCH BUSINESS FRANCHISE GUIDE.

THE PHILDAR CASE: THE EXCLUSIVE SUPPLY CLAUSES UNDER FRENCH AND EEC COMPETITION LAW

[In full text]

On June 17, 1996, a judgment which had been awaited for a long time and with some anxiety by French franchisors was issued.

After long legal proceedings between the Phildar Corporation and one of its former franchisees, the Appeals Court of Amiens had to determine the validity of an exclusive supply clause in franchise contracts.

Now, exclusive supply is a common clause in franchise contracts. Under such clause, the franchisor requires its franchisees to purchase only products manufactured by the franchisor or by a third party supplier, provided the latter is approved by the franchisor.

Some people favor the exclusive supply clause because they believe that success of a franchise greatly depends on the possibility for the franchisor to require the franchisees to purchase the products it manufactures or selects. Others reject such clause because they think it violates the principles of franchisee independence and free competition.

The issue of the validity of such clauses with respect to competition rules seemed settled since Commission regulation (EEC) No 4087/ 88 dated November 30, 1988.

Under Article 3-1 b of that Regulation, clauses requiring the franchisee to "sell or use in the course of the provision of services, goods which are manufactured only by the franchisor or by third parties designed by it" are lawful in so far as they are necessary to protect the franchisor's industrial or intellectual property rights or to maintain the common identity and reputation of the franchised network, "when it is impracticable, owing to the nature of the goods which are the subject-matter of the franchise, to apply objective quality specifications."

In the *Phildar* case, the Appeals Court of Douai took up these EEC provisions and ruled on December 5, 1991 that the exclusive supply clause was valid on the ground that the clause was "necessary to protect the identity and reputation of the Phildar franchise network."

The *Cour de Cassation (French Supreme Court for civil, commercial, criminal and labor matters)* nevertheless annulled this judgment on the ground that the Appeals Court had not sufficiently explained how the clause was justified by the network's interest. The *Cour de Cassation* is therefore no longer satisfied with the general and theoretical justification given by the Douai judges. From now on, the clause will be considered justified only if it is established that the clause is essential for the network.

This demonstration was undertaken by the Appeals Court of Amiens, to which the case was referred under change of venue after the judgment's annulment. It ruled that the clause was lawful, but only after fully establishing its usefulness for the network.

The reasoning of the Amiens judgment confirms that an exclusive supply obligation is not automatically lawful, and that the

franchisor wanting to impose such obligation on its franchisees must prove that it is essential for the network. A recent decision of the *Conseil de la Concurrence* (Competition Council) follows the same trend, as it also places the burden of proof on the franchisor. These two decisions are of interest because they give additional details on the products likely to be covered by such clause (see Section II).

These decisions are however consistent with the European and French caselaw, which on the one hand aims at avoiding unfair trade practices and on the other hand takes account of the essential nature of the said clause in franchise contracts. It is therefore necessary to link exclusive supply clauses to the former caselaw on the matter and to review their legal validity on a case by case basis (see Section I).

I. *Legislation and Caselaw on Exclusive Supply Clauses*

Exclusive supply clauses are not automatically valid under EEC competition regulations. They can, for instance, fall under the scope of Article 85, Section 1 of the treaty which prohibits agreements between undertakings in restraint of trade. Indeed, a franchisee bound by an exclusive supply undertaking cannot, by definition, purchase products from a manufacturer not approved by the franchisor. If the latter conquers a significant market share, because of the number of size of the enterprises of his network, there will be a noticeable market limitation to the detriment of other manufacturers.

This is why the European Court of Justice, then the European Commission, have had to determine the evaluation criteria of the said clause. Today, these criteria can be found in Commission Regulation dated November 30, 1988, which exempts some franchise contracts (A).

Besides, the European provisions on competition being directly applicable under French law, the French judges must enforce them.

It is therefore in compliance with the principles set at the European level that the *Conseil de la Concurrence* (Competition Council), the body with first level jurisdiction in France over unfair trade practices, also introduced some requirements in the matter of exclusive supply (B).

A) *European rules concerning exclusive supply clauses*

1. *Article 85 of the Treaty of Rome*

An exclusive supply clause can be prohibited by Article 85, Section 1 of the Treaty of Rome, which provides:

"The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which

a) directly or indirectly fix purchase or selling prices or any other trading conditions;

b) limit or control production, markets, technical development, or investment;

c) share markets or sources of supply;

d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Article 85, Section 2 specifies that "any agreements or decisions prohibited pursuant to this Article shall be automatically void."

But the caselaw of the EEC Court of Justice and the European Commission's practice have gradually specified in which cases the exclusive supply clauses are compatible with these provisions, more exactly the terms on which these provisions do not apply to the said clauses, and this pursuant to Article 85, Section 3 of the treaty, which adds:

"The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

—any agreement or category of agreements between undertakings;

—any decision or category of decisions by associations of undertakings;

—any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit, and which does not:

a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

Lastly, franchise contracts are covered since 1988, pursuant to this article, by a category exemption regulation. This regulation, which results from the caselaw of the EEC Court of Justice and the European Commission's practice, seems to establish the usefulness of exclusive supply clauses in franchise contracts.

2. *Principles set forth by the EEC Court of Justice*

The *Pronuptia* judgment, passed on January 28, 1986, enabled the Court to rule for the first time on the lawfulness of franchise contracts, in this specific case a distribution franchise contract. The Court in particular took position on the clauses of interest to us.

After having explained how distribution franchise systems are useful for franchisors and franchisees, the Court immediately specified that such a system is only viable if the franchisor can take the "necessary measures to protect the identity and reputation of the network which is symbolized by the sign." As a result, such measures are not competition restrictions under Article 85, Section 1.

Then the Court gave a list of these measures; they include the clauses "which require the franchisee to only sell products originating from the franchisor or from suppliers selected by the franchisor." Their justification is that, thanks to them, "the public will be able to find goods of the same quality in every franchised outlet."

Indeed, there is another way to control this quality: the franchisor could set objective quality specifications. But the Court admits that such specifications are excluded for some specific lines of business because of the very nature of the business (e.g. fashion, which constantly changes). Besides, it acknowledges that the enforcement of these specifications can "because of the high number of franchisees, involve costs which are too high."

Its conclusion is therefore that an exclusive supply clause "must, under such conditions, be considered necessary to protect the network's reputation." But the Court specifies that the clause "must not result in the franchisee being prevented from obtaining the products from other franchisees". This prohibition, the purpose of which is to fight market compartmentalization, is an established prohibition under EEC law and can be found in all European Commission decisions.

3. *Application of the principles by the European Commission*

Many requests by corporations wanting to benefit from the Article 85, Section 3 exemption have been referred to the European Commission. The Commission has the authority to grant this exemption on an individual basis and has gradually defined the evaluation criteria of the exclusive supply clauses with respect to Article 85, in the light of the principles set by the EEC Court of Justice.

In the *Pronuptia* and *Charles Jourdan* decisions (respectively dated December 17, 1986 [1] and December 2, 1988),[2] the Commission focused on the nature and quality of the products under review. Since these were fashion accessories, the Commission considered that the franchisee's obligation to order these accessories exclusively from the franchisor and from the suppliers specified by the franchisor fell under the "indispensable control for the protection of the identity and reputation of the network symbolized by the sign", the aim assigned to the clause being to "protect the homogeneity of the corporate image."

The *Computerland* decision, dated July 13, 1987,[3] uses the same legal grounds, but completes them. Thus, the network's identity and reputation is protected by allowing purchasers to obtain "products of the same quality from all franchisees"; this obligation prevents the sale of lower quality products, which would stain the network's reputation, and this to the detriment not only of the franchisor but also of the franchisees.

The nature of the products at stake—high quality micro-computing products—is not omitted in the Commission's reasoning and is used to expressly reject recourse to objective quality specifications: "Taking into account the extensive line of products

[1] OJEC L13, Jan 15, 1987, p. 39, pt. 25 ii.

[2] OJEC L35, Feb 7, 1989, p. 31, pt. 28 (¶9401, BUSINESS FRANCHISE GUIDE, 1989-1990 New Developments Transfer Binder).

[3] OJEC L222, Aug 10, 1987, p. 12, pt. 23 vi (¶8930, BUSINESS FRANCHISE GUIDE, 1986-1987 New Developments Transfer Binder).

proposed for sale and the very fast technological changes on the market, it would be impossible to guarantee the necessary quality control by setting objective quality criteria which could be used by the franchisees themselves. In fact, the setting up of objective standards could be detrimental to the franchisees' freedom to sell the most recent products, except if the quality criteria were continuously up-dated, a far too tedious—if not impossible—task".

The exclusive supply obligation is also considered as a "form of quality control" necessary to the "good operation of the enterprise" in the *Service Master* decision dated November 14, 1988.[4] The Commission however adds that the obligation, in that specific case, does not prevent the franchisees from "obtaining equipment and products of equivalent quality from third party suppliers". The products at stake—chemical products—met some objective criteria such as "safety, no toxicity, biodegradability and efficiency"; as a result, the franchisor must not "refuse to approve suppliers proposed by the franchisees."

The Commission went much further in its *Yves Rocher* decision dated December 17, 1986, where it neither refers to the homogeneity of the corporate image or of the goods nor to the network's identity and reputation. The Commission had to appraise the obligation for the franchisee to supply himself only from Yves Rocher or from other franchisees; it considers in a rather laconic way that the exclusive supply clause "falls within the very nature of the distribution formula" at stake.[5] In other words, the exclusive supply obligation would fall within the very nature of franchise.

The regulation concerning application of Article 85, Section 3 of the Treaty of Rome to categories of franchise contracts has resulted from the Commission's administrative practice.[6] In this regulation which sums up the commission's position, the exclusive supply clauses are not automatically allowed.

The essential principle on which the regulation is based derives directly from the *Pronuptia* judgment: a clause included in a franchise contract cannot be considered contrary to competition if the said clause is indispensable to the protection of the network's know-how, identity and reputation. This is expressed by Article 3-1 b) of the regulation: "the franchisor can impose an exclusive supply obligation to its franchisees in so far as this is necessary to protect the industrial or intellectual rights of the franchisor or to maintain the common identity and reputation of the franchised network", "where it is not possible practically, because of the nature of the products covered by the franchise, to apply objective quality specifications".

It is, however, necessary to link this article to the provisions of Article 5 points b) and c), which prohibit the same exclusive supply when it is not justified by the absence of objective specifications.[7] Where it is possible to set forth such specifications (for instance, in the *Service Master* case) and, despite this, the franchisee cannot supply himself with products of a quality equivalent to those which are proposed to him, the exemption does not apply. Similarly, in such case, the franchisor cannot refuse "for other reasons than the protection of the franchisor's industrial or intellectual rights or the protection of the network's identity and reputation", to appoint as approved manufacturers third parties proposed by the franchisee."

Finally, points b) and c) of Article 5 refer in turn expressly to Article 2-e of the regulation, which must also be taken into account when reviewing the legal validity of an exclusive supply clause: this article prohibits the franchisees from manufacturing, selling or using products competing with the franchisor's products covered by the franchise. This seems understandable: the franchisor's sign and reputation should not benefit to a third-party competitor. But this prohibition only applies to the products covered by the franchise; it does not apply to the said products' parts or accessories.

National decisions are for a large part inspired by Article 3-1 b) of the regulation and by the principles established by the EEC authorities.

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[4] OJEC L332, Dec 3, 1988, p. 38, pt 17 (¶9292, BUSINESS FRANCHISE GUIDE 1987-1989 New Developments Transfer Binder).

[5] OJEC L8, Jan 10, 1987, p. 49, pt. 45.

[6] Regulation n. 4087/88 OJEC L359, Dec 28, 1988, p. 46 (¶9290, BUISINESS FRANCHISE GUIDE 1987-1989 New Developments Transfer Binder).

[7] For an extensive comment of clauses of Regulation n. 4087/88, see Olivier Gast, "les procédures européennes du droit de la concurrence et de la franchise" (the European procedures of competition law and franchise).

B) *The review of exclusive supply clauses by national bodies and/ or courts*

The *Conseil de la Concurrence* in France is a nonjudicial authority, but with jurisdiction over agreements in restraint of trade and abuse of a dominant position.[8] For this purpose, it has the power to enforce directly Article 85, Sections 1 and 2, and 86 of the Treaty of Rome. It can therefore base its decisions on French law—Articles 7 and 8 of Order dated December 1, 1986—and on EEC law—Articles 85 and 86 of the Treaty of Rome.

On the other hand, the review relating to Article 85, Section 3 falls under the European Commission's exclusive jurisdiction.

In two decisions dated May 24, 1994 relating to franchise systems in the field of hairdressing services, the *Conseil de la Concurrence* followed the Commission's reasoning, applied the EEC principles and declared valid the exclusive supply clauses.

It has thus decided that "the products used in hairdressing salons are a transmission factor to the franchisees of the franchisor's know-how which participate to the development of the notoriety of the trademark and sign."

Use of these products, which besides cannot be covered by objective quality specifications, is therefore "indispensable to the good carrying into effect of the know-how" and can be legally covered by an exclusive supply clause.

II. *Validity of Exclusive Supply Clauses in France since the Cour de Cassation's Judgment dated January* 10, 1995.

The recent judgments passed by French courts in the *Phildar* and *Zannier* cases are a major contribution to the construction of the combined reading of the various articles of the EEC regulation concerning exclusive supply clauses. By putting them together, it is possible to outline a distinction between accessory products and other products covered by the franchise, within the meaning assigned by Article 2-e of the said regulation.

A) *The Phildar case*

1. *Facts*

Since 1955, the Phildar Corporation has developed through a distribution franchise the traditional sector of knitting, stockings-tights, socks and related products, plus, recently, lingerie and ready-to-wear sweaters.

The franchise contracts require franchisees, in general terms, to only sell Phildar trademark products.

One of the franchisees, undergoing serious financial difficulties, had requested from the Phildar Corporation the authorization to sell in its outlet products of another trademark. Despite not obtaining the authorization, the franchisee nevertheless decided to create in its outlet a Naf-Naf trademark clothes department, thus violating its contractual obligations.

The Phildar Corporation required the franchisee to stop immediately these dealings likely to harm the network's image, and the franchisee decided to file a claim in court against its franchisor on the ground that the exclusive supply clause in its contract was void and to claim damages.

2. *Proceedings*

The franchisee's claim was rejected by the court of first instance and by the Appeals Court.[9] The franchisee than lodged an appeal with the *Cour de Cassation*. Among the five grounds put forward, one challenged the reasoning used by the Appeals Court of Douai to justify the exclusive supply clause.

According to this ground, the Appeals Court, set forth in an abstract manner that the exclusive supply obligation was valid because it was necessary to protect the franchise network's identity and reputation, without establishing or specifying how it was in effect indispensable. It simply declared that such provision was made indispensable by the very nature of the distribution formula at stake. In doing so, the court had violated Article 85 of the Treaty of Rome and Article 8 of Order dated December 1, 1986.

Contrary to all expectations, the Appeals Court's formula totally complied with the

[8] The *Conseil de la Concurrence* does not have an exclusive jurisdiction over control of unfair trade practices. The judge having jurisdiction over criminal matters, as well as the civil or commercial judge, can also exercise such control, for instance under a claim for cancellation of an exclusive supply clause. However, decisions of the *Conseil de la Concurrence* can be appealed from in the Appeals Court of Paris, the judgments of which can also be appealed to the *Cour de Cassation*. The latter is therefore the final protector of the uniformity of caselaw relating to Order n. 86-1243 dated December 1, 1986 on free prices and free competition.

[9] Tribunal of Commerce of Roubaix, April 25, 1991, and Appeals Court of Douai, December 5, 1991.

Commission's formula used in the Yves Rocher decision, the *Cour de Cassation* accepted this legal argument and requested further details on the clause's justification:

"Whereas to decide termination of the franchise contract against Mrs. Daubresse and to sentence her to pay damages to the Phildar corporation, the Appeals Court sets forth that 'the exclusive supply obligation imposed on the Phildar franchisee is valid in so far as it is necessary to protect the identity and reputation of the Phildar franchise network; it falls under the very nature of the distribution formula at stake;'

"Whereas to found its judgment on such legal grounds, unfit to demonstrate in a practical way how the litigious clause was indispensable to protect the identity and reputation of the franchise network, the Appeals Court has violated (Article 455 of the New Code of Civil Procedure)."

3. *Meaning and scope of the obligation of a well-founded judgment*

The Appeals Court of Amiens gave extensive legal reasons to justify the necessity of including an exclusive supply clause in the franchise contract between Phildar and its franchisees.

Before we examine these legal reasons, very close to those taken up by the EEC authorities, a brief comment must be made. It relates to the new obligation put on the judges who decide a case on the merits to "dissect" a franchise contract to see if the exclusive supply clause in the contract is indispensable to the network's interest.

The Appeals Court of Douai had largely used the formula of the *Yves Rocher* decision and the formula of the Commission Regulation, referring both to the network's identity and reputation, and to the very nature of the distribution formula at stake.

Now, the *Cour de Cassation* pointed out that the judgment was not well-grounded. It thus imposed on the judges who decide on the merits a systematic search of the network's interest, thus casting a new light on Article 3-1 b) of the regulation.[10]

The *Cour de Cassation* therefore rejects any automatic link between franchise and exclusive supply. But is this new severity justified? It's not sure.

Indeed, this exclusivity is usually, and in an automatic way, the very nature of a franchise network. In particular, it allows the franchisor to manage with a view to the future and with protection; it reassures him because it guarantees markets for his products. On the other hand, it also benefits the network's franchisees: their work will not be indirectly challenged by a nearby franchise selling competitor products, which products would harm the franchised trademark and would create confusion in consumers' minds.

More essentially, in return for accepting the exclusive supply clause, the franchisee obtains the franchisor's know-how, trademark reputation and success methods. As long as his prices remain competitive, the franchisor is entitled to keep control of the products sold. By imposing an exclusive supply, he develops his network's success and the protection of his corporate image.

The *Cour de Cassation* does not say anything contrary to this. But its new severity concerning evidence and its higher-bid reading of the Commission Regulation seemed to threaten, in the future, many exclusive supply clauses. Some franchisors feared that their franchisees would use the judgment to sell, under the franchisor's sign, competitor products.

Finally, the judgment passed on June 17, 1996 is reassuring. Of course, exclusive supply clauses must be justified. But the justification used by the Appeals Court, although very comprehensive, does not contain any major changes, nor does it contain additional requirements compared to the caselaw studied above.

4. *The legal reasoning of the Amiens Appeals Court*

Being asked to review the validity of the litigious clause with respect to Article 85 of the Treaty creating the European Community, the Appeals Court first mentions the provisions of Section 1 of this article, as well as of Article 3-1 b) of Commission Regulation 4087/88.

The two arguments it then uses are not new.

The first argument is similar to the argument of the *Conseil de la Concurrence* in its two decisions relating to hairdressing franchises. It consists in demonstrating that the franchisor's know-how lies in the selective choice of products or their components.

The second argument focuses more classically on the nature of products at stake and the network's size; as a result, no objective

[10] Olivier Gast, "les clauses d'approvisionnement exclusif sous haute surveillance" (exclusive supply clauses under close watch). Les Petites Affiches, May 5, 1995, n. 54, p. 13.

quality specifications can be defined nor imposed.

On the other hand, the Court's judgment does not mention any distinction between products accessory to the franchise and products essential to the franchise. The claimant argued that the exclusive supply clause was drafted in terms too general and that it unduly applied to products which were not covered by the franchise. The claimant was in particular making reference to the lingerie items, more recently sold within the Phildar network; according to the claimant, a distinction should have been made between these lingerie items and the "knitting, stitch, socks, stockings, tights", which were more traditional products within the network.

The Appeals Court probably considered, as argued by the lawyer of the Phildar Corporation, that the range of products offered for sale by the Phildar network remained coherent compared to the corporation's consumer target, the complementarity of the products and the network's sign and image. As a result, it did not make the distinction asked by the franchisee.

But the *Conseil de la Concurrence* did make a distinction between the various products covered by the exclusive supply clause.

B) *The Zannier case* [11]

It's the *Conseil de la Concurrence* which, in this case, was in charge of reviewing compliance of a franchise agreement with the national law provisions prohibiting combinations in restraint of trade, that is Article 7 of Order dated December 1, 1986.[12]

On this occasion, it gives us an interesting analysis of an exclusive supply clause, in particular by specifying the products which can be covered by such clause.

The Zannier Corporation operated a distribution franchise in the field of textile industry, and more exactly in the field of children's clothing.

Its standard franchise contracts provided that "all purchases and supplies (of the franchise) will be made with and come from the Zannier Corporation S.A. or suppliers approved by the Zannier Group Z Corporation." The list of approved suppliers was given in a schedule to the contract, drafted as follows: "For the printing of your documents . . . ; for your outlet equipment . . . ; for your gift boxes . . . ; for your tills . . . ; for your Minitel printer . . . ; for your banners and fabric clerks . . . ." The contracts provided for the up-dating at regular intervals of this list; but they did not give the franchise any possibility to request approval of another supplier than those mentioned on the list.

The *Conseil de la Concurrence*, referring both to "national law" and to the "EEC rules," states that such a clause is valid "only where it is proved that there is no practical possibility, because of the nature of products covered by the franchise, to apply objective quality specifications".

At this stage of its legal reasoning, the *Conseil de la Concurrence* makes a distinction between two types of products, which must be exclusively purchased from the franchisor.

This obligation indeed concerned not only children's clothing, the purpose of the contract, but also the tills, the advertising elements and the outlet's layout.

Here, the *Conseil de la Concurrence* criticized Group Zannier for not giving the franchisees a possibility to request approval of another supplier than those on the list.

As a result, the exclusive supply clause in each standard contract, as it concerned articles mentioned in the schedule to the franchise contract, was declared contrary to the provisions of Article 7 of Order dated December 1, 1986.

The *Conseil* stressed the fact that the said clause "resulted in limiting the franchisees' commercial freedom beyond what was necessary to maintain the network's common identity and resulted in restricting competition between franchisees located on the same catchment area by limiting their sources of supply and the terms of the said supply". Besides, this obligation "may have restricted competition on the markets of these products".

The *Conseil* finally noted that some of these products were indispensable to the operation of a trade (for instance: the tills); for those which were not indispensable (such as gifts to customers), the *Conseil* states once again that the franchisees' obligation to deal, if necessary, with the enterprises appointed by the franchisor limited their independence beyond what was necessary to keep up the network's identity.

[11] Decision n. 96-D-36 dated May 28, 1996, relating to practices noted in the Zannier trademark children's clothing franchise network.

[12] The drafting of Article 7 of Order dated December 1, 1986 is very similar to Article 85 of the Treaty of Rome.

To conclude, franchisors must from now on justify their exclusive supply clauses in a more developed manner. However, the clauses will be reviewed according to the same criteria as used at the European community level, which can be summed up as follows:

Exclusive supply clauses must be made necessary by:

—the impossibility of defining objective quality specifications, because of the nature of the product at stake;

—the impossibility of imposing such specifications, or ensuring compliance with them, because of the network's size and of the high cost implied by a satisfactory control of quality.

They must in addition be justified by:

—either the necessity to protect the franchisor's industrial or intellectual property rights;

—either the keeping up of the network's shared identity and reputation. These notions cover, according to decisions, the homogeneity of the network's image or the constant quality of goods, to the benefit of the franchisees and franchisor.

Finally, these clauses must be limited to the products covered by the franchise: these can be very diversified (*Phildar* decision), provided there is some consistency between them. But such clauses cannot apply to products which do not improve the network's image and shared identity (this is the case for purely utilitarian products such as tills), nor can they apply to products for which objective quality specifications can be defined (*Zannier* decision).

[¶ 7348] U.S. Franchisor's Well-Known Trademarks Protected in South Africa

In the Matters Between: 1) McDonald's Corp., Appellant, and Joburgers Drive-Inn Restaurant (Pty.) Limited, First Respondent, The Registrar of Trade Marks, Second Respondent; 2) McDonald's Corp., Appellant, and Dax Prop CC, First Respondent, The Registrar of Trade Marks, Second Respondent; and 3) McDonald's Corp., Appellant, and Joburgers Drive-Inn Restaurant (Pty.) Limited, First Respondent, Dax Prop CC, Second Respondent.

South Africa Supreme Court, Appellate Division. Case No. 547/ 95. Dated August 27, 1996.

Trademark Law—South Africa—Protection of "Well-Known" Foreign Trademarks"—Knowledge Within Republic—Awareness Among Prospective Franchisees, Customers.—A U.S. fast food franchisor that conducted no business within South Africa and had no goodwill there was entitled to protection of its "well known" trademark under the South African Trade Marks Act of 1993. Section 35 of the Act provides protection to trademarks of foreign parties that are well known in the Republic of South Africa as being the marks of parties who are nationals or residents of a Paris Convention country, whether or not they carry on business or have any goodwill within the Republic. The marks of the franchisor—the largest fast food purveyor in the world—qualified as "well known" because a substantial number of potential South African franchisees and potential customers were aware of them through international advertising and marketing. The franchisor received 242 requests for franchise arrangements from South African persons and companies between 1975 and 1993. Consumer recognition was established by two surveys concluding that 77% and 90% of white residents of suburban areas of major South African cities were aware of the franchisor's name or marks. Even the adoption of the franchisor's name by a domestic restaurateur—and the restaurateur's struggle to maintain the mark—confirmed the franchisor's national reputation. Since the franchisor did not conduct business in South Africa, it was known by persons aware of the business as a foreign (and specifically U.S.) concern. **Back references: ¶ 1100, 1900.**

Trademark Law—South Africa—Protection of "Well-Known" Foreign Trademarks"—Right to Prohibit Infringement—Continuous and Bona Fide Use.—A U.S. fast food franchisor could enforce its "well known" trademarks in South Africa against an unauthorized user that did not make prior continuous and bona fide use of the marks. Section 36(2) of the South African Trade Marks Act of 1993 precludes a foreign