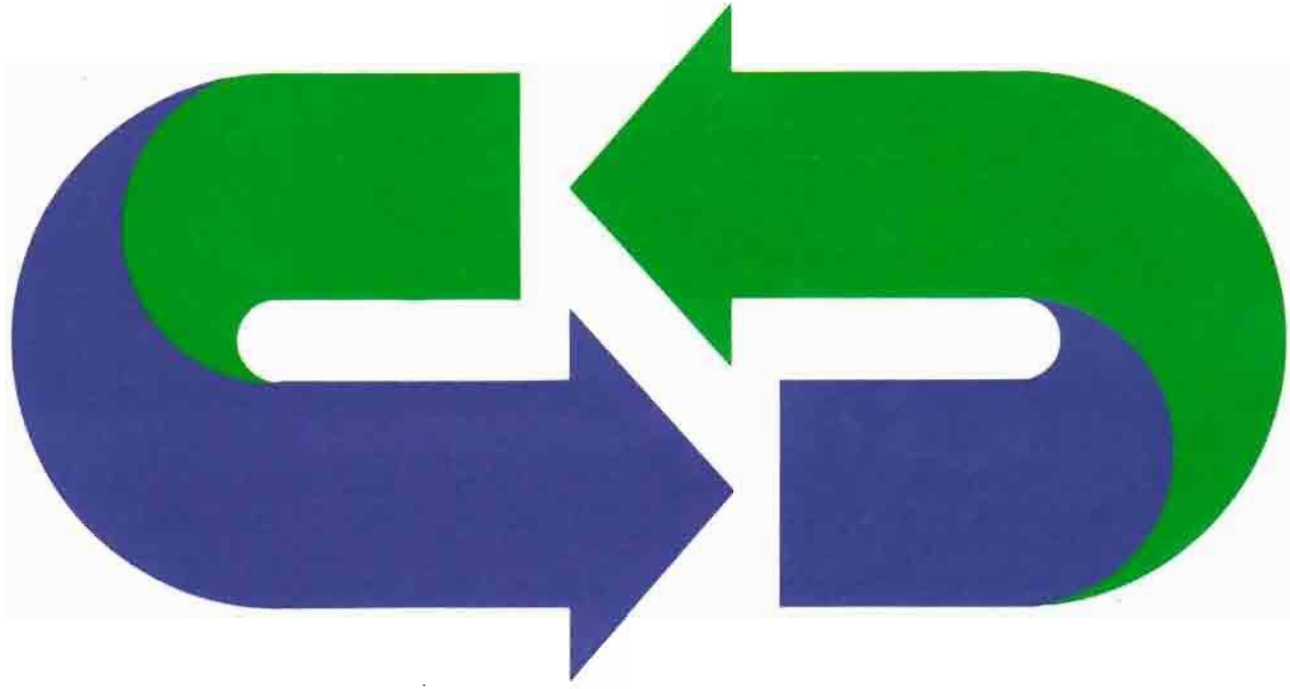

I Congresso e Feira Internacional de Franchising

HOTEL MAKSOUD PLAZA • 23/24/25 DE NOVEMBRO DE 1990 • SÃO PAULO • BRASIL

1º CONGRESSO E FEIRA INTE

HOTEL MAKSOUD PLAZA SÃO PAUL

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DATA	HORÁRIO	SESSÕES	
23/11	8:30/ 9:00	Abertura do 1º Congresso	
"	9:00/10:30	**PAINEL A - FRANCHISING E A ECONOMIA**	
		Ricardo Young Silva	- Presidente da ABF e Presidente do Yázigi
		Willian Cherkasky	- Presidente da International - Franchise Association - IFA - E.U.A.
		Carlos Langoni	- Economista e Diretor Presidente da Projeta Consultoria Financeira S/C Ltda.
		Peter Rodenbeck	- Presidente da Realco - McDonald's - RJ
"	10:30/11:00	Coffee Break	
"	11:00/12:30	**PAINEL B - CONVERTENDO SEU NEGÓCIO EM FRANQUIA**	
		Antonio Carlos Ascar	- Diretor Executivo do Grupo Pão de Açúcar
		Edmyr Piereck	- Diretor de Marketing do Grupo Microbat
		Edson D'Aguano	- Diretor de Franchising da Vila Romana
		Marco Antonio Pinheiro Lima	- Diretor Executivo da Commerce - MEDIADOR
"	12:30/14:00	**ALMOÇO VIDEO "O SISTEMA DE FRANCHISING"**	
"	14:00/15:30	**PAINEL C - O PAPEL DO SHOPPING CENTER NO DESENVOLVIMENTO DO FRANCHISING**	
		Antonio Paulo Pierotti	- Diretor Presidente da Conshopping
		José Isaac Peres	- Diretor Presidente da Embraplan
		Nelson Alvarenga	- Presidente da Ellus
		Alberto Carneiro Neto	- Diretor da Casa do Pão de Queijo
		Petrônio Theodoro Camacho	- Diretor Presidente da Intermix - MEDIADOR
"	15:30/16:00	Coffee Break	
"	16:00/17:30	PAINEL D - ASPECTOS JURÍDICOS DO FRANCHISING	
		Aparecido Antonio de Oliveira	- R.C.M. - Advogados S/C Rão, Caetano e Mendonça
		Thomas Macintosh	- O'Connor e Hannan Attorneys at Law - E.U.A.
		Olivier Gast	- Advogado Internacional, Presidente da Universidade Européia de Franchising e Presidente da Comissão de Franchising da União Internacional dos Advogados - França
		Luciana Morse	- Diretora Fernandes & Morse Advogados Associados - MEDIADOR
"	17:30/18:30	**PAINEL E - FORMAÇÃO E TREINAMENTO DE FRANQUEADOS**	
		Randy Vest	- Reitor da Hamburger University - E.U.A.
		Bernard Jeger	- Diretor Presidente da Nicecream
"	19:00/22:00	**COQUETEL DE ABERTURA DA FEIRA DE NEGÓCIOS**	
"	9:00	**ABERTURA DA FEIRA DE NEGÓCIOS**	
24/11	9:00/10:30	**PAINEL F - A ESTRATÉGIA DE COMUNICAÇÃO NO SISTEMA DE FRANCHISING**	
		Petrônio Correa Filho	- Vice-Presidente da MPM Propaganda
		Elizabeth Pimenta	- Diretora Presidente da Água de Cheiro
		Walter Galiano	- O Boticário (Master Franchise) - Diretor Executivo da Petra Com. de Produtos Naturais
		Ricardo Fischer	- Diretor da Editora Globo - MEDIADOR
"	10:30/11:00	Coffee Break	
"	11:00/12:30	**PAINEL G - AUTO-REGULAMENTAÇÃO DO FRANCHISING**	
		Marcos Gouvêa de Souza	- Diretor da Gouvêa de Souza & MH Associados
		Luis Fernando Furquim	- Presidente do CONAR e Diretor Executivo de Relações Corporativas do Grupo Pão de Açúcar
		Eduardo Villaça Mortari	- Vice-Presidente da Comissão de Ética da ABF - MEDIADOR
"	12:30/14:00	Almoço	
"	14:00/15:30	**PAINEL H. O FRANCHISING NO MUNDO**	
		Ricardo Young Silva	- Presidente da ABF
		Willian Cherkasky	- Presidente da International Franchise Association - IFA - E.U.A.
		Chantall Zimmer-Helou	- Diretora Executiva da Fédération Française de la Franchise - FR
		Enrique Gonzalez	- Vice-Presidente da Associação Mexicana de Franchising - México
		Oswaldo J. Marzorat	- Presidente da Associação Argentina de Franchising - Argentina
25/11	9:00/14:00	**FEIRA DE NEGÓCIOS**	

INFORMAÇÕES GERAIS

CREDENCIAMENTO:
23/11 DE 7:30 ÀS 18:00h - 24/11 DE 7:30 ÀS 18:00h
VENDA DE INGRESSOS PARA A FEIRA:
24/11 A PARTIR DAS 8:00h - 25/11 A PARTIR DAS 8:00h
COFFEE-BREAKS:
SERÃO SERVIDOS NO LOCAL DO CONGRESSO

FEIRA DE NEGÓCIOS

EXPOSIÇÃO PARALELA AO CONGRESSO COM 50 STANDS DE EMPRESAS VOLTADAS AO SISTEMA DE FRANCHISING.

A Feira de Negócios será nos salões BRASIL e TERRAÇO BONET

Entrada franca aos Congressistas e Palestrantes.
Horário da Feira: 23/11/90 das 19:00 às 22:00 hs.
24/11/90 das 9:00 às 22:00 hs.
25/11/90 das 9:00 às 14:00 hs.


FUNDAÇÃO
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CORUM
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alain manoukian
jacadi
LiLi Cube
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CONFERENCE DE MAÎTRE OLIVIER GAST

AVOCAT A LA COUR DE PARIS

DANS LE CADRE DU 1er CONGRESSO E FEIRA INTERNACIONAL DE FRANCHISING

LES 23, 24 & 25 NOVEMBRE 1990 A SAO PAULO

o O o

THEME : LES ASPECTS LEGAUX DE LA FRANCHISE EN FRANCE

DISCLOSURE AND GLASNOST:

COMMENTARY ON THE DECREE IMPLEMENTING §1 OF THE DOUBIN ACT

Fast-changing French trade is evolving under the influence of new forms of distribution emphasizing the importance of membership in a network and developing alongside the traditional distribution system.

Such networks, originally limited to distribution in primarily technical fields (motor vehicles and fuel, farm machinery and construction equipment) now extend to a much broader, open-ended area ranging from food to apparel and including furniture and appliances, so that every consumer must now turn to them for satisfaction of his household and business needs.

Franchising has facilitated the expansion of the sectors in which these new forms of distribution exist, but its role is equally important in the tertiary field. The franchising system, and distributorship and dealership contracts more generally, have furthered the redeployment of the job-creating small businesses.

Over 15% of the commercial sector firms are concerned - about 60,000, representing 700 billion francs of annual sales and an annual payroll totalling 30 billion francs.

Franchising enables individuals, freqently former business executives, civil servants or employees, to invest work and money in a proven system, while retaining their autonomy. "Because there are several thousand potential entrepreneurs in France, all of them prospective franchisees, an efficient and enterprising small business firm can hope to penetrate its market and regain competitiveness by forging solid chains" (from the introduction to Olivier Gast's draft Franchise Act).

But - this being the price of success (French franchising is the European leader) - too many non-professionals have gone into franchising without providing the networks they establish with the requisites, thus threatening to downgrade the franchise concept in public opinion.

So in 1981 I recommended enactment of a preventive law aimed at improving the ethics of the business and protecting future franchisees. In 1985, I drafted an act to regulate franchising and, more generally, "any type of contract the purpose of which is to raise initial funds from executive-investors for an intangible consideration which is neither commercially feasible nor operable".

These were efforts to reassure the public at large as to the reliability of such systems in order both to defend the interests of all franchisors, licensors, manufacturers, importers, etc. and of all small business firms, and to protect the candidates by informing them preventively of the principal characteristics of their contracts, their future partners and the market.

Without seeking to police the franchisor-franchisee relationship, which would inevitably have been obstructive and uneffectual, the aim in view was to require the franchisor, and more generally the licensor, manufacturer ~~or importer~~, clearly, objectively and honestly to inform and document all candidates for admission to the network as to its system and its product.

Parliament adopted those objectives in Doubin Act 89-1008. The parties' contractual relations are still governed by the principle of liberty of contract - "a contract has the force of law between the parties" - but Parliament has enacted a requirement of prior information for the benefit of the party deemed to be in need of it, just as a child is taught his catechism before his first communion.

The informational obligation reflects a new philosophy of contract law endorsed by legal writers and case and statute law, under which the party in the weaker bargaining position must be protected by a descriptive and preventive warning. "A contract has the force of law between the parties provided that they are adequately forewarned."

§1 of the Doubin Act clearly expresses this new way of striving for fairness. There is no need to cripple the dealings of the parties to a contract by over-regulation; freedom of contract must be preserved, but such freedom must be enlightened. The Act requires the party deemed to be the stronger to provide the other with specified information enabling the latter to contract advisedly.

Though frequently but inaccurately described in the press as a "franchise law", the scope of the Act is in fact much broader. Paragraph 1 of §1 states that it applies to all contracts entered into in the parties' mutual interest which entail authorization of use by one of the parties of the other's trade name, trademark or trade sign. The Act therefore covers not only franchise contracts but distributorship, dealership, partnership and trademark license contracts, voluntary chains, associations, cooperatives, etc., as long as the criteria in paragraph 1 of §1 are met, i.e. provided that there is a commitment of exclusivity or quasi-exclusivity for carrying on the business.

The information to be provided in writing (the Act requires delivery of a "document") must be supplied, with the proposed contract, at least 20 days before the contract is signed (§1, para. 4) or at least 20 days before any payment is made (this alternative usually applies in the case of a preliminary exclusive-territory contract). In the latter event, para. 3 of §1 of the Act contains special provisions relative to the services rendered in consideration of such payment and the parties' reciprocal obligations in event of default.

Finally, para. 2 of §1 provides that the contents of the document will be spelled out by decree, but Parliament laid down guidelines by specifying that the information provided shall relate inter alia to "the firm's age and experience, the conditions on and prospects of growth of the market involved, the size of the operators' network, the term and terms of renewal, cancellation and assignment of the contract and the scope of the exclusive provisions".

The implementing decree is to be issued by August 31 but its contents and the information which will have to be supplied are predictable from the latest draft of the decree (which has been repeatedly amended).

For clarity, the franchisor or other similar party (manufacturer, importer, licensor, etc.) "required to supply the informational document prescribed by the first paragraph of §1 of the Act of December 31, 1989" will hereinafter be called the "Discloser", a generic term describing anyone subject to an informational duty (including parties to contracts). The term "Disclosee" will identify any beneficiary of such informational duty (franchisees, dealers, distributors, licensees, etc.), and the document containing the requisite information will be called the "Disclosure", a term derived from American law which, in 1979, paved the way to a very strict precontractual informational duty by adoption of the Full Disclosure Law (which applies only to franchise contracts).

In considering the details of the latest draft of the decree, a requirement contained in both the Act and the draft implementing decree must be borne in mind at all times: the information provided must be "sincere" (para. 1 of §1 of the Act, para. 1 of §3 of the draft decree) and enable the Disclosee "to contract advisedly" (last part of para. 1 of §1 of the Act). The combination of the two concepts is a daunting requirement for Disclosers since erroneous information, although it may be "sincere" if the error was made in good faith, will not enable the Disclosee to contract advisedly (and vice versa).

What must the Discloser understand by "sincere" information? The vagueness of the language of the Act tends to jeopardize the Discloser's position, but it can circumscribe its vulnerability by making the information as exhaustive as possible.

It will of course be objected that too much information may defeat the purpose of the Act by lulling into a false sense of security a Disclosee too ready to rely on the Disclosure's apparent sincerity and on the document's weight and volume which will certainly be entailed by the duty to supply information enabling the Disclosee to contract, if he decides to do so, advisedly.

But although the Act as it stands imposes on the Discloser a total duty to supply the Disclosee, regardless of his business experience, with information enabling him to contract advisedly, this does not obviate the duty of inquiry imposed by the courts on every prospective party to a contract, here the Disclosee, interested in joining such a distribution system. Having at his disposal, by virtue of the Act, all of the information necessary to reach a decison, which simplifies and facilitates his investigation, it will be incumbent on every responsible Disclosee to make a careful study of the information provided, regardless of the quantity, and to use it as a basis for further inquiry, for example of other members of the same network (whose names and addresses will have been supplied to him by the Discloser), as to the benefits and drawbacks of the concept.

And while abundant information may seem superfluous, too little may be blameworthy. For instance, no existing provision requires a Discloser to reveal a police record. But could a Discloser contend that the information he provides is sincere if he conceals prior convictions for fraud? Has the recipient of information lacking that disclosure contracted advisedly as required by the Act?

This is of course an extreme example intended to show that the vagueness of the Act will require the Discloser to do more than comply strictly with the decree in order to satisfy the overriding requirements of the Act.

Pursuant to that rule, we recommend that the document be prepared on a "full disclosure" basis. More even than the text of the future implementing decree, which will be only a guide to the information to be supplied, short of the superfluous, the requirement of supply of information on all subjects necessary to enable the Disclosee to contract advisedly will always have to be borne in mind.

The vagueness of the language, the Discloser's need for security and the Disclosee's need for familiarity with the partner on which he will be dependent throughout the term of his contract because of its exclusivity or quasi-exclusivity, require information as complete as possible.

The Disclosure must supply full information concerning the future partner and its business, the scope of the commitment that the Disclosee will make by signing the contract, the size of the market for the contract products and/or services and, insofar as possible, the prospects for growth or shrinkage of that market.

The information must also be updated to the date on which the contract is signed or even thereafter.

The draft decree (para. 1 of §3) requires notice to the Disclosee, before he signs the contract, of significant changes in the information supplied occurring between delivery of the Disclosure and execution of the contract. That requirement calls for several comments:

- Prudence and the duty to provide sincere information require very exhaustive information in reference to changes occurring before the contract is signed. In our opinion, doubt as to the significance of a change should always be resolved in favor of disclosure;

- In the case of changes which will occur after the contract is signed, the same reasons call for disclosure of any significant change in the firm's organization or in any factor having a decisive effect on the network's future which is planned and will occur within two months of execution of the contract, unless such information is secret and the success of the project depends on its being kept in confidence.

A practical tip to enable the Disclosure to be easily updated by insertion of new developments is to prepare it in looseleaf form.

The Act and draft decree say nothing about the deadline for informing the Disclosee of changes. To resolve this practical problem with which Disclosers will be confronted, reference must be made to the spirit of the Act which requires the information to be sincere and to enable the Disclosee to contract advisedly. Report of a change the day before the contract is signed may be permissible if the Discloser was not previously aware of it but if a decisive new factor in the parties' future dealings is kept secret by the Discloser until the last minute, its good faith may be impugned by the courts.

Nothing is said about the method of reporting such changes to the Disclosee either. The rule should be written notice, since this affords the greatest security to both parties (reliability of the information for the Disclosee, proof that it was provided for the Discloser). But if delivery of a written document is physically impossible, such new factors should be reported to the Disclosee in any feasible way (by telephone, face to face, etc.).

One last question necessarily comes to mind: will a new 20-day period start to run from disclosure of such change(s)?

The courts will answer that question but it is reasonable to assume that, the change being "significant" ex hypothesi and so important to the Disclosee, he will be entitled to further time to consider the new data.

In any event, execution of the contract need not be deferred if the Disclosee is agreeable to signing it on the scheduled date.

We recommend that Disclosers devote careful thought to these strategic questions having material legal implications.

Finally, one last general provision of the draft decree requires notice of the reasons for omission of any information which should in principle be disclosed. As a practical matter, the Disclosure will contain, in lieu of the information to be supplied, the reasons requiring non-disclosure thereof, the most plausible of which will be trade secrecy.

Though the decree thus allows the latitude necessary for protection of the Discloser's interests, careful consideration must always be given to the validity of the reasons for non-disclosure and of the actual necessity for not disclosing any particular information.

Abuse of the non-disclosure privilege will inevitably cast doubt on the validity of the Disclosure.

The Doubin Act being necessary to ensure ethical conduct in the precontract period and having been in the cards for a long time, ethical franchisors and the like have nothing to fear from its disclosure requirements providing every Disclosee with evidence of the trustworthiness of their systems. Even before the Act was adopted, franchisors frequently gave prospective franchisees "data sheets" describing themselves and their networks, which is the basic information to be contained in the Disclosure. Henceforth, the document supplied will have to be much more detailed, very clear ("the information prescribed hereby shall be furnished clearly and sincerely" (para. 3 of §1 of the draft decree) and complete.

Since sundry information required by the latest draft decree has the same purpose, although not covered by the same section of the decree, we will discuss such information according to the following outline:

I. INFORMATION CONCERNING THE DISCLOSER

II. INFORMATION CONCERNING THE DISCLOSER'S BUSINESS

III. INFORMATION CONCERNING THE DISCLOSEE'S PROPOSED BUSINESS

The method will consist of setting forth the provisions of the decree in their latest form, analyzing them and giving concrete examples.

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I. INFORMATION CONCERNING THE DISCLOSER

- §1, 1/paragraph 1 of the draft requires, if the Discloser is a natural person, disclosure of his "full name, date and place of birth, trade name, business experience and home address or address of the registered office of the business as the case may be".

Although it seems difficult for a "natural person" to give the address of the "registered office" of his business (a drafting error for the Discloser's "business address"), the provision is clear and calls for no particular comment.

The information may optionally include the Discloser's educational background insofar as it may be of legitimate interest to the Disclosee. This is an option, not an obligation, but a prudential concern with full disclosure should in our opinion prompt inclusion of such information.

The Discloser's business experience must be described: the positions he has held, the relevant dates and the business sectors involved.

Franchising experience, especially in the relevant economic sector, must be highlighted.

Example:

Jean Landa is a 1987 graduate of the Institut de Promotion de la Franchise.

- From 1970 to 1980 he was a financial analyst with Compagnie Bancaire. In 1980 he became Treasurer of the Fast Food company, a large franchisor.

- Mr. Landa has owned the Fast Fish trademark and directly operated two restaurants since 1988.

The Discloser's Trade and Companies Register or Craft Register number must be listed (§1, 2/ of the draft). (It should be noted that though the decree calls for either number, registration on both the Craft and the Trade and Companies Registers may be required by law; if the Discloser is registered on both, we suggest that both numbers be listed.)

- §1, 1/paragraph 2 of the draft decree applies to legal entities, which most Disclosers are. A legal entity must set forth "the type of company, its name, its registered office address, the amount of its capital if any, the name(s) and business experience of the executive(s), the names of the principal members (its internal organization)".

The first four items raise no problems. The requirement of the names of the "principal" members is more difficult. On this score too, we suggest that doubt be resolved in favor of extensive disclosure, or that legal counsel be consulted.

The business experience of the executive(s) must be described. As in the case of a natural person Discloser, it is a good idea to include each executive's educational background for the reasons cited above.

The last item of information required by §1, 1/paragraph 2 "(its internal organization") is a puzzler. Do the parentheses mean that this information is optional? The question mark prompts us to recommend description of the internal organization in all cases.

The firm's divisions or departments - franchise, production, sales, research and development, finance, etc. - will have to be described, the number of staff of each stated, and the division and department heads named and their duties and responsibility briefly described.

Example:

AUTOFIX has four principal divisions:

- The franchise division headed by Paul Alpha, which is responsible for selection of and relations with franchisees. The three members of the division's staff are respectively in charge of training, assistance and management.

- The interior design division headed by Robert Gama, which is in charge of development and redesign of the standardized image and get-up of the garages. The other two people in the division are respectively responsible for installation and maintenance.

- The administrative division headed by Mrs. Marie Delta, which is responsible for the company's administrative and financial management. The four members of that division's staff head up the legal, accounting, finance and maintenance departments respectively.

- The research and development division headed by Abel Tourneclef, which is responsible among other things for development of AUTOFIX's innovations. The other three members of the division's staff are respectively in charge of technical improvements, marketing and engineering.

The firm directly operates three pilot stations.

- The last item of information required is the "Trade and Companies Register number" (and) "or the Craft Register number" (§1, 2/ of the draft decree).

However, as discussed in the introduction to this article, we recommend that Disclosers also include their police records and bankruptcies if any.

II. INFORMATION CONCERNING THE DISCLOSER'S BUSINESS

- The Discloser must first set forth "the date on which the business was founded and the stages in its development and in the development of its operating network if any" (§1, 3/ of the draft decree).

This information, the description of which is self-explanatory, consists of the history of the Discloser's business and operating network.

The date on which the business was founded is the date of commencement of operations; the date of the company's registration if any should be added.

"Stages of the development" of a business refers to legal changes: changes in the type of company, mergers and other organizational changes such as incorporation of subsidiaries, etc.

Changes in distribution methods must also be described, as well as the trend of the growth of the business (internal growth involving opening of branches or external growth by takeovers), the sales record, the rate of expansion of the staff, the evolution of the firm's products or services and the growth of the operating network (expansion of the sales outlets, rate of partner turnover, store locations and, in the case of franchisors, observance of the recommendation that initiation of a franchise network be preceded by operation for two years of three pilot outlets, one in Paris, one in a large provincial city and one in a medium-sized provincial city, and the number of pilots if any).

Example

FILDUNORD was founded in 1958 and registered on the Lille Trade Register on November 7, 1958 as a private limited company. It was converted into a public limited company in 1971.

FILDUNORD owns 90% of the capital stock of three subsidiaries incorporated in 1974, 1976 and 1977 (LES LAINES DU NORD, ORDIMAT and LES LAINES DE FRANCE). It capital has increased from F 50,000 initially to 80 million francs at this time. FILDUNOR originally distributed its products through approved dealers but has used a network of franchisees since 1980. FIDUNORD has opened seven branches for manufacture, maintenance and warehousing of its products. In 1988, it acquired 80% of the capital stock of S.A. OTARIE, which is in the same business.

Annual sales increased from F 200,000 in 1960 to 4.5 million francs in 1988 and then levelled-off. FILDUNORD's staff has grown from 30 to 320 over the years.

FILDUNORD, which formerly sold knitting yarn only, has diversified its product lines and now produces woollen clothing as well as ladies' underwear and socks and stockings.

The number of FILDUNORD's franchisees has risen from 40 to 3,200 throughout France and the rest of the European Economic Community. An average of seven franchised sales outlets are opened in France or elsewhere in Europe every year. FILDUNORD also owns 42 sales outlets.

- The Discloser must then describe its "operation(s)" (§1, 4/ of the draft decree).

What operations are referred to? The Discloser's operations relative to the proposed contract? Or must the Discloser make more general disclosure of all of its operations and those of its group, if they are directly related to the proposed contract? For example, it may be of legitimate interest to the Disclosee to know that he will be faced in his exclusive territory with competition from a sales outlet similar to his own which, although operated under a trademark other than the one licensed to him, belongs to a network controlled by the same group, which, depending on changing economic conditions, may not always have the same degree of interest in each of its networks.

Will a Disclosee ignorant of those facts contract advisedly? Our opinion is that the Discloser should in such circumstances describe all of its operations and/or those of its group, if they are similar to and/or compete with those covered by the proposed contract.

Example:

The Discloser, CHAUSS'BAT S.A., has a network of dealers doing business under the "ARBALL" trademark. It produces "midscale" shoes and distributes them through its network.

PIED VERT S.A., an affiliate of CHAUSS'BAT S.A., has a midscale and upscale shoe franchise network which does business under the "BOTTE ET MOK" trademark.

- The next items of required information are "the size of the operating network, the operating method(s) used and the number of operators using each method" (§1, 5/ of the draft decree).

The Discloser must state the number of operators having contracts with it similar to the proposed contract (covered by the Disclosure), describe any other operating methods used for the same products or services distributed under the same trademark but another type of contract (franchise, license, multibrand dealership, etc.), and list the number of operators using each operating method.

Example:

HERBELLA distributes MAGIBELL knitwear through a network of (as of the date of the Disclosure) 127 franchisees.

Its products are also sold in 327 multibrand stores throughout France which have dealership contracts with the Discloser.

- The Discloser must list (§1, 6/ of the decree) "the addresses of the firms in France with which it has contracts like the one proposed. If it goes back less than 10 years on the date of delivery of the document, the date of such contracts and, in event of renewal, the date of the initial contracts; if the contracts have been renewed, the date of the initial contracts. The list may be limited to the 50 firms nearest the planned operating location".

After supplying quantified data as to the size of its operating network, the Discloser must thus list the addresses of the network's members to enable the Disclosee to ask them directly for additional information which may differ from that supplied by the Discloser.

The dates of such contracts and/or only the dates of the initial contracts, if the contracts have been renewed, under the aforesaid conditions, must also be listed.

The date of the contracts (in effect on the date of delivery of the Disclosure, as opposed to the date of the initial contracts which have been renewed, as appears from the rest of the draft decree) need be stated only "if it goes back less than 10 years on the date of delivery of the document". But since the Act covers only contracts containing "an exclusive or quasi-exclusive clause" (last part of paragraph 1 of §1 of the Act), and §1 of the Act of October 14, 1943 limits "to 10 years the term of every exclusive clause" (whether total or partial: Sup. Ct. 26 January 26, 1988, unreported, No. 86-15-122), the date of such contracts cannot, or more precisely may not validly, go back over 10 years except for contracts not covered by the 1943 Act, which seems unlikely in view of the coverage of the Doubin Act.

By requiring Disclosers to state the dates only of contracts which have been in effect less than 10 years, the draft decree needlessly pretermits an opportunity to consider the validity of the exclusive clauses (and the contracts) of the members of the Discloser's network.

With a view to simplification, clarity and precision, we recommend that Disclosers always state the dates of the outstanding contracts and the dates of the initial contracts (when they have been renewed), which is not very burdensome since the list can be limited to the 50 firms nearest the Disclosee's planned site of operations.

Example

> On the date of the Disclosure, there are two "HOTEL DU NORD" franchises in France. One is at 2 Rue des Mines, Calais; the contract is dated April 10, 1984.
>
> The other "HOTEL DU NORD" is at 231 Rue du Grisou, Roubaix. The contract was entered into on June 24, 1976 and renewed on June 24, 1986.

- Then will come "the number of (and the addresses of the) firms with which contractual relations similar to those planned were terminated less than a year before delivery of the document, and the way in which they were terminated" (§1, 7/ of the draft decree).

The turnover rate of a network may indicate that the Discloser is more interested in collecting entry fees than in expanding its network.

But even numerous shutdowns may be due to economic conditions or to the incompetence of the other parties to the Discloser's contracts.

In any event, such information, which is excellent from the disclosure standpoint, will be a blinker light for Disclosees who give careful consideration to the information supplied.

The reference to the terminated firms' addresses was added in the latest version of the draft decree. Once again, we deplore the vagueness of the draft decree as to whether such addresses must or merely may be stated, resulting from the fact that the words "the addresses" are in parentheses. As in regard to the Discloser's "internal organization", we hope that the final decree will be clearer.

It is our opinion that even though it requires the total number of firms terminated in the preceding year to be stated, §1, 7/ of the decree can be construed, by reference to the preceding subsection (§1, 6/, which limits the list, as discussed above, to the 50 firms nearest the planned place of business), as limiting the required addresses to those of the 50 terminated firms nearest to the planned site of the Disclosee's operations (not the addresses of the terminated firms among the 50 nearest that site).

A list of addresses so limited will facilitate the Disclosee's inquiries by selecting for him the addresses to which he has ready access. We also hope that few networks will have experienced over 50 terminations of contractual relations within a year of delivery of the Disclosure.

The draft decree says nothing about the reasons for the terminations and requires only a descripton of the way in which each contract was terminated (mutual consent, judgment, non-renewal, bankruptcy, etc.). However, in the interests of full disclosure, it will be advisable to state the reasons.

Example:

In the period October 21, 1989-October 21, 1990 (the year before delivery of the Disclosure), MULTIMIX, the franchisor, terminated its contracts with two franchisees:

- The franchise contract of Mrs. Nicole Mugnier, 36 Rue des Pierres, Dijon, was cancelled on February 20, 1990 by notice given by return-receipted registered mail because her royalties were over 11 months in arrears. The cancellation was confirmed by the Commercial Court of Dijon on March 15, 1990.

- Richard Guigon, whose store was at 2 Quai Branly, Lyons, did not renew his franchise contract when it expired on June 11, 1990 because he retired on that date.

- The Discloser must make mention of "the existence, in the market radius or exclusive territory of the planned outlet, of any establishment in which products or services are offered with its express approval under the trademark, trade name or trade sign covered by the contract" (§1, 8/ of the draft decree).

The purpose of this provision is to advise the Disclosee of the existing competition in distribution of the brand in his territory.

If the Disclosee will have no exclusive territory under the contract, the intra-brand competition will result, in the Disclosee's market radius, from the existence of contracts between the Discloser and other parties which are similar or dissimilar to the one offered to the Disclosee. Each such establishment must be listed and the market radius must be realistically and fairly defined.

Even if the Disclosee will have an exclusive territory, he may, as envisaged by the draft decree, be subject to intra-brand competition in his territory.

That cannot be true of a distributorship contract (use of the word "exclusive" to describe such a contract being tautological since a distributor necessarily has a resale monopoly in its territory).

But a franchisee's position is different: the exclusive clause in a franchise contract merely means that the franchisee is exclusively entitled to use the franchisor's distinctive signs and know-how in a given territory, not that the franchisee necessarily has a resale monopoly.

Neither the franchisor nor other franchisees can compete with him in his territory, but he may be confronted with intra-brand competition by parties (such as multibrand dealers) which have other types of contracts with the Discloser.

If so, the Disclosee must be advised of the existence of such establishments.

But what does "the existence ... of such establishments ..." mean? Under a restrictive interpretation, only the number of establishments of each type need be stated. A broader interpretation would require listing of their addresses as well.

Example:

> Pierre Lampart will be MAILL'HAUT's exclusive franchisee in the Cannes area. The MAILL'HAUT products are also sold by two multibrand dealers at 3 Rue des Braises and 56 Rue du Soleil, Cannes.

- Next will come information relative to "trademark filing and registration date(s) and number(s); in the case of assigns or licensees, the date and number of entry on the National Trademark Register with, in the case of license contracts, a reference to the term for which the license is granted".

Trademark licenses are mandatorily included in distributorship and trademark license contracts but not necessarily in a franchise contract, in which the franchisor need only authorize the franchisee to use distinctive signs. (The November 30, 1988 exempting regulation of the Commission of the European Communities relative to categories of franchise agreements refers to "the use of a common name or sign", not specifically a trademark.)

But only a trademark enjoys the protection necessary for preservation of the interests of all the members of a network, as opposed to the protection of a trade name or trade sign. And as a practical matter, practically all franchisors fortunately now license the trademarks that they own or are entitled to use to their franchisees.

Since the trademark is one of the fundamental assets placed at every Disclosee's disposal (and one of the criteria of applicability of the Act), the latter must be acquainted with the Discloser's rights concerning the trademark(s). (Is it an assign? a licensee? If a licensee, is it authorized to grant sublicenses? etc.).

If more than one trademark is licensed to the Disclosee, we recommend specific identification of the one that he will be authorized to use as a trade sign.

If the Discloser has patents of importance in connection with the proposed contract, we also recommend mention thereof and take the liberty of a digression on that subject.

Patents are of no concern to mere distributors of a Discloser's products. But all patents and trade secrets are of prime importance to industrial franchisees and other parties contracting with the Discloser who or which also manufacture the products.

The question is whether the Doubin Act covers industrial franchise contracts? In our opinion it does, in the absence of any indication to the contrary.

The Act draws no distinction between production and distributorship contracts or between contracts covering products and/or services, as long as the conditions stipulated in §1 of the Act are satisfied. (Only the draft decree makes express mention of contracts which may cover products and/or services: §1, 8/ of the draft decree.)

A commitment of exclusivity or quasi-exclusivity is not inherent in such contracts. But the contracts covered by §1 of the Act are not confined to those which per se include such a commitment (such as license or distributorship, or exclusive procurement, contracts). §1 also covers contracts including a commitment of exclusivity or quasi-exclusivity even if inclusion of such a clause is not a criterion of classification of such contract.

Hence, an industrial franchise contract containing a clause requiring exclusive procurement of raw materials from the franchisor falls, in the absence of any provision of the Act to the contrary, within its scope as long as a trade name, trademark or trade sign is licensed to the industrial franchisee.

Example:

MIDWEST owns the MIDEST trademark filed in the National Industrial Property Office on May 25, 1971 under No. 547,856 and registered on October 11, 1971 under No. 104,703 in classes 17 and 42.

- The Discloser must list "its bank account(s) (the five principal accounts if there are more than five)".

This provision calls for no particular comment but requires an explanation: the term "bank account", replacing the term "banking references" in the previous draft, includes the account number.

Example:

None. Reason (required by paragraph 1 of §3 of the draft decree): the information to be supplied is not complicated enough to require an example.

- The last item of information to be supplied concerning the Discloser's business consists of "the certified balance sheets, income statements and, when it is required to issue them, the operations reports concerning the last two fiscal years available".

On this score too, the draft decree is adequately explicit and suggests only one question (which does not involve a problem of interpretation of the draft decree): when is a Discloser required to issue operations reports?

§341.1 of the Act of July 24, 1966 requires listed companies to issue semiannual operations reports and publish them in the BALO within four months of the end of the first half of every fiscal year. Each report must comment on the quantitifed data relative to the company's sales and results in the first half, describe its operations in that period, as well as its foreseeable trend in the fiscal year, and make mention of the important developments in the past half-year.

Example:

For obvious reasons, no example of such information can be included.

III. INFORMATION CONCERNING THE DISCLOSEE'S PROPOSED BUSINESS

This information is spelled out in §1, 12/ of the draft decree (requiring delivery of legal information), in §2, paragraphs 1 and 2 ("marketing" information) and in §2 paragraphs 2 and 3 ("financial" information). (No examples are included in this section because of the quantity of information that would have to be shown.)

A - LEGAL INFORMATION

- The Disclosure must state: "The term of the proposed contract, the terms of renewal, cancellation and assignment, and the scope of the exclusive rights".

Although the proposed contract must be delivered with the Disclosure (paragraph 4 of §1 of the Act), some of the contractual obligations of both parties must also be described in the disclosure document.

The specified clauses of the contract may be quoted or paraphrased, but a paraphrase must be as complete and accurate as possible.

As in the case of all the other information in the Disclosure, if the contract will be significantly amended between the delivery of the Disclosure and the execution of the contract, the Disclosee must be so advised before the contract is signed (last part of paragraph 1 of §3 of the draft decree).

Only one provision of the draft decree - that the "scope of the exclusive rights" must be spelled out in its "scope of application" - may raise problems of interpretation.

What exclusive rights are referred to?

They are probably not confined to the commitment of exclusivity (or quasi-exclusivity) mentioned in paragraph 1 of §1 of the Act: since the purpose of the Act, as reflected by the Parliamentary debates, is to protect by disclosure a party deemed to be weaker and dependent on the other, the commitment of exclusivity mentioned in the Act can only be a commitment entailing dependence of the Disclosee (such as an exclusive procurement obligation), not an exclusive territorial or exclusive supply clause, which on the contrary guarantees the Disclosee a resale monopoly (partial or total, see our comments on franchisees' exclusive territorial rights). (But it must be borne in mind that the normal consideration for such competitive edges guaranteed to the Disclosee consists of clauses which may entail dependence of the Disclosee on the Discloser, such as an exclusive procurement clause.)

The exclusive rights the scope of which is required by the last part of §1, 12/ of the draft decree to be described are all those incumbent on or accruing to the benefit of both parties - principally the exclusive territorial, procurement and supply clauses.

If the contract requires exclusive procurement from the Discloser or approved suppliers, any income realized by the Discloser from the purchase from it or the approved suppliers and the terms on which such income is realized must in our opinion be disclosed. The purpose of this is to show whether the Discloser properly discharges its buying office function and whether it retains any quantity or other discounts or commissions it may receive instead of plowing them back into the network in whole or in part, contrary to what franchise applicants may have been told to induce them to join the network.

- These data may be supplemented by disclosure of "the nature and contents of the services that it (the Discloser) agrees to render to the other party to the contract" (§2, paragraph 3 of the draft decree).

As in the case of the foregoing information, the nature and contents of such services (training, assistance, advertising, etc.) can be set forth by quoting the relevant sections of the proposed contract or by describing them otherwise in the Disclosure.

In either case a clear distinction must be drawn between the Discloser's initial and standing obligations, in order to obviate doubt as to the standing nature of a service which the Discloser might mandatorily render only until the sales outlet is opened.

B - MARKETING INFORMATION

- The Disclosure must supply "the information it has as to the general and local conditions on the contract market, and the prospects of growth thereof, specifying on the latter score the period to which the information relates" (§2, paragraph 1 of the draft decree).

This provision may have caused legitimate concern to Disclosers. Must they supply a detailed market study requiring hours of research and work and advising every Disclosee, who may be fronting for a competitor, of confidential data relative to the business? Must they inform the Disclosees of the company's future strategy, its merger or partnership plans, if any, etc.?

We do not believe that that was the intention of the drafters of the decree. More simply, in our opinion, the Disclosee must be provided with an "inventory", a snapshot of the city (or region) showing in particular the state of the competition on the market to which the proposed contract relates (such information is available from the local chambers of commerce) and the current condition of the market - it it shrinking, expanding, etc.? - applying for that purpose to specialist organizations which supply such data like the INSEE.

This is indicated by the wording of the draft decree: "information" (not a market study) as to the "general" (the concept of generality ruling out detailed and specific adaptation and individualization) and "local conditions on the contract market" (only in the territory in which the Disclosee will do business).

Similarly, "the prospects of growth" of the market will concern only information accessible to everyone and developed by specialist organizations (as mentioned above).

Once again, certainty as the degree of adaptation of such information must await clarification by the courts.

- As discussed above, neither the quoted nor any other provisions of the draft decree require a market study. But §2, paragraph 2 of the draft decree requires "Supply of the underlying data with any planning document or study provided to the other party to the contract".

So, if the Discloser gives the Disclosee a market study or any other planning document with the Disclosure or later, it must simultaneously supply him with the data specified in the draft decree.

C - FINANCIAL INFORMATION

- It will now be necessary to determine "the expenses and capital exenditures specific to the trade sign or trademark that it (the Discloser) requires of him with a view to operation of the contract business" (last part of paragraph 3 of §2 of the draft decree).

One phrase of this subparagraph - "the expenses and capital expenditures specific to the trade sign or trademark" - calls a first comment to mind: it can be inferred from the wording used that only the amount of the expenses relative to the trademark license, lease (or purchase) of the trade sign, and the advertising documents, bags and other products to which the Discloser's trademark is affixed need be disclosed, and no other capital expenditures or expenses. It would have been preferable for the draft decree to refer to expenditures and expenses specific to the network, for instance, since that concept is broader than the other.

It appears that in using the wording they did, however, the drafters of the decree meant to exclude from the disclosure obligation only the expenses and capital expenditures that every merchant, whether or not he belongs to a network, must incur for purposes of his business - leasehold, insurance, corporate organizational expenses, etc.

By the rule of contraries, the Discloser will therefore be required to inform the Disclosee of all expenses which membership in its network will specifically require of him.

In the case of a franchise contract, such expenses are entry fees, the Discloser's initial services, expenses of installation and fitting-up of the sales outlet, equipment, opening inventory, etc.

The duty of disclosure applies only to the initial expenses and capital expenditures, because the draft decree mentions only those required "with a view to operation of the contract business". The term "with a view to" rules out expenses and capital expenditures which will have to be incurred after the sales outlet is opened.

It is nonetheless advisable to describe the royalties that will be payable, since they are already known.

It will also be advisable in the interests of full disclosure to mention for the record all the other expenses and capital outlays necessary for opening of the sales outlet even though they are not "specific" to the network, and to provide average cost figures insofar as possible.

The draft decree does not require supply of a projected operating statement to the Disclosee. But every ethical Discloser will deliver such a document to the Disclosees, who, if they are serious, will always call for it. We recommend delivery of three projected operating statements to every Disclosee - a minimum statement, an average statement and a maximum statement.

Such projected operating statement(s) will then be subject to paragraph 2 of §2 of the draft decree. (See our comments above relative to delivery of a market study.)

Once the Disclosure has been prepared, the Discloser must not forget, if a payment is required before the principal contract is executed, to advise the Disclosee of the services rendered in consideration of such payment and of the parties' reciprocal obligations in event of default (paragraph 3 of §1 of the Doubin Act).

The Discloser may provide such information by either:

- Including it in an appendix to the Disclosure (relative to the "principal" contract), or

- Setting it forth in a separate document, stating the purpose and context of such information with precision - example: Disclosure relative to the preliminary exclusive-territory contract, or

- If a contract is entered into in connection with such payment, supplying a copy of such contract, if it clearly spells out the services rendered in consideration of the payment and the parties' reciprocal obligations in event of default.

Finally, the last page of the document may contain a detachable "receipt" for the Disclosee to sign when the Disclosure is delivered.

Since the information in the Disclosure is confidential, we also advise all Disclosers to retain legal counsel to prepare an undertaking of confidentiality to be signed by the Disclosee obligating him to keep the information and the proposed contract in confidence.

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The Disclosure will enhance the Disclosees' legal security. The new Act will not be burdensome to ethical Disclosers since they already supply much of the required information voluntarily.

But the Disclosure is not a be-all and end-all. The Discloser will have to supply all such additional information as may seem necessary in light of the business sector, and question the Disclosee about his own expertise, capacities and characteristics.

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Olivier GAST