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International Commercial Transactions, Franchising, and Distribution

Arnold S. Rosenberg

Alfredo L. Rovira

Michael R. Daigle

Florian S. Jörg

Marc Ryser

See next page for additional authors

Authors
Arnold S. Rosenberg; Alfredo L. Rovira; Michael R. Daigle; Florian S. Jörg; Marc Ryser; William P. Johnson; Anders Forkman; Alan S. Gutterman, ed.; and Calvin A. Hamilton, ed.

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I. New Secured Transactions Laws and Registries in Australia, China, Cambodia, Honduras, Guatemala, Solomon Islands, and Vanuatu; Developments in Private International Law Regarding Secured Transactions

With the encouragement of the World Bank, Asian Development Bank, and other international financial institutions, in 2008-09 several countries modernized their secured transactions laws, expanded the types of moveable property that can serve as collateral for a debt, and established and streamlined registries for non-possessory security interests in moveable property.

In July 2009, the Council of Australian Governments established a target date of May 2011 for a national Personal Property Security Register (PPSR) to go online.[1] The PPSR will replace over forty existing commonwealth, state and territorial registries.[2] As of fall 2009, a proposed Personal Property Security Bill was pending in the Australian Senate that contains elements of the Canadian and New Zealand Personal Property Security Acts, which in turn were derived in part from Article 9 of the U.C.C. as it existed prior to

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* This article updates events during 2009. The authors are Arnold S. Rosenberg, Assistant Dean, Thomas Jefferson School of Law, San Diego, California; Dr. Alfredo L. Rovira, Senior Partner, Brons & Salas, Buenos Aires, Argentina; Michael R. Daigle, Cheng Cohen LLC, Chicago Illinois; Florian S. Jörg, Dr.iur., MCJ, Attorney-at-Law (New York and Switzerland) and Marc Ryser, Dr.rer.publ. et lic.iur., CFA, both of Bratschi, Wiederkehr & Buob, Zürich/St. Gallen, Switzerland; William P. Johnson, Assistant Professor of Law, University of North Dakota School of Law, Grand Forks, North Dakota; Anders Forkman, Vinge, Malmoe, Sweden; and Paul Jones, Jones & Co., Toronto, Ontario, Canada. The article was edited by Dr. Rovira; Alan S. Gutterman, Gutterman Law & Business, Piedmont, California; and Calvin A. Hamilton, Hamilton Abogados, Madrid, Spain.

1. Senate Standing Committee on Legal and Constitutional Affairs, Exposure Draft of the Personal Property Securities Bill 2008 (2009), *available at* http://www.aph.gov.au/SENATE/COMMITTEE/legcon_ctte/personal_property/report/report.pdf.

2. *Id.*

1999.[3] The Australian Personal Property Security Act will replace over seventy existing laws governing security in personal property.

With assistance from the Asian Development Bank in 2008-09, two Pacific island nations, the Solomon Islands and Vanuatu, enacted new secured transactions acts containing elements of Article 9 of the U.C.C., and established registries for secured transactions.[4] Another Pacific Island nation, Palau, is expected to follow suit.[5]

In Central America, the Legislature of Honduras passed a new secured transactions law that is based on Article 9, but while the law was pending signature by that country's president, the President was ousted and the continuing crisis has stalled the law's going into effect as of this writing.[6] Nonetheless, Honduras has continued preparations to implement a new central registry for secured transactions once the law becomes effective.

In 2008, Guatemala enacted a law based on the Organization of American States (OAS) Model Law on Secured Transactions, and as of January 2, 2009, its centralized registry for security interests in moveable property went into effect.[7]

In 2008-09, a number of countries also implemented earlier legislation on secured transactions. In China, on October 8, 2009, a centralized receivables registry managed by the Credit Reference Center of the People's Bank of China went online, implementing provisions of the 2007 Property Rights Law regarding security in moveable property which became effective October 1, 2007. Among many other changes, the Property Rights Law expanded the range of permissible collateral to include accounts receivable.[8] Similarly, in Cambodia, a law enacted in 2007 modernizing the legal regime for secured transactions was implemented in 2008 by putting a centralized registry into effect.[9]

In the European Union, efforts to establish a Common Frame of Reference regarding contract law, including secured transactions in moveable property as envisioned in the European Commission's 2003 Action Plan on the harmonization of contract law, faltered in 2008-09.[10] It also appears unlikely that the European Union and its member states will sign the proposed U.N. Convention on the Assignment of Receivables in International Trade, though the United States and Canada may do so. The European Union's objections have centered on the choice of law provisions, particularly on application of "autonomous" conflict of laws rules set forth in the Convention rather than the conflict of laws rules of individual states in resolving disputes regarding the assignment of accounts receivable.[11]

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3. *Id.*
4. SHADID AKHTAR & PATRICIA ARINTO, DIGITAL REVIEW OF ASIA PACIFIC 2009-2010 (2009), *available at* http://www.idrc.ca/openebooks/456-7/.
5. *Id.*
6. Steven L. Schwarcz, *Towards a Centralized Perfection System for Cross-Border Receivables Financing*, 20:3 U. PA. J. INT'L ECON. L. 455, 466-472 (1999), *available at* http://www.law.upenn.edu/journals/jil/articles/volume20/issue3/Schwarcz20U.Pa.J.Int'lEcon.L.455(1999).pdf.
7. TERRY L. MCCOY & TIMOTHY MCLENDON, 2009 LATIN AMERICAN BUSINESS ENVIRONMENT REPORT (2009), *available at* http://www.latam.ufl.edu/LABE/Content/2009LABER.pdf.
8. The People's Bank of China, 1st Anniversary of the Accounts Receivable Pledge Registration System (Oct. 17, 2008) *available at* http://www.pbc.gov.cn/english//detail.asp?col=6400&ID=1182.
9. SOK HACH, CAMBODIA ECONOMIC WATCH (2008), *available at* http://www.docstoc.com/docs/11066729/Cambodia-Economic-Watch-Oct-2008.
10. ULRICH MAGNUS, ACTION PLAN FOR A EUROPEAN CONTRACT LAW (2003), *available at* http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/5-35.pdf.
11. *Id.*

In December 2008, the U.N. General Assembly adopted a resolution recommending that member states enact legislation in accordance with UNCITRAL's 2007 Legislative Guide on Secured Transactions.[12] As of late 2009, efforts were proceeding to finalize a supplement to the Legislative Guide on Secured Transactions dealing with security rights in intellectual property.

II. Duties and Liabilities during Preliminary Negotiations under Argentine Law

The treatment afforded to pre-contractual negotiations is a rather novel issue under Argentine law. There are no specific regulations in this regard, and conflicts arising in connection with preliminary negotiations have been considered on a case-by-case basis.

Sections 920 and 921 of the 1998 Draft Unified Code of Civil and Commercial Obligations (*Proyecto de Código Único de las Obligaciones Civiles y Comerciales de 1998*), which was approved by the House of Deputies but was not finally enacted, governs these issues.[13] The reference to the Unified Code contains a summary of the criteria held by most Argentine courts during the last forty years.[14] Section 920 establishes the duty to act in good faith to prevent the unfair break-off of negotiations.[15] A breach of this duty results in liability for damages to the negative contractual interest (or reliance in the negotiations).[16] The negative contractual interest is defined as costs incurred, but not a loss of profits.[17] This has been the criteria sustained by most Argentine courts.[18]

Letters of intent do not constitute offers unless they include all the characteristic elements of a contract: intent to enter into a contract, addressed to a specific or determinable person, and precise details are required for entering into a contract if the offer is accepted.[19] Courts have recently held that even though a letter of intent was signed by the offeree it could not be invoked as proof of acceptance because it was not sent back to the offeror.[20] Therefore no pre-contractual liability could arise from the terms of such letter of intent.[21] Additionally, the letter of intent did not include precise details of the contract and was different in time.[22]

Moreover, in a well known case, the multinational corporation Benetton S.P.A., as licensee of the "Benetton" trademark, was found guilty of breaching a preliminary agreement with a local company although its terms included several items found in more formal

12. Press Release, United Nations General Assembly Meetings Coverage, Administration of Justice, Criminal Accountability of UN Officials on Mission Among Issues, as General Assembly Adopts 18 Texts Recommended by Legal Committee (Dec. 11, 2008), *available at* http://www.uncitral.org/pdf/english/working groups/wg_3/ga-10798.pdf.

13. Superior Tribunal of Santiago del Estero, LLNOA 2006 (Sept.), at 945, LEXIS 11/31640.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Nacional de Apelaciones en lo Comercial de la Capital Federal [CNCom.] National Court of Appeals in Commercial Matters, Panel A, 11/06/2007, Societé Dufour S.A. c. Reisfeld, Daniel Bernardo, La Ley Online [L.L.] (Arg.).

20. *Id.*

21. *Id.*

22. *Id.*

agreements such as products to be licensed, territory of the licensee, scope of the license, exclusivity, quality control, minimum thresholds of sales, etc.[23] Benetton was convicted and ordered to pay monetary damages to the negative contractual interest of the local company, and US $1,800,000 for loss of business opportunities.[24] The Court also took into consideration the conduct displayed by Benetton representatives during the negotiations.[25] After the execution of the preliminary agreement, Benetton representatives sent to the representatives of the local company a "User's Manual" and a sample of the License Agreement usually used by Benetton.[26] It was clear to the Court that the intention of the parties was to close the deal.[27]

Activities of the parties during the negotiation stages prior to agreement are governed by a social contract that results in the application of duties of conduct arising not from a contract, but from general principles such as *neminem laedere*, or that may be inferred from patterns of behavior which are common to all legal acts—the good faith provided for in Section 1198 of the Civil Code.[28] Such duties include the duties of cooperation, an obligation to cooperate in the preservation and development of negotiations, and custody.[29]

Preliminary negotiations do not necessarily lead to the execution of an agreement, and as a general principle, no liability arises from termination of preliminary negotiations.[30] If, however, such negotiations are put on record and later on broken off, they are expected to terminate under circumstances evidencing good faith.[31] Otherwise, the cost of all expenses incurred, tasks performed, and due diligence conducted during such frustrated negotiations must be reimbursed.[32] In a recent decision, an Argentine court held that all the costs of all incurred expenses must be actually proved by the claimant by means of receipts or other supporting documents prior to any request of reimbursement.[33]

Liability generally arises as a consequence of negotiations terminated in the absence of due notice based upon the principle of reasonableness.[34] No pre-contractual liability exists, however, if termination of negotiations with due notice (i) is for cause; (ii) such cause is fair; and (iii) notice of such cause is given to the other party.[35] Such cause is deemed to be fair if it is not attributable to the behavior of the negotiator who breaks off the negotia-

23. Nacional de Apelaciones en lo Comercial de la Capital Federal [CNCom.] National Court of Appeals in Commercial Matters, Panel C, 11/12/2001, Benettar S.A. c. Benetton S.P.A, La Ley [L.L.] (24/01/2003) (Arg.).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Nacional de Apelaciones en lo Comercial de la Capital Federal [CNCom.] National Court of Appeals over Civil Matters, Panel C, 28/10/2008, May Day Services Group S.A v. Nestlé Argentina S.A, LEXIS 70051210 (Arg.).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Alcance y Evolucion de la Responsabilidad Precontractual, http://gobato.blogspot.com/2007/04/1.html (Mar. 17, 2007, 5:57 EST) (citing SC Buenos Aires, 15-6-93 "Katinski, Tomás R. v. Gil, Zulma E. *in re.* Performance of Contract.").

35. *Id.*

tion.[36] It must be also a supervening cause but, above all, notice thereof must be given to the other party.[37]

Pre-contractual liability may also arise as a consequence of failure to abide by partial agreements already reached.[38] Even in the absence of an executed agreement, any matters already discussed and agreed upon may not be reopened unilaterally.[39] If those matters are discussed again, and negotiations are broken off as a consequence of such situation, the negotiator who proposed further discussions over the terms agreed upon may be held liable.[40]

In short, Argentine laws distinguish preliminary negotiations that do not create a contractual relationship from preliminary agreements or other similar contractual situations requiring further actions until a formal agreement is entered into. While preliminary negotiations may create tort liability with a two year statute of limitations, preliminary agreements create contractual liability with a ten year statute of limitations.

III. Developments in the Legislation of Capital Markets and Transactional Law in Switzerland

Significant new legislation came into force in the area of mergers and acquisitions (M&A) law in Switzerland on January 1, 2009. One aspect of this legislative activity took the form of adjustments to the Federal Act on Stock Exchanges and Securities Trading (Stock Exchange Act, SESTA)[41] which also provided a basis for the complete revision of the Ordinance of the Takeover Board on Public Takeover Offers (Takeover Ordinance, TOO),[42] which sets forth the rules to be followed for actions before the Takeover Board. Additionally, a new set of regulations governing the Takeover Board (Regulations of the Takeover Board, R-TOB) came into force, which included organizational provisions.[43] Moreover, the Ordinance of the Swiss Financial Market Supervisory Authority on Stock Exchanges and Securities Trading (Stock Exchange Ordinance-FINMA, SESTO-FINMA), which similarly contains relevant adjustments to takeover law, also became effective.[44] In general, these changes create new rights for shareholders, new restrictions for bidders, expand the list of unlawful defensive measures, and alter the publication and notice provisions.

A number of changes also occurred in the area of securities law. As of January 1, 2009, the rules regarding disclosure of significant shareholdings in Swiss companies listed in

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. Bundesgesetz vom 24. März 1995 über die Börsen und den Effektenhandel [BEHG] [Federal Act on Stock Exchanges and Securities Trading] Mar. 24, 1995, SR 954.1 (Switz.).
42. Verordnung der Übernahmekommission vom 21. August 2008 über öffentliche Kaufangebote [UEV] [Public Takeover Offers] Aug. 21, 2008, SR 954.195.1 (Switz.).
43. Reglement der Übernahmekommission vom 21. August 2008 [R-UEK] [Regulations of the Takeover Board] Aug. 21, 2008, SR 954.195.2 (Switz.).
44. Verordnung vom 25. Oktober 2008 der Eidgenössischen Finanzmarktaufsicht über die Börsen und den Effektenhandel [FINMA, BEHV-FINMA] [Stock Exchange Ordinance] Oct. 25, 2008, SR 954.193 (Switz.).

Switzerland has been tightened considerably.[45] Since May 4, 2009, the entire trade in Swiss blue chip stocks is once again processed from within Switzerland, and no longer over the SWX Europe (formerly Virt-x) trading platform in the U.K.[46] With the reunification of stock trading on the SIX Swiss Exchange, the stocks that were previously listed in the "EU-Compatible" Segment, and traded in the "EU-Regulated Market" Segment of SWX Europe were, upon transfer of trading to the SIX Swiss Exchange, automatically relisted in the Main Segment beginning on May 4, 2009.[47] No action on the part of issuers was necessary.[48] The regulatory "EU-Compatible" Segment and its implementing provisions were rescinded on May 3, 2009.[49] Due to this change and other internal reorganizations designed to harmonize regulations and to adapt to developments within the last ten years, revisions were made to the Listing Rules of the SIX Swiss Exchange (LR), which became effective on July 1, 2009.[50]

IV. Developments in International Franchising

With the ever-expanding prominence of franchising as a global distribution method, more countries moved to enact or refine laws and regulations pertaining to the offer and sale of franchises and/or the relationships between franchisors and franchisees, and more courts and tribunals found opportunities to interpret those laws and regulations. Several developments in 2009 bear watching into 2010.

A. Australia

In November 2009, the Ministers for Innovation, Industry, Science, and Research in Australia announced their intention to strengthen the Franchising Code of Conduct and certain provisions of the Trade Practices Act to give franchisees greater protection from anti-competitive behavior by more powerful franchisors.[51] These measures will include: (1) giving the Australian Competition and Consumer Commission (ACCC) increased enforcement powers, including the ability to warn the public (so-called "naming and shaming") about "rogue or unscrupulous" franchisors, to assess pecuniary penalties against non-compliant franchisors (up to AUD 1.1 million), to conduct random audits of franchisors, and to seek redress for franchisees where the ACCC believes a large number of franchisees have been harmed; (2) allowing the concept of "good faith" in relation to franchise agreements be defined via the evolving common law; (3) requiring franchisors to clearly disclose end-of-term arrangements, such as renewal, and to provide franchisees with at least six months' notice of whether the franchisor intends to renew the franchise

45. Six Exchange Regulation, Listing Rules (2009), *available at* http://www.six-swiss-exchange.com/download/admission/regulation_new/rules/03_01-LR_en.pdf.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. Media Release, Australian Government Innovation Minister, The Hon. Dr. Craig Emerson MP, Government to Strengthen Franchising Code of Conduct and Unconscionable Conduct Law (Nov. 5, 2009), *available at* http://minister.innovation.gov.au/Emerson/Pages/GOVERNMENTTOSTRENGTHEN FRANCHISINGCODEOFCONDUCTANDUNCONSCIONABLECONDUCTLAW.aspx.

agreement; and (4) requiring the parties to participate in proscribed procedures to facilitate dispute resolution.[52] The government intends to appoint an expert panel that will be charged with reporting, by the end of January 2010, on whether further changes should be made to the Franchising Code to address other "inappropriate" franchisor behaviors.[53] Watch for these legislative changes to become effective in early 2010.

B. Canada

Developments in two Canadian provinces during 2009 bear watching in 2010. In Manitoba, the Law Reform Commission accepted comments through October 2009 on its report recommending adoption of a pre-sale disclosure law and regulations governing the franchisor-franchisee relationship (particularly, termination and encroachment).[54] And, in April 2009, the Department of Justice and Consumer Affairs in New Brunswick proposed new regulations under that province's Franchises Act.[55] If adopted, the regulations and the Act would come into force together following a three to six month notice period. As proposed, the regulations would require that franchisors provide prospective franchisees with pre-sale disclosures similar to those already required by the provinces of Alberta, Ontario and Prince Edward Island.[56] But a key difference in the proposed New Brunswick regulations is the requirement that the parties submit to informal dispute resolution processes. A party to a franchise agreement would be allowed to issue to the other a notice of dispute that would require the parties, within fifteen days, to attempt to resolve the dispute, failing which, a party could issue a notice to mediate.[57] The proposed regulations expressly provide, however, that delivery of either a notice of dispute or notice to mediate does not preclude a party to the franchise agreement from taking any other measure in relation to the subject matter of the dispute.[58] The government is reviewing comments it received to the proposed regulations and is likely to publish the final regulations in early 2010.

C. People's Republic of China

In 2009, there was a noticeable increase in the number of Chinese franchise cases that became available online. This is in part due to the fact that franchise cases have been transferred from the commercial divisions to the IP benches of the relevant courts, and the IP benches are more likely to publish their decisions. With this increase has come confusion over the status of the 2+1 Rule.[59] Perhaps it is not a primary requirement after all.

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52. *Id.*

53. *Id.*

54. Manitoba Law Reform Commission, Thirty-Eighth Annual Report 2008-2009 (2009), *available at* http://www.gov.mb.ca/justice/mlrc/reports/2008-2009annual_report.pdf.

55. *Id.* (The Act was originally passed in 2007 but has yet to come into force because of the delay in finalizing the implementing regulations.)

56. *Id.*

57. *Id.*

58. *Id.*

59. Commercial Franchise Administration Regulation (promulgated by the State Council, Jan. 6, 2007, effective May 1, 2007), art. 7, 1225 St. Council Gaz. 10 (P.R.C.). The second paragraph of the

With respect to a provision in the second paragraph of Article 7 of the May 2007 Franchise Regulation (the "2+1 Rule"), which states that "[f]or a franchisor to be engaged in franchising it must have at least 2 directly-operated company-owned stores and have operated them for at least 1 year," the courts have not been consistent.[60] For example in *Wang Jin v. Beijing Sunlight Ruili Beauty Co. Ltd.*, the court specifically cited Article 7 of the Franchise Regulation and ruled that because it had not been complied with, the franchise agreement was null and void.[61] In *Liu Yongxing v. Talent Cat (Beijing) International Brand Management Consultants Co., Ltd.*, however, the appeal court upheld a decision of the Haidian District Court that said exactly the opposite:

"《特许条例》第七条关于特许经营
资格的规定属于规范性规定，并非禁止性规定，违反该条规定并不导致合同无效的法律后果，故法院对刘永兴要求确认合同无效的诉讼请求不予支持."[62]

(The provisions of Article 7 of the Franchise Regulations on eligibility requirements for franchisors are administrative provisions and not mandatory provisions, and thus a violation does not lead to the legal consequence that the contract is null and void.)

There are several more cases on either side of this divide. Until recently, most were district court decisions (the lowest level). But in the spring of 2009, a meeting was held in April in Beijing to discuss, *inter alia*, the split among the courts.[63] It was attended by judges from several Beijing courts, including one from the Beijing Higher People's Court (the court just below the Supreme People's Court), a representative of the Franchise Department of the Ministry of Commerce (MOFCOM), the Secretary of the China Chain Store and Franchise Association, a university professor and some others.[64] They discussed a number of issues, but much of the discussion was focused on the "2+1 Rule."[65] One side maintained that it is only an administrative provision, and that a breach of the rule may lead administrative penalties (fines) on the franchisor, but will not invalidate the contract.[66] The other side maintained that it was a substantive requirement which, if not met, invalidated the franchise agreement.[67] What is most interesting is that the representative of MOFCOM and the most senior judge supported the "administrative" position. To Liu Jixiang of the Beijing Higher People's Court, the first part of Article 7, which requires a

商业特许经营管理条例 [Commercial Franchise Administration Regulation] was adopted on January 31, 2007 at 167th Regular Meeting of the State Council, in effect from May 1, 2007.

60. *Id.*

61. 王静 v. 北京阳光瑞丽美容有限公司 (Beijing Chaoyang Dist. Ct., Oct. 10, 2008), http://www.bj148.org/sfgk/jpal/msajfl/dwqjf/200810/t20081010_23533.html.

62. 刘永兴 v. 天才猫（北京）国际品牌管理顾问有限公司 (Beijing No. 1 Interm. Ct., Apr. 10, 2009), http://bjgy.chinacourt.org/public/paperview.php?id=67127.

63. Beijing Courts Hold Network Broadcast of Franchise Contract Dispute Seminar (Apr. 24, 2009), *available at* http://www.chinacourt.org/zhibo/member/index.php?member_id=1000&zhibo_id=1097&domain=bjgy.chinacourt.org.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

mature business model, is mandatory, but the second paragraph, the "2+1 Rule," is an administrative guide.[68]

If the "2+1 Rule" is simply an administrative guide, this will be of major significance to foreign franchisors seeking to enter China. If they are comfortable that they have a mature business model then they will not be liable for rescission. But how to handle the requirements of the filings with MOFCOM is another question. Fortunately the representative of the Ministry of Commerce stated that MOFCOM will consider locations held by indirectly owned corporations to be the same as locations directly held by the franchisor seeking registration.[69] Still, the list of franchisors registered with MOFCOM shows that there are very few foreign franchisors registered.[70] It appears that most foreign franchisors have not registered.

D. South Africa

In April 2009, the President of South Africa assented to the Consumer Protection Act, 2008, which will become generally effective in October 2010.[71] The Act, which provides sweeping consumer protections, considers franchisees as "consumers" entitled to the Act's protections. The offer of a franchise to a prospective franchisee, the franchise agreement itself, and the supply of goods or services to a franchisee in respect of the franchise agreement are all deemed to be transactions between a supplier and a consumer, as contemplated by the Act.[72] Franchise agreements must be in writing, and the franchisee will be allowed to cancel the agreement, without cost or penalty, by giving the franchisor written notice within ten business days after signing.[73] While the Act generally prohibits tying or bundling arrangements, it provides an exception for franchisors where the tied goods or services are "reasonably related to the branded products or services that are the subject of the franchise agreement."[74] The Act appears to give the Minister the ability to require certain mandated disclosures within the body of the franchise agreement. While that seems unlikely, franchisors will be required to provide certain pre-sale disclosures to prospective franchisees. It is expected that the Minister, in consultation with the National Consumer Commission, will develop regulations relating to the form and substance of these disclosures by April 2010.

E. United Kingdom

Although the United Kingdom has no franchise-specific legislation, the greater propensity of courts to give weight to technical bulletins issued by the British Franchise Association, even when considering issues involving parties who are not members of the BFA,

68. *Id.*

69. *Id.*

70. Ministry of Commerce, Enterprise Exchange, http://txjy.syggs.mofcom.gov.cn/ (last visited Jan. 20, 2010).

71. Consumer Protection Act 68 of 2008 (Cape Town). The portions of the Act that establish a National Consumer Commission and that authorize the Minister (a Cabinet-level member of the executive branch) to develop implementing regulations under the Act will become effective in April 2010.

72. *Id.* § 5(6).

73. *Id.* § 7.

74. *Id.* § 13(2).

makes the following bulletins noteworthy. During 2009, the BFA issued bulletins which (i) prohibited a franchisee's failure to satisfy the minimum performance standards from being asserted as grounds for immediate termination; (ii) required franchisors to disclose the existence of supplier rebates; and (iii) prohibited franchisors from imposing confidentiality obligations on their franchisees that would restrict the franchisees' ability to discuss disputes with franchisors with the BFA.[75]

V. Russian Regulations on Permitted Agreements between Economic Agents

As part of the adoption of what is known as the Second Anti-Monopoly package of amendments to the Russian Anti-Monopoly Law,[76] regulations under Part 2 of Article 13 of Russia's Law on the Protection of Competition were published online in July.[77] The Regulations are dated July 16, 2009, and are of interest to distributors, licensors and franchisors, as well as competition law advisors. They are entitled "On Permitted Agreements between Economic Agents" and deal with a variety of competition law issues. Prohibited practices are resale price maintenance, territorial and customer restrictions (unless for restrictions on advertising in an exclusive territory-which does not apply to retail), restrictions on the sale of spare parts, and prohibitions on the resale of the goods.[78] Restrictions on purchasers acquiring substitute goods are acceptable if they are grandfathered in, or if the restrictions do not last longer than three years from the commencement of the agreement.[79] Similarly, requirements that the purchaser purchase more than fifty percent of its supply of a particular item are permitted if they are grandfathered in or limited to three years.[80] There are also restrictions on the setting up of exclusive territories.[81]

VI. U.N. Convention on Contracts for the International Sale of Goods

The United Nations Convention on Contracts for the International Sale of Goods, a multilateral treaty governing certain sale of goods transactions, is one of the most significant legislative texts of the U.N. Commission on International Trade Law (UNCITRAL).[82] The CISG is significant, in part, because of its automatic application to common international sales transactions.[83] Its significance is also due to its widespread adoption. For example, the United States and most of its top trading partners, including

75. MICHAEL DAIGLE, 2009 REVIEW OF INTERNATIONAL FRANCHISING DEVELOPMENTS (2009), *available at* http://www.chengcohen.com/09News.pdf.

76. О защите конкуренции-[SZ RF] Russian Federation Collection of Legislation on Protection of Competition, 2006, No. 135-FZ. The Regulations in Russian are *available at* http://www.kadis.ru/texts/index.phtml?id=38362.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 (*entered into force* Jan. 1, 1988) [hereinafter CISG].

83. *Id.* art. 1(1).

Canada, China, Mexico, and most (though not all) member states of the European Union, are parties to the CISG.[84] Additional countries continue to accede to the CISG. On August 1, 2009, the CISG entered into force for Japan, a member of the G-20 and a major U.S. trading partner.[85] The CISG also entered into force for Lebanon on December 1, 2009 and for Armenia on January 1, 2010.[86] Albania acceded to the CISG in May of 2009, and the CISG will enter into force for Albania on June 1, 2010, bringing the total number of parties to the CISG to seventy-four.[87]

A. U.S. Case Law

There are surprisingly few decisions by courts in the United States interpreting the CISG.[88] Nevertheless, the body of U.S. case law applying or interpreting the CISG continues to grow, and some U.S. courts appear to be gaining comfort with the CISG. In *Palm Bay International, Inc. v. Marchesi Di Barolo S.p.A.*, one U.S. court considered an Italian wine producer's motion to dismiss a claim for breach that was brought against the producer by the producer's U.S. customer.[89] The producer's two arguments in support of its motion to dismiss were: (i) *forum non conveniens*, and (ii) deference to litigation that the producer commenced in Italy eight days before the U.S. litigation.[90] The court rejected the Italian producer's *forum non conveniens* argument, and ultimately denied the motion to dismiss, reasoning that federal courts in the United States have been able to interpret and apply the CISG with "little difficulty."[91]

For now, however, there continues to be a paucity of decisions rendered by U.S. courts under the CISG. Nevertheless, twelve opinions (published and unpublished) of U.S. courts were reported in 2009 that include some reference in the opinion to the CISG.[92]

84. *See* United Nations Treaty Collection: Status of CISG, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en (last visited Mar. 30, 2010).

85. Press Release, UNCITRAL, Japan Accedes to United Nations Convention on Contracts for the International Sale of Goods (CISG), U.N. Doc. UNIS/L/120 (July 4, 2008), *available at* http://www.unis.unvienna.org/unis/pressrels/2008/unisl120.html.

86. Economic Research & Analysis Department, *Lebanon this Week*, Byblos Bank, at 3, Nov. 24-28, 2008, *available at* http://www.byblosbank.com.lb/newscenter/economic_research/Publications/LTW/LTW-93.pdf.

87. Press Release, UNCITRAL, Albania Accedes to United Nations Convention on Contracts for the International Sale of Goods (CISG), U.N. Doc. UNIS/L/128 (May 18, 2009), *available at* http://www.unis.unvienna.org/unis/pressrels/2009/unisl128.html. Two additional countries, Ghana and Venezuela, have signed but not yet ratified the CISG.

88. *See, e.g.*, Miami Valley Paper, LLC v. Lebbing Eng'g & Consulting GmbH, No. 1:05-CV-00702, 2009 WL 818618, at *9 (S.D. Ohio Mar. 26, 2009) (acknowledging that the case law interpreting and applying the CISG is sparse).

89. Palm Bay Int'l, Inc. v. Marchesi Di Barolo S.p.A., No. 09-CV-601 (ADS)(AKT), 2009 WL 3162286, at *1 (E.D.N.Y. Oct. 3, 2009).

90. *Id.*

91. *Id.* at *4; *see id.* at *6 (noting that "[f]ederal courts, including this Court, have had little difficulty in interpreting and applying the CISG. As such, the Court does not share Marchesi's apparent concern about the potential difficulties in applying the CISG").

92. Macromex S.r.l v. Globex Int'l, Inc., 330 F. App'x 241 (2d Cir. 2009); Banks Hardwoods Fla., LLC v. Maderas Iglesias, S.A., No. 08-23497-CIV, 2009 WL 3618119, at *1 (S.D. Fla. Oct. 29, 2009); Banks Hardwoods Fla., LLC v. Maderas Iglesias, S.A., No. 08-23497-CIV, 2009 WL 3618011, at *1 (S.D. Fla. Oct. 29, 2009); Berry v. Ken M. Spooner Farms, Inc., No. C05-5538FDB, 2009 WL 927704, at *1 (W.D. Wash. Apr. 3, 2009); Construcciones E Installaciones Electromecanicas S.A. v. Hi-Vac Corp., No. C2-07-234, 2009 WL 2252314, at *1 (S.D. Ohio July 24, 2009); Doolim Corp. v. R Doll, LLC, No. 08 Civ. 1587 (BSJ) (HBP), 2009

Of those twelve opinions, however, seven include only very limited (if any) discussion of the CISG.[93] Thus, only five 2009 U.S. court opinions contain more than minimal interpretation of or analysis under the CISG. One of those opinions, *Palm Bay International, Inc.*, is introduced above, and another opinion, *Taub v. Marchesi Di Barolo S.p.A.*, is a companion case to *Palm Bay International, Inc.* containing the same or very similar analysis. The remaining three are introduced below.[94]

In *San Lucio, S.r.l. v. Import & Storage Services, LLC*, the plaintiff, an Italian supplier of cheese, brought a claim against its U.S. buyers for breach of the buyers' payment obligations.[95] The parties agreed that the CISG governed the contract, and the Italian supplier filed a motion for partial summary judgment seeking an order that Italian, not U.S., law would govern determination of the applicable rate of prejudgment interest and recovery of attorneys' fees.[96] In considering the supplier's request for prejudgment interest and attorneys' fees pursuant to Italian law, the court noted that Article 78 of the CISG entitles a party to prejudgment interest when the other party fails to make or is late in making a payment that is due.[97] The rate of interest, however, is not established by the CISG, and the court resorted to U.S. law to fix the rate.[98] Similarly, the court noted that the CISG is silent on payment of attorneys' fees.[99] Even though Italian law asserts that attorneys' fees are to be awarded to the prevailing party, the court noted that U.S. law does not.[100] Consequently, attorneys' fees were not recoverable.[101]

In *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*, the court conducted a careful analysis of the CISG in its consideration of the motion for partial summary judgment brought by the plaintiff, a U.S. buyer, and the motion for summary judgment brought by the defendant, a German seller.[102] The dispute arose over the sale of a paper winding machine to the U.S. buyer by the German seller.[103] Some of the issues before the court depended on the terms of the contract between the parties.[104] The arrangement between the parties, however, involved a "battle of the forms," and the ex-

WL 1514913, at *2 (S.D.N.Y. May 29, 2009); Innotex Precision Ltd. v. Horei Image Prods., Inc., Civ. Action File No. 1:09-CV-547-TWT, 2009 WL 5174736 (N.D. Ga. Dec. 17, 2009); Miami Valley Paper, 2009 WL 818618, at *4; Palm Bay Int'l, 2009 WL 3162286, at *4; Rice Corp. v. Grain Bd. of Iraq, No. 2:06-cv-01516, 2009 WL 3489916, at *3 (E.D. Cal. Oct. 26, 2009); San Lucio S.r.l. v. Imp. & Storage Servs., LLC, Civ. Action No. 07-3031 (WJM), 2009 WL 1010981, at *1 (D.N.J. Apr. 20, 2009); Taub v. Marchesi Di Barolo, S.p.A., No. 09-CV-599 (ADS) (ETB), 2009 WL 4910590, at *1 (E.D.N.Y. Dec. 10, 2009).

93. *Macromex S.r.l*, 330 F. App'x at 241; *Banks Hardwoods Fla., LLC*, 2009 WL 3618119, at *1; *Banks Hardwoods Fla., LLC*, 2009 WL 3618011, at *1; *Berry*, 2009 WL 927704, at *1; *Construcciones E Installaciones Electromecanicas S.A.*, 2009 WL 2252314, at *1; *Innotex Precision Ltd.*, 2009 WL 5174736, at *1; *Rice Corp.*, 2009 WL 3489916, at *1.

94. After this article was written, another opinion including some analysis of the CISG was reported. *See* Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd., No. 4:09cv00318 SWW, 2009 WL 5181854, at *1 (E.D. Ark. Dec. 23, 2009).

95. San *Lucio, S.r.l.*, 2009 WL 1010981, at *1.

96. *Id.*

97. *Id.* at *3.

98. *Id.*

99. *Id.* at *1.

100. *Id.* at *1 n.1.

101. *Id.* at *4.

102. *Miami Valley Paper*, 2009 WL 818618, at *1.

103. *Id.* at *1-2.

104. *Id.* at *5-8.

change of documents that created the battle of the forms therefore affected the formation of the contract between the parties and, accordingly, the terms of the contract.[105]

In resolving the parties' cross-motions, the court noted three specific differences between the CISG and the Uniform Commercial Code (U.C.C.) with regard to contract formation.[106] First, the court found that, unlike the U.C.C., which has abrogated the mirror image rule under Section 2-207, the CISG applies the mirror image rule.[107] Second, the CISG has no statute of frauds.[108] Third, the CISG contains no parol evidence rule and instead allows the court to consider statements or conduct to establish, modify, or alter the terms of a contract.[109] Thus, questions of contract formation and determination of the terms of the contract may be analyzed and answered very differently under the CISG than under U.C.C. Article 2.

Finally, in *Doolim Corp. v. R Doll, LLC*, the court considered a claim brought by a Korean supplier against its U.S. buyer for nonpayment under a series of contracts between the two parties for the manufacture and supply to the U.S. buyer of approximately 500,000 women's knit pants, dresses, and tops.[110] The buyer failed to make some of the payments when due, and the supplier brought a claim for breach.[111] The court methodically analyzed the applicability of the CISG and concluded that it was applicable.[112] The court then analyzed the CISG's provisions relating to the buyer's payment obligations and to the seller's remedies for breach.[113] Ultimately, the court entered judgment for the Korean supplier.[114]

VII. The New Swedish Commission Agency Act

On October 1, 2009, a new Commission Agency Act (the Act) entered into force in Sweden. It replaces the 1914 Commission Agency Act, which covered not only commission agents but also commercial agents and travelling salesmen.[115] Through the Act, certain provisions of Directive 2004/39/EC are implemented into Swedish law.[116]

The main distinguishing feature of a commission agent, as opposed to other types of distributors, is that he sells or buys in his own name for the account of the principal or supplier (the principal).[117] Commission agency offers the advantage of limiting the busi-

105. *Id.* at *1-2.
106. *Id.* at *4-5.
107. *Id.* at *4 (citing Article 19 of the CISG). Regrettably, the court failed to note that Article 19 of the CISG varies slightly-but materially-from the common law mirror image rule, in that Article 19(2) contemplates that an acceptance of an offer that contains additional or different terms can nevertheless constitute an acceptance, if the additional or different terms do not materially alter the terms of the offer, and provided that the offeror does not object to the additional or different terms. CISG, *supra* note 82, art. 19(2).
108. *Miami Valley Paper, LLC*, 2009 WL 818618, at *5.
109. *Id.*
110. *Doolim Corp.*, 2009 WL 1514913, at *1-2.
111. *See id.* at *5-6.
112. *Id.* at *5.
113. *Id.* at *6-7.
114. *Id.* at *1.
115. *Id.* The 1914 Commission Agent Act was a joint Nordic legislation and is still, as amended, in force in Denmark and Norway.
116. Council Directive 2004/39/EC, 2004 O.J. (L 145) 1.
117. *Id.*

ness risk of the commission agent, because the principal - if he is a supplier - as a general rule is obliged to supply the goods and, if no buyer is found, accept their return from the commission agent.[118] In addition, the commission agent is entitled to recover certain costs from the principal, such as payments made and expenses incurred in relation to a transaction covered by the agency agreement.[119] From the principal's view, there is the advantage of getting access to a sales organization without having to establish an organization of his own.[120] Another important benefit to the principal is the level of protection he receives in the event of the agent's bankruptcy.[121] If the principal chooses to distribute his goods through a distributor and sells his goods on credit, these goods will typically not be protected from the distributor's creditors in the event of bankruptcy whereas the opposite is true in a commission agency relationship.[122] Finally, the identity of the principal, as a general rule, need not be disclosed to the third party with whom the transaction is concluded.[123] Conversely, the commission agent is not under any obligation - unless otherwise agreed - to disclose the name of the third party to his principal.[124]

The scope of the Commission Agency Act is limited to agents who sell or purchase movable property and agents who deal in real property or services are not covered by the legislation.[125] Securities fall into the category of movable property and transactions involving securities may well represent the most numerous (and perhaps also most economically important) commission agency relationship to which the legislation applies.[126]

The Commission Agency Act distinguishes between commercial commission agency, where the commission agent acts within a business, and civil commission.[127] As might be expected, many of the provisions of the Act apply only to commercial commission agency relationships.[128] Some provisions, notably those dealing with the termination of the commission agency agreement and the right to goodwill compensation, do not apply to commission agency relating to trade in securities.[129] As a general rule, the principal and the commission agent may agree to deviate from the provisions of the Act.[130] One important restriction applies, however, if the principal is a consumer and enters into an agreement with a commercial agent.[131] In such case, the law is mandatory in favor of the consumer.[132]

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*; *but cf.* art. 21 (Under Swedish law, retention of title is generally not enforceable if the goods are intended for resale).

123. 2004/39/EC.

124. *Id.* But if the commission agent does not disclose the identity of the third party with whom he has concluded a transaction, he will stand *del credere* and thus be liable towards the principal for the due fulfillment of the end customer's obligation according to the sales agreement.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

The basic obligation of the commission agent is set out in Section 4 of the Act, and consists of acting in the best interests of the principal.[133] More specifically, this obligation includes following his instructions, to inform him of facts that are of importance in concluding the assignment (to a reasonable degree), and to inform him of transactions completed with a third party, all without delay.[134] In addition to these general obligations, the Act imposes obligations on the commission agent with regard to goods in the care of the agent, including the obligation to care for and keep the goods separate from those of other principals or of the agent himself.[135]

In consideration of the services performed by the commission agent, the principal shall pay a commission.[136] This consideration is usually, but not always, determined as a percentage of the value of the goods sold or bought.[137] A commercial commission agent is usually only entitled to a commission if the third party has fulfilled his obligations under the relevant sales agreement.[138] Insofar as it does not conflict with antitrust law, commission may also be payable if the commission agent has been allocated a certain geographical area or certain customers and the principal concludes a sales agreement directly with a third party in a category reserved for the commission agent.[139]

As security for the payment of commission, the Act provides the commission agent with a pledge in the goods held on behalf of the principal as well as payments due by the principal to a third party, or by a third party to the principal, relating to such goods.[140] If both the commission agent and the principal act within their respective businesses, the pledge extends to all goods held by the commission agent on behalf of the principal, irrespective of whether the goods relate to the payment of commission in question.[141]

In the event of the termination of a commission agency agreement by the principal, the commission agent may be entitled to damages.[142] No damages are payable if the agreement is terminated in accordance with its terms (*i.e.*, either at a fixed date set out in the agreement or by observing a notice period agreed between the agent and the principal).[143] But in addition to possible damages, the Act stipulates that the commission agent, as a rule, is entitled to goodwill compensation due to a termination.[144] The provisions are

133. *Id.*

134. *Id.* ("[the] Member States shall require that investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. Nevertheless, whenever there is a specific instruction from the client the investment firm shall execute the order following the specific instruction."). *Id.* art. 21.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

closely modeled on, if not identical to, those applying to commercial agents.[145] Consequently, the commission agent is entitled to compensation equal to one year's commission, based on the average commission during the five years preceding the termination.[146]

145. *Id.*
146. *Id.*