Asia Franchise
Business Opportunities

China's Franchise Measures In A Civil Law Context

China's current Measures for the Regulation of Commercial Franchising)[1] (the "Franchise Measures") have been strongly criticized by franchise lawyers from common law jurisdictions such as the United States for a number of reasons, including the vagueness of the drafting[2]. They have also been misinterpreted.

While there are provisions in the Franchise Measures that could be improved, these critics usually have little experience with civil law jurisdictions in general, and this leads to many of their misinterpretations and other misunderstandings.

China is a civil law jurisdiction similar to Germany or France. In civil law systems law is developed from general principles that are often set out in a civil code. If there are gaps in the drafting of the subordinate laws and regulations, the appropriate legal response can be determined by inference from the general legal principle in the code. In contrast in common law systems law is developed on a case by case basis, and statutes must be drafted very precisely. What is not specifically prohibited is considered to be permitted.

The two systems have also diverged with respect to the negotiation of contracts. In common law the purchaser has the responsibility to conduct his or her own due diligence on the subject of the contract or to negotiate representations and warranties from the seller. This is known as the doctrine of *caveat emptor*, or buyer beware. Securities regulations and franchise laws were initially developed in common law jurisdictions such as the U.S. to require disclosure of key items in large part because purchasers were unable to do sufficient due diligence under the doctrine of buyer beware.

In contrast various civil law systems have developed the notion that contracts must be negotiated in good faith (or "pre-contractual good faith"). This means that a vendor must disclose certain information accurately during negotiations. Remaining silent and failing to inform the proposed purchaser about material facts regarding the business may be considered to constitute an absence of good faith in the conduct of the negotiations. This in turn invalidates the consent that is necessary for the formation of a contract. This is known as the doctrine of *culpa in contrahendo* (or "fault in negotiating").[3]

China is still developing its civil code, but the principles that apply to contract negotiations such as buying a franchise have been set out in the General Principles of the Civil Law of the People's Republic of China[4] and the Contract Law[5]. In particular Article 42 of the Contract Law requires that:

In the making of a contract, the party that falls under any of the following circumstances, causing thus loss to the other party, shall hold the liability for the loss. (1) engaging in consultation with malicious intention in name of making a contract; (2) concealing intentionally key facts related to the making of a contract; (3) taking any other act contrary to the principle of good faith.

In Québec and Germany similar provisions exist in the civil codes[6]. In these jurisdictions there are no franchise specific laws. In both jurisdictions judges have used such provisions in franchise cases to place an obligation on the franchisor to disclose what may simply be described as all material facts to the prospective franchisee. The German court went so far as to say:

Before concluding a contract the Franchisor has an obligation to explain to the other party facts that would thwart the purpose of the contract and that are of substantial importance

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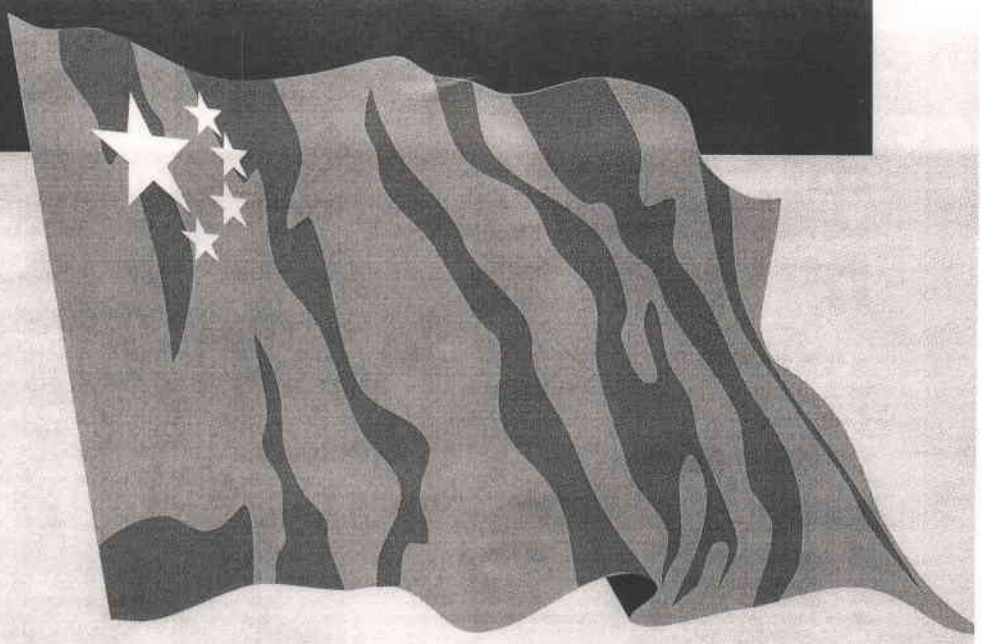
[1] *Ministry of Commerce Order No. 25 of 2004, in effect February 1, 2005.*

[2] *See for example Gary R. Duvall, Paul Jones, Amy Sommers and Guanxi Zheng, "Rising Affluence and Post-WTO Reforms: Converging Trends Boost Franchising in China," paper presented at the American Bar Association Annual Meeting, Chicago, Illinois, August 7, 2005 and in particular Section D by Gary R. Duvall and Guanxi Zheng entitled "China's New Measures for the Regulation of Commercial Franchises," and see Christopher A. Nowak, John Pratt and Carl E. Zwisler, "International Franchising in an Unclear and Uncertain Legal Environment," in The Fine Art of Franchise Law-29th Annual Forum on Franchising (Chicago: ABA Forum on Franchising, October 11-13, 2006).*

[3] *See Rudolf von Jhering, "Culpa in Contrahendo, oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen" (Culpa in Contrahendo or Damages for Void or Unperfected Contracts), in 4 Jahrbücher Für Die Dogmatik Des Heutigen Römaischen Und Deutschen Privatrechets [Yearbooks of the Dogmatics of the Modern Roman and German Private Law] 1(1861). Friedrich Kessler and Edith Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom to Contract: A Comparative Study, 77 Harvard Law Review 401, at pp. 401-9 (1964) as cited in E. Allen Farnsworth, Duties of Good Faith and Fair Dealing under the Unidroit Principles, Relevant International Conventions, and National Laws, Universität Köln, available online at http://tldb.uni-koeln.de/php/pub_show_document.php?pubdocid=122100.*

[4] *Adopted at the Fourth Session of the Sixth*



to the other party in the resolution of the negotiations (see Rostock 1996, ff. m.w.N.). Such circumstances include particularly, without further justification, information regarding expected profits and financial feasibility[7].

In China the Franchise Measures have elaborated on the principles set out in Art. 42 of the Contract Law when applied to franchising. Article 19 of the Franchise Measures set outs a list of information to be disclosed that is not intended to be exhaustive. The list often includes the phrase "and similar information."[8] It further provides that the franchisor must make other disclosures requested by the franchisee[9].

Such vagueness in drafting is an anathema in common law and in the U.S. Article 19 has been translated by simply omitting the phrase "and similar information,"[10] making it into a list of limited and specific requirements such as would be found in a common law statute. Others have described the requirements of Art. 19(9) as being "so open ended as to be unreasonable."[11] These are serious misinterpretations.

Another debate centers around the meaning of the phrase "operational results" in Art. 19(2). Some common law attorneys interpret it very restrictively to exclude the disclosure of average gross sales for each location[12]. But Art. 42 of the Contract Law does not allow a franchisor to intentionally conceal key facts or material facts. Based on this provision, this phrase should be read more broadly, and in a manner closer to that used in the German and Québec courts.

China's Franchise Measures do have some provisions that should be criticized. It is not clear from the Franchise Measures whether a foreign franchisor can contract directly with a Chinese franchisee, or must first set up a Foreign Invested Enterprise in China ("FIE") in China. The decision in Han Mei Yan v. Beijing Yinqi Bayi Yinqi Jianmei Limited[13] where all franchise agreements entered into directly by foreign franchisors before December 11, 2004 were found invalid has added to the confusion. This issue needs to be resolved.

But overall the Contract Law and the Franchise Measures are clearly in line with franchise requirements in other civil law jurisdictions, and should be accepted as such.

Paul Jones
Jones & Co. – Toronto
pjones@jonesco-law.ca
416-703-5716

National People's Congress on April 12, 1986.

[5]Adopted at the Second Session of the Ninth National People's Congress on March 15, 1999 and came into force on October 1, 1999. The Contract Law is similar to the section on obligations in a civil code.

[6]Code civil du Québec, L.Q., 1991, c. 64, Arts. 6, 7 and 1375 ; Bürgerliches Gesetzbuch §241(2) and 311.

[7]Landgericht Kaiserslautern, Aktenzeichen : 4 O 607/00, 26 Mai 2004. Translation by the author. The Québec cases are Cadieux c. St-A. PhotoCorporation, Cour supérieure, 9 avril 1997 and Les Investissements Stanislas et Patricia Bricka Inc. c. Groupe CDREM Inc., Cour d'appel du Québec, 23 juillet 2001.

[8]See Arts. 19(1),(2) and (8).

[9]Art. 19(9).

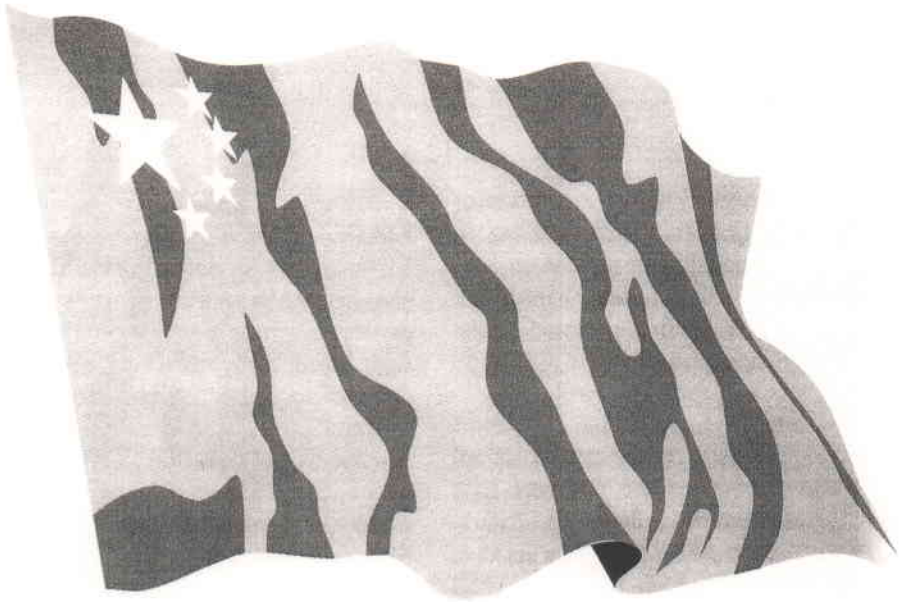
[10]See the unofficial translation of the "Measures for the Regulation of Commercial Franchise" in CCH, Business Franchise Guide ¶7065 by Philip F. Zeidman, Lee J. Plave and Tao Xu of DLA Piper Rudnick of Washington, D.C.

[11]Nowak, Pratt and Zwisler, supra note 2, at p. 26.

[12]Duvall and Zheng, supra note 2.

[13]Beijing Chaoyang District People's Court, No. 5967, August 16, 2005, available at: http://www.lawyer3721.net/index.php3?file=detail.php3&kdir=1657. The franchisor was from Korea.

民法体系里的商业特许经营管理办法



中国于04年出台的《商业特许经营管理办法》（下称“特许办法”）被美国等一些奉行普通法系国家的律师从多个方面提出批评,如:字眼含糊等。同时，他们也曲解了一些法条。

虽然新出台的特许办法在很多方面还可以进一步完善，但是多数这些批评家都对民法体系缺乏认识，以致于对办法产生曲解，甚至误解。

中国与德国和法国等国一样采取的都是民法法系。在民法的法系里，许多法条都是一些社会上长久以来奉行的道德标准发展而来。当法律的草稿与社会存在的规章制度存在差异时，通常的做法是根据普遍使用的法律原则推论出最后的定稿。反观普通法则是参考案例，基本原则及条例等起草都十分谨慎。一些没有明令禁止的条例都会被仔细地研究。

这两大体系在合约谈判方面的规定也有所不同。在普通法下，买方有权执行尽职调查（对卖方进行调查），或以合理的理由向卖方提出责任让渡的请求,即所谓的“货物出门概不退换”或“买家自理”条款。保价条例及特许条例最初是在普通法系的背景下制定的，例如美国在“买家自理”的条例下，买家不可能都对卖方进行彻底的调查，因此可以要求卖方对关键信息进行披露。

相比之下，在民法法系里，对合约的谈判都必须在善意假设下进行，意即卖方在合约谈判的过程中必须准确地披露与合同相关信息。若不进行披露或不完整披露合同标的物信息，则此单交易可视为不诚信的。合约也会因为缺少必要部分而被视为无效,即所谓的“缔约过失”。

即管中国还在完善其民法体系，但如购买特许权等适用于合约谈判的条例在中华人民共和国民法及合同法中也有所规定。在合同法第42条中提到:
当事人在订立合同过程中有下列情形之一，给对方造成损失的，应当承担损害赔偿责任:
（一）假借订立合同，恶意进行磋商;
（二）故意隐瞒与订立合同有关的重要事实或者提供虚假情况;
（三）有其他违背诚实信用原则的行为。

在加拿大魁北克及德国的民法中有类似的规定，在这些国家地区都没有特许经营的专门法律。在这两个地方，法官都曾在有关特许经营的案件中使用这些规定，指明特许人有责任向潜在加盟者披露“全部信息”。德国的法院指出:

在合同到期之前，特许人有责任向加盟者披露与合同相关及对加盟者和合同谈判有重要意义的信息（参见罗斯托克1996,ff.m.w.N），包括与预期利润和盈利可行性有关的信息。

在中国，合同法第42条中的详细说明可适用于特许经营。中国特许经营管理办法第19条对需要披露的内容都详细地列明了。而其中多次运用“等相关信息”的字眼，这就使得特许人须向加盟者提供更多他们所需的信息。

诸如这些含糊的条例在美国等普通法系的国家是不会出现的。当特许条例第19条被翻译时就被删去了“等相关信息”的字眼，使得披露的内容变得有限而更加明确，更具普通法系的味道。也有指特许办法第19条第9款太宽泛过度，并将引起曲解。

另一个争议在于19条第2款中提及的“经营情况”字眼。一些在普通法系里的律师指出这将限制各个单店披露其每月的平均销售总额。但在合同法第42条中规定特许人不得有意隐瞒相关的重要信息。基于这个规定，这个字眼应被更广泛地理解，在某种程度上，应更贴近德国和魁北克的法院所用的规定。

中国的《商业特许经营管理办法》的确有一些地方需要修改完善。里面一些不明确的规定将使得国外特许人难以跟国内加盟者签订特许合同，或必须先在中国设立投资公司（“FIE”）。例如，北京音其巴艺健美中心(一个韩国的特许经营机构)在2004年12月11日之前都是直接采用国外特许人引进的特许经营合同,这将增加他们的困惑。因此,这些问题都亟待解决。

但纵观合同法和商业特许经营管理办法，它们都明显符合特许经营的需求，这点是值得我们承认的。

钟保禄
加拿大多伦多 钟保禄律师事务所
pjones@jonesco-law.ca
416-703-5716