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MESSAGE FROM THE CHAIR

A new year for the Antitrust, Franchising and Trade Regulation Section promises to further develop the Section's presence within the community of attorneys that practice in these areas. Over the past year, the Section has brought section attorneys together for in-person conferences, teleconferences and social events to strengthen the relationships between our members.

This year we have fresh faces on our Council as well as familiar ones from years past. We hope to carry the momentum built in the last year into the future and to bring the Section educational and enrichment events that are truly relevant and worthwhile. We are kicking the new year off with a slew of October and November events including a recent teleconference on the antitrust concerns facing realtors using the Multiple Listing Service, and upcoming Franchising and Antitrust conferences.

In this special edition of our e-Newsletter you'll find the details of our upcoming events and the promise of more to come. The complete e-Newsletter will be back in the next edition.

We have some great things in store and we look forward to your participation and feedback in the upcoming year.

Best regards,

Blair Renfro
 Chair SBM Antitrust, Franchising and Trade Regulation Section

SECTION NEWS**Upcoming Franchising Seminar**

The Section will be putting on a Franchising Seminar on October 30, covering a variety of franchising law topics. The seminar will be held at the Hotel Baronette in Novi (27790 Novi Rd., Novi, MI 48377). Topics include:

- Help! How Can I Get Out of My Franchise Agreement?
- Claims on which Franchisees and Franchisors Can Sue or Arbitrate
- Motor Vehicle Dealer Terminations
- State Law Effects on Motor Vehicle Manufacturer-Dealer Relations

[Register Online; Seminar Details and & Mail/Fax Form.](#)

Great Lakes Antitrust Institute Tuition Sponsorship

This year our section will not only be participating in the newly formed Great Lakes Antitrust Institute, but we are providing tuition reimbursement to section members that would like to attend. The conference will bring together practitioners from several surrounding states for a day-long program that promises to provide great insight into the current administration and other recent developments. The conference will take place on November 6th in Columbus Ohio. Tuition reimbursement is available for the first ten in-

IN THIS ISSUE:

Section Info:	1
Message from the Chair	1
Section News	1
International Contract Law Developments and Their Imminent Impact on American Contract and Franchise Law	3
by: Howard Yale Lederman	

terested members. Please contact section Chair, Blair Renfro to sign up.

[Register for the Conference](#); [Contact Blair Renfro](#).

MLS Webinar a Success

On October 22nd, the Section hosted a Webinar covering current facing realtors arising from the FTC's 2006 enforcement actions against Michigan realty groups based on the use of the Multiple Listing Service Database (MLS). The webinar was organized and given by David Janis, and brought together practitioners in the field via teleconference. The section hopes to utilize this format to host future events that bear discussion to fill the gap between email list servers and in-person seminars.

Missing Something?

You may have noticed that this edition of the Section's e-Newsletter does not feature the full news coverage that has appeared in prior newsletters. Look for the complete newsletter to return in the next edition. In the meantime, we are proud to feature an article by frequent contributor and Section Treasurer, Howard Y. Lederman, which appears on page 3.

Now Accepting Submissions

If you have an antitrust, franchising, or trade regulation article that you would like to submit to be considered for publication in an upcoming e-Newsletter, please submit your work to the Section's Publications Editor, [Justin Hakala](#). Submitted works will be circulated to council members for blind review; publication decisions can be expected within a month.

Missed the Last E-Newsletter?

If you missed the June e-Newsletter, be sure to check out the archives at the State Bar of Michigan Website, accessible [here](#).

INTERNATIONAL CONTRACT LAW DEVELOPMENTS AND THEIR IMMINENT IMPACT ON AMERICAN CONTRACT AND FRANCHISE LAW

By Howard Yale Lederman[†]

As almost everyone is aware, during the last 65 years, American franchising has grown by leaps and bounds. According to the most comprehensive recent study available, the January 31, 2008 PriceWaterhouseCoopers study for the International Franchise Educational Foundation, as of December 31, 2005, “[f]ranchised businesses operated 909, 253 establishments in the United States in 2005, counting both [franchisor-owned and franchisee-owned] establishments These establishments amounted to 3.3% of all business establishments in the United States. Franchised businesses provided 11.0 million jobs, met a \$278.6 billion payroll, and produced \$880.9 billion of output. Franchised businesses accounted for 8.1% of all private non-farm jobs, 5.3% of private-sector payroll, and 4.4% of all private sector output in 2005 . . . franchised businesses provided more jobs in 2005 than all manufacturers of durable goods, such as computers, cars, trucks, planes, communications equipment, primary metals, wood products, and instruments.”¹ Even since 2001, these numbers have increased significantly.² Thus, in the national business and legal landscape, franchising’s and franchise law’s importance have grown substantially.

During the last 30 years, international franchising has also exploded. Despite the present severe recession, US franchisors “have remained bullish on international expansion”³ According to one source, franchising “exists in more than 160 countries and is used in more than 70 different business sectors. U.S. franchisors are expanding internationally,” and this growth is “ever-increasing.”⁴ At least twenty-four countries regulate pre-franchise agreement disclosure of information. These include Australia, Brazil, Canada (Alberta only), China, France, Indonesia, Japan, Malaysia, Mexico, Romania, South Korea, and Spain.⁵ Many of these countries’ laws are similar to the US FTC Rule 36⁶ and the Michigan Franchise Disclosure Law (“MFIL”) requiring

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¹ PriceWaterhouseCoopers, II *The Economic Impact of Franchised Businesses, Results for 2005*, Executive Summary (January 31, 2008), available at http://www.franchise.org/uploadedFiles/Franchisors/Other_Content/economic_impact_documents/EconomicImpactVollIpart1.pdf.

² PriceWaterhouseCoopers, II *The Economic Impact of Franchised Businesses, Results for 2005*, Executive Summary (January 31, 2008), available at http://www.franchise.org/uploadedFiles/Franchisors/Other_Content/economic_impact_documents/EconomicImpactVollIpart1.pdf.

³ M. Prewitt, *Brands bullish on global growth* (2008) available at <http://www.nrn.com>.

⁴ M. L. Herman, *International Franchising* (2009), available at <http://www.franchise-law-com/PracticeAreas/International-Franchising.asp>.

⁵ M. L. Herman, *International Franchising* (2009), available at <http://www.franchise-law-com/PracticeAreas/International-Franchising.asp>; T M Pitegoff, *International Franchising* (2002), available at <http://www.pitegofflawoffice.com/>

⁶ 16 C.F.R. pt. 436 (2007).

franchisors to furnish Franchise Disclosure Documents (“FDDs”) to prospective franchisees.⁷ Furthermore, an international franchisor aiming to expand overseas needs to become familiar with the host nation’s substantive and procedural law ranging from tax to trademark, arbitration to court, and antitrust to contract.⁸ Becoming familiar with the host nation’s substantive and procedural law requires becoming familiar not only with present law, but with international agreements impacting on, likely to impact on, or likely to lead to developments impacting on present law. An international agreement ostensibly having nothing to do with franchising or franchise law illustrates these requirements.

On April 11, 1980, after proposal and negotiation efforts stretching back to 1980, international negotiations in Vienna produced the United Nations Convention on Contracts for the Sale of Goods (“UNCISG”).⁹ Since that date, 71 nations, including the United States in 1987, have ratified the UNCISG: “States from ‘every geographical region, every stage of economic development and every major legal, social and economic system’” have ratified the treaty.¹⁰ Since then, other nations, like Armenia and Albania, have ratified the UNCISG.¹¹ Of the major trading nations, only the United Kingdom, South Africa, Brazil, and India have not ratified the UNCISG.

Most important for our purposes is the UNCISG’s rejection of the parol evidence rule or rule against contradicting integrated writings.¹² This rule exemplifies common law rules applicable to franchise agreements in common law nations, like the United States, Canada, Great Britain, and South Africa. In Article 8(3), the UNCISG rejected the rule against contradicting integrated writings in favor of the following:

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of

⁷ M. L. Herman, *International Franchising* (2009) available at <http://www.franchise-law-com/PracticeAreas/International-Franchising.asp>; T. M. Pitegoff, *International Franchising* (2002), available at <http://www.pitegofflawoffice.com>.

⁸ M. L. Herman, *International Franchising* (2009) available at <http://www.franchise-law-com/PracticeAreas/International-Franchising.asp>; T. M. Pitegoff, *International Franchising* (2002), available at <http://www.pitegofflawoffice.com/>.

⁹ United Nations Convention on Contracts for the International Sale of Goods, opened for signature April 11, 1980 available at <http://www.cisg.law.pace.edu/cisg/text/treaty.html>.

¹⁰ R. N. Anderson, *Note: MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention on Contracts for the International Sale of Goods*, 1999 B.Y.U. L. Rev. 351, 362 (1999) [hereinafter *Note: MCC-Marble Ceramic Center*]; accord, J. Felemegas, “*The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation (2000)*” Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), p 115.

¹¹ *United Nations Convention On Contracts for the International Sale of Goods*, Wikipedia available at http://en.wikipedia.org/wiki/United_Nations_Convention_on_Contracts_for_the_International_Sale_of_Goods; United Nations Information Service, *Armenia Accedes to United Nations Convention for the International Sale of Goods* (February 17, 2009) available at <http://www.unis.unvienna.org/unis/pressrels/2009/unis127.html>; United Nations Information Service, *Albania Accedes to United Nations Convention for the International Sale of Goods* (May 18, 2009) available at <http://www.unis.unvienna.org/unis/pressrels/2009/unis128.html>.

¹² Contrary to its name and widespread belief, when applicable, the rule bars not only oral evidence, but also written evidence. Thus, Professor Corbin renamed the rule The Rule Against Contradicting Integrated Writings. Since this name is more accurate, I shall use his name. 6 *Corbin on Contracts* (Lexis Nexis Interim Ed. 2002), § 573.

the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.¹³

As the leading US UNCISG commentator and negotiator, Professor John O. Honnold, recognized: “Article 8(3) cuts through technical rules that might bar access to relevant materials.”¹⁴ Among those technical rules is the rule against contradicting integrated writings. “[T]he CISG, unlike American contract law, includes no parole-evidence rule, and ‘allows all relevant information into evidence[,] even though it contradicts the written documentation.’”¹⁵ “One of the most important differences between the UCC and the CISG involves the parole evidence rule . . . there is no parole evidence rule under the CISG.”¹⁶ In Article 2-202, the UCC incorporates a relatively mild version of the rule against contradicting integrated writings.¹⁷ In contrast, under the UNCISG, precontract evidence contradicting or varying from a written contract is admissible.

As Professor Honnold recognized, the UNCISG’s rejection of the rule against contradicting integrated writings in favor of letting judges evaluate the formerly barred evidence “is consistent with a growing body of opinion that the ‘parole evidence rule’ has been an embarrassment for the administration of modern transactions.”¹⁸ He noted that in 1976, the English Law Commission recommended the rule’s abolition.¹⁹ He also noted the UCC drafters’ adoption of a relatively mild rule version. Professor Honnold explained why he believed UNCISG Provision 8(3) made the rule against contradicting integrated writings unnecessary: “Jurists interpreting agreements subject to the Convention can be expected to give special and, in most cases, controlling effect to detailed written agreements.”²⁰ Further, he saw UNCISG Article 6 giving effect to the parties’ contract as a check and balance on Provision 8(3).

“Since Canada, Mexico, and most of the larger European nations have also adopted the CISG, the convention governs a majority of all [US] foreign transactions . . . in the United States, the Permanent Editorial Board for the Uniform Commercial Code has used the Convention as a constructive model for reforming the UCC.”²¹ The UCC’s Permanent Editorial Board has instructed the individuals revising the UCC “to give ‘due consideration to the harmonization of domestic and international law.’ The revisers have made numerous references to the CISG being

¹³ UNCISG, *supra* note 11, art. 8(3).

¹⁴ J. O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed. Kluwer International (1999)), p. 119.

¹⁵ *Tevee Toons, Inc v. GMBH*, Case No. 00 Civ. 5189 (RCC), 2006 US Dist. Lexis 59455, *22 (S.D.N.Y. 2006) (*quoting* *Claudia v. Olivieri Footwear Ltd.*, Case No. 96 Civ. 8052 (HB) (THK), 1998 US Dist Lexis 4586, *4-5 (S.D.N.Y. 1998)).

¹⁶ Murray, Hague & Lannis, *CISG: Trap for Unwary Drafters* (Dec. 11, 2007).

¹⁷ Honnold, *supra* note 13 at 121.

¹⁸ Honnold, *supra* note 13 at 121.

¹⁹ Honnold, *supra* note 13 at 121, citing English Law Commission, *Working Paper No 70, Law of Contract, The Parol Evidence Rule* (1976).

²⁰ Honnold, *supra* note 13 at 121.

²¹ *Note: MCC-Marble Ceramic Center*, (citing P. Winship, *Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners*, 29 *International Law* 525, 527 (1995) and P. Winship, *Domesticating International Commercial Law: Revising UCC Article 2 in Light of the United Nations Sales Convention*, 37 *Loyola L. Rev.* 43, 46 (1991)).

more in step with modern commercial practice than the UCC.”²² Even most common law nations, whose law has incorporated the rule against contradicting integrated writings for centuries or decades, have ratified the UNCISG and thus rejected the rule. These nations include the United States, Australia, Canada, Cyprus, New Zealand, Singapore, Lesotho, Uganda, and Zambia.²³ The main holdouts have been Great Britain, South Africa, Brazil, and India.²⁴

Most American courts have held that since the UNCISG is a treaty, based on the US Constitution’s Supremacy Clause, the UNCISG overrides state rules against contradicting integrated writings.²⁵

Even though the UNCISG ostensibly applies only to sale of goods, its impact on other, nongoods sectors is growing. For example, in 1998, the European Union’s Commission on Contract published its revised *Principles of European Contract Law*.²⁶ In 2006, the drafters revised the *Principles*.²⁷

According to *Principles* Article 101, when the parties designate the *Principles* as governing law through a governing law provision or other means, or when the general law principles or the law merchant govern.²⁸ “The *Principles* go even further than the CISG in rejecting provisions [barring or restricting] the admission of evidence in a contract dispute.”²⁹ Thus, integration and no-oral-modification provisions merely establish rebuttable presumptions. Only if individually negotiated for the specific contract will such provisions be enforceable.³⁰ Even then, evidence barred or restricted under such provisions is admissible for several purposes, such as showing ambiguity, the parties’ contractual intent, or waiver. Further, if the other party can show reasona-

²² L. A. DiMatteo, *The Law of International Contracting* (Kluwer Law International 2000), p 249.

²³ *United Nations Convention on Contracts for the International Sale of Goods*, Wikipedia available at http://en.wikipedia.org/wiki/United_Nations_Convention_on_Contracts.

²⁴ *United Nations Convention on Contracts for the International Sale of Goods*, Wikipedia available at http://en.wikipedia.org/wiki/United_Nations_Convention_on_Contracts.

²⁵ *E.g.*, *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D’Agostino, SpA*, 144 F.3d 1384 (11th Cir., 1998), *cert. den. sub. nom.* *Ceramica Nuova D’Agostino, SpA v. MCC-Marble Ceramic Center, Inc*, 526 U.S. 1087 (1999); *Tevee Toons, Inc v. GMBH*, Case No. 00 Civ 5189 (RCC), 2006 US Dist. Lexis 59455 (S.D.N.Y. 2006), *Shuttle Packaging Systems, LLC v. Tsonakis*, 2001 US Dist. Lexis 21630 (W.D. Mich. 2001); *Claudia v. Olivieri Footwear Ltd.*, Case No. 96 Civ 8052 (HB) (THK), 1998 US Dist. Lexis 4586 (S.D.N.Y. 1998); *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*, 23 F. Supp. 2d 915 (N.D. Ill. 1998); *Samson Plastic Corp v. Battenfeld Extrusionstechnik GMBH*, 718 F. Supp. 886 (M.D. Ala. 1989); *contra* *Beijing Metals & Minerals v. American Business Centre of Texas, Inc*, 993 F. 2d 1178 (5th Cir. 1993) (Court did not even mention CISG).

²⁶ The Commission on European Contract Law, *Principles of European Contract Law* (1998), available at <http://www.jus.uio.no/m/eu.contract.principles.1998/doc.html>.

²⁷ The Commission on European Contract Law, *Principles of European Contract Law* (2006), available at <http://www.jus.uio.no/m/eu.contract.principles.2006/doc/html>.

²⁸ *Principles of European Contract Law*, art. 1.101

²⁹ *The Law of International Contracting*, *supra*, p. 150.

³⁰ The Commission on European Contract Law, *Principles of European Contract Law* (2006), Articles 2:104, 2:105(2) & (3), 2:106(1), available at <http://www.jus.uio.no/m/eu.contract.principles.2006/doc/html>.

ble reliance on precontract negotiation statements, notwithstanding any integration provision, the statements are admissible.³¹

Therefore, over the past three decades, the internationalization of contract law, a body of law most applicable to international franchising, has been growing. Indeed, as franchising has become more international, the need and justification for one body of international franchise law has also grown. The rule against contradicting integrated writings exemplifies a common law contract rule in conflict with and incompatible with the new international regime. Given the probable and imminent impact of European and world contract law on American contract law, major changes in American contract and franchise law are likely.

³¹ The Commission on European Contract Law, *Principles of European Contract Law* (2006), Article 2:105(4), available at <http://www.jus.uio.no/m/eu.contract.principles.2006/doc/html>.