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THE TRAPS FOR THE UNWARY IN FRANCHISING AGREEMENTS AND THE ROLE OF THE DISCLOSURE PRESALE REGULATION – THE SERBIAN CASE

Abstract: *The law of franchising is growing nowadays. Together with increase of franchising activities there is also a visible trend of spreading franchising regulations in many countries. This trend is not dependent on the legal system of the country. In the last 15 years approximately 30 states have incorporated rules on franchising in the domestic regulations. Process of franchising regulation corresponds with the past activity of UNIDROIT (International Institute for Unification of Private Law) in the area of franchising. Countries regulate different aspects of complex franchising legal relationships so there are different methods which could be used as the guide through the national legislations. Among them there are the type of provisions regulating franchising contract, type of the legal rules which are adopted in legislation process, type of legislative technique, etc.*

Legal modalities of these new autonomous contracts are developing simultaneously. The distinctive features of franchising contractual mechanism are continual legal relationship, franchisor right of control over franchisee's activities as well as franchisee's commitment to follow advices and directives of the franchisor. Inherent contractual disequilibrium is an obvious feature of all franchising agreements. Asymmetry in franchising contractual relationship is caused by the one goal – it is virtual identity between legally independent but economically interconnected and mutual related contractual partners - franchisor and franchisee. This gap between legal and factual reality in franchising agreements is the fertile soil for many abuses and traps in franchising obligation relationship.

In the last two years the Republic of Serbia encountered the various proposals to regulate franchising. Franchising has visible growth in Serbia. The number of franchisors who have entered the Serbian market is growing daily, two International Franchising Conferences have been organized in 2007, Serbian Chamber of Commerce have established Center for Franchising in 2007 in order to promote and facilitate franchising activities, the new Serbian Association for Development of Franchising (SURF) is established in 2009, the First Serbian Franchising Fair will take place at the beginning of October in Belgrade, etc. Moreover, in the legal context there are also significant events favorable to franchising. Serbian Commission for drafting the new Serbian Commercial Code have been included obligation norms regulating franchising contract in the draft of this legal act de lege ferenda. There are many significant reasons which prevail in the decision of the legislator to regulate this new and complex agreement. Among many factors and causes which promote decision of franchising regulation, one of the most important ones is the protection of the economic position of the domestic contractual partner- franchisee which is traditionally the economically weaker party in the franchising contract. The experiences of many countries that decided to regulate franchising show that existing franchisees were so pervasively exploited that no sensible business person is (over) encouraged to enter a franchise relationship. Then, the regulation of franchising, that entails a burden on franchisors will bring benefits to the franchise industry as a whole, included franchisors as well

as franchisees which are protected with the obligation norm of the franchising regulation. The role of regulation in this case is creation of equilibrium of contractual party interests in the franchising agreement.

Keywords: franchising agreement, disclosure presale law, traps, contractual misbalance, UNIDROIT Guide, Model Law, Serbian regulations

Introduction - an illusion of identity of the franchisor and franchisee

“...Then God said: Let us make man in our image,
after our likeness...”

The First Book of Moses 1.26.

Genesis

Is the franchising the new type of the agreement which is developed thanks to the American autonomous contractual practice or it is a concept which covers different types of agreement for a variety aspects of business activities? Is the franchising a form of licence agreement which combines the features of several types of predefined, nominate and established contracts such as sale contract, lease-hire contract, distributorship, agency contract or it is the new *sui generis* contract which is based on specific consideration (lat. *causa*)? How many different forms of franchising are recognized nowadays? Is the division between industrial, distribution and service franchising still actual or more common classification refers to the type known as business format franchising which has come to be used to indicate the whole concept of franchising? What is *diferentia specifica* which differs franchising from other similar forms of business? Is the franchising agreement an institute of the law of contract or it is the method of merging the companies and therefore subject of company law? Are the obligations of the parties in the multi-contractual forms of franchising (master franchising arrangements) which derive from divided and independent contracts mutually and legally interdependent? What are the consequences of the master franchising agreement coming to an end? The problems that are likely to arise especially in the domain of international franchising could be extremely complex and there are number of areas in which controversies could develop.

There are so many questions which stress the wide area of franchising activities and the difficulties of those questions rise with the level of legal purity and rigidity which is inherent to an approaching legal method especially for the lawyer who derives from the big family of civil law. Not only legal literature but court decisions, administrative regulations, and legislation have failed to provide even the most basic element for a nationwide legal standard: a uniformly accepted definition of franchising.

Legal relationship which derives from the conclusion of a franchising agreement creates an illusion of corporative identity between franchisor and franchisee which subjects are economically

interdependent but legally independent contractual partners. The concept of franchising represents a business system which is based on a contractual link between legally independent but economically integrated subjects where standardized business concept and the package of industrial and intellectual property rights have been transferred from a successful legal person positioned on the market to an independent trader. The main features of franchising contractual relationship are the long-term duration of contract, franchisor's right of control over the business activities of the franchisee as well as duty of franchisee to act according the directions of the franchisor in operation of the franchising business activities. Franchisor's attempt is to create an *alter ego* through the visual identity with the franchisee in front of the third persons. Those specific "*hiring of franchisor's image*" and transfer the franchisor's goodwill to the franchisee is real "*causa credendi*" in franchising relationship. This legal "goal" of the transaction is the main reason of the numerous specific features which divides franchising agreement from other "classical" form of contractual relationship such as sale-purchase contracts, agency, distribution and other forms of contract which do not establish so high intensity of symbiotic relationships among the contractual partners.

The franchising agreements are represented "relational contracts" where the level of symbiosis among the contractual partners is extremely high. So, the franchising agreement is characterized by the multidimensional asymmetry in the variety of its aspects. The most important gap is the crucial disbalance between proprietary and managing effects in contractual instruments of franchising. The features of franchising cause that franchisee voluntarily transfers his managing rights to the franchisor. Further disbalance which is being created in franchising business system is the specific gap between economic unity of the franchising group as a whole and legal plurality of the parts of the franchising network. Of course, this gap is caused in order to achieve uniformity and visual identity of the system as a whole in front of the customer. High level of cooperation among the partners in the franchising contracts joined with those specific features of franchising legal relationship have created numerous potential risks for both sides of contractual partners. For the franchisee as the economically weaker contractual partner entering into franchising agreement could be a question of destiny. An undersigning of the franchising agreement for the franchisee could mean that by entering a franchisor business "*river of success*" franchisee becomes "*man in franchisor image, after his likeness*" but at the same time those features of franchising system could become "*the heel of Achilles*" of the whole franchising concept. Beside wide circle of benefits the franchising legal relationship could create number of potential risks, defects and abuses which are consequence of the mentioned gap between economic and legal reality which is an inherent part of each franchising agreement. Those risks and potential traps for the ones who entered unwary in the franchising agreement could become more dangerous if franchising agreement is an

innominate (anonymous) contract which is unknown in domestic legal system and consequently without any protective norms which could prevent abuse of franchising capacities.

1.1. Risks and potential capacities for abuse in franchising agreement

There are varieties of benefits in entering into a franchising agreement but one of the main risks is the loss of freedom in taking business decisions. The level of restrictive clauses in franchising agreement is extremely high in order to keep exclusivity of franchise's rights. Besides, there are other risks in decision of entering in franchising model of operating business activities.

Firstly, the cost of the franchising package which depends on its worth could be very high and vary from several thousands to several million of Euros. The costs of entering franchising business concept differs and it could include many investments and costs, in variety of forms such as initial fee, entrance fee, "admission ticket", for the right to use the franchisor's systems and trademarks. Such entrance fee or admission ticket is essentially to defray the franchisor's initially training and recruitment costs. In some cases the initial fee may be viewed as a form of prepaid royalties. Beside entry fees there is paying of periodical fee (royalty), paying advertisement and marketing costs (in form of paying for consulting and advertising services), training costs for franchisee and their employees, etc. In certain jurisdictions it may be desirable to refer to this fee as a management fee instead of royalty because of the adverse tax effects of the use of latter terminology. All those costs as well as those loads should be precisely calculated, provided and defined in franchising agreement in advance.

There is a comparison which is presented very often not only colloquially but in legal literature too, which says that franchising relationship is the corporate very similar to a civil marriage. Mostly, those relationships have been projected as a long term operations but they often failed to survive after period of time. When disputes arise, a lot is at stake as the parties often bring years of concerns to the table. The challenge, where appropriate, is to handle the disagreement to make it possible for the marriage to survive and flourish; failing which, to result in the least amount of pain while separating/parting ways. As those corporate is better structured in good agreement there is less space for conflicts and disputes during the life of legal relationships.¹

¹ Dispute resolution methods in the long-term contracts such as franchising are crucial. Well-founded legal advice and practical management of a dispute may avoid escalation of disagreements between a franchisor and a franchisee. However, there are times when this is not enough. Franchising Lawyers handle franchise disputes through negotiation/mediation, arbitration, and, if necessary, litigation. In those countries such as in the USA, where alternative dispute resolutions (ADR) methods are highly developed there are specific institutions structured for solving disputes in specific area such as franchising. American National Franchise Mediation Program (NFMP) provides a specific step-by-step approach to dispute resolution for both franchisors and franchisees and assists in the setting up a meaningful mediation process. The NFMP has specific ground rules for mediation:

There are plenty of risks and for the franchisor too. The loss of control under unprotected knowledge, experiences, know-how and skills which are contained in Operation Manual could make those benefits to be exposed to the competent without authorization. Of course, there are always present risks that franchising package will be object of poor sale if franchise is not projected well or sales marketing is not done in an appropriate way. The franchising systems which are not grow rapidly usually decline very fast. Poor contact and communication between franchisor and franchisee is potentially very dangerous for a prospective legal relationship. The main conflicts between franchisor and franchisee take places where expectation of franchisee are not met, when gain is under the projected or expected one, because successful operation of franchisee is commitment on the part of the franchisor.²

From the prospective of the franchisee advantages of the entering into franchising system and is opposed by the antithesis which is realized in wide area of restrictions in operating business activities. Those restrictions could be grouped into five main groups: 1. territorial restrictions which limits franchisee's sale's territory; 2. franchisee's obligation of exclusive purchasing; 3. fixing the price and other conditions of sale, 4. prohibition of the franchisee's competition to the franchisor during the validity of the contract as well as post-contractual competition requirements; 5. franchisee's restraints in election of the potential consumer or consumer on the specific markets. Those restrictions could be potentially very dangerous if during the contract realisation franchisors support and help are missing. Most of disputes arise because of the gap between franchisee's needs to be competitive in the marketplace and the possibility of the franchisor to obtain it and support which is franchisor capable to provide.³

There are three critical components of most of the franchise systems -the brand, the operating system, and the ongoing support and training provided by the franchisor to the franchisee:

- (1) The brand creates the demand, allowing the franchisee to initially obtain customers.

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- * Process is non-binding
 - * Mediator will be neutral and impartial
 - * Parties will cooperate with mediator
 - * Mediator controls the procedural aspects of the mediation but the process is typically not formal
 - * Each party must have a decision maker with authority to negotiate a resolution at the mediation
 - * Process will be conducted expeditiously
 - * Entire process is confidential
 - * The franchisee may withdraw from the process at any time

The objective of the program is to create a process which enables disputes between franchisors and franchisees to be resolved, without the high costs of litigation. It is highly important for the long-term contractual relationship such as franchising because costs of litigation are not only monetary, but include (1) impaired relationships, (2) lack of focus on the core business, and (3) increased stress on all parties.

² Secujski G., Sikimic D., Popovski B., Milenkovic-Kerkovic T, *Fransizing-Vas siguran put ka poslovnom uspehu*, Beograd, 2008, pp.44-49.

³ Lorinc, J. , *Opportunity Knocks: The Truth About Canada's Franchise Industry*, 1995, pp.242

(2) The operating system essentially "delivers the promise," thereby allowing the franchisee to maintain customer relationships and build loyalty.

(3) The ongoing support and training provide the impetus for growth, providing the franchisee with the tools and tips to expand its customer base and build its market share.

The genesis of the disappointment begins during the recruitment phase of the relationship and continues beyond the start-up as the franchisee struggles to remain competitive, unless the franchisor delivers on its promises and is committed to providing excellent initial and ongoing training and support.

The franchisor controls the franchisee through the location selection approval clauses, approval of any other business operation of the franchisee, working hours, advertisement and marketing control, supplier selection clauses ⁴ and by the franchisor's control of other business decisions which are important for assurance of the uniformity of the system as well as for the protection of the unauthorized use of the franchisor's intellectual property rights, either during or for some period following the termination of the franchising agreement.

One of the most difficult injuries of the party's legal equilibrium in the franchising agreement is the situation where the franchisor is not legal proprietor of the rights which create franchising package as well as the situation where content of the franchise package is worthless, or if know-how contents inapplicable and obsolete knowledge, skills and experiences. There is frequent abuse practice of the franchisor that intentionally creates mistakes on the side of the franchisee on the issue of the nature of the franchising package, type of supply, education and training or the issue of the experience and past business success of the franchisor has to be intentionally overestimated.

If there are no mandatory norms which prescribe obligation of the franchisor to supply franchisee in pre-contractual phase in advance with the disclosure document with all important information relating to the franchising concept, there is a possibility that franchisor can give to the prospective franchisee document in writing which contain one type of gain projection and other, more optimistic projection could be given from the franchisor orally. Besides, it is possible in situation when decision on location for the franchise unit is taken by the franchisor that this decision is not taken from the experience or on the good valuation but franchisor's decision could be made on the basis of best provision which franchisor takes from the real estate market.

Training and education costs could be very high or hidden. Education and training of the franchisee and his employee could be performed by the person who is connected or affiliated to a

⁴ Case which illustrates franchisor's rights to control supply of ingredients which franchisees use in their operation is the Case Little Caesars where franchisor has filed suit against forty franchisees for using non-conforming ingredients at their Little Caesars restaurants. The complaint alleges trademark infringement and breach of contract. The franchisee association claims that the lawsuit is nothing more than Little Caesars retaliation against franchisees that refuse to purchase product from the franchisor's distributorship.

franchisor or person who is not professional in this area or price could be extremely high. Besides hidden information on initial investments for the opening the franchising business (fees, deposits, inventory, royalty, lease est.) it is not rare in the franchising practice that franchisor hide information which discloses litigation history or convictions of franchisor or affiliated person to a franchisor or their bankruptcy history. It is crucial for the new franchisee to have information on the other franchisees in order to make contact with them and inform themselves on the business experience and quality of cooperation with the franchisor. Financial information concerning the franchisor could be also very important for the prospective franchisee such as balance sheet for most recent fiscal year, income statement, statement of changes and other financial data.

As franchisee “leases” franchisor’s goodwill and part of his market as well as customer it is real that with good operation of the franchised business during the years franchisee can improve operations and increases the value of franchise. (“*The dwarf who is sitting on the back of the giant could see further then giant himself*”). After termination of agreement there is an added value of the franchise package which belongs to a franchisee. Some of the legislations (such as German and Belgium) prescribe that in all types of distributorship agreements after termination of the agreement there is an obligation to reimburse those value to a distributors.

1.2. Potential traps in the franchising agreements

In relational contracts such as franchising there are numerous of possibilities which enable *mala fides* behaviors of the parties. Complexity and the extensiveness of the franchising agreement document increases potential traps for the unwary parties entering legal relationship. Besides there is legislative a gap in the field of the franchising in the majority of national jurisdictions in spite of the fact that during 1990 and after 2000 there was a rush of franchising specific legislation around the globe which was inspired by the activities of International Institute for the Unification of Private Law (UNIDROIT) intra-governmental organization situated in Rome and its Guide to International Master Franchise Agreement (1998, rev. 2007) and Model Franchise Disclosure Law (2002).

In spite of the fact franchising is a good vehicle for entering a foreign market there are clauses in the agreement which deserve special attention in order to escape unpleasant experience during the realization of the contract. The following clauses could be potentially misused to favor a party (franchisor) which is usually the one who prepares and offers draft contract document.

In the introduction part of the contract franchisor is usually awarding franchisee the right to use its proprietary business format, systems and trade marks in order to offer a service and/or a product in the designated territory. This part of the contract provides that the franchisee comply with the terms of the

contract and follow the rules and quality control guidelines set forth in the franchisor's OM (Operation Manual). It is important for the franchisee to check status of the franchisor's industrial and intellectual property rights as well as adaptability of the operation manual directives for the local market conditions.

All knowledge, skills and know-how which are contained in the OM will be communicated to the franchisee in the training program. As know-how consists of all confidential and proprietary information, experiences, operating techniques and other knowledge and all physical matters – such as the manuals, drawings, specifications, data, calculations, catalogues, designs and the like-relating the system it will be crucially important to provide all costs and duration of training and education in advance. Beside, franchisor need to protect the content of the operation manuals and other promotional and advertising materials, training films and videos, architectural plans and computer programs according the national copyright law. So, the franchisee will be obliged to protect the confidentiality of the franchisor's training materials and OM and in practice it is common that franchisee is asked to sign Letter of Confidentiality which stipulates material and criminal responsibility of the franchisee for any breach of confidentiality. Special attention is to be paid to the clauses which prescribe costs of education and training as well as institution which will perform training and education's activities.

Clauses which provide territorial exclusivity need to be balanced between two options - excessive intrabrand competition, which could destroy the franchise system, at one side, and the oppose problem, which is awarding territory that could be to large for any one single-unit franchise to serve, leaving business to be captured by a competitor.

Language of the contract should be the one which franchisee understands well.

Agreement should clearly express representations by the franchisor and by the franchisee and their obligations according trade names, trade marks and patents which identify consumer recognition and confidence in the product and service as a lifeline of any successful franchise system. So it is highly important to ensure through the appropriate clauses the adequate protection of rights to the trade marks and proper use and care of the franchisor's trade mark and other industrial property rights. Because of potential infringement or unfair competition or other acts likely to impair franchisor goodwill and reputation it is also important to entrust franchisee with the monitoring of those acts on the relevant market. To prevent misappropriation of the franchisor's trade mark or intellectual property it is possible to provide that franchisee will monitor developments of the marketplace which may be infringing, promptly report these violations or potential claims to the franchisor and support and cooperate with the franchisor when he makes decision as to how to proceed when and if action is taken. Good practice which is determinate in certain jurisdictions as mandatory in situation when formal trade mark license is executed by the franchisor is obligation of filling at the relevant trade mark registry that license in order to ensure

that franchisee's use of the mark is allowed by the franchisor and it is used to the franchisor's benefit only.

During the operation of the franchise business franchisees usually make improvements in the concept, enlarge number of the customer and their satisfaction and in many other ways he can improve value of the goodwill which is exclusively property of the franchisor. The value of the goodwill after expiration or termination of the agreement has been increased because of the franchisee's operation and improvement of the used intellectual rights. There are mandatory norms in certain jurisdictions which provide compensation for the increased goodwill after the expiring or termination of the kind of relational contracts such is the case in Belgian law on termination of distributorship agreement (goodwill indemnity). So it will be fair to provide in franchise agreement that after expiration or termination of the franchise agreement certain sum of monetary amount will be assigned as attributable to any goodwill associated with the franchisee's use and improvement of the franchise system and concept or the proprietary intellectual rights as so called compensation for increased goodwill.

Stressing the question of restraints of the franchisee it should be noted that those restrictions need to be balanced in order to protect franchise system against unauthorized use of the franchisor's intellectual property, either during or for some period following the termination of the franchise agreement. But the reasonableness and sensibility of these clauses may vary because of franchisor underlying industry, the conditions in market place, public policy, mandatory norm of the domestic jurisdiction and many other factor. For example in EU (Commission Directive No. 2970/1999) a term of one year of post-contractual competition restraints is mandated by requirements from the Directive.

Term and renewal of the agreement clauses should potentially be dangerous if definite period of time is prescribed and this period is drafted too short to sustain capital which is invested in business from the franchisee. There are two possibilities in negotiation term and renewal clauses in franchise agreement. One is to choose definite period of time where it is advisable to determine the appropriate length of initial and renewal terms according to a franchisee's reasonable amortization schedule for recovering investment as well as commercial durability of the system. The most usual term is from five up to twenty year term.

In addition, agreement should provide and conditions for prolongation or renew initial agreement as well. Those clauses should be drafted very carefully because impossibility of renewal could represent injury for the party (franchisee) because of the massive investments.

If the clauses prescribe that agreement is concluded for the indefinite period of time, it is to be checked if parties are entitled to provide in advance for the notice period to be given to effect termination of the agreement.

Clauses which prescribe prices for the goods or services derived from franchised units are forbidden – price fixing or resale price maintenance clauses in the franchise agreement are to be null and void according to the EU regulation.

Sometime clauses which define right to termination of a franchising agreement could be framed in uncertain and imprecise way which possibly gives to wide authorization to a favored party to terminate the franchising contract because of “good causes”.⁵ This concept is authorizing franchisor to widely and it is prohibited *exempli causae* in US state law.

On the other side rights of franchisee which empowered him to terminate the contract because of acts of franchisor are very often inadequate, drafted and formulated in too narrow way.

Those along with a variety of contractual franchise practices could make franchising a means of doing business susceptible to disappointment, unfair business practices and even fraud. That abusive practice attracts negative publicity to franchising and referred it often to in the media as the “wild west” of business. This negative publicity impacts not only the affected franchisee, but all other franchise systems, by impairing investor confidence, limiting ability of franchisors to recruit qualified prospects, and undermining the willingness of banks and other leaders to finance franchise-based business.

1.3. Autonomous International Regulation and National Legislation of Franchising in Comparison with Serbian Prospective Legislation

Franchising has got its start in the USA where the first obstacles and difficulties arose and the USA has been the first jurisdiction which resorted to legislation as a means of reducing or eliminating those problems (Federal Trade Commission Rule 1979). The method of this initial wave of franchising specific legislation attempted to require and regulate the content of certain presale disclosure to prospective purchasers. The main idea was that disclosure of that most important information (and penalties for failure to disclose) would prevent and inhibit the sale of franchises by unethical franchisors on the one side, and contain expectations of purchasers, on the other side. The presale disclosure legislation in the USA was uniformly administered by security regulators and at the same time it secured appropriate due diligence before entering into legal relationship. In the first period franchisor was required to register with the appropriate state agency, but later registration of the franchisors has been deleted as a requirement.

⁵ *Dayan v. McDonald's Corp.* (446 N.E.2d.958 (1984) Appellate Court of Illinois) case is interpreted in the literature in very different ways. It illustrates difficulties which can create too wide framing of acts which give the franchisors the right to terminate franchising agreement immediately because of “good causes”. In American literature this case is used to explain difficulty in supervising the operations of franchisee in distant foreign country but in part of the legal literature this case is example of the abusive interpretation of the termination clauses in the franchising agreement. Schaffer, R., Earle, B., Agusti, F., *International Business Law and Its Environment*, West, 2002, pp.15-16; Milenkovic-Kerkovic T. *Autonomni ugovori trgovinskog prava*, Ekonomski fakultet, Nis, 2008, pp. 151-153.

Notwithstanding presale disclosure requirement, some of the abusive conduct continued, mostly on the part of the franchisor. It was the reason for number of the U.S.A. states to enact franchise relationship laws. One of the most frequent issues addressed in that legislation is a prohibition against termination of franchisees with “good cause”.

First franchising legislation was followed by the autonomous regulation made by the most important franchising association such as International Franchise Association (IFA) and European Franchise Federation (EFF) which provides the pre-contractual duty of disclosure in their Code of Ethics for Franchising. The regulation which is important for franchising agreement, in spite of the fact that it is out of force from 31 May 2000 and limited only to the field of competition law is the European Union Commission Regulation (fostered after famous “Pronuptia” case) No.4087/88 the most important part of which, in the matter of disclosure, is the definition of franchising which is broadly adopted in the franchising legal literature as well as in legislation process.

The most important legal instruments regarding franchising in international context are UNIDROIT (International Institute for the Unification of Private Law) “*Guide to International Master Franchise Arrangements*” (Rome 1988, rev. 2007) containing high-level information of all problems in different stages of conclusion and implementation of franchising agreement not limited to legal issues only, and the chronologically second instrument, but of the greatest importance for topic of the enactment disclosure law project in Serbia is UNIDROIT “*Model Franchise Disclosure Law*” devoted to the franchisor’s duties to disclose material information to franchisee, which is together with its Explanatory Report clearly addressed to national legislators, as the “soft law” instrument of the new “*lex mercatoria*”.

In the last 15 years (which period corresponds with the past activity of UNIDROIT in the area of franchising) an increased number of the countries (especially developing countries and countries with economics in transition) have regulated franchising. Nowadays approximately 30 states have incorporated rules on franchising in domestic regulations.⁶ There are different methods which could be used as the guide through the national legislation (type of provisions, type of law to be adopted - disclosure, relationship or registration law, type of legislative technique, etc).⁷ The method chosen in this article is the method of legislative technique which regulates franchising in national jurisdiction. The instruments which are used in those regulations vary from the specific franchising law legislations – *lex specialis*, enactment the provision related on franchising in national Civil Code, franchising regulation in other different area of law (for example law that regulate intellectual property) and limited number of countries

⁶ The author spent 2 month research period at the UNIDROIT Library in Rome working on project “Enacting Franchising Disclosure Law in Serbia” in 2005. The Report on Research Project has been adopted from the Governing Council of UNIDROIT in May 2005. The opinion and attitudes in this articles are author’s and doesn’t represent the official opinions of UNIDROIT.

⁷ The most useful in that area is the articles Peters, L. “The Draft UNIDROIT Model Franchising Disclosure Law and the Move Towards National Legislation”, ULR 2000-4, pp.717-735; The Draft Unidroit Guide to Franchising-How and Why?, ULR1996-4, pp.694-707. as well Annex 3 to Guide to International Master Franchise Arrangements – “Legislation and Regulations relevant to Franchising” also on UNIDROIT web site which is periodically updated

regulated franchising through governmental regulation. The most numerous are the countries which adopted specific franchising regulation. As it is stressed the first law on franchising was adopted in the USA in 1979, where franchising originated and US federal law on franchising was adopted in 1979 as Federal Trade Commission (FTC) Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures. It was the first law which regulates the information a franchisor is required to supply the prospective franchisee with (so called *franchising disclosure law*) in order to provide it with all the elements necessary to evaluate the franchise it is proposing to acquire. It is the federal law and FTC Rule applies in all fifty states and it is indented to provide a minimum pre-contractual protection of the franchisee. It therefore applies wherever states have not adopted more stringent requirements. This law is still in force although an amended Rule has been adopted and effective as from July 2007. The North American Securities Administrators Association (NASAA) has adopted a Uniform Offering Circular (UFOC) that indicates 22 types of information which should be furnished to a prospective franchisee. Canada has the longest experience with franchising legislation as well as provinces Alberta, Ontario and Prince Edward Island have franchise specific regulation from 1995. France was the first European state which enacted franchising specific disclosure law in 1989 (*Loi Doubin*). Specific franchising regulation in form of the law has also Brazil 1994, Malaysia 1998, Kazakhstan and Korea in 2002, Italy 2004, Belgium 2006, Sweden 2006. Other countries that regulate franchising enacted the provision on franchising in their Civil Code. After Albania in 1994, this method has been used by Russian Federation 1996, Georgia 1997, Belarus 1998, Lithuania 2000, Kazakhstan 2002, Moldova 2003, and Ukraine 2004. Each mentioned legislations uses the method enacted in Russian Civil Code (Part 2, Articles 1027-1040)⁸ which doesn't deal with disclosure in any detailed manner, but instead regulate certain aspects of the relationship between the parties. They *inter alia* deals with the form and registration of the contract, sub-concessions, the obligation of the parties and the consequences of the termination of the exclusive right granted in the agreement.

The number of countries has included provisions related to the franchising in the existing or new law which regulate other aspects of economic life other than franchising (Mexico 1991, Croatia 1994, Spain 1996). Finally, countries as Indonesia and Romania (1997), China (2004) and Vietnam (2006) enacted detailed franchising regulation in the form of Decree which regulate legal regime applicable on franchising in very detailed manner.⁹

There are significant trends in the adopted legislation: a very limited number of countries hasn't even mentioned disclosure requirements but provides very rigid and restricted provisions regulating contractual relationship between franchisor and franchisee (Russia, followed by the Kazakhstan,

⁸ UNIDROIT Guide on International Master Franchise Arrangements, Rome, rev. 2007, Annex 3, pp. 296.

⁹ *Ibidem*, pp. 294-301/.

Lithuania and Belarus); some legislation only mention disclosure without any details but at the same time regulate in very detailed way questions concerning contract specification, such as obligation and liability of each of the parties, renewal of the franchising agreement (Malaysia, Albania, China, Romania). A number of countries have a registration requirements with the different object to be registered (Spain, Russian Federation) and the main feature of Malaysian and Indonesian regulations is the existence of very stringent, detailed and burdensome provisions on registration which purpose is not only informational, but the registration requirements start to be specific procedure for the approval of the franchise business which, along with the protectionist as well as domestic party highly protective provisions contained in both acts, is very discourage for franchisors and takes to much burden on their side. For the same reasons registration requirements have been nullified in some legislations (Canada-Alberta). Most of the franchise laws contain the disclosure requirements which obligate franchisor to disclosure different categories of information, and the amount of detail is different in national legislation. The longest lists are contained in the U.S. and Australian legislative (their experience with the abuse being the longest) which is in accordance with common law legal technique of providing big number of clauses in order to cover all specific situation – method of *numerus clausus*, and the civil law countries and those which followed the method of providing more general provisions which will be made concrete within the case law, have a shorter list of information which the franchisor is mandatory to provide a prospective franchisee with. The new Italian franchising legislation represents this civil law method, containing general provisions with the broader definitions of franchising, its varieties, and obligations of the parties as well as the limited number of disclosure requirements. In the German and Austrian Law there is a general duty of information in accordance with general principles of contract law, and despite there is no any specific franchising law in the both countries, the case law is on the very sophisticated level, treating in many cases the consequences of infringements of franchisor's duty to inform franchisee in pre-contractual period¹⁰

¹⁰ LG Hanover, 11 April 1995-140267/94 and BGH NJW 1987, 41, 42. In spite of the facts that nor German neither Austrian legislation doesn't provide any specific franchising legislation, there are in the last years some movement toward. To avoid problem of unamortized investments of franchisee after the termination of the franchising agreements Austria is enacted the new §454 in the Austrian Commercial Code (came into force on August 21, 2003) which is applicable to all kinds of vertical agreements including franchising agreements in which the commitment of the investment has been agreed after this provision has come into force. The new provision provides that entrepreneurs have the right to compensation in respect of their investment after the termination of a distribution contract with the binding entrepreneur, according the some conditions provided by this article for investment and for the termination of the contract. More, Speigelfeld, Austria – Compensation for Franchisee's Investment, International Journal of Franchising Law, Vol.2, Iss.1, 2004, pp.28. Furthermore, there is the provision in the German HGB art.89(b) regulating the mandatory compensation has to be paid to a commercial agent for his loss of "goodwill" (after EC Directive on Commercial Agents such compensation has to be paid in all EU member states), and this provision applied from the German courts by analogy to franchising agreements. Beside, there is of the significant importance for franchising agreements also the reform of German BGB made in 2002 in the sphere of

Italian experience with the franchising and the new legislation enacted in 2004, together with the commentary in the legal literature on that issue¹¹ were the very precious reflecting that the law is compromise of interests of all subjects involved of franchising, and especially the role of Franchising Association in process of law drafting and implementation.

Sweden also promulgated disclosure regulation in franchising agreement in 2006 when the Swedish Parliament, after many years of discussions and a number of proposals, adopted a franchise-specific law: the Law on the duty of a franchisor to provide information (24 May 2006, Law no. 2006:484) (Lag om franchisegivares informations skyldighet). It is a disclosure law, which deals with pre-contractual disclosure, comprising only six articles.

The following table contains comparative approach to a national franchising legislation which embraces both method of regulation and used legislative instrument in countries which already adopted franchising regulation in one way or another.

Table: Comparative law on franchising
Source: Unidroit Guide to International Master Franchise Arrangements (1998,rev.2007)
www.unidroit.org

	CIV-IL CODE	OTHER LAW	LEX SPECIA-LIS	GOVERNMENTAL REGULATION	RELATION-SHIP (OBLIGATION) NORMS	DISCLOSURE NORMS	REGISTRATION NORMS	YEAR
Albania	#				#	#		1994.
Australia					#	#		2006.
Belarus	#				#		#	1999. rev.2005.
Belgium			#			#		2006.
Brazil			#		#	#		1994.
Canada - Alberta			#		#	#		1995.
Canada- Ontario			#		#	#		2000.
Canada- Prince Edward Iceland			#		#	#		2007.
Croatia		#						1999.

the breach of contract. In , Zimmerman,R.,Breach of Contract and Remedies under the New German Law of Obligations, in Centro di studi e ricerche di diritto comparato e straniero, Roma , 2002.

¹¹ Frignani,A., Proposed Franchise Bill for Italy and Laws Fostering Franchising (Financial Incentives) , in Interantional Journal of Franchising Law, Vol.1,Iss.2,2003,pp. 6-14; Peters,L.,Una lege per franchising, Diritto del Commercio Internazionale, Aprile-Giugno, 2004,pp.323-335; Frignani,A.Italian Senate Rules on the Regulation of the Franchise, unofficial translation, in International Journal of Franchising Law, Vol.2,Iss.3,pp.36-38.

Estonia		#			#			2002.
France			#			#		1989.
Georgia	#				#			1997.
Indonesia				#	#	#	#	1997r..2006
Italy			#		#	#		2004.
Japan		#				#		2002.
Kazakhstan			#					2002.
Lituania	#				#			2000.
Malesia			#			#	#	1998.
Mexico		#			#	#	#	2006.
Moldova	#		#		#		#	2003. 1997 lex spec.
PR China				#	#			2004.
R Korea		#			#	#		2002.
Romania			#		#	#		1998.
Russian Federation	#				#		#	1996.
Spain		#				#	#	1998.
Sweden			#			#		2006.
Ukrain	#				#		#	2004.
USA			#			#		1979.
Vietnam				#		#		2006.

1.4. The Necessity for Enactment of Franchising Law in Serbia

In the context of the development of franchising activities Serbia is faced with “back to the past”.¹² It is the paradox case because almost 15 years after the promotion and growth of franchising in Serbia last year for Serbia’s economy was “franchising year”. Two franchising Conferences have been organized by the Serbian Chamber of Commerce (SCC) where Center for Franchising were established (December 2007) in order to organize and concentrate franchising subjects and activities as well as to precede coming Serbian Franchising Federation. At the beginning of the 2009 an national association for

¹² There were number of Yugoslav enterprises which had developed their own franchising systems, represented with previous state and social owned companies which were in the process of privatization during the 90ies such as Tigar, C-market, Pekabeta, Yumco. Most of those enterprises had developed each one contractual practices with standard forms franchising agreements. Some of those franchising contracts were lease contracts by their legal nature. See, C-Market standard form franchising agreement in MilenkovicKerkovic,T.”Ugovor o fransizingu”,Nis,1998.pp.195-210

development of franchising has been founded in Belgrade (Serbian Association for Development of Franchising - SURF). Many foreign franchising systems have been entered in Serbia during the last year (Springfield, Mango, Re/Max, Curves, IQS, Office 1 Superstore) and the more important fact is establishing of successful domestic franchising systems such as E Ducan, Com Trade, Belka, AMC, DIS etc. Conscious of the real benefits of franchising, of its potential to act as a stimulus of economic growth and creation of jobs Serbian Chamber of Commerce has established the Work Group for Franchising Regulation. “*Guide to International Master Franchise Arrangements*” prepared by the experts of UNIDROIT which is the most comprehensive international franchising document is going to be published in Serbia. The purpose of translation Guide into Serbian will be to spread knowledge with a view to providing all those who deal with franchising, whether they be franchise operators, lawyers, judges, arbitrators or scholar, with a tool for the better understanding of the possibilities it offers. Those activities correspond with the education seminars “The Franchising – A Step Ahead to Success” organized by the Center for Franchising (SCC) throughout Serbia and Republic Srpska with the goal of education of prospective franchising operators in Serbia’s economy.

Besides the process of promotion and franchising education in Serbia as well as entering many of the foreign franchising systems into Serbian economy there are contemporary attempts of Serbian legal doctrine and legislative practice to regulate some aspects of the franchising agreement. The most successful was the work of the Commission of Legal Experts formed from the Serbian Government in 2006 which proposed at the end of 2007 Model for the regulation of franchising agreement as well as leasing and factoring, as presently anonymous contracts in Serbian legislation. Those rules will be integrated as “New Commercial Contracts” in Serbian Law of Obligation which will be the part of the new Serbian Civil Code which will be enacting by the Commission. The norms which regulates franchising proposed by the Serbian legislator are obligation law provisions regulating contractual relationships between the franchisor and franchisee. The Working Group of SCC has initiated enactment franchising disclosure requirements in the Draft of prospective Civil Code. This initiative was well accepted by the members of Serbian Civil Code Commission.

The comparison with other countries’ regulations and experiences in franchising business show that in Serbia, the development of franchising in the economic life and the role of franchise associations such mentioned Centre for Franchising is on beginning of their way. Insufficient franchising practice has caused economic subjects in Serbia to lack needed knowledge as well as experiences with the pattern of abusive conducts. Furthermore, the Code of Obligations provides the duty of information of the other contractual party on contract’s important facts only with its general norms. Moreover, the duty of information provided in Art. 268 seem to be applied in post contractual phase, after the contract is

concluded, and it should be difficult to embrace its mandatory rule on pre-contractual phase of the contract. Also, the sanction which is provided by mentioned article of Code of Obligations is only in the party's duty to compensate loss suffered by the uninformed contractual party, without any consequences on legal destiny of the contract by itself. The Serbian experience with adoption of the Law on Financial Leasing shows that this specific legislation has introduced the concept of leasing and has encouraged potential investors to engage in leasing operation, and the legislation was promotional for this legal instrument. Enacting the franchising disclosure obligations of the franchisor in future Serbian Civil Code will not have mandatory effects for relationships of the contractual parties which could be created through registration requirements.

Through the proposed clauses relating on franchising in the future Serbian Civil code Commission offered set of open remarks and questions which need to be answered before the acceptance of any definite solution.

The first question is does Serbia need franchise law at all? There are different arguments in attempt to try to find an answer and many different arguments for opposite answers. The comparative legislation experiences show that legal creators might wish to have a franchise law without recognizing any impairment to be addressed. Actual lack of experience with the franchising might cause unnecessary regulation where law comes up even before having a significant franchise networks to be governed. Enactment of burdensome regulation without prior finding of the harm to be eliminated could prevent development of franchising instead to promote it. Even if there are found problems to be solved legally, it is not always appropriate to enact a law specifically regulating franchising arrangements. Many of the problems are best addressed by laws of more general nature, such as general contract law or competition law. Sometimes instead of unnecessary regulation it could be useful to applied existed legal doctrine applicable to franchise agreements in resolving contractual or practical problems.¹³

But many reasons inspired Serbian Commission to offer clauses *de lege ferenda* which will regulate so called the new contracts in business law such as franchising agreement, factoring and leasing contracts. The most relevant between numerous arguments of the Commission are the argument of applicable law which is weak point of any franchising contract where domestic regulation lacks as well as the complex nature of franchising contract. This complexity could not be overcome with the application of the law of general nature (general rule of the Law of Obligation, Competition Law ect.) or with the clauses deriving from other contracts (sale contract, licence contract). There is very significant reason which prevails in the decision if franchising regulation is effective. It is the argument of the protection of the economic position of the domestic franchisee which is traditionally the economically weaker party in

¹³ Kozuka, S. Overview of the Draft Model Law of Unidroit on Franchising, Tokyo Internet Law Journal, 2002/1/12, pp.2

the franchising contract. The experiences of many countries which decided to regulate franchising shows that existing franchisees were so pervasively exploited that no sensible business person is over encouraged to enter a franchise relationship. Then, the regulation of franchising, even entails a burden on franchisors will bring benefits to the franchise industry as a whole, included franchisors as well as franchisees which are protected with the obligation norm of the franchising regulation. The role of regulation in this case is creation of equilibrium of contractual party interests in the franchising agreement.

Another important reason in favour on franchising regulation in the future Serbia's codification is the reason of applicable law in the franchising agreements with foreign elements. In the most of the agreements the choice of applicable law clauses are on disposal of the party autonomy principle which practically means that choice of law will be selected by the franchisor as an economically stronger contractual partner which always imposes its domestic law as the law which will govern the contract. As applicable law could also became the source of unequal status of the contractual parties in franchising contract it could be the prevalent reason which inspired the legislator to provide domestic norms which will govern franchising contract in Serbia.

All that questions are opened in Serbian legal doctrine and in future legislative activities and in case where the "franchise law" will be found effective bringing benefits to the franchise industry as a whole, including franchisors as well franchisees the model of possible regulation is proposed.

1.5. The Content of the Model for the regulation of Franchising Contract in the Future Serbian Code Civil

What is the content of proposed regulation on franchising contract in Serbian legislation *de lege ferenda*?

The intention of the legislator is to define franchising contract in accordance wit the modern notion of franchising which embraces only integrative franchising systems such as business format franchising. The traditional industrial or distributive franchising contracts are no more in Europe treated as franchising systems but rather as forms of licence and exclusive distribution contracts.

The definition, content and essential elements as well as the rule of mandatory written form of franchising contract are relevant for regulation of franchising in future Serbian codification.

There is also proposed rule on registration of franchising contract in Business Registers Agency which should not have constitutional then rather evidential effects. A number of countries have registration requirements (Spain, Russian Civil Code, Indonesia, Malaysia ...). There are differences between countries as to what must be registered. The author of the article has opinion that registration

norm should be burdensome for franchisor without any significant effect because franchising contract doesn't content significant propriety law effects as leasing contract which registration is already provided in Serbian positive law. The Work Group of Serbian Chamber of Commerce has proposed to the Codification Commission that instead of registration norm it is more urgent to enact the norms provided pre-contractual responsibility of the franchisor to provide the franchisee with the information relevant to make rational decision to enter in the franchising system. This initiative as well its arguments presented by the author of the article will be considered by the Commission and if accepted will be enacted to the prospective franchising regulation.

Besides notion, elements, form and registration of the franchising contract Serbian legislator provided a set of norms which regulate most controversial questions in the life of an franchising contract such as sub-franchise contract (capacity of the franchisee prescribed by the contract to transfer rights and obligations on third person , connections between master franchise contract and sub-franchise contract, annulment of master contract causes annulment of the sub-franchise contract), rights and duties of the parties in franchising contract, limitation of the party autonomy (restrictive clauses in the sphere of goods, territory and consumers, post-contract competition clauses). Those clauses included in-term as a post-term covenant against competition to protect against unauthorized use of the franchisor's intellectual property, either during or for some period following the termination of the franchising agreement.

It is prescribed responsibility of the franchisor for the demand of the third person in the case of inconformity of goods or services provided by the franchisee. Termination and conditions for the renewal of the franchising contract are prescribed as the rules of minimum protection for the party as well as termination of the contract in case of liquidation or bankruptcy of the franchisor or the franchisee , as well as in case of the termination of the exclusive rights of the franchisor. Obligation of the loyal competition during and after termination of the contract is provided together with maximum one year post-contract competition clauses. Obligation of the confidentiality on the side of franchisee during and after termination of the contract is also provided.

It is proposed by the Working Group of the Serbian Chamber of Commerce to prescribe disclosure obligation of the franchisor to provide franchisee with the set of information before entering in the franchising contract. The scope of information depends on the goal of disclosure requirements as well as the relative nature of the norms contended in future Civil Code. Enacting of disclosure franchising clauses in the future Code could be affected in an increase of common economic and legal understanding of franchising concept.

1.5.1. What is the Scope of the Proposed Regulation of Franchising Disclosure Requirement in Future Serbia's Civil Code

During two month research period at UNIDROIT in Rome during 2005 the author of this article has prepared the Draft Franchising Disclosure Law for Serbia which has been created considering definitions from UNIDROIT Model Franchise Disclosure Law as well EU Commission Regulation NO 4087/88. This Draft was the inspiration for the proposal of enactment disclosure requirements in the franchising regulation in the prospective Serbian Civil Code defined by Working Group for Franchising Regulation of Serbian Chamber of Commerce.

Furthermore, the proposal also contains language requirements provided that disclosure document as well as proposed franchise contract must be in language which is officially used in the prospective franchisee's principal place of business or place of activity, which is not contained in the UNIDROIT Model Law, because this requirement could be of big importance for domestic economic subjects which foreign language skills are traditionally not well developed, as well as because of the fact that duty of responsible franchisor in international franchising is to translate disclosure documents, contract, etc. into the franchisee's mother language(in this into Serbian). The time period when the disclosure document must be given to the prospective franchisee is prolonged to 30 days (instead fourteen day time period in Model Law) within which period franchisee could examine the document and obtain expert legal and other types of advice. The number of days within disclosure document need to be updated is fixed on 30 days and in the situation when material changes (defined in Art. 3(5)) occurred it is stipulated obligation of the franchisor to inform prospective franchisee in writing as soon as possible, and disclosure document must be updated 15 days after material changes occurred.

The type of the information which franchisor must obtain are no so extensive as contended in the UNIDROIT Model Law and in the author`s Draft but it should contain information on the franchisor ¹⁴,

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- ¹⁴ a) registered legal name, legal form and registered place of business of the franchisor, and the address of the principal place of the business of the franchisor;
- b) trade mark, registered trade name, business name or similar name, under which the franchisor carries or intends to carry on business in the territory of the Republic of Serbia;
- c) the address of the principal place of business in the Republic of Serbia;
- d) the amount of the registered capital of the franchisor and the amount of the registered capital of the affiliate of the franchisors;
- e) a description and summary of the activities and the operations characterising the franchise to be operated by the prospective franchisee.
- f) the description of the business experience of the franchisor and its affiliates granting franchises under the same trade name, including mandatory information of the length of time which franchisor has run a business of the type to be operated by the prospective franchisee, as well as the information on the length of time during franchisor has granted franchises for the same type of business as that to be operated by the prospective franchisee.
- g) information of any criminal convictions or any finding liability in a civil action or arbitration procedure involving franchise or other businesses relating to fraud, mispresent or similar act of the franchisor, affiliate of the franchisor or any of senior manager or director of the franchisor for the previous five years, together with the providing of the summary of any court or arbitral decision taken in mentioned proceedings.

on the franchisor's business system¹⁵, list of other franchisees together with the data on changes in number of the franchisee in last three years¹⁶, data of status if franchisor's trade marks and other intellectual property rights¹⁷, financial matters¹⁸ as well as the disclosure document must contain the most important information if there are not already contained in the proposed franchising contract attached to. If the following information is contained in the proposed franchising contract, the disclosure document will contains reference to the relevant section of the franchise agreement, and if those information are not contained in the proposed franchising agreement, that fact shall be clearly stated in the disclosure document¹⁹. The required information which disclosure documents shall contains

h) information on any bankruptcy, insolvency, reorganizations and the comparable proceeding involving the franchisor and its affiliates for the previous five years and the court citation thereof.

¹⁵ i) the informations on the franchisee in the business system, including information on the total number of franchisees and company-owned outlets of the franchisor and of its affiliates of the franchisor granting franchises under substantially the same trade name, and information on the trade and/or personal names, business addresses and business phone numbers of the franchisees which outlets are located nearest to the proposed outlet of the prospective franchisee in the Republic of Serbia, then in the contiguous States, or , if there are no such outlets, outlets in the State of franchisor but in any event of not more than 15 franchisee.

¹⁶ k) information (trade and/or personal name, business place, business phone number) about the franchisees of the franchisor and about franchisee of affiliates of the franchisor that have entered out from the business system during the three years before the one during which the franchisee agreement is entered into, with an indication of the reasons for the termination of the contractual relationship (contracts terminated or not renewed by the franchisee, contracts terminated or not renewed by the franchisor or by the affiliate of the franchisor, contracts terminated due to the bankruptcy or insolvency, voluntary terminated or not renewed contracts);

¹⁷ l) information on the status of the franchisors intellectual property rights on the territory of Republic of Serbia, which are to be licensed to the franchisee as the part of the franchise (trade marks, patents, copyrights, utility models, design, software etc.) with the mandatory information on the registration or on the application for registration, the trade or/and personal name of the owner of the intellectual property rights or the trade or/and personally name of the applicant, the date of which the registration of the intellectual property rights licensed expires, and the limitation of that intellectual property rights form the third parties, and litigation or other legal proceedings, if any, which could have a material effect on the prospective franchisee's legal right, exclusive or non-exclusive , to use the intellectual property under proposed franchise contract;

¹⁸ n) Financial matters , including

- an estimate of the amount of the prospective franchisee's total initial investment;
- financing offered or arranged by the franchisor , if any;
- the financial statements which show financial position of the franchisor verified from the legal empowered and independent revisor , including balance sheets, and balance of profit and loses for the previous three year, or from the beginning of the franchisors business activity (*it is indispensable those provision to be examined from the financial experts*);

¹⁹ a) the term and conditions of the renewal of the franchise contract;

b) a description of the initial and on-going training programs of the potential franchisor and/or its employees, regarding to the trainer and of the subject who bears the expenses of the training program, and the duration and the expenses of the training program;

c) the nature and extent of exclusive rights if there are to be granted to to be granted to the prospective franchisee relating to the territory and /or customers, , and the information of any reservation by the franchisor of the right to use or to license to use of , the trademarks covered by the franchising contract, and if

depending of the fact if there are already included in the proposed franchising contract, there are some addition in some of the paragraph, such as description of the training program, the fact of the personality of the trainer, the duration, expanses as well as the clear signification of the fact who bears the expenses of the trainings programmes.

The legal remedy for the omission of the franchisor to obtain the disclosure document should be the right of the franchisee to ask the court for the annulment of the concluded contract under Article 112 Code of Obligations and /or to claim against the franchisor for the damages suffered because of the omission of the franchisor (disclosure document or notice on material change are not delivered at all, contain misrepresentations, or fraud, or make an omission of material fact).

Conclusion

The comparative analyses of the provisions of franchise laws adopted in recent period lead to the observation that with the exception of the Russian Civil Code (and legislation which is inspired by Russian legislation) all franchise laws in different ways and extents deal with disclosure requirement. As additional method of protection a number of countries impose relationship norms in their legal instruments. Other norms and regulations are inspired by domestic conditions and with the intent of the legislator to protect domestic franchisee and domestic products or industry.

The intent of Serbian legislator to promote franchising throughout franchising law which is contented in the prospective Civil Code which has been prepared is inspired by the idea of protection interests of the parties in the franchising contract relationship. Obligation – relationship norms which regulate contractual aspects of franchising agreements together with future disclosure requirements which will protect parties in the pre-contractual stage of the relationship would be *de lege ferenda* important method in the process of creation legal security as well as a healthy commercial law environment for future development of franchising in Serbia.

franchisor reserves the right to sell or distribute the goods and services under the same or other trademark which will be transferred to the prospective franchisee;

d) conditions under which the franchisor could terminate the franchising contract and effects of such termination;

e) conditions under which the franchisee could terminate the franchising contract and effects of such termination;

f) the limitations which, if any, are imposed on the franchisee, in relation to territory and/or to customers;

g) non-competition clauses imposed during and /or after termination of the franchising contract;

h) the initial franchisee fee (in the manner of the system entrance fee) and the royalty, and other fees and payments;

i) the conditions for the assignment of other transfer of the franchise to the third parties;

j) any choice of law and choice of forum clauses and the method of dispute resolutions.