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The Legal Issues of Franchising Agreement in Serbia – Enacting the Disclosure Law or Not

Introduction or is There Franchising in Serbia

Franchising is not a new concept in Serbia in Montenegro but paradoxally it is in its prenatal stage if compared to the other parts of the world. After years of wars, isolation, economic sanctions and separation of ex Yugoslav Republics, Serbia is now in the middle of the process known as the transition to the market economy. Franchising has started to be known as way of doing business in ex Yugoslavia from the mid 60s through the introduction of the Coca Cola, Avis, Hertz rent-a-car, Intercontinental Hotels, Hyatt Regency, American Express. Most of those contractual practices were not developed as the franchising agreements because of the fact that this form of contract had the legal status of the unnamed contract in Yugoslav legislature. But, despite different names all those contract were the franchising contract by its legal nature (*Falsa demonstratio non nocet*). After stagnation in

the 70s during the 80s there occurred the significant process of proliferation of franchising contractual practices represented by the most famous franchising contract between McDonalds and domestic corporation Genex which took form of joint venture agreement and the first McDonalds restaurant in Yugoslavia was opened in Belgrade during 1988. Beside the international franchising, Serbian economy started to develop domestic franchising systems at the end of 80s and in the first years of 90s but during the decade of wars, isolation, sanctions of the UN, economic stagnation and hyperinflation, as well separation of the Yugoslav ex Republics all franchising incentive stopped.¹ In spite of those negative tendencies two franchise associations were found during the 90s, one for the federal level called Yugoslav Franchising Federation (YUFA) which is situated in Novi Sad (Vojvodina) and regional Serbian Franchising Federation which place of activity is in Nis. Both associations have adopted European Code of Ethic for Franchising. Nowadays neither international nor domestic franchising has an important implementation and role in Serbian economy. Unfortunately, there are no any economic data about the role, situation and tendency of the development of franchising in Serbian economy as well about concluded franchising contracts. Under auspice of American Embassy in Belgrade and Serbian Chamber of Commerce in April 2007 it has been held First Franchising Conference in Serbia which shown opportunities and challenges for development of franchising in Serbia together with case studies of several international and domestic franchising systems which operate in Serbia (Office One Superstore, Diners Club International, Capriolo, Fornetti etc).

¹ 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 90es 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:] T. Milenkovic Kerkovic, *Ugovor o fransizingu*, Nis 1998, pp. 195–210.

The Recent Legal Environment for Franchising Agreement in Serbia

Serbian commercial law does not provide explicit provisions dealing with the franchising contract. The franchising agreement is the unnamed autonomous commercial contract in domestic legislature based on the freedom of contract principle. There were the polemics about the legal nature of this institute in Serbian legal literature and in the case law.

The domestic legal theory is divided about the issue on the legal nature of the franchising contract into two different views (as in the comparative legal theory on franchising).² One part of the legal authors are treat franchising as the contract *mixty iuris*, which embraces in its complex structure elements of different legal instruments such as distribution and licence agreements, lease contract, sales contract as well as elements of corporate group structure from company law, and the other group of authors who insist on *sui generis* legal nature of franchising agreement. It is interested to note that domestic case law of commercial courts, in spite of a minor number of the cases on franchising, speaks in favour specific legal nature of franchising contract.³ In defining those contractual practices, there were some main characteristics of franchising which relate to the set of intellectually property rights (trade mark, service mark, trade name, design, utility model etc.) and some of the authorizations which are similar to but don't represent the rights ipso facto, because the current law, on the present stage of development, hasn't formulated a typical mechanism for protection for such authorization represented by know-how and goodwill.

As far the question of the definition is concerned, it could be noticed that no recognised definition of franchising contract had been

² A. Schulz, *Germany*, [in:] *International Encyclopaedia of Franchising*, London 2004, pp. 7–8.

³ “the parties were concluded the franchising contract which is the *sui generis* commercial contract.” See: High Commercial Court Award, No. 6110/95, 23.11.1995.

accepted by the Serbian legal doctrine nor by the international one before the franchising agreement was regulated in sphere of competition law in EEC Commission Regulation No 4087/88 of 30 November 1988.⁴

It is important to underline in trying to define this legal instrument that franchising is not one type of the agreement, it covers as an “umbrella term” different types of business practices, and could be defined as “continual contractual relationship whereas one contractual party – franchisor commits itself in exchange for consideration to grant to the other contractual party – franchisee the right of production and/or distribution of the franchisors goods and/or services on the specified territory, as well as right of using franchisors “goodwill” throughout of the incorporation of the franchisee in the franchisors commercial system in the manner of granting a set industrial and intellectual property rights, related to trade mark, service mark, trade name, shop sign, utility models, patents, know-how, industrial design and under the technical and commercial assistance and control of franchisor, throughout the simulation of identity in front of the third party will be realized, but with the legally and financially independence of both contractual party.”

The franchising agreement with its specific economic *ratio* enables the contractual parties to realize sophisticated business interests, creating, at the same time, a typical discrepancy between its own economic and legal effects, because of the fact that conclusion of the franchising agreement produces legal independence together with the economical interdependence of contractual parties which fact is underlined with the franchisor’s certain right to control and supervise franchisee’s business activities. This discrepancy between legal and economic reality produced by franchising agreement is not unique in the area of com-

⁴ Commission Regulation (EEC) No4087/88, 30 November 1988 on the application of Article 85(3) of the Treaty to categories of franchising agreements (OJ EEC L359/46, 28 December 1988), enacted like the Block Exemptions of Community Competition Rules after the “Pronuptia” case.

mercial law⁵, however, in addition to the fact that franchising belongs to type of arrangements which is typically to be concluded between two economically unequal parties, in most cases throughout the franchisors' standard form contracts (take-it-or-leave-it) and with the standard terms, all those features together with the complexity of the concept of franchise *eo ipso*, create the possibility of abuse and malicious behaviour in franchising commercial practice.

In spite of the fact that Serbian Code of Obligations (CO)⁶ does not provide explicit provisions dealing with the franchising contract or especially with the franchisor's duty to disclosure all relevant information to the franchisee in order to provide him with sufficient elements for taking an informed decision on entering in franchisor's business net, it is worth mentioning that similar to other civil law countries, domestic obligation law contains some common principles and rules applicable to franchising. The relationship between contracting parties is subject to the general principle of freedom of contract (art. 10. CO), equality of the parties (art. 11), good faith and fair dealing (art. 12), prohibition of inconsistent behaviour (art. 13), principle of equal values of parties' mutual commitments (art. 15) and many other principles covering formation, validity or interpretations of the contracts, for example such as are so called *contra proferentem rule* (art. 100), as well rule which regu-

⁵ This discrepancy between legal and economic reality can be observed in another institutes of commercial law; it exists, for example, in the field of corporate groups phenomenon as well in the matter of countertrade multicontractual structured agreement, where economical unity of the group or the whole countertrade agreement is in collision with formal independence of the legal entities, which form the corporate group or in collision with formal independence of particular contracts in countertrade agreements.

⁶ Code of Obligations Relationships, "Official Gazette SFRY", No 29/1978 in force from 1. October 1978 with changes and annexes ("Official Gazette SFRY" No 39/1985, 45/1989, 57/1989 and "Official Gazette FRY", No 31/1993) which had been inspired by Suisse Code des Obligations and its uniform method of regulation both the civilian and commercial contracts in one legislation document is one of the best domestic legal text and the rare one which have survived disappearing of the ex Yugoslav State in which auspices it had originated, and it is unique legal text which is now applied as the positive legislation in the six States emerging from ex Yugoslav Republic (Slovenia, Croatia, Federation BIH, Serbia and Montenegro and EYR Macedonia). The main characteristic of the domestic Code of Obligations is the uniform regulation of both civil and commercial relationships in the matter of contracts and torts.

lates performance of the contract providing the duty of information of the other contracting party about all the facts important for mutual contractual relationship very clearly (art. 268).⁷ Two more institutes provided by the provisions of domestic Code of Obligations regard franchisor's duty to disclosure are important – the first is pre-contractual responsibility for *culpa in contrahendo* (art. 30) which is the provision rarely to appear as a written principle in the comparative law of obligations, and the provision (art. 45) which regulates the institute of the pre-contract (contract to make a contract). In the domestic Code of Obligation (art. 686–717), there are also the provisions regulating the licence agreement which norms could be applicable to franchising contract, providing that contract must be concluded in writing (form *ad solemnitatem*) and registered, as well the presumption that if it is not agreed otherwise between the parties, it is considered that licence is territorially unlimited. Provisions on Code of Obligations related to licence agreement provide and the sub-licence, which provisions could applicable on the sub-franchise contract concluded pursuant the master franchising agreement.

The main obstacle in the regulation of the franchising contract, as it is already mentioned in UNIDROIT *Guide on International Master Franchise Arrangements* is the fact that those arrangements are the subject to a great many different areas of law and many of them are outside the scope of the law regulating commercial contracts and intellectual and industrial property rights. In spite of the fact that those other fields of national law are not so relevant in the case of the implementation franchising disclosure law (which was the main idea of the research) it will be of some importance only to sketch the main characteristics of Serbian most significant branches of law closely connected with the franchising. Beside the Code of Obligations which norms regulate all

⁷ It will be worth underlining that important value of the Serbian Code of Obligation is that it contents general principles as well as specific provisions very similar to the two most important instruments which regulate the law of international trade – United Nations Convention on International Sales and UNIDROIT Principles of International Commercial Contracts.

the nominated types of the contracts (commercial and civilian contracts in the same Code), there is the new Serbian Law on Business Companies which was adopted in the last days of 2004⁸ completely replacing by its provisions previous Law on Enterprises (1996). The new Law on Business Companies has kept the basic structure, form and general principles (providing four types of business entities with full legal capacity – partnership, limited partnership, limited liability company, joint stock company as well as entrepreneur as the physical person – with the main characteristic of flexibility in providing minimum capital requirements) yet improving the concepts of corporate governance, protection of investors as well the protection of the minority of shareholders and reorganizations all institutes of which are conceived with the primary aim to attract investment, both foreign and domestic. During the last year Serbia has adopted the set of new Laws regulating the industrial and intellectual property rights (trade marks, service mark, patent, design in accordance with the provisions of the TRIPS and European Union Regulation, providing also possibility of protection European registered patent (Convention on European Patent) on the territory of Serbia and Montenegro.⁹ Law on Foreign Investment¹⁰ provides a rule, very attractive for foreign investors through the tax incentives, possibility of repatriation of funds, protection of the investors through the national treatment principle, import of the equipment free of taxes. Law on Financial Leasing¹¹ adopted in 2003 is based on UNIDROIT Convention on International Financial Leasing (Ottawa 1988) also applicable to cross border transaction will also be for particular interest of franchising agreement where specific equipment is needed for the franchisee, providing invulnerability of lessor's rights over the equipment under the insolvency law.

⁸ Law on Business Companies ("Official Gazette RS" No 61/2004).

⁹ Trade Marks Act ("Official Gazette RS" No 61/2004; Law on Legal Protection of Design "Official Gazette" No 61/2004; Law on Patents "Official Gazette" No 32/2004).

¹⁰ Law on Foreign Investments ("Official Gazette SRJ" No 3/2002).

¹¹ Law on Financial Leasing ("Official Gazette RS" No 55/2003).

There are more branches of law relevant for franchising in Serbian legal environment such Competition Law (in accordance with European Competition Law), Bankruptcy Law (enacted in 2004) and Taxation Law; Labour Law, Law of Property but in spite of their undoubted importance for franchising practice there are not of big relevance for enacting franchising disclosure requirements.

Franchise is the object of the obligations in each franchising agreement and one of the first requirement in Serbian Code of Obligation (art. 46) provides that object of contractual obligation must be possible, legal and sufficiently definite or definable. If offer is not sufficiently definite contract could not be concluded. Because of such complexity of franchise, because of the distinction in the economical status and power, knowledge and experience between contractual parties in franchising agreement which distinctions are crucial and imminent to this legal instrument (without those advantages on the side of franchisor, franchisee wouldn't have any interests in obtaining franchise) the franchisees need to be informed, prior to entering franchising agreement, on the content of the franchise as well on all relevant facts giving them a possibility to take informed decision on conclusion of the prospective agreement. This duty of informing other contractual party, which as general principle exists in all Codes which regulate contractual relationships, need to be regulated in very precise way in the case of franchising. The research of the comparative law experiences in legislations (especial the new Italian Law on Franchising) and regulations relevant to franchising (the most important UNIDROIT instruments regulating the franchising) were precious method to consider the question: "Does Serbia need franchising law at all?" and if the answer is positive – "What kind of franchising law does it need?"

Autonomous International Regulation and National Legislation of Franchising

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. There are different methods which could be used as the guide through the national legislation (type of provisions, type of applicated law – disclosure, relationship or registration law, etc.)¹² and the method I have chosen is the nature of legal instrument which regulates franchising on national level. The instruments which are used in those regulations vary from the specific franchising law legislations (having the longest experience with franchising the first law was adopted in the USA in 1979, then legislation in Canadian province Alberta – renewed in 1995, France which took first European franchising legislation in 1989, Brazil 1994, Malaysia, Kazakhstan and Korea in 2002, Italy in 2004), than introduction of provisions relating to franchising into the existing law or Code (Mexico 1991, Croatia 1994, Spain 1996) enactment of the new Civil or Commercial Codes with specific franchising provision (the Russian Federation 1996, Byelorussia 1998, Lithuania 2000), government regulation (Indonesia, Romania and China in 1997), an at the end specific and in the comparative legislation the rarest method of enacting mandatory Code of Conduct (Australia 1998).

There are different 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

¹² The most useful in that area is the articles L. Peters, *The Draft UNIDROIT Model Franchising Disclosure Law and the Move Towards National Legislation*, ULR 2000, No 4, pp. 717–735; *The Draft UNIDROIT Guide to Franchising – How and Why?*, ULR 1996, No 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.

by the Kazakhstan, Lithuania and Byelorussia); 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 characteristic of Malaysian and Indonesian regulations is the existence of very stringent, detailed and burdensome provision 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 each 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, contained general provisions with the broader definitions of franchising, its varieties, 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 period.¹³

The autonomous regulation made by the most important franchising association International Franchise Association and European Franchise Association 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 are UNIDROIT *Guide to International Master Franchise Arrangements* (Rome 1988) contenting 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 my project is

¹³ 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 unamortised 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" 2004, Vol. 2, is. 1, p. 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 the breach of contract. In: R. Zimmerman, *Breach of Contract and Remedies under the New German Law of Obligations*, Centro di studi e ricerche di diritto comparato e straniero, Roma 2002.

UNIDROIT *Model Franchise Disclosure Law* devoted to the franchisor's duties to disclose material information to franchise, which is together with its Explanatory Report clearly addressed to national legislators, as the "soft law" instrument of the new *lex mercatoria*.

Italian experience with the franchising and the new legislation enacted in 2004, together with the commentary in the legal literature on that issue¹⁴ were the very precious reflecting that the law is compromise of interests of all subjects involved of counter trade, and especially the role of Franchising Association in process of law drafting and implementation.

Necessity for Enactment of Franchising Disclosure Law in Serbia

The comparison with other countries' regulations and experiences show that in the Serbia, neither the development of franchising in the economic life nor the role of franchise associations or their Code of Ethics is on a desirable level. Insufficient franchising practice has caused economic subjects in Serbia to lack needed knowledge as well as any 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. Beside, duty of information provided in art. 268 seems to be applied in post contractual phase, after the contract so 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

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

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 specific franchising disclosure law will have effects in introducing franchising in the economy without any limitation or burdening prospective franchisors, which could be created through registration requirements or through providing any obligation and contractual requirement which will have mandatory effects for relationships of the contractual parties. Creating an Draft which will contain only disclosure requirements will be, beside other effects, very useful and for the educational purposes of domestic economic subjects. Even if national legislator does not accept to take legislation activity on the issue of franchising, the solution which contains the draft should be relevant to prospective franchisees as a list of important information which are to be considered before entering franchising agreement. Information to be disclosed from the proposed Serbian Draft should be take over from the national franchising association in order to be attached to the domestic Code of Ethics like a list of information which franchisee should examine before to enter in any prospective franchising contract. Moreover, the grate role of this act will be the protection of domestic subjects (consequently in the role of franchisee) against fraud if they have mandatory based right to truthful and essential information, without any negative consequence for the promotion of franchising because of the absence of any other provision except disclosure requirements.

On this stage of development of franchising as a business concept in Serbia, any other franchising provisions relating to contractual relationship between the parties in the franchising agreement would have rather burdensome and inhibiting effects, discouraging any development on that area. Enacting relationship or registration provisions related to franchising agreement will be hostile to franchising practices

and may be disincentive to foreign investors. Otherwise, enacting of disclosure franchising law could be effected in an increase of common economic and legal understanding of franchising concept, and together with other governmental activities in founding franchising educational and resource centres, seminars, workshops on franchising issue, with a closer cooperation with domestic franchising association, as well as through the translation of the UNIDROIT *Guide on International Master Franchise Arrangements* into Serbian language would facilitate the development of franchising business activities, in terms of increase of it attractiveness for economic subjects despite the negative effects on Serbian economy which are caused by both economic and political instability of the Serbian market. This research could be seen as the first step towards making “healthy commercial law environment” for franchising.

Conclusion or What is the Scope of the Draft Franchising Disclosure Law for Serbia

During two month research period at UNIDROIT 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, but is extended to “industrial” and “distribution franchising” in addition “business format franchising” which contains definition from UNIDROIT Model Law. This extension is made because of the presumption that in the first period of development of franchising in Serbia that will be other formats of franchising which could prevail over the “business format franchising”, and this presumption caused that proposed definition of franchise contract to embrace all different types of franchising arrangements. Furthermore, it is mentioned in the article 2, which defines the franchise contract, that that contract is considered a commercial contract on which is related the provisions

from the law regulated obligation relationships as well as it contract can be concluded in any business activity. The provisions of the Draft should be interpreted in the light of the Explanatory Report submitted to UNIDROIT *Model Franchise Disclosure Law* as well domestic Code of Obligations and Code of Business Companies.

Furthermore, the proposed draft 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 definitions contained in the Draft are based on the UNIDROIT *Model Law*, but the Draft contains the shorter list with definition, which method is more in compliance to civil law drafting technique, as well as their formulation is made in accordance with domestic Code of Obligation and in accordance with the new domestic Law on Business Companies. 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 lists with exemptions (contained in the Art. 5 of Model Law and in the Art. 7 of the Draft) is shorter than in the Model Law containing the exemptions (A), (B), (D), (E), (F), because of the fact that exemptions (B) from the Model Law is very difficult to be a proof in domestic financial and legal conditions.

Besides, the most provisions from the core article 6 from the Model Law has been take over into the Draft considering to be the first rate information which will enable prospective franchisor to take an informed decision and give him opportunity to be in the equal contractual position with the franchisor as far as it is possible. Some of the requirements are added, for example, in the information which must be included in the disclosure document beside provided legal name, legal form and address, it is added in the Draft also and the amount of the registered capital of the franchisor as well as of the affiliates of the franchisor, which information should be of the importance for the prospective franchisee, especially in domestic circumstances where after the enacting of the new Law on Business Companies mandatory requirements for the minimum amount of registered capital is very low (500 EU) for the limited liability company (which is the most popular status form in domestic conditions). Some of the information contained in the Model Law has been taken over to the Draft (for example Art. 6(1) (N) from Model Law related to financial requirements of proving the audited financial statement of franchisor, including balance sheets and balance of profit and loss) but it is objected that there is need to be examined from the financial experts in order to find out if the expenses of those requirements, to provide audited or independently verified financial statements, would be to much burdensome, especially to the smaller franchisor in domestic financial conditions which accepted international accounting standards. Furthermore, the requirements from Art. 6(1) (O) Model Law related to the franchisor's obligation to provide the prospective franchise with the description of the state of the general, as well as of the local market of products and services that are subjects of the proposed franchising contract, are not included in the text of the Draft considering that those requirements could be very difficult for franchisor to obtain (especially if it is the foreign commercial subject which is for the first time at the Serbian market). Furthermore, it is considered that those information should be obtain by the franchisee, which by entering into the franchising agreement need to show

business responsibility of the reasonable trader which includes bearing a reasonable business risk of the prospective franchisee.

In the second group of the required information which disclosure documents shall contain 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, in paragraph 2(B) of Art. 6 of the model Law it is added beside the description of the training program the fact of the personality of the trainer, the duration, expenses as well as the clear signification of the fact who bears the expenses of the trainings programmes. As the remedies for the conducts of which make the injury of the franchisee right to be informed (disclosure document or notice on material change are not delivered at all, contain misrepresentations, or fraud, or make an omission of material fact) it is provided the annulment of the contract on the demand of the franchisee by applying to the court for annulment according to the solution from the Code of Obligations. The domestic Code of Obligations provides in art. 111–117 consequences of the contract to be avoid because of the faults which exists during the conclusion the contract. The injury of the franchisee rights to be disclosed all important information about prospective franchising contract creates a breach and also constitutes an abuse on the part of the franchisor producing the fault in franchisee intention to conclude franchising contract. Because of the fact that those rules are prescribed in the general rules for contracts in domestic Code of Obligations those provisions were mentioned in the Article 10 of the Draft providing remedies for abusive conduct on part of franchisor. Remedies provided by the Draft is the annulment of contract by the franchisee demand to the court, together with the exceptions provided in the Model Law considering that franchisee was already informed through the other means (except in the case of misrepresentation treated as such abuse on the part of franchisor which could not be excused by the proposed exemptions) and termination will be in the relevant circumstances create the abuse of rights on the part of franchisee if he claim for the termination because of the conduct represents injury of the minor importance comparing

with the existence of the whole contract. The last provision which creates restriction of the rights of the franchisee to terminate (nullified) contract because of the minor failure of the franchisor's duty to inform is although based on the general principle of the Serbian Code of Obligations which prohibit abuse of right in the situation when one party performs its right in opposite to the nature and purpose of contract (art. 13 CO) which is the realization of the general principle of good faith and the fair dealing contained in the UNIDROIT *Principle of International Commercial Contracts* (art. 1.7). The terms when right for nullification and/or right to claim for damages expire is provide in the manner of the domestic rules which provides the term. So, it is provided an subjective term related to the franchisee awareness of the conduct which create the breach connected only with the right to claim the damages, but the most difficult legal consequences contained in the franchisee's right to nullified the contract is provided as an subjective term of one year after act or omission constituting the breach, and in the objective and final term of two years after the conclusion the contract. Those relative short terms when contract should be nullified are provided to preserve legal certainty of the contractual relationship, and to short the term of franchisor's uncertainty in the destiny of the concluded franchise contract.

The proposed provision of the Draft should be interpreted in the reflection of the Explanatory Report on UNIDROIT *Model Franchise Disclosure Law*, general principles of domestic Code of Commerce as well as provisions of UNIDROIT *Principles of International Commercial Contracts* 2004.

Summary

In this paper the author deals with the legal environment for franchising in Serbia which legislation does not provide specific or explicit provisions dealing with the franchise contract. Despite the fact that franchising continues to grow as a preferred legal instrument to con-

duct business in the global market business practice in Serbia hasn't many experiences with franchising. The franchising agreement feature is that arrangement which embraces elements of several types of contracts as well as it is connected with several kinds of law which elements qualified this contract as a contract *sui generis*. Except the rules regulating commercial contracts which are in Serbia contend in the Law of Obligations (based on the Suisse Law of Obligations) and the law of intellectual property rights which is in Serbia harmonized with the main principles of European intellectual property rights there are significant different branches of law which are essentially connected with franchising. Except the rules of general contract law which in Serbia regulate in the same way commercial and non commercial contracts, there are specific Law on Financial Leasing (2003). Law on Business Entities, taxation law, property law, Law on Consumer Protection and Law on Productor's Liability, The Investment Law, Competition Law and other different areas of law the majority of which are regulated domestically and at the times domestically. At the international level franchising is object of harmonious regulation enacted in UNIDROIT *Guide on International Master Franchise Arrangements and Franchising Disclosure Model Law* created in 2002 by the experts under auspices of UNIDROIT. Experiences of number of countries manifested that it is necessary to enact the specific disclosure regulation over franchising in order to protect the economically weaker party in franchising contract – franchisee. Proposal of the author of the article is prompt translation of the UNIDROIT *Legal Guide on Franchising* and *de lege ferenda* enacting specific legislation in Serbia which will deal only with the question of disclosure commitment in franchising contract.