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ON BUSINESS FORMAT FRANCHISE

IN THE UNITED STATES AND EUROPE

- LESSONS FOR SERBIA

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ABSTRACT

This paper focuses on comparative analysis of business format franchise in the United States and Europe, with a special focus on Serbia. Franchise is widely recognized as a modern, yet new and complex model of doing business, making it an exceptionally interesting topic to analyze.

The selection of jurisdictions is made with respect to the rich experience on franchise that comes from United States, the birthplace of business format franchise, that had been followed by Europe. Notably, business format franchise is treated differently in these two continents and that is why an analytical comparison sheds the light over the reasons for regulating, as well positive and negative features of various regulatory regimes. Serbia, on the other hand, is the central subject of this thesis. Franchise in Serbia is treated as an innominate contract, with no particular regulation and developed practice. However, the novelty in Serbia is the Draft of Civil Code that is not yet enacted, but regulates franchise for the first time. Therefore, the ultimate goal is to analyze the Draft and evaluate it by comparison with other regulatory systems.

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List of Abbreviations

BFA	British Franchise Association
CCFA	China Chain Store & Franchise Association
CFIL	California Franchise Investment Law
CFRA	California Franchise Relations Act
FDD	Franchise Disclosure Document
FRED	Franchising Regulation Evaluation Data
FSMA	Financial Services and Markets Act
FTC	Federal Trade Commission
OECD	Organization for Economic Co-operation and Development
UFOC	Uniform Franchise Offering Circular
UNIDROIT	International Institute for the Unification of Private Law

Introduction

Business format franchise, one of major and most commonly used types of franchise, stands for a mutual business relationship between two independent entities that comprehends business package that is transferred from franchisor to franchisee. On the one side, the franchisor has a duty to provide franchisee with a comprehensive assistance which includes a set of trainings, manuals, equipment, marketing, etc, as well advisory support, audit and supervision over franchisee. Furthermore, he introduces franchisee with his standardized business format of functioning and grants rights and privileges to franchisee to operate the business under the franchisor's intellectual property rights and know-how. On the other side, the essential duty of the franchisee the payment of the fees and royalties. Apart from that, as franchisee tries an already proven formula of success, he is obliged to follow the instructions and advices provided by franchisor. Another important requirement considers compliance with uniform standards that are applicable in franchisor's business, which are considered as substantially important feature of franchise. In simplest terms, franchise is essentially a license agreement because its crucial part is related to transfer of intellectual property rights and know-how. However, franchise is more than licence – it comprehends a set of services provided by franchisor in order to establish franchise system and maintain its operation. From economic perspective, franchise is a form for entrepreneurs and small enterprises to access the market

Franchise is usually described as a „win-win" relation in which franchisor gets to expand his business while simultaneously being paid for services he provides, while franchisee is granted the opportunity to operate business under a famous brand and achieve entrepreneurial dream. Although each party benefits somehow from this relationship, one must keep in mind that the parties do not have equal economic, information and bargaining powers – franchisor is, by all

means, a superior and dominant party. However, asymmetry between parties of franchise needs to be tolerated because it derives from its nature that is imposed as controlling and monitoring position of franchisor over franchisee. Supposing that control is another essential element of franchise, it is hard to predict until where it should be tolerated by law. Therefore, the first important task of this thesis is to present how disparity of the parties is reflected in their business relationship through the case law and what approaches can be implemented in order to mitigate such disbalance.

Franchise is tightly connected to economic, industrial, technological and innovation development of the country and the region. While it was flourishing in capitalist countries, mainly in common law countries, it started expanding to European continent, followed by later reception in post-socialist countries. Each of these changes and moves forward were followed with respectful defining on how the parties should deal with the franchise and progress of franchise regulation. Since franchise started crossing borders and becoming more internationalized, new issues came into view, such as different cultures, language, standards and legal environment.

The jurisdiction selected for this thesis can be paralleled with the timeline of franchise development. Franchise in modern sense started being operational for the first time in United States by Singer Sewing Machine Co.[1] However, global expansion overseas to Europe and the rest of the world commenced only around 50 years ago. The economic background and enthusiasm of building franchise system was far more enthusiastic in US and in common law countries in general, such as Canada and Australia, than in Europe and the other continents. Thus, regulatory process in US was established on the so-called three regulatory layers whose aim was to comprehensively protect the weaknesses of the system that may potentially harm the parties. On the other hand,

[1] Martin Mendelsohn and Robin Bynoe, *Franchising* (FT Law & Tax 1995), 22.

franchise in Europe remained predominantly unsystematic and regulated on the national level, despite the efforts to harmonize the regulatory rules in the whole region. Later on, franchise arrived to post-socialist and emerging countries, where it did not reach its full regulatory shape until today, keeping quite scarce regulatory solutions from the civil codes. One of these countries is Serbia.

Thus, the main motive of this thesis is to contribute to Serbian analysis of current and future regulation on franchise. The main reason for that is a scarcity of papers and lack of academic research that would suggest the future perspective of franchise economic and legislative development. In other words, franchise did not receive enough of attention as it deserves. However, that situation slightly changed recently because one whole section of the Draft of Civil Code of Serbia is devoted to franchise, which is pending adoption since 2015. Since announcement, the interest on franchise regulation started increasing and some academic contributions were made, but still deficiently. Out of small portion that is found in Serbian academic articles, it is concluded that the most of articles focus merely on describing the lack of regulation, giving reasons why that should be changed, but do not provide with concrete conclusion on how the changes should happen. The articles of the newer date touch some of the selected issues because of the more profound knowledge on franchise that was started by translation of important acts and guidelines to Serbian language, such as the ones provided by UNIDROIT. Still, the more recent articles still tend only to present the new legislative solutions of the Draft in descriptive, rather than substantive manner. The main academic absence related to franchise in Serbia is the comparative analysis that would critically observe and point out at issues that could be assessed from the practical point of view. Also, since the adoption of the Draft regulating franchise is expected to come to effect in the near future, it is important to analyze how will prescribed clauses influence the development of franchise in Serbia.

Therefore, this thesis combines theoretical and practical aspects of franchise. It offers an overview of reasons for imposing the national franchise regulation and explains different legislative approaches that are adopted from US to Europe. Afterwards, a number of cases is presented with the aim to emphasize certain issues that arise in the disputes and that are, according to the author's opinion, not sufficiently covered in academia. The selected court cases are followed by discussions on how these issues may have an impact on Serbian reality and gives explanations on what Serbian legislator should take into account and learn from the issues presented.

The paper is divided into two chapters. First chapter opens by posing the question why the regulation on franchise is needed and what troubles the lack of regulation might bring. Furthermore, it represents the models that exist worldwide, specifically comparing US and various European regulatory solutions. By the end of the chapter, Serbian current regulatory situation is presented, followed by the overview of the relevant articles from the Draft. Second chapter focuses on the case law. Three important cases are chosen with the aim to emphasize the concrete issues that the parties are facing in franchise relationship. Firstly, the Polish case presents the issues that arise when franchise is treated as an innominate contract, but also discusses the essence of the franchise. Furthermore, the purpose of the second case is to present the economic troubles that threaten the franchisees as weaker parties when concluding franchise contract. In that sense, the author believes that it is more important to present firstly the consequences of the unequal position of the parties from the economic perspective. Thus, an example of a public comment addressed to FTC is introduced, which eventually came to the court, although with an unsuccessful ending. The other purpose of this subchapter is to give a background and serve as introduction to the following case, which is primarily focused on the legal aspects. In concrete, the disparity of bargaining powers is presented in the German case. That case also demonstrates different approaches that

various jurisdictions might have taken to prevent or restrain demonstrated inequality that harm one of the parties.

Even though franchise is in general well covered topic by both legal and economic scholarship, some parts of research conducted for this paper were not without difficulties. The first issue appeared during the attempt to find Serbian cases on franchise, which would remain impossible without the external help. Furthermore, it was especially hard finding any information about McDonald's business conduct and dispute. Firstly, while trying to find the public comment from the website of FTC, the link of the website seemed to be removed, but its content was found on the alternative website. Besides that, after many attempts to find a court case related the public comment, only brief citations of the case by the academics could be used for the purpose of explaining why the case was unsuccessful. As that remained the main limitation of this thesis, the conclusion of the author is that big corporations, such as McDonald's, do not allow being publicly criticized. On the other hand, as one of the main topics of thesis is analysis of asymmetrical relation of the parties, the author decided to focus merely on asymmetry regarding bargaining powers, considering that more attention is given to information asymmetry.

One of the crucial findings of this research is presented under the topic of FRED research, where the researcher compared how burdensome regulations are in Europe and whether that is appropriate or not. Besides that, author's intention is to make conclusion on selected cases and their consequences, with intention to bring those conclusions closer to future franchise in Serbia.

To conclude, the main purpose of presented research is to make an analytical and comparative overview on existing regulations worldwide and to present practical issues that appear in reality, mostly focusing on lack of regulation issues and bargaining disparity, but especially reflecting on how didactical those cases might be for Serbian future regulation of franchise.

CHAPTER 1 - Regulation on franchise in US, Europe and Serbia

This chapter discusses the necessity of regulation of franchise throughout various legislations. Firstly, it discusses why it is important to regulate franchise. The reasons are given by emphasizing the potential abuses that may arise due to lack of regulation. Furthermore, it examines different approaches on how to regulate franchise and explains its main features. The aim of this chapter is to represent diversity of regulatory models that exist worldwide. Specifically, it introduces the regulatory solutions provided in United States and countries of the European continent. Finally, it focuses on Serbian regulation where franchise is still treated as an innominate contract. Still, Serbian legislator regulates franchise for the first time in Draft Civil Code of Serbia, which is presented at the end of the chapter.

1.1. Why franchise should be regulated?

Spencer argues that it is not the question whether franchise should be regulated but how it should be regulated.[2] On the basis of this statement, this subchapter explains why regulation of franchise is necessary. Firstly, it is important to make an overview on what are the benefits and costs of self-regulatory dealing of franchise relationship by the parties and see what happens if parties are left on their own, with no rules to obey or follow.

In the first place, it is important to distinguish two sides of term 'regulation'. Regulation in traditional and broader sense is defined as a set of statutory rules and procedures that are governed and supervised by administrative agencies.[3] In other words, that means the "direct intervention" of the public authority in the matters of the business actors by enacting legislation or statutes.[4]

[2] Elisabeth Crawford Spencer, *The Regulation of Franchising in the New Global Economy* (Edward Elgar 2010), 5.
[3] Iain G MacNeil, *The Law on Financial Investment* (Hart Publishing, 2005)
[4] Crawford Spencer (n 2) 15.

On the other side, self-regulation is explained as a model in which 'a subject exercises control over itself to maintain the stability of its function'.[5] In practice, it is not unusual to have a negative attitude towards interference of government in private matters.[6] It is believed that regulation imposed by public authorities may have negative impact on business due to burdensome regulation which reduces efficiency and does 'more harm than good'.[7] According to OECD, the burden of red tape falls especially on small-scale businesses which may discourage them from any business attempt.[8] In general, self-regulation is perceived as flexible and effective way of governance, contrary to statutes that create barriers and unnecessary burden which turns to be ineffective and disincentive.[9]

In franchise sector, self-regulation main features are consisted of disclosure before the franchise agreement is concluded, dispute resolution between the parties and the use of best knowledge and practices.[10] Although self-regulating model has its advantages, numerous and various issues arise between the parties during their long-lasting relationship. The most detrimental one is when one party (generally franchisor) abuses his strategically stronger position to harm the other party. Such abuses served to many countries as the crucial motive for regulating franchise.

Consequently, the famous FTC Franchise Rule was enacted after nine years of investigation on abuses that occurred as result of information asymmetry, as well the naturally unequal position of the parties.[11] Australian Franchising Code of Conduct sets as its main objective "raising standards of conduct in franchising sector (…), reducing the cost of resolving disputes in

[5] Ibid 19.
[6] Ibid 3.
[7] Ibid 3.
[8] OECD, *Businesses' Views on Red Tape: Administrative and Regulatory Burdens on Small and Medium-Sized Enterprises* (Éditions OCDE / OECD Publishing 2001), 9.
[9] Crawford Spencer (n 2) 23-24.
[10] Mark Abell, *The Law and Regulation of Franchising in the EU* (Edward Elgar 2013), 82.
[11] Ibid 118. See Table 4.1.

the sector, reducing risk and generating growth in sector by increasing the level of certainty for all participants, and addressing the imbalance of powers between franchisor and franchisee".[12]

The objective of the most of European franchise-specific legislations was to prevent abuses that arise from information asymmetry. Since these consequences appear only after the conclusion of franchise relationship, the states ensure to protect franchisees by setting the criteria that requires all the necessary and appropriate information to be disclosed by franchisors prior to conclusion of their business relation. Therefore, if franchise is fully left to self-regulation, profit interests may harmfully overrule other values of franchise relationship.[13]

1.1.1. Potential abuses by the parties

In general, establishment of the franchise may be risky just as any other business – the investor of the new business makes number of mistakes due to his lack of knowledge and experience, his money can be easily wasted, the equipment might not be adequate, but his business may be affected by the external factors as well.[14] In spite of that, the franchise serves as the business model that reduces some sort of risks, although to the certain extent. However, where some types of risks are mitigated by the assistance and supervision offered by the franchisor, another sort of risk arises. Thereby, the risks are shifted in that way that the two contracting parties turn to be opposed to each other. Thus, the franchisor turns to be risk himself against the franchisee in the way that he might not offer adequate solutions that are needed or he takes advantage over the franchisee in the unfair manner.[15] In particular, the main argument for regulating franchise comes from the idea that since they have unequal positions that caused by nature of their

[12] Trade Practices (Industry Codes – Franchising) Regulations (1998). See Spencer, 119.
[13] Tamara Milenković Kerović, 'Zbog čega i kako je potrebno regulisati ugovor o franšizingu u Srbiji' (2015) 4-6 Pravo i privreda 320, 324.
[14] Martin Mendelsohn and Robin Bynoe (n 1), 32.
[15] Milenković Kerović (n 13), 324.

relationship, in which franchisor is economically and strategically stronger positioned party, the more vulnerable party should be offered bigger protection. As abuses might come from both sides and in every stage of franchise relationship, possible abuses are presented in the following content.

During pre-contractual phase, the franchisor can easily take advantage on franchisee for own benefit in terms of information asymmetry. The lack of regulation that imposes the conditions that are required before entering into contractual relationship might aggravate position of the parties, especially if some of them is lacking knowledge and experience in franchising.[16] In case that franchisor does not know what kind of information should be disclosed, he may unintentionally cause harm to franchisee.[17] However, that is not a common situation since franchisors are by rule well-developed companies with plenty of experience.[18] Normally, franchisors may choose not to disclose selected information in order to make franchisee enter the franchise agreement, knowing that franchisee would regularly not agree on it if he knew all relevant circumstances.[19] Reasonably, every franchisor would hide his unsuccessful history of franchising, bad experiences and disputes with previous franchisees if there is no requirement for disclosure.[20] The absence of awareness on disclosure and bad negotiation may do even more harm to franchisee.[21] Accordingly, if franchisor provides with misleading information, franchisee may get something he did not expect or may receive worthless franchise for disproportionate fee.[22] In relation to false disclosure or lack of appropriate one is also acquisition of worthless franchise where franchisee pays costly trainings and receives inadequate knowledge transfer or bad quality

[16] Ibid 326.
[17] Ibid 323.
[18] Ibid
[19] Ibid 326
[20] Ibid
[21] Ibid
[22] Ibid

franchise concept.[23] All of the above listed issues are representing lack of power and vulnerability of franchisee's position, showing that he can only rely on what is voluntarily disclosed by franchisor where the regulation is lacking. Closely related to the information asymmetry is the bargaining imbalance between the parties, where the franchisor is the party who dictates all the rules of the franchise arrangement. The bargaining asymmetry is further elaborated within issues of the German case.[24]

When a franchise relationship is already established, some risks are shifted to the franchisor as well. Generally, franchisor's issues are related to handling the franchisees' behavior, from enthusiastic newcomers to overly self-confident entrepreneurs.[25] First of all, it may happen that franchisor fails to recruit an appropriately skilled franchisee and that his performance does not live up to expectations, which can be reflected badly on franchisor's business and increase his costs of coordination and supervision.[26] Additionally, there is always a risk of non-payment of agreed fees by franchisee, which certainly causes many disputes. Still, the most harmful act for franchisor may be abuse of his intellectual property, reputation and 'free riding'.[27]

Yet, franchisor may protect himself from potential abuses by setting restrictive clauses in the franchise contract. Unquestionably, he may impose a duty on franchisee to act in compliance with franchise system and continuously monitor him in order to prevent abuses. In contrast, franchisee does not have any opportunity to negotiate the terms of their relationship or impose liability measures on franchisor. Thus, a proper education of franchisee about nature of franchise relationship is needed, because that is beneficial for both franchisor and franchisee. [28]

[23] Ibid
[24] See subsection 2.3.1.
[25] Martin Mendelsohn and Robin Bynoe (n 1), 34.
[26] Ibid
[27] Ibid 72.
[28] Dennis A Yao, 'The franchise rule: theory and enforcement' (ABA Forum on Franchising Dallas, Texas 1993) available at: https://bit.ly/2GvDImL 17.

Finally, one of the biggest issues appear in relation to termination and post-contractual relation of franchisor and franchisee. The parties have uneven opportunity for claiming termination of the franchise contract, where, as usual, franchisor dictates the terms. That is shown by the power of franchisor to terminate contract at any time, even if franchisee is profitable, in case that he assumes that franchisee is becoming too independent or powerful.[29] That can be quite inexpedient for a franchisee, especially if he is in position where he has to pay off the debts from loans or leasing.[30] Apart from that, in case of unjustifiable termination of contract, franchisee may be found in such a bad financial situation where he cannot initiate a lawsuit to receive indemnification. All the above-mentioned problems are even worse in terms of absence of regulation, since the last phase of franchise relationship is only exceptionally regulated.

As presented, there are plenty of reasons for regulating franchise relationship. In conclusion, if regulation answers the needs of franchise parties by being moderately protective, efficient and generally good quality rules, it certainly cannot do more harm than good, but may serve to protect both parties from abuses of one another.[31]

1.2. How to regulate franchise?

As already mentioned, both parties of franchise may abuse their positions by harming the other party, which is usually the underlying rationale of the states to regulate franchise. Therefore, the legislator's task is to analyze and evaluate a number of factors that affect the franchise relationship, including the abuses, as well the potential consequences. Still, this task is far from easy, especially having in mind a number of regulatory approaches that were created over time.

[29] Ibid 111.
[30] Ibid
[31] Crawford Spencer (n 2), 45.

Generally speaking, "regulation should ideally be tailored to the needs of the activity being regulated".[32]

An example of a well-constructed model of regulatory requirements that franchise should desirably follow is represented as "regulatory objectives" enacted by Financial Services and Markets Act.[33] Those objectives are: market confidence, public awareness, protection of consumers and the reduction of financial crimes.[34] Abell suggests that the first three objectives should be applied for the purpose of regulating franchise in European Union.[35] In other words, regulation should aim to ensure the ongoing confidence in financial services, that is "preserving both actual stability (...) and the reasonable expectations that it will remain stable".[36] Second objective refers to adequate disclosure, including "promoting of both benefits and risks".[37] Thirdly, in terms of franchise, protection of consumers encompasses both franchisors and franchisees as opposed to public authority. Therefore, the legislator should have in mind, when measuring the amount of protection, the "differing degrees of risk involved, experience and expertise, the needs of consumers and the principle that individuals should take responsibility for their decisions".[38]

There is no universally accepted approach on what type of regulation on franchise is appropriate, nor what goals should it achieve.[39] The regulation varies worldwide from a broad and detailed treatment of franchise, through diverse and uncomprehensive regulation or complete lack of regulation. Therefore, three main patterns may be formulated with regard to how much regulation should be considered as necessary, with the additional hybrid one.

[32] Ibid, 38.
[33] Financial Services and Markets Act 2000 (FSMA 2000)
[34] Ibid, pt 1.
[35] Abell (n 10), 200.
[36] Ibid
[37] FSMA 2000, s 4.
[38] FSMA 2000, s 5(2).
[39] Mark Abell, 'In Which EU Jurisdictions Is Franchising Most Heavily Regulated and How Effective/Appropriate IsThat Regulation' (2012) 10 Int'l J. Franchising L. 19, 21.

Firstly, franchise may be regulated in a detail manner in a special legal act that pertains merely to franchise. Secondly, franchise relationship may be governed by general rules of contract that are generally found in civil codes of states. Thirdly, franchise can be left to the regular conduct of the industry itself. Finally, these three basic models of regulations and their important elements overlap and mix, for which reason an additional hybrid model is recognized as a separate model. Regardless the model of regulation, each one of them tends to set the rules that protect the weaker party of franchise and create fair treatment of both parties. Each model of regulation is presented under a separate subsection with the example of regulatory solutions of countries that represent them truthfully.

1.2.1. Regulation-based model

First model of regulation is the so-called *regulation-based model* that has roots from United States and therefore is also named as *US model*. As its name demonstrates, the main feature of this model is franchise being regulated by number of regulations that are intertwined in that manner that they create „a complex web of federal-cum-state (...) regulations".[40] It covers parties' relationship profoundly by imposing mandatory rules that are enforced by specialized administrative agencies.[41] An another important characteristic of this model is that it primarily focuses on *ex ante* protection of the franchisee.[42] This means that the parties of the franchise agreement are not left on their own, since they do not have to rely only on protection of their rights through arbitration or litigation, but the rules that are set forth on precautionary basis. In United States, the so-called "regulatory interventions" pertain to the already mentioned web of regulations

[40] Tibor Tajti, Systematic and Topical Mapping of the Relationship of the Draft Common Frame of Reference and Arbitration: monograph (2013), 72.
[41] Ibid, 74.
[42] Ibid, 72.

which is recognized in three different types of laws: disclosure laws, relationships law and registration law.[43] Altogether, this model is reasonably regarded as the most protective as it offers the widest protection to franchisees which tends to prevent from potential abuses and disputes. Although regulation-based model is typical for United States, the further subchapter reflects also on some regulatory solutions from European countries, especially regarding their franchise-specific laws.

In United States, pre-contractual phase is regulated by the FTC Franchise Rule that is enacted on a federal level, obliging all the states of US to align their legislations with it. FTC Rule, fully named 'Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures' prescripts merely disclosure rules. FTC Rule imposes binding rules that comprehend minimum level of requirements that every state of United State has to comply with. However, states are free to decide whether they want to impose extensive disclosure rules or remain at the minimal level of requirements.[44] Thereby, the disclosure documents are not filed nor reviewed by FTC and it does not offer any federal private remedy in case of breach of FTC Rule – the authority for these actions belong to states.[45]

FTC Rule includes disclosure of material facts and it does not regulate content of contract itself.[46] The rationale of this Rule is to influence and mitigate the possibility of information imbalance that repeatedly occurs if the franchisor decides not to disclose information that is relevant for the franchisee to make an informed decision. Therefore, FTC's job is to „prosecute those franchisors who do not live up to the disclosure requirements mandated by law".[47]

[43] Ibid
[44] Crawford Spencer (n 2) 146.
[45] Ibid, 152.
[46] John Adams and Prichard Jones, *Franchising – Practice and precedents in business format franchising* (3rd edn, Butterworths 1990) 304.
[47] Yao (n 28), 17.

An important contribution concerning the creation of uniform disclosure is commenced by Uniform Franchise Offering Circular Guidelines (UFOC Guidelines) created by North American Securities Administration Association (NASAA) in 1974.[48] UFOC classified types of information in 23 categories with brief explanations. As UFOC became widely used by the franchisors in lieu of FTC format, a modified version of UFOC was amended to FTC Franchise Rule in 2008. and became a standard franchise disclosure document format (FDD).[49]

Interestingly, a widely-held 'perfect' model of franchise is Californian one, which is at the same time the first law ever regulating franchise. California Franchise Investment Law (CFIL) was adopted in 1970, using the 'blue sky' securities law as its model for regulating disclosure.[50] As it name suggests, the main subject of protection are those who invest in franchise – the franchisees.[51] The general requirement of the CFIL for franchisors is to register disclosure documents and finalized franchise agreement prior to selling franchises in California, to the Department of Business Oversight.[52] As declared in the Corporation Code of California „it is the intent of this law to prohibit the sale of franchises where the sale would lead to fraud or a likelihood that the franchisor's promises would not be fulfilled, and to protect the franchisor and franchisee by providing a better understanding of the relationship between the franchisor and franchisee with regard to their business relationship".[53] Hand in hand with CFRA, Californian franchise regulation remains the most protective franchise-specific law.

[48] Martin Mendelsohn, *The guide to franchising* (7th edn Cengage Learning EMEA 2004), 322.
[49] John Baer and et al., 'Overview of Federal and State Laws Regulating Franchises, Distributorships, Dealerships, Business Opportunities and Sales Representatives' <https://bit.ly/2PpxXJA> accessed 12 March 2019.
[50] Mendelsohn (n 48) 316-317.
[51] Ibid, 316.
[52] 'About the Franchise Investment Law' <https://bit.ly/2ITNDna> accessed 16 April 2019.
[53] California Code, Corporations Code - CORP § 31001.

After a big entrance of franchise to US during the 1960s, franchise arrived to Europe in 1970s, where it gained popularity and started growing rapidly.[54] A big move towards European franchise regulation was made by UNIDROIT[55], whose objective was to create model laws that would serve as "inspiration and guidance to national legislators".[56] Firstly, UNIDROIT Guide to International Master Franchise Arrangements was adopted in 1998. and revised in 2007, while Model Franchise Disclosure Law in 2002. The aim of the latter was to start a trend of enacting of franchise laws and achieve the goal of widespread and uniform regulation on disclosure. Despite its desired impact, Disclosure Model Law is far away from any sort of unified model of regulation. Before the adoption of UNIDROIT Disclosure Law, 14 out of 20 countries already did adopt legislation that regulates disclosure. As result, today only eight countries of European Union have a franchise-specific regulation.[57] Although franchise-specific regulation seems as generally good option for regulating, its deficiency is a mere focus on disclosure, which comprehends only one part of franchise relationship. In European Union, this type of regulating threatens to disinterest the potential franchisors and franchisees from starting with franchising, as well as it fails to decrease risks to convenient measures.[58]

France is the first European country to adopt franchise-specific regulation in 1989 that focuses merely on disclosure. The so-called *Loi Doubin* does not refer directly to franchisors, but imposes a duty of disclosure to any party that transfers intellectual property rights.[59] Although it regulates the pre-contractual phase, French statutory regulation completely disregards other phases

[54] Abell (n 10), 15.
[55] International Institute for the Unification of Private Law (UNIDROIT)
[56] Crawford Spencer (n 2) 116.
[57] Those are: France, Spain, Romania, Italy, Belgium, Sweden, Estonia, Lithuania. See Abell (n 10) table 3.2., 92.
[58] Ibid, 91.
[59] Diaz Odavia Bueno, Franchising in European Contract Law: A Comparison between the main obligations of the contracting parties in the principles of European Law on Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC) (European Law Publishers 2008) 33.

of franchise relationship. The justification provided by the group of experts when enacting Loi Doubin, was that „the internal relationship in franchising agreement by statute (...) could adversely affect the dynamic character of franchising".[60]

To conclude, disclosure requirements are beneficial to both franchise parties: by giving access to information, franchisee is acquainted with all the relevant circumstances that allow him to take an informed decision about acquiring franchise, while for franchisor disclosure gives a warranty that the franchisee cannot later claim that he did not know what he was getting into.[61] Still, if disclosure laws remain the only legal acts that regulate franchise, the protection of the franchise parties remains deficient and inefficient, since regulating just initial stage of the long-lasting relationship is not enough.

US is exceptional for its regulation of the franchise because it covers the whole duration of relationship. Seventeen of US states imposed the so-called relationship laws.[62] The importance of this relationship law is that it encompasses the period during which the whole franchise relationship lasts, including matters such as prohibition of discrimination, possibility of the franchisees of one franchisor to associate with one another and matters of competition by the franchisor.[63] California enacted California Franchise Relations Act (CFRA) which regulates „renewal, non-renewal and termination of franchises".[64] Surprisingly, according to Mendelsohn's analysis, the relationship law of Iowa is the most comprehensive among all the states.[65]

On the federal level, FTC Franchise Rule does not contain requirement on registration and filing procedure and it does not examine the disclosure documents. The authority to prescribe

[60] Ibid, 33-34.
[61] Mendelsohn (n 48) 331.
[62] Crawford Spencer (n 2), 150.
[63] Mendelsohn (n 48) 337.
[64] T-Bird Nevada LLC, et al. V. Outback Steakhouse, Inc.,et al. 2010 WL 1951145 (Cal.App. 2 Dist.)
[65] Mendelsohn (n 48) 338.

registration laws, set rules of procedure and requirements for filing is given to the states.[66] In US, fifteen states make an obligatory demand of disclosure document.[67] The rationale of registration requirement is regarded as another way of disclosure of information that is relevant for franchisees before concluding franchise agreement by publishing it in the public register.[68] In that way, the franchisees are enabled to base their decision by comparing what had been offered to them with what had been offered to other franchisees of the register.[69] On the other side, the franchisors are being controlled by administrators of the registers who review if the minimum requirements for disclosure are met.[70] As Abell concludes, „prevention is better than cure".[71]

1.2.2. Private law-based model in Europe

Private law-based model is typical for European jurisdictions where franchise relationship is based on rules and remedies from general contract law.[72] Franchise rules are either regulated in national civil (or commercial) codes or statutes, but not in franchise-specific regulations.[73] Additionally, under this model regulation are included those civil law jurisdictions that have not expressly included rules governing franchise in their legislation, apply rules of other contracts whose characteristics are similar to franchise contract.[74]

There are two main differences between this model and regulations-based model. Firstly, in relation to enforcement of rights of the parties in private law-based model, both sides can rely only on traditional private law remedies, meaning that protection creates only *ex post* effects.[75]

[66] Ibid, 318
[67] Crawford Spencer (n 2) 147.
[68] Abell (n 10) 260.
[69] Ibid
[70] Ibid
[71] Ibid
[72] Tajti (n 40) 74-75.
[73] Ibid
[74] Ibid, 75.
[75] Ibid, 75.

That may be problematic because the parties can turn only to litigation or arbitration when the damages have already occurred, meaning that the parties are left on their own in enforcing their rights. Secondly, another problem is the lack of administrative agency that would step in and provide assistance to the parties in case of some issues.

Hungary is an example of a jurisdiction that treats franchise as an innominate contract, which is regulated by the Civil Code which classifies franchise under "atypical" and "mixed" agreement section.[76] However, this regulatory solution (or lack of one) is creating difficulties for the court because it needs to analyze which element of the contract is dominant in each case to that extent the application of its rules shall prevail.[77] As Hungary is a civil law country, the courts are not bound by prior decisions, so inconsistency in case law and uncertainty can reasonably create lack of trust in the franchise system, as well turn out to be dissimulating for the franchise parties to enter into franchise.

As the contract is the main self-regulating tool that governs a concrete franchise relationship while its gaps are filled by the court in case that dispute arises.[78] Therefore, this model seems to be disadvantageous to the franchisee, given the fact that franchise agreements are by rule standardized contracts that are not open for negotiating. Since this model regulation is open to numerous risks for the franchise parties, this thesis deals with this matter through case law, in order to show the realistic troubles that should motivate legislators to find another regulatory solution for franchise. Showing the regulatory situation in Hungary. similar situation exists in Poland and Serbia, which is the reason why the case from Poland is examined to detail on and evaluated with potential impact on Serbia in Chapter 2.

[76] Stefan Messmann and Tibor Tajti, *The Case Law of Central & Eastern Europe: Enforcement of Contracts* (European University Press 2009), 288.
[77] Ibid, 289.
[78] Crawford Spencer (n 2), 29-30.

1.2.3. Industrial self-regulatory model

Industrial self-regulatory model is regulated by codes of ethics or conduct.[79] The specific of this model is that the rules on franchise are imposed by trade associations that create mandatory rules for their members.[80] The oldest franchise association is the International Franchise Association (IFA) which was created in 1960 in US and whose members shall comply with Code of Ethics of IFA.[81] Another example of a regional franchise rules created by an industry association is the *European Code of Ethics for Franchising* imposed by European Franchise Federation.[82] Currently, this franchise association is consisted of 17 member states who are obliged to comply with ethical rules imposed by the Code, while the main aims that EFF stands for are: promotion and encouragement of franchise development, representation of interests in franchise industry before EU institutions, as well promotion of fair dealings between the franchise parties.[83] Although, the Code of Ethics is important source that requires from its parties to deal in ethical and fair way, it still remains in domain of unenforceable soft law.[84]

The most explanatory instance of self-regulatory model exists in United Kingdom. There, franchise is kept in the hands of British Franchise Association (BFA) and members of BFA are obliged to comply with certain codes and procedures adopted by association, including Code of Ethical Conduct.[85] Not just that BFA has the right to access and supervise confidential franchise information of its members, but it also offers mediation and arbitration services in case that dispute arises between the parties of franchise.[86] As shown in practice, advantage of BFA is that it closely

[79] Tajti (n 40) 77.
[80] Crawford Spencer (n 2), 28.
[81] Ibid, 304.
[82] Ibid, 29.
[83] 'The European Franchise Federation (EFF)' (13 October 2016) <https://bit.ly/2DwcQk5> accessed 16 March 2019.
[84] Abell (n 10), 81.
[85] Mendelsohn, (n 34), 308.
[86] Ibid, 309.

cooperates with government and legislator with the aim to facilitate franchise business conduct and remove unnecessary burden.[87] In UK, it is firmly believed that formal regulation is not necessary and that franchise relationship should be naturally regulated by market.[88]

1.2.4. Hybrid model

Lastly, a type of regulation that combines the above-mentioned regulatory models is *hybrid model*. Ordinarily, this model offers combination of elements of law that are part of private law and industry self-regulation, although some degree of regulatory interventions are present.[89] This category is typical for post-socialist and non-European emerging markets that still do not have a developed experience with franchise.[90]

A true example of a country that adopts elements from the other models is franchise regulatory system of China, which took place over the period of ten years.[91] The first franchise-related regulation was imposed in 1997. named Administration of Commercial Franchise Procedures (1997 Franchise Measures), which provides for regulation of both disclosure and registration, while the last product of the regulatory process ended in 2007. by aggregating a set of legal acts under the name „Franchise Regulations".[92] An uncommon and remarkable requirement of Chinese law is that the franchisees should be qualified as „lawfully established enterprise or other economic organization; and that it has financial resources, fixed premises and personnel".[93] An important contribution to that process was given by the China Chain Store &

[87] Ibid 312.
[88] Ibid
[89] Tajti (n 40), 80.
[90] Ibid
[91] Ibid, 81.
[92] Crawford Spencer (n 2) 181-182.
[93] Ibid, 185

Franchise Association (CCFA), an association with non-profit membership that is representing franchise chain on the national level.[94]

1.3. FRED research[95]

An interesting research has been conducted by Mark Abell who used FRED methodology to calculate how burdensome are national regulations on franchising in EU and whether that is effective and appropriate considering nature of the franchise.[96] The research comprehended 28 EU member states' franchise regulation and it referred to some solutions that are accepted in US and Australian regulations as the ideal ones.

Surprisingly, Abell got to conclusion that franchise is the most heavily regulated in those countries that do not have a franchise-specific law. According to the research, those are the countries that follow German approach[97] which treats duty of good faith strictly and does not perceive franchisees as independent business people.[98] Interestingly, EU countries that did enact franchise-specific laws turned to be the least detailed and comprehensive, which leads to conclusion that franchise laws did not provide with the expected effectiveness.[99] Besides that, United States and Australia, as countries with the most comprehensive regulation, took the middle position at the scale of franchise regulation strictness.[100]

At last, the researcher concludes that "weight of regulation does not necessarily equate to

[94] Yun Zhang 'The Information Imbalance in the Franchising Relationship: A Best Practice Model for Prior Disclosure and an Evaluation of China's Regulatory Regime' (DPhil thesis, University of New South Wales 2011), 336.
[95] Franchising Regulation Evaluation Data methodology is used to evaluate quantitative and qualitative aspects of regulation on franchise. See Abell (n 39).
[96] Ibid
[97] Those are: Germany, Austria, Greece, Portugal. Ibid
[98] The franchisees are rather qualified in these countries as "quasi consumers, quasi-employees and commercial agents". See Abell (n 39) 25.
[99] Ibid
[100] Ibid 21.

effectiveness or appropriateness of regulation".[101] The reason for that is exaggerated focus on regulation itself and overprotection of franchisees, without addressing other significant issues.[102] Countries with such regulation are criticized for failing to address the importance of maintaining continuous trust in franchise system, familiarizing the parties with possible risks and failing to promote and encourage them to enter into the franchise system.[103] Besides, countries that regulate franchise in special law do not offer bigger and more appropriate protection than those who lack franchise regulation, but contrary.[104]

1.4. Franchise regulatory situation in Serbia

Franchise in Serbia became a new business model from 1980's in the economic environment. Up to this day, Serbian legal system does not contain any regulation that addresses franchise specifically.

Franchise contract is treated as an innominate contract to which numerous laws are applicable. Law on Obligations serves as replacement to Civil Code that Serbia still does not possess. In relation to franchise, this law is applicable as a subsidiary legal source which regulates franchise agreement through general contract rules.[105] For instance, article 12 related to good faith and fair dealings is applicable to franchise contract and it can be significant in negotiation or drafting of contract phase.[106] Pursuant to that, article 30 imposes *culpa in contrahendo* liability that burdens franchisor during negotiations and protects franchisee to some extent.[107]

[101] Ibid 19.
[102] Ibid 24.
[103] Ibid 24.
[104] Ibid 25.
[105] Mirko Vasiljević, Trgovinsko pravo (14th edn Udruženje pravnika u privredi Republike Srbije 2014) 324.
[106] Tamara Milenković Kerović, 'Legal Incentives for the Franchising Investments – Serbian case' (2013) 1 Studia Prawnicze. Rozprawy i Materiały 85, 93.
[107] Ibid

The fact that this is a type of contract that encompasses number of specific elements from different nominated contracts raises many issues in legal treatment. [108] Consequently, provisions of Law on Obligations related to contract of sale, leasing or license may be applied to franchise as well.[109] As franchise is closely related to license contracts, articles 686-711 that cover license may be applicable to franchise with regard to transfer of intellectual property from franchisor to franchisee, but only if contract is concluded under the name of license.[110] Law on Trademarks mentions franchise by imposing mandatory provision regarding registration requirement.[111] Other areas of law are similarly addressed, depending on segments of franchise that is in focus.

1.4.1. Weaknesses of current regulatory situation

By reason of general regulation of franchise in Serbia, many concerns have been raised due to its lack of regulation and recognition as *sui generis* contract. Without determining the nature of franchise, as well as clarifying the position of the parties, it is likely that franchisee ends up damaged because of lack of knowledge and wrong expectations, which happened in Polish case.[112] Thus, scope of protection of franchisee should drag the most attention to legislator when enacting franchise regulation.

Absence of duty to disclose relevant information to the franchisee gives an open opportunity for franchisor to dictate and abuse the whole franchise relationship. Besides that, general rules from Law on Obligations cannot cover all the possible situations that could arise as an issue and that would lead to dispute. In concrete, article 268 of Law on Obligations imposes a liability for failure to notify other party on the relevant facts of their relationship, but in practice,

[108] Milenković Kerović (n 107) 88.
[109] Ibid, 94.
[110] Vasiljević (n 106), 324.
[111] Law on Trademarks (Official Gazette of the Republic of Serbia Nos. 104/2009 and 10/2013). See article 8.
[112] See subsection 2.1.1

that is applicable only after the contract is concluded.[113] That leaves a gap in pre-contractual phase, which is in franchise relationship a crucial part that needs to be regulated. Furthermore, in case of non-disclosure, the franchisee could only seek compensation for damages, but the legal destiny of franchise agreement could not be affected in any other way.[114]

In Serbia, the termination of the franchise relationship is primarily regulated by the contract or by the general rules on termination of contracts contained in Law on Obligation, that are applicable only in the event that the contract is not sufficiently regulated or the court refuses to apply the termination clauses of the contract.[115] Therefore, in the system where the specific type of contract is not regulated, it is recommendable to provide the good coverage and well-balanced terms of termination.[116]

On the other hand, regulation on franchise in Serbia would have many positive outcomes for Serbian economy in general, especially regarding business activity and employment.[117] An example of positive practice where a special law was enacted is Law on Financing Leasing, which positively promoted and increased activities of investors.[118] According to this example, adoption of franchise rules would also promote and encourage franchise parties to engage in this business concept by guaranteeing them adequate legal protection.

1.4.2. Draft of Civil Code of Serbia

The first initiative to regulate franchise happened in 2002. when Dr Parivodić was asked to draft sections on franchise and distribution contracts to be included into the new draft Law on

[113] Tamara Milenković Kerović , 'The new directions in enactment of franchising regulation in Serbia' (2008) 5 Facta Universitatis 205, 210.
[114] Ibid
[115] Milan Parivodić, 'Termination of Franchise Contracts - A Comparative Study' (2009) 7 Int'l J. Franchising L. 5, 5.
[116] Ibid
[117] Milenković Kerković 'Zbog čega i kako je potrebno regulisati ugovor o franšizingu u Srbiji' 325.
[118] Milenković Kerković, 'The new directions in enactment of franchising regulation in Serbia' 210.

Trade. According to his words, that was regrettably not achieved due to political reasons of that time.[119] Later in 2006, an increasing interest to regulate franchise was shown by formation of Commission of Legal Experts that proposed Model of regulation of 'New commercial contracts', that included franchise, leasing and factoring.[120] Consequently, the biggest step in regulating franchise is achieved in Civil Code, which is in the form of draft since 2015.

The proposed Draft of Civil Code dedicates to franchise a whole chapter with 35 articles. Chapter XXXIX of the Draft, if adopted in its entirety, presents a hybrid model of regulation. The proposed regulation includes two main types of 'regulatory interventions' that are characteristic for regulation-based model. Thus, Draft contains some mandatory rules, including disclosure and registration requirements, as well non-mandatory rules that allow freedom of the parties to contract.[121] The chapter on franchise can be regarded also as relationship law, because it regulates the whole franchise relationship – from conclusion of contract until termination and post-termination phase. Its content is mainly focused on defining and describing nature of franchise, as well rights, duties and liabilities of both franchisor and franchisee. Besides that, it contains provisions on limitation of rights of the parties and provisions related to termination of franchise contract. Apart from that, one section deals separately with master franchise, which is regulated on the basis of UNIDROIT Guide to Master Franchise Arrangements from 2007. Additionally, article 1262 only mentions registration requirement by referring to conditions set in a special code that regulates Register of Intellectual Property Office. The chapter of Draft devotes four articles to disclosure that are based on legislative solutions from UNIDROIT Model Franchise Disclosure Law from 2002. However, article 1269 provides additional provision related to language

[119] Milan Parivodić, 'Franchising in Serbia and Montenegro', 2 Int'l J. Franchising L 19 (2004) 20.
[120] Milenković Kerović 'The new directions in enactment of franchising regulation in Serbia' 206.
[121] Milenković Kerović „Zbog čega i kako je potrebno regulisati ugovor o franšizingu u Srbiji" 336.

requirement, prescribing requirement that disclosure document shall be written in official language of legal seat of the franchisee. This provision eases position of the franchisee by imposing a duty to cross-border franchisor from to translate all the necessary documents related to franchise agreement to franchisee's mother tongue.[122]

The last section dedicated to the franchise in the Draft of Civil Code prescribes the duration, renewal and termination of the franchise agreement. It contains seven articles[123] pertaining to the exit from agreement and provides with its consequences and option to renewal. According to the Draft, the franchise agreement may be concluded with definite or indefinite duration.[124] When negotiating duration of the contract, the parties shall take into consideration "the market demand, specific features of franchise system, as well the status of intellectual property rights that are transferred to the franchisee". Furthermore, the article 1288(2) states that the duration of the agreement shall be as long as it allows the franchisee to benefit from return of his investment. This is quite a remarkable and uncommon solution given by the Serbian legislator, because the other jurisdictions usually prescribe minimum duration of the franchise relationship as the mandatory norm, aiming to protect the weaker party.[125]

Moreover, the Draft clearly defines the consequences of the termination, stating that the franchisee shall cease from using the intellectual property after the expiration of the agreement.[126] Besides that, the franchisee shall return all the documents that contain know-how and equipment, refrain from using any rights that were transferred by the franchisor, as well abstain from revealing the confidential information, knowledge and practices received during the agreement validity.[127]

[122] Ibid 213.
[123] Draft arts 1288-1294.
[124] Draft art 1288(1).
[125] Jasna Bujuklić Mitrović, 'Ugovor o Master Franšizing u Svetlu Nacrta Srpskog Građanskog Zakonika' (Pravni fakultet Univerziteta u Beogradu 2018), 18.
[126] Draft art1294(2).
[127] Ivanka Spasić 'Poslovni sistem franšizinga – Šansa za privrednike u Srbiji' (2016) 7-9 Pravo i privreda 11, 28

The proposed provisions of the future Serbian Civil Code is one of the main topics in focus of this thesis. At first glance and before put into force, the chapter XXXIX gives impression of a contract that was taken seriously and comprehensively while drafting. The following chapters aim to analyze crucial provisions on franchise that would lead to detecting possible threats learned from comparison with US and European regulatory solutions.

CHAPTER TWO – Franchise case law

The purpose of this chapter is to present the various practical issues that occur in franchise reality. The number of cases and situations that happen inside and outside of the court, point out both legal and economic issues and unfairness that occur between the parties due to their naturally unequal positions. Thus, all selected cases of this chapter aim to show the causes and consequences of the franchise asymmetry of the parties, mostly focusing on asymmetry with regards to bargaining powers of the parties.

The chapter starts with Polish case that shows what kind of problems occur when franchise is treated as an innominate contract. The case analysis is followed by discussion related to Serbian Draft that regulates franchise, evaluating two alternatively imposed definitions of franchise. Furthermore, the next section presents the case whose essential importance rests outside of the court and focuses on economic side of the problem. It is the situation where franchisees lost a substantial amount of profit that was caused by franchisor's requests that forced the franchisees to terminate contract due to lack of funds before the license expiry. Although the case went before the court, it was rejected on procedural basis, which shows the powerlessness which franchisees face as weaker parties as result of franchisor's dictated conditions and determination. German case points out the situation where the franchisor stipulates clauses in franchise agreement that are unfair and harmful for the franchisee. Each one of these cases is followed by discussion on what can be learned from the cases and court's decisions. At last, current and new regulatory solutions in Serbia are presented, with the latter being discussed and evaluated from the perspective of the Draft of Civil Code of Serbia.

2.1. Franchise as an innominate contract

Although franchise is discussed until this point in different terms of regulation, this section presents situation in which franchise rests as innominate contract in some jurisdiction. As an innominate contract, this means that franchise is not classified by any specific name under any statute, nor does it have a defined form or content.[128] This experience of franchise exists in Hungary, Poland and Serbia. To illustrate, franchise in Poland is used in business environment, but does not have a legal definition, franchise-specific law does not exist, nor do disclosure and registration requirements exist.[129] Consequently, article 353 of the Polish Civil Code proclaims freedom of contract, meaning that nothing but general rules of contract law apply to franchise, as it is treated as an innominate contract.[130] Thus, as the stated article declares, the parties are free to build their relationship as they wish, but the content and purpose shall stay within the limits of the law, the nature of the legal relationship or good morals.[131] Similar clause is stipulated in article 10 of Law on Obligations in Serbia, which states that "parties to the obligation relations shall be free, within the limits of compulsory legislation, public policy and good faith, to arrange their relations as they please".[132] In the further text, Polish case is presenting the confusion and accompanying issues that arise from franchise being treated as innominate contract.

2.1.1. Polish case[133]

The parties of the case entered into the contract on 24 June 1993 with the aim to regulate their business relationship related to distribution of ice-cream which is used by mobile sales points.

[128] Business dictionary <https://bit.ly/2UGNHcs> accessed 18 April 2019.
[129] 'Franchise: Poland 2019' (*International Comparative Legal Guides*, 18 September 2018) <https://bit.ly/2Zx7Ncs> accessed 18 April 2019.
[130] Messmann, Tajti, (n 76), 653.
[131] Ibid
[132]The Law of Contract and Torts (tr) Đurica Krstić (Jugoslovenski pregled 1997), art 10.
[133]Decision of Court of Appeal of Katowice (4 March 1998) I Aca 636/98.

The franchisor, Family Frost – Polska Sp. z.o.o., was obliged to allow to the other party to use specific vehicles with franchisor's logo and provide with advisory services about know-how and business conduct. On the other side, two entrepreneurs (franchisees) have to pay PLN 58,967 as initial licensee fee and regularly make the payments to the franchisor, including costs related to distribution, rental of vehicles and payment for products. Apart from that, the contract was applicable to specific territory indicated by the franchisor.

However, the franchisees faced many struggles since the commencement of the franchise relationship as their business was unprofitable, which amounted PLN 497,242.52 of debts that they owed to the franchisor. After terminating the contract and demanding the payment of the balance, the franchisor was sued by the franchisees who claimed that the contract was void. Firstly, the franchisees alleged that they could not perform the contact "due to reasons of economic nature". Furthermore, they claimed that the nature of the contact was violated because it created an unjust subordination between the parties in which only one party limits business decisions and transfers all the risks to the other party. Lastly, they asserted that the contract violated good morals. The franchisees required the return of paid initial license fee, claiming that there was no equivalent act of the franchisor that would justify this payment. The franchisor renounced these claims, alleging that the contact is in compliance with the nature of the franchise contract and that the franchisees failed to maintain the required sales level which led to such unfavorable results.

The Circuit Court granted the franchisees with the amount of the initial fee with interest, but also granted the franchisor with the whole amount of debt. Discontented with results, both parties appealed to the Court of Appeals of Katowice. The Court of Appeals finally decided in favor of the franchisor, ordering the initial fee to be paid back to the franchisor, holding that the franchise contract is valid.

As regards to the alleged violation of the nature of franchise relationship, the court held that asymmetrical positions of the parties are constituent part of the nature of franchise and that the contract did not exceed its limits allowed by freedom of contract. Furthermore, the court denied franchisees' claim that they are the only party to carry the burden of the contractual relationship, contending that the franchisor risks the violation of his business schemes, trademark, business name, professional experience, etc. Thus, the failure of franchisee's acts can severely harm "the general image of the franchisor on the market, its commercial standing, competitiveness, etc". Besides that, the court disagrees with the plaintiffs in relation to the financial risks that burden only the franchisees, emphasizing that the franchisees themselves admitted that they entered the business relationship with insufficient funds, wherefore they had to finance from the credit offered by the franchisor. Thus, it explains that this contract cannot be against good morals, since franchise arrangement is characterized by two types of fees, as paid in present case – the initial fee, paid for rights transferred under license) and the regular fee, related to the on-going assistance and other services provided by the franchisor while the relationship lasts. The court reasoned that the franchisees' duties are to pay the fees as agreed upon the contract and follow the instructions, while the franchisor, in fact, risks more, since he invests in the commencement of the business, including assistance and advisory services, but also risks the whole brand's reputation. At last, the Polish court finally rejected all claims of the franchisees, concluding that the franchisees sought to justify their financial loss by making allegations that the contract is void.

2.1.2. Lessons for Serbia from the Polish case

For the purpose of this paper, the main focus on the Polish case goes to the two facts that derive from it – the issue of franchise not being regulated by any primary source of law and the definition of the nature of franchise. Firstly, this case sheds a light on the situation where national

jurisdiction does not regulate franchise in any law, which leads that the court has authority to determine the essence of the innominate contract from secondary sources of law.[134]

Poland, just like the other Central and Eastern emerging countries that aim to expand their market and develop economy, was introduced to franchise at the time when many Western countries reached the full natural growth and development of franchise. As Poland did not enact any legislation related to franchise up to this day, this contract is governed by general contractual terms, while relevant provisions may be found in Civil Code, the Consumer Protection Law, the Competition Law, the Labor Code, General Data Protection Regulation and unfair trade practices, with addition to principles from European Code of Ethics and laws of EU.[135] Consequently, shaping the treatment of franchise rests in hands of Polish courts as a last resort.[136] The courts exercise their discretionary power when they, for instance, declare the contract null and void according to qualification of relevant circumstances of each case.[137] For that reason, the presented Polish case from 1998 represents a benchmark in further defining and legal treatment of franchise. Another important case where franchise is defined in more depth is the case of Supreme Court of in case no. I CSK 348/06.[138] Besides that, the franchise agreement is governed by the general contractual principles, among which the so-called "principle of community life" which is equivalent to the fair dealing principle.[139] This principle plays an important role in franchise because the contract may be declared void if it is "substantially unjust", one party shows lack of respect and/or causes damage to other party's interests.[140]

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[134] Tibor Tajti, 'Franchise and Contract Asymmetry: A Common Trans-Atlantic Agenda' [2015] Loyola of Los Angeles International and Comparative Law Review 245, 247.
[135] Petro Nemesh, Vitalii Kadala, 'Economic and Legal Aspects of the Franchise Agreement in Poland' (2019) 5 Balt. J. Econ. Stud. 137, 138.
[136] 'Franchise: Poland 2019' (n 130).
[137] Nemesh, Kadala (n 136), 138.
[138] Ibid
[139] Ibid, 139.
[140] Ibid

However, as Poland is a leading country of the region to implement the franchise concept in its economy, having 85% of national franchises and more than 10,000 new franchises established each year[141], the question is whether it is acceptable for franchise to remain unregulated. As presented, remaining "no name" contract with no strict rules to govern it, leaves to the court a wide discretionary power to decide the case, which creates uncertainty and unpredictability. The Court of Appeal of Katowice paid a lot of attention to the nature of franchise relationship between the parties and pointed out many important features of the franchise agreement that were (potentially) unknown to the franchisees. However, as the court was to determine how much contractual disequilibrium may be allowed in favor of one party over another, the reasoning of the decision may be considered as slightly unfair for the franchisees.

Although the asymmetrical feature of the franchise contract was construed accurately, in the author's opinion the court was not right in one important point concerning the negotiation and conclusion of the contract. It seems that the court was harsh in the matter that it did not take into consideration the weight of franchisees position, regarding the fact that they had no chance to negotiate the terms of the contract, but had to adhere to it on the "take it or leave it" basis. The court's tone of "accusing" the franchisees for justifying their business failure with claiming that the contract is void leaves a bitter taste of this decision. Notwithstanding the lack of other suggestion in modifying of court's decision, the tone of decision clearly takes the side of franchisor, neglecting the franchisee's weaker position and blaming the franchisees for their own breakdown. In fact, the franchisees were the ones who were practically unable to exit the agreement which was clearly unfavorable for them. Also, many risks and burdens overloaded their position during the course of franchise relationship, which can lead to conclusion that they went

[141] Ibid, 138.

bankrupt because the franchisor dictated everything.[142] Besides that, as franchise was a new entrepreneurial concept of that time, it is understandable that the franchisees could not fully understand the essence of the contract and could not perceive it as burdensome and inequivalent as it appeared. At last, the main critique goes against the harsh reasoning of the Court of Appeals. Yet, this holding should be also praised because it realistically represents the reality of the franchise arrangement and indirectly indicates that the franchisees should be more cautious when entering into franchise.

2.1.3. Lessons for Serbia

Imagining that the case such as Polish one appeared before Serbian courts, as the regulatory environment is practically the same in Poland and Serbia, the outcome would depend on court's interpretation of general rules of contract law. As the franchise case law in Serbia is still scarce, it is uncertain how would the court decide in this case. The business environment in Serbia is not sufficiently developed to create a behavior of the actors of the franchise relationship to present the issues they are facing before the courts. The lack of developed case law related to franchise confirms that fact. As the matter of fact, the court's databases only give results of the cases that are not essentially related to the essence of franchise, but only occasionally mention it as a contract in which the main breach occurred. One case drew attention to possible issues that might occur once franchise becomes more domesticated business concept in Serbia. Although not too relevant in the sense that should provide Serbia with new legislative lessons of conduct in the future, this case merely points out on possible abuse from the franchisee as the party that the regulations by rule attempt to provide protection against the franchisor.

[142] Tibor Tajti (Class of Law for Small and Mid-Scale Start Up Enterprises, 14 January 2019).

The case no. 92/2001[143] points out the legal consequences that arise for both parties after the termination of the franchise agreement. In this case, the franchise agreement was concluded between the parties with limited duration of five years. However, after the agreement expiration, the franchisee continued using the trademark of the franchisor. The court rightfully decided on behalf of the franchisor, issuing an injunction towards the franchisee to cease using the intellectual property rights of the franchisor. The court ruled on the basis of the non-competition rule of the Law on Trade.[144] Therefore, this case shows that even though franchisors are usually regarded as the stronger party that may misuse his position, the other way around is possible as well.

As franchise is a complex business relationship, the conclusion is that it should not remain unregulated, since the openness to interpretation may be misused in various ways, even by the court. Still, it seems that courts and scholars are not able to give an universal and consistent answer to "what asymmetry is concretely made of and what level of franchise asymmetry should be tolerated".[145] As concluded, the essence of franchise lays in the asymmetrical positions of the parties, such asymmetry may be outweighed by imposing duties that would burden the franchisor. In that sense, the Draft of Civil Code of Serbia does not leave the franchisor without duties with corresponding sanctions. Under the article 1276, the franchisor is liable for the existence and content of the rights that are transferred to the franchisee, as well for the disclosure, not just in pre-contractual phase, but also throughout the whole relationship. The sanction that these article imposes against the franchisor are the avoidance of the contract or proportional reduction of the franchise fee. In any case, the franchisee has a right to damages. Thus, the Draft efficiently imposes the duties towards the franchisor, creating a certain amount of balance between the parties.

[143] *Zabrana korišćenja firme i žiga posle prestanka ugovora o franšizingu* [2001] Supreme Court of Serbia 92/2001.
[144] Zakon o trgovini („Službeni list SRJ", br. 32/93, 50/93, 41/94, 29/96 I 37/02 – dr. zakon i „Službeni glasnik RS", br. 101/05 – dr. zakon i 85/05 – dr. zakon
[145] Tajti 'Franchise and Contract Asymmetry: A Common Trans-Atlantic Agenda' 273.

2.2. Reasons for unfavorable outcome for franchisees in franchise disputes

Before opening a discussion about the franchise case law related to disparity of bargaining powers, this section presents the practical side of problems from the franchisees' perspective. Mendelsohn remarks that beside a large number of franchise cases, "the consequences for franchisors are not as dire as the large number of lawsuits may suggest".[146] It means that winning a case against a more powerful opponent is usually unrealistic, so the franchisees see no purpose in bringing action against franchisors. Consequently, it is usually hard or even impossible for franchisees to initiate or proceed with the lawsuit because of lack of sufficient funds and high litigation expenses. The situation where the franchisee was unable to efficiently defend himself at hearings is demonstrated in the German case where franchise contract clause contained arbitration clause that created an unfairly unbalanced relation between the parties.[147] All of these are reasons that make franchisees unable to effectively defend their fundamental rights that were harmed.

In reality, not only that the franchisees barely engage in franchise litigation, but in case that they do, they may be easily challenged by the franchisor for the lack of standing before the court. Therefore, the primary task of the franchisor as defendant is to focus on arguments against the legal standing of the franchisee before the court, rather than preparing for the best defense.[148] In order to make a standing before the US court, plaintiff needs to have a "legally protectable and tangible interest at stake in the litigation".[149] That requirement shall be satisfied by fulfilling the requirements of the so-called "constitutional standing test", which requires not only mere economic loss, but such injury that is distinct and palpable and that is caused by challenged activity

[146] Mendelsohn, Bynoe (n 1), 340.
[147] See subsection 2.3.1.
[148] Jon S Swierzewki, 'Standing in Franchise Disputes: Check the Invitations, Not Every Party Gets Inside' (2007) 26 ABA 1, 1.
[149] Ibid

for which remedy can be offered by the court.[150] In general, the franchisors may be presumably held liable for fraud or substantial breaches, but hardly for antitrust violations or breaches of duty of good faith and fair dealing or breaches of fiduciary duties.[151] Consequently, making a standing in the franchise litigation in United States may be difficult to achieve under both federal and state laws, but especially if franchisee as plaintiff relates its claims on antitrust violations of the franchisor.[152]

2.2.1. The case of McDonald's

The main discussion of this subchapter is not directly focused on the court case, but rather on the economic troubles of franchise from perspective of the franchisee, while legal issues on this topic are further elaborated in the following case. The situation in which franchisees opposed to the franchisor, McDonald's Corp, is represented in a "FTC Public Comment #61"[153] that was composed by the franchisees, Joan and Frederic Fiore, who addressed the comment to Federal Trade Commission. The crucial contribution of this public comment, also called "McDonald's McVictims rights", is the revelation of the essential issues of asymmetry of the parties of franchise, which is fearlessly delivered by the franchisee.

In 1972, the married couple Fiore opened their first franchised McDonald's restaurant in Long Island City in New York and later expanded their business, holding five restaurants in total. Being a wealthy and well-secured family, Joan and Frederick Fiore wanted to achieve "the great American dream of entrepreneurial financial independence in (their) retirement years". After being forced to terminate the franchise agreement just before their 20-year-long lease would expire, the

[150] Ibid
[151] Mendelsohn, Bynoe (n 1), 341.
[152] Swierzewki (n 149) 1-2.
[153] Frederick Fiore and Joan Fiore, 'F.T.C. Public Comment 61' (*Wikifranchise.org*, 30 April 1997) <https://bit.ly/2GCgcCO> accessed 16 March 2019.

couple accused the franchisor of unjust de-franchise process. The issue occurred when McDonald's required from the franchisees to build a double-drive through, which would cost the franchisees $75,000 that they could not afford. The franchisor claimed such requirement on the basis of re-investment clause from the franchise contract, under which franchisees were obliged to re-invest 10% of annual sales into the restaurants that were directed by them. Fiore couple condemned such act as devaluation of their business and claimed violation of antitrust rules. Their understanding of rationale for such acts of McDonald's was the aim to acquire premises for "fat bargain prices", which would be followed by contracting franchise to the fresh and unexperienced franchisees for much higher price. They also underline that McDonald's deliberately "forces many of its older franchisees out of the system by a number of avenues, one of which is to purchase their franchisees stores at bargain basement prices and ultimately inflating their earnings and devaluing the franchisees assets." Thus, as Fiore couple was pressured by the franchisor to sell their restaurants because of "restrained sale", they were forced to sell their restaurants for 20% of their true market value. Although the couple requested to purchase real estate and build their restaurant on their own, McDonald's denied such request, alleging that allowing to franchisees to possess real estate would be against McDonald's policy. An important part of the public comment is devoted to discussion of disparity of bargaining powers of the franchise parties.[154] At last, the

[154] "As relates to the McDonald's Corporation versus the potential/present franchisee, the unbalance in bargaining position gives the franchisor power to pick sites and build buildings without warranty or recourse against franchisor.

a) It forces the franchisee to pay for all maintenance and repair costs on that site and in any McDonald's restaurant regardless of the cause of that cost, including franchisor fraud and negligence;
b) It permits the franchisor to determine who the franchisee can buy supplies from
c) It permits the franchisor to establish prices that the supplier charges, including a union transportation cost for delivery, regardless of whether your restaurant is one or five hundred miles from supplier's place of business;
d) It permits the franchisor to subjectively assess whether a franchisee is complying with the franchise standards;
e) It permits the franchisor to require minimum gross monthly sales that UFOC and franchise agreement require;
f) It permits the franchisor to require promotional items at below cost prices;
g) It permits the franchisor to arbitrarily determine if franchisee is expandable based upon franchise agreements;
h) It permits the franchisor to terminate franchises on the death of the principal franchisor (once the franchisees have been determined to be un-expandable) to threaten or to terminate the franchise if the franchisee enters into other business opportunities with his capital and time;

franchisees sharply contend: "McDonald's Corporation robbed us of our savings".[155]

Eventually, the case of Fiores ended up before District Court for the Eastern District of New York in 1996. However, the case *Fiore v. McDonald's Corp.*[156] lacked any success – the court concluded that the plaintiffs have "no standing, as individuals, to sue the franchisor".[157] The further court's explanation was that franchisees of the business who legally transfer their interest in franchise to a corporation, cannot sue the franchisor as individuals if they own 100% of the shares.[158] Besides that, the court stated that "having to respond to irrelevant allegations is prejudicial".[159]

In conclusion, this case sums up the most common reasons for initiation of franchise disputes, in concrete the following two: the disparity franchise agreement imposes by use of stronger bargaining power of one of the parties and the termination of the contract either by creating indirectly conditions that lead to termination by franchisees or direct termination by the franchisor, at any time. The risks and troubles that this case represents may happen in any franchise relationship, regardless the jurisdiction that regulates its particulars. Therefore, it is unnecessary to conclude how would this case relate to franchise in Serbia, because this is the economic reality that follows any franchise. However, the legal solutions may vary in different jurisdictions. That is why this case is only a threshold that opens Pandora's box of franchise, whose only minor part is elaborated in following cases to the extent possible.

i) It permits the franchisor to subjectively determine if a franchise is going to be renewed;
j) If the franchise is not renewed, it permits the franchisor to punitively review and approve potential buyers and the purchase price of the franchise. See Fiore, Fiore (n 154).

[155] The accusations continued as follows: "McDonald's has single handedly destroyed franchisee's lifestyles, savings, pensions, retirement plans, homes, caused financial ruin, broken marriages, uprooted families, bankruptcy and suicides". Ibid

[156] *Fiore v McDonald's Corp* [1996] EDNY WL 91908.

[157] Swierzewki (n 149), 9.

[158] Ibid

[159] Ibid

2.3. Disparity of bargaining powers of the parties

"There is overwhelming disparity in bargaining positions between a McDonald's Corporation, as franchisor and landlord, which is the best example of what happens in a business system that is totally unregulated and where franchisees have absolutely no rights of recourse". [160] By saying this, Fiore family described their relationship and position as opposed to their franchisor, McDonald's which is presented in the previous section. These are the words that present the essential risk every franchisee takes with entering into the franchise system – the risk that their powerlessness is being abused by the more powerful franchisor that decides on everything.

The franchise agreements are ordinarily offered in the standardized type of contract that is imposed to the other party on the "take it or leave it" basis.[161] The franchise contracts risk to be driven by the unfair conditions if there is no equality of bargaining positions of the parties or one party is unable to negotiate effectively.[162] Thus, those circumstances "contribute to greater power to a franchisor and greater uncertainty and risk for a franchisee".[163] Consequently, the balance between the parties is affected even before the franchise agreement is concluded – from negotiations until termination, especially if arbitration or litigation interfere in the franchise relationship. According to Emerson, arbitration and venue stipulations are, besides franchise duration and insurance requirements, typical provisions that are not stipulated for the benefit of the franchisee.[164] These are clauses that clearly express stronger bargaining power of the franchisor.[165]

[160] Fiore, Fiore (n 154).
[161] Elizabeth Crawford Spencer 'The Applicability of Unfair Contract Terms Legislation to Franchise Contracts' (2013) 37 U.W. Austl. L. Rev. 156, 163.
[162] Ibid
[163] Crawford Spencer (n 2) 113.
[164] Robert Emerson 'Franchise Contract Clauses and the Franchisor's Duty of Care toward its Franchisees' (1994) 72 N.C. L. Rev. 905, 956
[165] Ibid

The dispute resolution is generally resolved in the franchise agreement, by prior disclosure or by codes of the industry associations.[166] The disputes most commonly arise during or in relation with pre-sale phase, and for that reason, mediation is regarded as the most efficient method of resolving disputes in franchise.[167] In United States, the FTC Rule does not require disclosure of methods of dispute resolution by mediation or arbitration, although that matter is left to states to regulate.[168] Other countries with franchise-specific regulation do not contain provisions that are referring to dispute resolution, most likely because it is commonly left to the other legal acts.[169] The main idea of stipulating the alternative dispute resolutions (ADR) is to take the early steps of solving the disputes at the earliest stage and to reduce costs and delays.[170] Still, the lack of regulations of the conflict resolution provisions is rather inconvenient, given the importance these matters have while managing the contractual relationship of the parties.[171] The following case illustrates a situation where franchisor imposed conditions to arbitrate the case to the extent that put the franchisee in the disadvantaged position.

2.3.1. German case No 141 [172]

The franchisor's intention was to spread its business of restaurants that sells sandwiches and salads on German territory and for that reason it chose a small German start-up company to operate restaurants in the city of Erfurt. The franchise agreement was concluded in 2002 between the Dutch subsidiary of US franchisor and the German entrepreneur. Five years later, the franchisee failed to pay franchise fees and Dutch subsidiary terminated the franchise contract and initiated

[166] Zhang (n 95), 53.
[167] Milenković Kerović 'Zbog čega i kako je potrebno regulisati ugovor o franšizingu u Srbiji', 329.
[168] Crawford Spencer (n 2), 150-152.
[169] Ibid, 281.
[170] Mendelsohn, Bynoe (n 1), 341
[171] Crawford Spencer (n 2), 281.
[172] *Germany No 141, Subsidiary company of Franchiser v Franchisee* [2011] Higher Regional Court of Thuringia 1 Sch 01/08.

arbitration with the venue in New York, United States. The sole arbitrator chosen by the arbitration clause of the contract decided in favor of the claimant. However, when the award was sought to be enforced, the Court of Appeal of Thuringia refused to do so. Therefore, the analysis focuses on the reasons for denial, explaining the facts that made the franchise agreement "grossly disadvantage the franchisee".

The main reason for denial of enforcement of the arbitral award was the existence of the strategic asymmetry between the parties. Firstly, the franchise agreement contained the conditions set in the standardized form of contract provided entirely by the franchisor. The contract provided for the Liechtenstein law as applicable law to the contract. The disputes that would arise between the parties are stipulated to be resolved by the International Centre for Dispute Resolution (ICDR) and under the UNCITRAL Rules. Moreover, the arbitration clause of the contract declared the place of hearings to be held in New York in United States.

Consequently, the Appellate Court of Thuringia held that the arbitration clause created "considerable disparity" between the parties, making the arbitration clause null and void under the Liechtenstein law. Such disparity is constituted by selecting the venue of arbitration to be in New York, the place that is hardly reachable for a small and inexperienced start-up company without substantial amount of funds invested. Thus, the franchisee was put in a disadvantageous position because traveling to the oral hearings overseas would amount high expenditures of money and time, most probably with unsuccessful outcome. Finally, the court declared that it is irrelevant whether the oral hearings were actually held in New York.

2.3.2. Lessons from the German case

However, the issue of the case denotes severe problems that arise in case of the dispute between the parties, since their positions are apparently imbalanced. In concrete, at the time of

initiated litigation or arbitration, the franchisee already suffers difficulties in the business to that extent that his chances to fund the legal proceedings are reduced and certainly less possible than those of the franchisor.[173] There are two possible ways to solve or mitigate this inequality.

On the one hand, the imbalanced circumstances that took place in the above-mentioned case are resolved by the courts. Since neither Germany, not Liechtenstein have franchise-specific laws, the German court analyzed the position of the franchisee in more depth in order to decide what character shall be assigned to his position and which rules shall apply. Accordingly, the court equated the franchisee with the consumer, by definition provided in the Liechtenstein Civil Code (ABGB). Consequently, the court held that the same rules provided in the Section 879(3) of Civil Code on "Consumer Protection" shall be applied to the franchisee, especially concerning disparity between the parties in which one of the parties is disadvantaged.[174]

According to Spencer, one of the "layers of governance" is the judiciary interpretation.[175] As she presents, the courts have a crucial role in interpreting and enforcing statutes and contracts, which goes hand in hand with the cases where franchise is self-regulated contract, namely it is regulated merely by franchise agreement.[176] This gives to the courts a discretionary power to interpret default rules of the contract, as well implied terms such as good faith and fiduciary duties.[177] Consequently, the inconsistency, efficiency, unpredictability and flexibility of interpretation are serious reasons for concern. Although Court of Appeal of Thuringia made fair and just decision, deficit of precisely defined rules for a specific contract such as franchise may

[173] Tamara Milenković Kerković 'The Main Directions in Comparative Franchising Regulation – UNIDROIT Initiative and its Influence' (2010) 13 ERSJ 103, 109.
[174] "A clause contained in standard conditions which does not determine one of the reciprocal main performances is void at any event if, in light of all the circumstances of the case, it causes a considerable disparity of contractual rights and obligations to the disadvantage of one of the contracting parties."
[175] Crawford Spencer (n 2), 34.
[176] Ibid
[177] Ibid

cause additional harm. One must also take into account that courts may also be influenced by external factors, especially if some of the "big players" is sitting on the bench of defendant. Thus, the danger lies where result of dispute depends only on court interpretation with no strict legislation to support it.

On the other hand, the more favorable option is the regulatory solutions, since jurisdictions where laws regulating franchise are enacted have by rule more secure and franchise-friendly environment. Regulation enables the countries to efficiently protect the more vulnerable party by reacting on misconduct of the other one. A bright example of extensive protection of the franchisee is represented in the Californian case *T-Bird Nevada LLC v Outback Steakhouse, Inc.*[178] One of the issues of the case is whether the forum selection clause should be governed by Florida or California law. The essence of the case is the best described by the following quote: "claims of each side are swords in California and shields in Florida", meaning that the franchisee could attack the validity of the contract if Californian law prevails. Finally, the California Court of Appeals held that the Florida forum selection clause is void on the basis of California Franchise Relations Act. The protective clause of CFRA states that "a provision in a franchise agreement restricting venue to a forum outside this state is void (…)".[179] Thus, if the franchisee is unfairly forced to litigate before the outside-of-state court at a "considerable expense", the franchise agreement shall be void.[180]

In conclusion, as bargaining disparity represents one of the important asymmetrical features of this contract, it shall be considered as a constituent part of its nature. However, the real challenge for the legislator is making a proper basis for creating balance between the parties by

[178] T-Bird Nevada LLC, et al. V. Outback Steakhouse, Inc.,et al (n 64).
[179] California Franchise Relations Act (CFRA) 1995 §20040.5
[180] T-Bird Nevada LLC, et al. V. Outback Steakhouse, Inc.,et al (n 64) para 4.

selecting conditions and criteria in order to mitigate asymmetry.[181] Thus, the courts should be advised to take that fact into consideration as an important circumstance of the franchise relationship which makes the franchisee a weaker party.

[181] Tajti (n 135), 251.

CONCLUSION

Taking everything from this paper into consideration, two streams of conclusions can be deducted with regards to theoretical and practical part reproduced in the two chapter of this paper. However, these conclusions shall not be interpreted separately, but to the contrary – one does not go without the other. Taken together, they create a complete picture of business format franchise.

First chapter opened by posing the question why the regulation on franchise is needed and what troubles the lack of regulation might bring. Various issues were presented, concluding that abuses in franchise may come from both parties. Therefore, it is more likely that the franchisee may harm the franchisor by non-payment, although the more harmful might be the irreparable injury related to violation of intellectual property and know-how of the franchisor. On the other side, it is more common that the franchisor would benefit from information and bargaining asymmetry, which can lead to situation where he is the only party that may terminate the contract, leaving the franchisee trapped in franchise arrangement until bankruptcy.

Moreover, the aim of the first chapter was to make an overview of the existing regulatory regimes of franchise primarily in United States and Europe, but it comprehended even further jurisdictions such as China and Australia. Three main regulatory models were presented with the additional hybrid one, each being represented by the dominant state that decided upon regulating franchise under that model. Firstly, in is concluded that the US three-layered regulatory system is the most comprehensive, effective and successful regulatory system that countries should look up to. As the majority of scholars concur, the brightest example of franchise regulation exists in California because it goes a step further, especially regarding the disclosure and registration requirements, as well out-of-state venue of disputes article which render contract void if stipulated in unfair manner to harm the franchisee. Another remark to the regulatory regimes pertains to

European regulation, which is fragmented and differentiate widely. The main result in evaluation of different regimes is the best concluded in the FRED research conducted by Abell. Firstly, he concluded that it is not necessary to have a franchise related law in order to impose burdensome rules over franchise. Therefore, the countries with Germanic approach turned out to the least appropriate regime due to their overwhelming rules, while contrary, franchise-specific regulation appeared to be the least protective. The most balanced regulatory types pertain to US and Australia. Besides the representation of the other jurisdictions, the main focus was on Serbia. After a brief introduction to poorly regulated franchise at this moment, an overview of the whole franchise section followed, emphasizing new and interesting solution provided by the Draft of Civil Code.

The second chapter focused on the concrete and real issues of franchise arrangement. Firstly, the Polish case presented the issues that arise when franchise is treated as an innominate contract. The Court of Appeals of Katowice pointed out correctly some of the features of the franchise, but sided with the franchisors and not taking into consideration the hardship of franchisees position. Thus, the court was too harsh when reasoning the position of the franchisees. This case presents magnificently the issue of lack of franchise-related regulation, which threatens Serbian case law as well. In conclusion, the situation where courts are given much of discretionary power leads to unjust results for the parties. There, one more point is given in favor to regulating franchise.

The Mcdonald's case presented the close-up of the franchise relationship between the parties. It shows how franchisor can create such a situation from which the franchisees suffer all the risks while being unable to terminate the contract. Unfortunately to the franchisees, they could not even get the chance to present their case before the court because of lack of legal standing as individuals. That just proves that the franchisors are better positioned parties.

That conclusion leads to another issue of disparity of bargaining powers, presented in the German case. The essence of the case pertains to the inability of the franchisees to negotiate and efficiently impact any part of the franchise contract. Although this time the court made a just decision, there is still the risk of court's misinterpretation, as well misuse. Therefore, the courts should be more tightly coupled with the legally binding rules that govern the franchise relationship. A positive example once more belongs to California franchise regulation, since the Californian case showed why its regulatory system is the most comprehensive, effective and protective in the world and why other countries should look up to it. Reasonably, one cannot expect the franchisee to be cautious but must also provide the effective and protective regulation and enforcement mechanisms.

As regards to the Serbian franchise law, a lot of hope is given to the adoption of the Draft of Civil Code. Not just that the franchise would be regulated for the first time, but the quality of the regulation stands out for its comprehensiveness. The positive side of the section about franchise is that it does not focus only on one part of franchise regulation, but it includes both pre-contractual and the whole franchise relationship until its termination with the following consequences. Thus, it contains both disclosure and relationship rules, while the registration requirements are referred to be used in another legislation that deals with intellectual property rights. In conclusion, the Draft seems promising and at least at first glance, it creates realistic and well-formatted regulatory solutions. Hopefully the franchise section, as well the whole Civil Code will not remain just another decent piece of legislation, but it will be adopted, applied and enforced fairly and justly.

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