

FRANCHISING IN THE MIDDLE EAST: The Example of Egypt

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With the largest population in the Arab Middle East and a central location between Europe and East Asia, Egypt offers one of the biggest sources of franchising markets in the world for new business opportunities. Egypt, however, does not have specialized laws regulating franchising, which results in real challenges for investors who are seeking to franchise their businesses in Egypt, along with their legal advisors. It also creates problems for the courts who must rule on disputes arising from franchising transactions.

Because of this lack of formal legal guidance in Egypt, other laws, including contract, commercial and agency laws, have had a substantial impact on franchising. This inconsistency in application can lead to contradictions as to the specific nature of franchising, which can make it difficult to negotiate and decide various issues arising under franchise agreements. Further, the variety of applications can impose heavy burdens on franchising parties.

With all of these factors in place, it seems like a perfect time to discuss a new legal framework for franchising in Egypt. Such legal reform will be important for Egypt in order to recover from the economic impact of the January Revolution and subsequent political unrest, and also to improve the chances for foreign investment. A comprehensive Egyptian franchise law proposal should address various issues that are commonly dealt with in other franchise law frameworks around the globe, such as disclosure commitments, registration requirements, and substantive rights and obligations of the parties.

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INTRODUCTION

Franchising is a business tool where a business owner, the franchisor, allows another person, the franchisee, to trade in his goods or services in conformity with the franchisor's business plan and using the franchisor's trademark. Franchising is beneficial for both franchisors and franchisees. Franchising helps franchisors to expand their business rapidly through a well-organized distribution system. Franchising also allows franchisees to become a part of a successful business chain already mastered by the

franchisor and to receive the technical assistance necessary to efficiently operate the franchised business, such as guidance on store layout, design, and site selection.

In Egypt, franchising is an emerging market and is treated as an important investment methodology that significantly contributes to the Egyptian Gross Domestic Product (GDP).¹

It helps to speed up Egypt's economic growth by attracting foreign investment into Egypt and creating new job opportunities. This is particularly important considering Egypt's central position in the Middle East, making Egypt a connection point to Middle Eastern markets and enhancing its attractiveness to franchisors.² Approximately forty international franchisors have outlets in Egypt, with twenty-five in the food sector alone. Furthermore, with a population of over 95 million, Egypt has a high demand for top brands in fashion and technology. Given the need for convenient services in Egypt, franchises can provide an effective solution, but franchising is still an emerging market and can be heavily concentrated. For example, Cairo, Egypt's capital and largest city, contains 65 percent of all Egyptian franchised outlets. Another 8.6 percent are found in Alexandria, the second largest city.³

Though franchising in Egypt is one of the primary investment strategies, Egypt does not have a law on franchising. To comprehensively regulate the specific aspects of a franchising transaction, franchising laws should address issues such as: 1) the definition and elements of a franchise, 2) protection of intellectual property granted by the franchisor to the franchisee, 3) confidential know-how, 4) non-competition and non-solicitation, 5) disclosure of all relevant information by the franchisor before the conclusion of the franchise agreement, and 5) the day to day operation of the franchised unit by the franchisee, among others.

In Egypt, the lack of formal governance addressing the aforementioned issues has left regulation to a hodgepodge of other laws, such as those governing general commercial contracts, intellectual property, tax, insurance, and labor. This wide and varied application of laws and regulations contradicts the specific nature of franchising transactions, which requires strong protections for both parties, particularly with the fast growth of technology and the complexity of international licensing. Another issue faced in applying a mixture of laws to franchising is that

1. J. Perry Maisonneuve, *Franchising in the Middle East: Business Perspective*, in *FRANCHISING IN THE MIDDLE EAST: NAVIGATING THE RISKS AND REWARDS OF THE WORLD'S MOST INTERESTED MARKET 10* (The American Bar Association ABA Forum on Franchising and the ABA Center for Continuing Legal Education ed., 2010).

2. Hussein Aboul Fath, *Franchising Your Concept in Egypt*, INT'L FRANCHISE ASS'N. (Apr. 2007), <http://www.franchise.org/franchise-news-detail.aspx?id=33656> [<https://perma.cc/TX7M-2ZP9>].

3. MARKETTEERS-EGYPT, *FRANCHISING CENSUS EGYPT 2004* (2004), <http://www.efda.org/3A-Franchising-Census-Egypt-2004.pdf> [<https://perma.cc/AF99-PSSJ>] (powerpoint presentation summarizing report commissioned by SFD-SEDO, Franchise Department).

the franchising parties generally prefer their agreements to be governed by simple and comprehensive law, as the application of complex laws can complicate negotiations and decisions on various issues arising under an agreement. This is particularly true in a civil law country like Egypt, where courts are more dependent on written statutes. A focused franchise law could work as a reference point both for Egyptian courts in deciding disputes and for parties in forming agreements. It is not sensible for a country like Egypt to lack specialized law to regulate the growing business of franchising.

This article aims to provide a comprehensive explanation of franchising in Egypt and what solutions will best fit the problems Egypt currently faces in this arena. Part I of this article gives an introduction on franchising in general. Part II analyzes and evaluates the current status of franchising in Egypt. Part III explains comparative approaches to dealing with franchising issues around the globe, and it provides recommendations based on such comparisons in connection with proposed legislation that would fit into the Egyptian legal system.

I. UNDERSTANDING THE LEGAL SPECIFICATIONS OF FRANCHISING

An understanding about franchising and its legal particulars are critical before discussing the situation in Egypt. As such, the first section of this Part explains the common definition of franchising, as a distribution and marketing methodology, provided by the relevant specialized entities, as well as the main differences between franchising and similar transactions such as licensing, distributorship, agency, and employment. The second section of this Part introduces the main set of rules regulating franchising worldwide, including disclosure rules, relationship rules, and registration rules.

1.1 *Definition of Franchising*

Franchising is a business tool through which one investor (the franchisor) allows another investor (the franchisee) to trade the franchisor's goods or services, using the franchisor's "know-how," in conformity with the franchisor's business scheme, and using the franchisor's trademark.⁴ The franchisee runs such a business under the control and with the assistance of the franchisor, and in return, the franchisee pays the franchisor an agreed-upon amount of fees.⁵

Know-how is defined as a collection of "identified," "secret," and "substantial" data gathered through the franchisor's practices and experiences.⁶ "Identified" means that the know-how is defined in an inclusive

4. Michael G. Brennan, *Franchising and Licensing: Their Relevance to Corporate Counsel*, 2000 BUS. L. INT'L 222 (2000).

5. 16 C.F.R. § 436.1(h)(2) ("The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation.")

6. EUR. FRANCHISE FED., EUROPEAN CODE OF ETHICS FOR FRANCHISING, *available*

way that suits its confidential nature.⁷ “Secret” means that the know-how is confidential and undisclosed to the public.⁸ “Substantial” means that the know-how is material to the franchisee’s use in connection with the franchised business whether in the field of manufacturing, contacting consumers, or managing the franchised business.⁹

The element of business scheme outlines a method for operating the business according to the system determined by the franchisor.¹⁰ It usually requires use of the franchisor’s trademarks, business standards, product and service specifications, training systems, operation manuals, specific advertising systems, and other requirements determined by the franchisor to establish a consistent look across all the franchised outlets.¹¹

Licensing the use of intellectual property is the cornerstone of franchising transactions. For franchising purposes, the most important intellectual property licensed to the franchisee is the franchisor’s trademarks.

The element of control and assistance is the extent to which franchisors manage and direct different aspects of the franchised business. In essence, control occurs through various activities, such as assisting franchisees in choosing a location, preparing the premises, and fulfilling the requirements for design and appearance. Control also includes assisting (to a certain extent) with business operations, providing technical training for the franchisee’s employees, and providing help with establishing accounting systems and marketing. Control and assistance is important because it ensures that franchisors maintain the goodwill of their businesses and protect the use of their franchised trademarks.¹²

Finally, fees cover all payments, whether direct or indirect, made by the franchisee or any third party acting on his behalf, to the franchisor or its affiliates, whether by lump sum or installments, in any form, and provided in the franchise agreement or required by the practical nature of the business.¹³ Fees may include different forms of payments such as initial franchise fees, payments for advertising assistance, payments for rent, payments for required equipment and supplies, security deposits, escrow deposits, and royalties on sales.¹⁴

at <http://www.eff-franchise.com/Data/Code%20of%20Ethics2.pdf> [<https://perma.cc/2856-LCUK>] (last visited Feb. 22, 2012).

7. *Id.*

8. *Id.*

9. *Id.*

10. *See, e.g.*, CAL. CORP. CODE § 31005 (2012); CONN. GEN. STAT. § 42-133e (2012).

11. Rochelle B. Spandorf, *Franchise Player*, 29 LOS ANGELES L. 34 (2006).

12. Mark H. Miller, *Unintentional Franchising*, 36 ST. MARY’S L.J. 315 (2005).

13. Final Guides to the Franchising and Business Opportunity Ventures Trade Regulations Rule, 44 Fed. Reg. 49,967 (Aug. 24, 1979) (discussing the FTC’s intent to capture all hidden franchise fees).

14. Miller, *supra* note 12, at 36.

1.2 *Distinguishing Franchising from Other Methodologies to Expand a Business*

Because many elements of franchising overlap with other forms of legal business transactions, there may be confusion about the nature of the franchise transaction. A product franchise, for instance, is a distribution methodology that may cause confusion between franchising and distributorship agreements.¹⁵ In distributorship agreements, distributors agree to distribute goods under the same name of the principal. In product franchises, franchisees do the same. Along similar lines, because franchisors exercise a degree of control over the franchisees' operation of the business, franchising may be confused with employment agreements, as well as agency and licensing.

1.2.1 *Franchising v. Licensing*

Franchising transactions are often confused with licensing agreements because both kinds of transactions include the grant of a license for the use of a trademark, a name, or other forms of intellectual property rights.¹⁶ Although the core of the franchisor-franchisee relationship is licensing, the use of a trademark and the grant of know-how, marketing, and manufacturing are crucial, but ancillary, tasks. This contrasts with licensing, where the main purpose is the manufacture of licensed goods. As a result, franchising does not require the same level of prior experience in manufacturing. In particular, franchisors have more control over the franchised business because franchisees need to follow the business systems or plans of franchisors, unlike licensors, whose rights are only to supervise the use of the license in order to protect it and to collect royalties.

Franchising should also be distinguished from technology transfer agreements. A technology transfer agreement is a form of licensing agreement by which a license is given by the transferor to the transferee to establish a manufacturing unit to manufacture a product using the transferor's technology without having control over the way the licensee operates its business.¹⁷ Nevertheless, a franchise agreement is only a limited license that allows the franchisor to authorize the franchisee to use the franchisor's trade name or mark to produce or distribute the franchisor's products or services where the franchisor has day-to-day control over the franchisee's operation of the business.¹⁸

15. MARTIN MENDELSON ET AL., *FRANCHISING LAW* 10 (Martin Mendelsohn, ed., Richmond Law & Tax, 2d ed. 2004).

16. *Id.* at 47.

17. INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW [UNIDROIT], *GUIDE TO INTERNATIONAL MASTER FRANCHISE ARRANGEMENTS* 11 (2007).

18. *Id.*

1.2.2 *Franchising v. Distribution*

Distribution contracts are common for relatively low-cost products requiring little pre- and post-sale services, or for products that consumers are used to buying in retail outlets that carry multiple brands of the same product, such as appliances.¹⁹ Under a distribution model, a distributor buys goods from a manufacturer and title is transferred to the distributor upon payment, with distributors then selling products under their own name.²⁰ Moreover, distributors may sell competing or complementary products to the products they are charged to distribute. In these arrangements, distributors sell products in their own way, using their own business systems and methods. Distributors do not need the same level of technical training.

In contrast, franchisees distribute franchised products under the trade name or trademark of the franchisor. Franchisees are not allowed to sell any competing products to the franchised products. In addition, franchisees work according to the business system and the instruction of franchisors. Finally, franchisees usually need special kinds of training programs run by franchisors.²¹

1.2.3 *Franchising v. Agency*

A commercial agent is an intermediary who is authorized to negotiate and conclude a commercial transaction on behalf of or in the name of the principal, while a franchisee is completely independent of the franchisor.²² The franchisor and the franchisee are not liable for each other's behavior and the franchisee does not have the power to bind the franchisor. In other words, an agent is a legal representative who deals on behalf of, and for the benefit of, the principal, while a franchisee operates the franchised business on his own behalf and for his own benefit, with no authority to work on behalf of the franchisor.²³

1.2.4 *Franchising v. Employment*

While there are many distinctions between franchising and employment, the most important is that the degree of control exercised in each relationship is different.²⁴ While employers maintain complete control over employees, franchisees are considered independent and subject only to a limited degree of control that includes the business and technical systems necessary to achieve expected outcomes. The amount and method of payment, moreover, is one of the elements that distinguish franchising

19. Brennan, *supra* note 4, at 222, 225.

20. MENDELSON, *supra* note 15, at 46.

21. *Id.*

22. UNIDROIT, *supra* note 17, at 9.

23. ANDREW J. SHERMAN, FRANCHISING AND LICENSING 349-50 (Am. Mgmt. Ass'n, 3d ed. 2003).

24. Peter C. Lagarias & Robert S. Boulter, *The Modern Reality of the Controlling Franchisor: The Case for More not Less, Franchise Protections*, 29 FRANCHISE L.J. 139, 145 (2010).

and employment relationships.²⁵ Employees do not make payment to their employers to begin or maintain a business relationship. Finally, it should be noted that franchisees are in control of the business to a certain extent. For example, they have the capacity to employ personnel and be responsible for them.

1.3 *The Laws Regulating Franchising*

Generally speaking, three types of rules regulate franchising relationships: (1) pre-sale disclosure laws that require disclosure of relevant information; (2) registration laws requiring the registration of franchising agreements, disclosure documents, and any other related documents; and (3) relationship laws organizing the franchise parties' rights and obligations.²⁶

Disclosure laws mandate that franchisors disclose to potential franchisees any information that can be expected to affect the franchisees' decision to enter into franchise transactions.²⁷ Disclosure laws are the most common variation of these laws among countries regulating franchising. Approximately thirty countries have specialized franchising laws and of those, nineteen have only disclosure laws.²⁸

Registration laws are typically tied to disclosure laws.²⁹ Thus, registration rules usually require franchisors to file their disclosure documents, as well as information on their intellectual property (and sometimes documents related to their consultants and brokers), with a competent government registration authority before making franchise sale offers.³⁰ Registration is usually required for authentication purposes.

Finally, a few countries have franchisor-franchisee relationship laws. Relationship laws typically regulate the performance of the franchise relationship after a franchise agreement has been finalized. Relationship laws elaborate on issues such as the rights and obligations of the franchising parties, renewal and transfer of a franchise agreement, good faith performance of the agreement, and the methods available for settling disputes arising out of the performance of a franchise agreement.

II. FRANCHISING IN EGYPT: THE CURRENT SITUATION

Egypt is currently the franchising center of the Middle East, with up to \$14 billion invested in the franchising sector, although its history

25. SHERMAN, *supra* note 23, at 349.

26. See Pamela J. Mills, *Franchising Around the Globe, Relationship, Definition and Regulation*, in GOING INTERNATIONAL: FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS (American Law Institute and the American Bar Association ABA Committee on Continuing Professional Education eds., 2005).

27. 16 C.F.R. § 436.5 (2012).

28. ELIZABETH CRAWFORD SPENCER, *THE REGULATION OF FRANCHISING IN THE NEW GLOBAL ECONOMY* 227 (2010).

29. *Id.*

30. *Id.* at 248.

is fairly recent.³¹ Franchising first entered the Egyptian market with the implementation of the Open Door Policy in 1973. Wimpy, an English fast food chain, was the first franchise in Egypt.³² Within a few years, the franchising sector experienced rapid growth, resulting in hundreds of international brands establishing a presence in Egypt.³³

Since 1973, the Egyptian franchise market has continued to grow.³⁴ In fact, from the end of 2002 through 2004, the number of franchised outlets increased by 14 percent.³⁵ Examples of famous foreign brands in Egypt include Chili's, Hard Rock Café, KFC, McDonald's, Pizza Hut, Baskin Robbins, Carvel Ice Cream and Ruby Tuesday.³⁶ Aside from the food sector, markets for lifestyle brands, home appliances, and clothing are also expanding due to similar investment.³⁷ In 2006, SAS-Egypt, an Egyptian franchisor, bought La Senza and Esprit brands to distribute in Egypt, and the Swedish company Ikea has established a home furnishings franchise presence.³⁸

Egypt also has a specialized franchise association, the Egypt Franchise Development Association (EFDA). The EFDA is a non-governmental organization founded in 2001 to promote the Egyptian franchising industry. With the establishment of the EFDA, Egypt became the first Middle Eastern country to be a member of the World Franchise Council. The establishment of EFDA contributed to the development of franchise sector in Egypt and made Egypt active in franchising on a global scale in a way that enabled Egypt to join the World Franchise Council. For instance, EFDA supports foreign investors, franchisors or franchisees, planning to expand to Egypt. EFDA also provided a database of the franchising industry in Egypt for interested foreign investors. Moreover, EFDA provides information to the world about franchising in Egypt through publications and international events attended by various stakeholders from around the world.

The EFDA has a Law of Ethics that is binding on all members, but not binding on parties to franchise agreements until they explicitly adopt it as part of their franchise agreement.³⁹ The most important feature of the Law of Ethics is that it requires the franchisor to have at least one pilot operation before starting a franchised business. Further, under the Law of Ethics, franchisors have to be the legal holder of the licensed trademark, provide franchisees with necessary training, and disclose relevant information about the franchised business to the franchisee.

31. *Franchising Future*, OXFORD BUS. GROUP, Feb. 23, 2007.

32. Fath, *supra* note 2.

33. *Id.*

34. *Maisonneuve*, *supra* note 1, at 16.

35. *MARKETEERS-EGYPT*, *supra* note 3.

36. *Id.*

37. *Franchising Future*, *supra* note 31.

38. *What is Franchising?*, EGYPTIAN FRANCHISE DEV. ASS'N, <http://www.efda.org>, eg (last visited March 15, 2011).

39. *Id.*

Despite all of these developments, there is little awareness about what franchising entails in Egypt.⁴⁰ As explained earlier, the lack of franchising laws represents the most important roadblock to the development of Egyptian franchising. The applicable law is usually the law that bears the closest relationship to the provisions of the franchise agreement. The common laws applicable to franchising transactions in light of the absence of an Egyptian franchising law include, mainly, agency law and transfer of technology law. However, applying general laws to franchising transactions can cause confusion for the relevant parties and result in more conflicts and disputes.

2.1 *Applying Agency Law to Franchising Transactions*⁴¹

Some Egyptian practitioners and legal writers believe that agency is the closest analog to franchising and recommend that franchise agreements should be subject to the provisions of the Egyptian Commercial Law governing agency and the Commercial Agency Laws. According to the Egyptian Commercial Law, agency is the contract by which a commercial agent undertakes to perform a specific legal service in favor of the principal, whether in the name of the principal or the name of the agent himself, in cases of undisclosed agency.⁴²

Beside these general rules on agency, which regulate any agent transaction where effects go to the principal, the Egyptian agency rules regulate another special type of agency, contracts agency. Contracts agency refers to the situation where the agent markets, negotiates, and concludes transactions in a specific area, in the name and for the benefit of the principal.⁴³ Contracts agency is typically confused with franchising due to its special nature, where the agent acts like a franchisee to a certain extent by marketing, negotiating and concluding the transaction for the principal.

Comparing both relationships, agents are not legally independent from principals. Rather, the principal is liable for the agent's actions that are done for the benefit of and on behalf of the principal. Unlike agency, the franchisee is legally independent from the franchisor. Here, the franchisee does not have any power to bind the franchisor as the franchisee acts in his or her own name and for his or her own benefit.

Based on the distinction in where liability lies, the two relationships are considered distinct. Moreover, agency laws provide rules on termination that are specific to the nature of the agency relationship, rather than the franchise relationship. Thus, upon the expiration of a defined-term agency contract, renewal is compulsory under Egyptian Commercial Law. The principal must, if he or she decides not to renew the contract,

40. Maisonneuve, *supra* note 1, at 16.

41. See Law No. 17 of 1999 (Commercial Law), *al-Jaridah al-Rasmiya*, 17 May 1999, arts. 148–91 (Egypt).

42. *Id.*

43. *Id.*

pay compensation to the agent, even if the contract provides otherwise. In contrast, this compulsory termination rule does not fit with the nature of a franchise relationship, as compelling a franchisor to remain within the franchising contractual relationship after its expiry might result in harming his trademark and business. Consequently, agency is very different from franchise and both are incompatible with each other.

2.2 *Applying Transfer of Technology Law to Franchising Transactions*

Another perspective amongst Egyptian practitioners and legal writers is that franchise agreements are essentially technology transfer agreements, which would still make these agreements subject to the relevant Egyptian Commercial Law provisions.⁴⁴ However, looking into the rules regulating technology agreements shows that franchise agreements are in fact distinct in multiple aspects. In technology agreements, the licensor transfers technical information to the licensee to use in a special, technical way to produce specific commodities or to install or operate specific equipment. The mere sale of technical products is not itself a transfer of technology.⁴⁵ Hence, licensing the use of a trademark is not, in itself, a transfer of technology unless it is connected to an actual transfer of a technology contract. In addition, the subject matter of a technology transfer is different from franchising, as it is not restricted to technical information related to the production of specific goods. Rather, it also includes services.

Unlike the practice with franchises, technology transfer rules on licensing are protective of licensees and limit licensor control of transferred technology. For instance, Article 75 of the Egyptian Commercial Law provides that:

“Any contractual term or condition that may impose restrictions on the licensee’s freedom to use the transferred technology may be null. This shall, particularly, apply to conditions imposing any of the following obligations on the licensee: i) compelling the licensee to accept and pay for the improvements introduced by the licensor, ii) prohibiting the licensee to amend the technology in a way that matches with local requirements, iii) compelling the licensee to accept the licensor’s business plan or business scheme, iv) compelling the licensee to purchase raw material, machinery, equipment, and spare parts, necessary for the technology operation, from the licensor or supplier determined by the licensor. . . .”⁴⁶

The success of transfer of technology given the type of management and purchase of relevant raw material could be understood, particularly in high technology sectors, as they are typically protective of the technical assets. In particular, licensors tend to be monopolistic, which can

44. *Maisonneuve*, *supra* note 1, at 16

45. *Id.*

46. *Id.*

eliminate competitive activities and put markets at risk. This leads the legislature to intervene in order to protect weaker parties and competition. In contrast, franchising is just a methodology to expand the franchisor's business in a way that complies with the business plan, marketing plan, and operation mechanism of the franchisor. Thus, in franchise transactions, the franchisee runs the franchised business under the control of and with the assistance of the franchisor.

In addition, applying rules of transfer of technology to franchise agreements would make franchise agreements subject to obligatory choice of law and forum requirements.⁴⁷ This is because the Egyptian Commercial Law provides that Egyptian courts shall have sole jurisdiction to rule on disputes arising from technology transfer agreements. It even mandates the application of the Egyptian law when the agreement provides otherwise. Furthermore, the Egyptian Commercial Law provides that if the parties of a transfer of technology choose arbitration as a method of solving disputes arising out of a transfer of technology agreement, arbitration must be held in Egypt according to Egyptian law.⁴⁸ Accordingly, applying transfer of technology laws to franchising would not work.

2.3 *The Need for Legal and Economic Reform*

Recent economic turmoil has highlighted the need for addressing franchising and similar issues. In particular, the Egyptian economy has declined due to political instability since the January Revolution.⁴⁹ Foreign investors fled, taking their capital with them. More than 300 Egyptian businessmen are on a government watch list.⁵⁰ Over the following year, Egyptian GDP declined four times. The foreign exchange reserves with the Central Bank of Egypt dropped from \$36 billion at the beginning of 2011 to \$22 billion in October 2011, and further dropped to \$15 billion in January 2012. Tourism decreased by 35 percent and the stock market saw a decline of more than 40 percent. This indicates that the Egyptian transitional government did not adequately support the Egyptian economy during the transition period,⁵¹ and therefore the new government will face the potential of severe economic decline. These economic risks

47. See Law No. 17 of 1999 (Commercial Law), *al-Jaridah al-Rasmiyah*, 17 May 1999, art.75 (Egypt).

48. *Id.*

49. The continuing unrest due to the contradictions between different demands—majority interests v. minority rights, secular vs. religious, military vs. civilian, Christians vs. Muslims, Muslim Brotherhood vs. Salafists, poor and unemployed vs. elites, old vs. young. See Ben W. Heineman Jr., *Why Egypt's Economy Matters*, THE ATLANTIC, (Dec. 12, 2011), <http://www.theatlantic.com/international/archive/2011/12/why-egypts-economy-matters/249718/> [<https://perma.cc/3WPR-PRX8>].

50. David Schenker, *Egypt and the Arab Fall*, L.A. TIMES, (June 1, 2011), <http://articles.latimes.com/2011/jun/01/opinion/la-oe-schenker-egypt-20110601> [<https://perma.cc/RG4F-7W8E>].

51. IBRAHIM SAIF, CHALLENGES OF EGYPT'S ECONOMIC TRANSITION 2 (2011), http://carnegieendowment.org/files/egypt_econ_transition.pdf.

highlight the importance of careful attention to both applied economic and legal policies. Despite all of this, through a consideration of Egyptian laws, the government should be able to boost the recovery of the Egyptian economy and improve the financial situation in Egypt after these problems caused by the January Revolution. Pursuing legal reform will help and, specifically, establishing franchising law can be a strong solution to redeveloping economic prosperity in Egypt.⁵²

III. RECOMMENDATIONS TO THE EGYPTIAN LEGAL SYSTEM ON FRANCHISING BASED ON COMPARATIVE GLOBAL APPROACHES

As mentioned earlier, comprehensive franchising laws around the world usually regulate three areas: pre-sale disclosure, registration of franchise offers, and regulation of the relationship between the contracting parties.⁵³

Disclosure laws, the most common among countries regulating franchising, mandate that franchisors disclose to potential franchisees any information that can be expected to affect the franchisees' decision to enter into franchise transactions.⁵⁴ Approximately thirty countries have specialized franchising laws and of those, nineteen have disclosure laws.⁵⁵

Registration laws typically accompany disclosure laws. Thus, registration rules often require franchisors to file their disclosure documents, as well as information on their intellectual property (and sometimes documents related to their consultants and brokers), with a competent government registration authority, e.g., ministry of commerce and trade, before making franchise sale offers. Registration is usually required for authentication purposes.

Finally, a few countries have franchisor-franchisee relationship laws. These relationship laws typically regulate the performance of the franchise relationship after a franchise agreement has been finalized.⁵⁶ The laws clarify details about the rights and obligations of the franchising parties, renewal and transfer of the franchise agreement, good faith performance of the agreement, methods available for settling disputes arising out of performance of the agreement, and termination of a franchise agreement.⁵⁷

52. GLOBAL INSIGHT, COUNTRY INTELLIGENCE REPORT: EGYPT (2011), <http://myinsight.ihsglobalinsight.com/servlet/cats?filterID=1147&serviceID=4078&typeID=15431&pageContent=report&pageType=ALL> – inaccessible without an account

53. See Pamela J. Mills, *Franchising Around the Globe, Relationship, Definition and Regulation*, in GOING INTERNATIONAL: FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS (Am. Law Inst. and the A.B.A. Comm. on Continuing Prof'l Educ. eds., 2005).

54. 16 C.F.R. § 436 (2012).

55. SPENCER, *supra* note 28, at 227

56. *Id.* at 263.

57. *Id.*

3.1 *The Subject Matter of Franchising Relationships*

Some legal systems do not exclude similar business tools like employer-employee relationships and partnerships, which can be confused with franchising, from the systems' definitions of franchising.⁵⁸ In order to develop applicable franchising laws, a clear, detailed definition is necessary.⁵⁹ Specifically, the definition would need to clarify that the franchisor grants a franchisee a license to operate a business under the franchisor's trademark and to use the franchisor's trade secrets or other intellectual property, while holding administrative rights and control over the business in return for fees paid by the franchisee, as distinguished from partnerships, services agreements, and agency relationships.⁶⁰ The Egyptian legislation should provide a comprehensive definition of franchising, including factors such as control and assistance, a marketing plan, and a community of interests, fees, and licensing intellectual property. Such a definition, according to this paper's proposal, should exclude other forms of licensing transactions that have similar features to franchising, as noted earlier.⁶¹

3.2 *Scope of Application for Franchising Laws*

In some legal systems, franchising law applies only to franchises located under its jurisdiction.⁶² Other systems require governmental approval to franchise in their territory.⁶³ Some systems apply their franchising law only if the offer or acceptance is issued within their territory or if the business operation takes place within their territory.⁶⁴ In Egypt, proposals recommend that the proposed law apply to franchising actually occurring in Egypt, whether in the form of offer, acceptance, operation, or conclusion of the contract. Specifically, the Egyptian legislator provides for the application of various local laws only if offer,

58. BYRON E. FOX & BRUCE S. SCHAEFFER, *FRANCHISE REGULATION AND DAMAGES*, Westlaw (2011).

59. Franchise Act 1998, *Warta Kerajaan seri Paduka Baginda Gazette*, 31 December 1998, available at http://www.commonlii.org/my/legis/consol_act/fa199895/ (Malaysia) [hereinafter *Malaysian Franchise Act*], at art. 4

60. *See id.*

61. Examples include agency and transfer of technology agreements.

62. *See* 16 C.F.R. § 436.2 (2007).

63. Article 7(4) of the Chinese Old Measures provide provides that "A franchisor shall have the following conditions: 4) Having at least two direct sales stores that have been undertaking the business for more than a year or direct sales stores established by its subsidiary companies or its holding companies within the territory of China." *Shāngyè tèxū jīngyíng guǎnlǐ bànfǎ* *Shāngyè Texu Jingying Guanli Banfa* (商业特许经营管理办法) [Measures for the Administration of Commercial Franchises] (promulgated by the Ministry of Commerce, Dec. 30, 2004, effective Feb. 2, 2005) art. 7(4), (China), <https://perma.cc/8YCM-T2W5>.T2W57(4), CLI.4.56488(EN) (Lawinfochina).

64. *See* *Warta Kerajaan seri Paduka Baginda Gazette*, [Franchise Act 1998] Jan.1, 2013) (Malay.), http://www.commonlii.org/my/legis/consol_act/fa199895/.

acceptance, business operation, or conclusion of the contract takes place in Egypt. Examples of these local laws include sales law.

3.3 *Liability Arising out of Pre-Contractual Negotiations*

Once the parties sign the final documents, classic rules of contracts apply, but many issues that are not regulated by these rules can nonetheless arise. This can include letters of intent, existence of pre-contractual disclosure obligations, and liability arising out of these obligations. Franchising laws seem to leave these issues to general contract law, advertisement law, and tort law, among others. Notwithstanding general rules related to pre-contractual liability, a proposed Egyptian franchising law should avoid silence on disclosure requirements during pre-contractual negotiations. Egypt should be more prudent and should create a separate disclosure requirement during pre-contractual negotiations. This would reduce opportunities for fraud by franchisors, as disclosure makes franchisees aware of all information that is expected to affect their decision to enter into franchise transactions. In a country like Egypt, with a large number of small investors as franchisees, disclosure rules will guarantee a minimum level of transparency.

3.4 *Contractual Liability and Liability to Third Parties*

In some legal systems, vicarious liability arises for a franchisor when a third party claims that it is legally responsible for an act or omission of a franchisee or any member of the franchisor's network.⁶⁵ A common rule is that franchisors are vicariously liable only when there is an agency relationship between the franchisor and the franchisee or member. In addition, direct liability for the franchisor can arise in cases of an injury on the franchise premises where franchisors breach duties to third parties, and this breach directly causes the injury in question.⁶⁶ Examples of such direct liability include instances where franchisors are liable for inspecting and fixing premises defects, or when franchisors are responsible for designing or constructing franchise premises.⁶⁷ Because the Egyptian Civil Code recognizes both vicarious and direct liability and clearly regulates them, proposed Egyptian franchising law does not need to include separate provisions. Franchising agreements can be regulated by the general rules governing contracts without the need for repetition.

3.5 *Indemnity and Insurance Clauses*

Franchise agreements typically include indemnification clauses requiring the franchisee to indemnify the franchisor for any settlements or judgments levied against the franchisor for the franchisee's actions

65. See generally Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417 (2005).

66. Heather C. Perkins, Sarah J. Yatchak & Gordon M. Hadfield, *Franchisor Liability for Acts of the Franchisee*, 29 FRANCHISE L.J. 174, 177 (2010).

67. *Id.*

and costs associated with defending against those claims. In addition, franchise agreements often require the franchisee to list the franchisor as an additional insured party on the franchisee's liability policy. Passing responsibility to the franchisee makes sense in a vicarious liability claim, because it is the franchisee's negligence, not the franchisor's, that brought the franchisor into the litigation.⁶⁸ While some legal systems require an explicit indemnification provision in the agreement for the franchisee's own negligence,⁶⁹ other legal systems are silent on the indemnification issue.⁷⁰ Indemnification clauses in Egypt are determined by the contract parties and are regulated by the provisions of the agreement in question. Accordingly, the proposed Egyptian law should not provide any specific provisions on indemnifications.

3.6 Remedies

Franchising law should have a comprehensive list of remedies available for breaches of franchising agreements. Having different remedies gives judges a broad discretionary power and a variety of options when deciding remedies. In addition, listing various remedies helps the contracting parties reach a satisfactory contractual performance rather than a termination of the franchise agreement. Remedies come in different forms, depending on whether the breach in question was of a franchise agreement, franchise laws, or disclosure and registration laws. Available remedies include injunctive relief, payment for goodwill, and repurchase of inventory. For instance, one possible remedy for breach of a franchise agreement (for termination without good cause or for declining renewal), is making the franchisor buy the franchisee's inventory.⁷¹ The main remedy granted in case of breach of franchise agreements is

68. See generally Jay Hewitt, *Franchisor Direct Liability*, 30 *FRANCHISE L.J.* 35 (2010); see also Perkins, *supra* note 66, at 181.

69. See Joyce Mazero, *Impact of Other Local Laws*, in *FUNDAMENTALS OF INTERNATIONAL FRANCHISING* 265 (Richard M. Asbill & Steven M. Goldman eds., 2001).

70. E.g., *Progressive Child Care Sys., Inc. v. Kids 'R' Kids Int'l, Inc.*, No. 2-07-127-CV, 2008 *Tex. App. LEXIS 8416*, at *1 (*Ct. App. Tex. Nov. 6, 2008*).

71. Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, in *FUNDAMENTALS OF FRANCHISING* 210 (Rupert M. Barkoff & Andrew C. Selden eds., 3rd ed 2008)).

injunctive relief,⁷² in addition to damages.⁷³ Some laws also provide for monetary remedies in cases of a breach of the obligations imposed by the law itself, such as the non-fulfillment of confidentiality obligations, or a breach of disclosure laws, such as the franchisor giving misleading statements of material facts.⁷⁴

The proposed Egyptian franchising law can refer to the remedies available under the general rules of contracts found in the Egyptian Civil Code that regulate performance of contracts in a comprehensive way.⁷⁵ The Egyptian law, however, should go further, adding provisions addressing both repurchase of inventory and payment for goodwill, as these are not addressed by Egyptian contract law at all.

3.7 Good Faith

The principle of good faith and fair dealing encompasses different standards around the globe that vary between civil and common law countries and change depending on the nature and requirements of each contractual relationship. A majority of civil law countries generally require good faith in contracts. Similarly, common law countries regularly impose a duty of good faith and fair dealing in the performance and enforcement of contracts, whether through statutes or the courts.⁷⁶ In

72. A good example is *Progressive Child Care Sys., Inc. v. Kids 'R' Kids Int'l, Inc.*, where the franchisee was operating the franchisor's two childcare facilities under the trade name "Kids 'R' Kids" in return for 5% of the enrollment-based revenue. The franchisee stopped paying the franchisor royalties in March 2002 and started operating both facilities under the name "Legacy Learning Center." Kids 'R' Kids claimed breach of contract, breach of personal guaranty, fraud, and conspiracy. The jury awarded \$1,385,008.72 to the franchisor for past and future royalties. The court of appeals affirmed and explained that under Georgia contract law (that governing the agreement) an injured party should be placed in the position in which it would have been absent the breach. Applying this principle, the court found that the injured party could claim damages for lost profits, which entitled the franchisor to an amount of money equal to lost future royalties. *Progressive Child Care Sys., Inc. v. Kids 'R' Kids Int'l, Inc.*, 2008 Tex. App. LEXIS 8416, at *1. (Ct. App. Tex. Nov. 6, 2008).

73. Also, *Petro Franchise Sys., LLC v. All Am. Props., Inc.*, is a good example for injunctive relief. In that case, the franchisor started providing competing products in the exclusive territory of the franchisee and the franchisee refrained from paying royalties. While the court found there to be no dispute over whether the franchisee failed to pay royalties, it found that the franchisor correctly followed the termination procedure after the franchisee stopped paying. Moreover, the court found that losing the franchise does not represent irreparable harm to the franchisee particularly because this harm could be compensated through monetary damages. On the other hand, though, if the franchisee were to continue to use the franchisor's trademarks without authorization, the franchisor would suffer irreparable harm. The court, therefore, granted the franchisor's request for a preliminary injunction. *Petro Franchise Sys., LLC v. All Am. Props., Inc.*, 607 F. Supp. 2d 781, (W.D. Tex. 2009).

74. 16 C.F.R. § 436.2 (2007).

75. See generally Law Al-Jarida Al-Rasmiyya [Civil Law] No. 131 of 1948 (Civil Law), *al-Jaridah Waqa'i' al-Rasmiyah, Misriyah* 29 July 1948 at, arts. 126, 203, 221. (Egypt).

76. E.g., Robert S. Adler & Richard A. Macc, *Good Faith: A New Look at an Old*

addition to general rules regulating good faith and fair dealing, contracting parties typically include provisions on good faith and fair dealing.⁷⁷ In franchise agreements, these provisions may be referred to explicitly, impliedly, or by reference. Though the Egyptian general rules of contracts require that a contract be performed in good faith, the proposed Egyptian franchising law should have a separate provision to clarify how broadly good faith can be interpreted in the context of franchising.⁷⁸ To be effective, the provision should give examples of violations of good faith in franchising transactions. The provision could also provide penalties for violations of its requirements by contracting parties. These penalties would help ensure a robust application of the principles of good faith and fair dealing and the protection for weaker parties against unfavorably drafted provisions, which would contribute to reducing future disputes among the contracting parties.

3.8 *Franchising Agreements*

A couple of issues arise in connection with the franchise agreement, including whether the agreement must be in writing, and if not, the consequences of such an oral agreement. It is also important to think about whether a franchise agreement should be required to include specific provisions, without which the agreement would be void. The general rule of Egyptian contract law is that a contractual relationship does not need to be in writing to be valid. This rule, however, has some exceptions that are comprehensively stated by governing law. Examples include the exception provided by the Egyptian Civil Law that business associations' articles of incorporation must be in writing, otherwise they are invalid.⁷⁹ Similarly, the Egyptian Commercial Law requires that a transfer of technology agreement be in writing.⁸⁰ Applying general rules of contract law, franchising agreements would not need to be written, nor would they be required to include specific provisions. Nevertheless, to facilitate the process of proof of a franchise transaction and to reduce any potential disputes, the proposed Egyptian franchising law should in fact require that a franchise agreement be written and include specific provisions, the absence of which will void the agreement. Disputes could arise in connection with any of the franchise transaction components such as trademark, confidential information, exclusive nature of the transaction, royalties, and others.

Doctrine, 28 AKRON L. REV. 31, 42 (1994).

77. See Andrew Terry & Cary Di Lernia, *Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions?*, 33 MELBOURNE U. L.R. 542, 549 (2009).

78. Law No. 131 of 1948 (Civil Law), *Al-Jarida Al-Rasmiyya* Code), *al-Waqa'i al-Misriyah*, 29 July 1948 (Egypt).

79. *Id.* at art. 507(1).

80. *Id.* at art. 74 (1).

3.9 Term

Many franchising laws require a minimum term for the franchise agreement, the violation of which may result in invalidation of the agreement.⁸¹ The rationale behind this rule appears to be protection of the franchisee who needs a proper amount of time to see the results of investing capital in franchising transactions. Egyptian contract law recognizes the freedom of contracting parties to set a term for their contract, except in select situations where the law itself mandates a minimum term. For example, the technology transfer agreement is required to be at least five years and is considered void if any shorter.⁸² A proposed Egyptian franchising law should incorporate a provision that provides a minimum term for franchise agreements, in order to guarantee protection for the franchisee against abusive or wrongful termination.

3.10 Transfer

Transfer means enabling either party; the franchisor or the franchisee to transfer his rights and obligations arising from the franchise agreement to a third party. Transfer provisions are usually hard to negotiate because franchise relationships are usually based on personal considerations. It is common for franchise agreements to include the franchisee's obligation not to assign the franchised business or the franchise agreement without the prior approval of the franchisor.⁸³ Regulating transfer is important, because the franchisor may want to replace the franchisee, or the franchisee may need to find an individual to replace his or her role in the business.

Laws generally handle the issue of transfer from varying perspectives. Some laws prohibit the franchisor from unreasonably withholding its consent to the transfer made by the franchisee. For instance, a franchisee may transfer the franchised business on the condition that the transferee meets the reasonable qualifications of the franchisor so long as those qualifications are based upon legitimate business concerns (training programs, payment of franchise fees, etc.).⁸⁴ Some other laws require franchisees to notify the franchisor of his intent to transfer the franchise and to include specific information in the notice, such as the transferee's name, address, and business experience, to enable the franchisor to decide upon the transfer.⁸⁵

81. UNIDROIT, *supra* note 17, at 48–49.

82. Egyptian Commercial Law, *supra* note 47, at art. 86.

83. Bruce S. Schaeffer, *Succession Planning Forfor Franchisees*, 21 *FRANCHISE L.J.* 90, 92 (2001).

84. IOWA CODE § 523H.5(1) (2011).

85. ARK. CODE ANN. § 4-72-205(a) (2017) (“It shall be a violation of this subchapter for any franchisee to transfer, assign, or sell a franchise or interest therein to another person unless the franchisee first notifies the franchisor of that intention by written notice, setting forth in the notice of intent the prospective transferee’s name, address, statement of financial qualification, and business experience during the previous five years.”); IOWA CODE § 523H.5(1) (2011) (“A franchisee shall give the

The proposed Egyptian franchising law could require the franchisor's consent to transfer a franchise agreement. The reason behind obtaining the franchisor's prior approval for transfer is that the franchisor is not obliged to accept a contracting party he or she did not choose. In return, to avoid any abusive denial by the franchisor of the transfer, the law may require a franchisee to grant the franchisor the right of first refusal before offering transfer of the franchise to a third party.

3.11 *Termination*

Termination is one of the most important issues that may arise with respect to franchise agreements because termination ends the franchising parties' relationship and all the rights and obligations attached. Accordingly, franchising laws have strict rules on termination to protect both parties, particularly the franchisee, against abusive termination and to reduce the number of disputes and losses arising out of termination.

The proposed Egyptian franchising law should provide a comprehensive set of termination rules. It should provide franchisors a right of termination for good cause and should explain precisely what good cause entails. It should also give hypothetical situations for termination for clarity. Moreover, subject to appropriate exceptions, such as in cases of insolvency, criminal actions, or repeated bad acts by the franchisee, the Egyptian law should grant the franchisee a period to cure any mistakes or deficiencies that may otherwise give the franchisor a legal right to terminate or refuse to renew the agreement. The period of time would vary depending on the reason for termination. While the franchisee could be given a reasonable period of time to cure a breach arising of force majeure event, a franchisee could hardly be given any period of time in cases of insolvency, or repeated bad acts by the franchisee.

Finally, to create equilibrium between franchising parties' rights of termination, the Egyptian law should allow the franchisee the right to terminate the franchise agreement in certain cases, such as when franchisors intentionally fail to meet disclosure requirements. A reasonable period for termination notice from the terminating party should also be required in all cases.

3.12 *Prohibitions Against Discrimination*

Prohibitions against discrimination promote equal treatment of different franchisees by their franchisor. Unjustifiable discrimination might result in potential franchisees refraining from entering into franchise agreements since they would not receive similar benefits to the rest of the franchisees. Unjustifiable discrimination among franchisees might also result in unfair competitive behavior by various franchisees within the

franchisor no less than sixty days' written notice of a transfer which is subject to the provisions of this section, and on request from the franchisor shall provide in writing the ownership interests of all persons holding or claiming an equitable or beneficial interest in the franchise subsequent to the transfer or the franchisee, as appropriate.”).

same pool. Prohibitions against discrimination are particularly important in master franchise agreements where sub-franchisees are committed through franchising agreements with common provisions to run the business of a master franchisor. Prohibitions against discrimination should consider the circumstances surrounding each franchising transaction. For example, differences between franchisees based on the time the transaction concluded or the training needed may lead to acceptable discrimination in franchise agreement provisions.

The proposed Egyptian franchising law should also prohibit discrimination among franchisees based on color, religion, sex, or the like. It should also prohibit discrimination with respect to goods and equipment supplied, services or training provided, royalties conveyed, and renewal or transfer terms granted. Additionally, a unique rule could support both franchisor and franchisee interests by allowing discrimination in specific cases when capital needs, experience, or other franchisee requirements are different. The Egyptian law should provide a list of situations where discrimination is acceptable and will not be deemed a breach of the law or against justice. Discrimination against franchisees could be prohibited, for example, in connection with paid fees or royalties, supplied goods, services or equipment, and advertising services. However, discrimination related to differences in time of concluding franchise agreements and differences among franchisees' needs regarding capital, training, experience, or other qualifications could be legitimate. Other permissible discrimination includes that related to governmental efforts to promote specific goods or services, and franchisees' needs to treat deficits or problems arising with business operations.

3.13 *Settlement of Disputes*

The importance of regulating the franchising dispute settlements arises most prominently in countries with long, complicated litigation procedures that make arbitration more efficient. Other countries consider recourse in court a matter of public order, and these countries may be reluctant to accept arbitration or other alternative methods of settlement. Arbitration clauses can also favor big business, which can make policymakers uncomfortable. In all of these situations, statutory interference may be necessary to encourage efficient settlements.

In Egypt, arbitration is preferred by contracting parties, because it guarantees confidentiality and supports the special needs of commercial reputations and trade secrets, particularly with regard to technology transfer agreements. The importance of regulating settlements in general (and arbitration in particular) is heightened in Egypt, because judiciaries are often accused of being influenced by the executive branches of government. This implies that the contracting parties usually trust arbitration more than the judiciary, which makes it important to provide a flexible and practical regulation of arbitration to facilitate the process of settlement of disputes.

In Egypt, arbitration law has three notable aspects: 1) it distinguishes national and international arbitration, as the law applies to any arbitration held in Egypt; 2) it gives parties absolute freedom to choose the applicable procedural and substantive law; and 3) it leaves the parties free to hold the arbitration either in Egypt or abroad. The rule of the freedom of the parties to choose the applicable substantive and procedural law has some exceptions. For example, the Egyptian Commercial Law considers it a matter of public order that arbitration in a technology transfer agreement must be subject to Egyptian substantive and procedural arbitration laws, and any agreement to arbitrate under a different foreign law is automatically null and void.⁸⁶ Some critics refuse the conservative attitude of the Egyptian legislator requiring the application of the Egyptian law in arbitration in transfer of technology. They argue that this conservative approach discourages foreign investors from transferring technology into Egypt.

Due to the fact that both transfer of technology and franchising include the transfer of know-how and may be accused of favoring a specific party, the Egyptian legislature might adopt similar rules to those conservative arbitration rules in transfer of technology to franchising. Nevertheless, the proposed Egyptian franchising law should avoid adopting the conservative requirement of applying Egyptian law to arbitration to franchising, because requiring the application of the Egyptian law in arbitration in franchising would reduce contractual parties' desire to resort to arbitration.

3.14 *Rights and Obligations of the Parties*

Few legal systems provide comprehensive lists of the rights and obligations of franchising parties. This may be because rights and obligations in franchising transactions vary according to the nature and requirements of each transaction. Some systems, however, provide more examples than others, such as training, guidance on operation of the franchised business, and technical support for the franchisee. In the same way, other laws require the franchisor to assist the franchisee in operating the franchised business, supply required materials, and provide training services. It may indeed be difficult for Egyptian law to outline all rights and obligations in franchising agreements. Nevertheless, the law should provide for minimum rights and obligations, which are the most common, such as confidentiality, non-competition, and training by the franchisor.

86. Egyptian Commercial Law, *supra* note 41, at art. 87 ("The Egyptian courts shall have the jurisdiction of deciding disputes arising from the technology transfer contract referred to in article 72 of this law. Agreement may be reached on settling the dispute amicably or via arbitration to be held in Egypt according to the provisions of the Egyptian law. In all cases, deciding the subject of dispute shall be according to the provisions of the Egyptian law, and all agreement to the contract otherwise shall be null and invalid.").

3.15 *Disclosure and Registration Rules*

Disclosure and registration are the most important issues arising in franchising. In fact, in some countries, franchise laws are essentially disclosure laws. Disclosure laws require the franchisor to disclose to the franchisee specific, material information that would substantially affect the franchisee's decision to invest.⁸⁷ Registration rules require registering disclosure documents with the competent governmental agency.⁸⁸ Disclosure and registration requirements give the franchisee access to necessary information about the franchised business, the franchisor, and the potential franchise agreement. Having access to such information assists the potential franchisee in reaching an informed investment decision, and it inspires confidence in the franchisor that the franchisee meets its requirements, because the franchisee is acting with knowledge that all the necessary information has been disclosed.⁸⁹ Moreover, disclosure and registration reduce the chances for fraud, misunderstanding, and false expectations based on uncertain assumptions. This confidence helps reduce the chances that the franchise will fail.

3.15.1 *Disclosure*

The timing of disclosure, types of issues that are required to be disclosed, protection of the confidentiality of the disclosed information, and remedies in case of a failure to comply with disclosure requirements vary from one country to another.⁹⁰ Legal systems also vary on when disclosure documents must be submitted. Franchisors are typically required to submit disclosure documents ten to thirty days before the conclusion of a franchise contract.⁹¹

Common disclosure requirements include information about the franchisor, such as the background of its officers and directors, litigation history, bankruptcy history, and financial statements. These disclosures also include information on the franchised system, such as intellectual

87. Regulations on Administration of Commercial Franchises (promulgated by the State Council, Jan. 31, 2007, effective May 1, 2007) art. 5 (Lawinfochina) (China) [hereinafter Chinese New Regulations].

88. Malaysian Franchise Act, *supra* note 59, at art. 57.

89. Kevin M. Kennedy, *Drafting an Enforceable Franchise Agreement Arbitration Clause*, 22 FRANCHISE L.J. 112, (2002).

90. *Id.*

91. In the United States, for example, disclosure take place fourteen days before paying the consideration, executing the franchise agreement, or any time earlier if the franchisee reasonably requires disclosure. 16 C.F.R. § 436.2(a). Another example is the Chinese New Regulations and the Chinese Measures for the Administration of Information Disclosure, which require franchisors to submit both the franchise contract and disclosure documents thirty days before the conclusion of a franchise contract. Chinese New Regulations, *supra* note 87, at art. 21; *see also* SPENCER, *supra* note 28, at 182. Chinese Measures for the Administration of Information Disclosure of Commercial Franchises (promulgated by the Ministry of Commerce, Apr. 6, 2007, effective May 1, 2007) art. 4 (Lawinfochina) (China) [hereinafter Chinese Measures for the Administration of Information Disclosure].

property information, advertising programs, and training programs. Moreover, information on franchisor requirements, such as site selection, restrictions on sales, and initial investment, are often included. Disclosures not only cover the substance of the business, but also cover the proposed agreement itself, including initial fees, territorial rights, dispute resolutions, term, transfer, and termination.⁹² In addition, disclosure typically covers the franchisor, including a sample of the trademark, a description of the business, the initial investment, contact information, type of business entity, location, market data about franchised goods and services, laws and regulations, financial issues like payments for goods or services, franchisee fees, or estimated initial investment amounts for the franchisee, and required sources of supplies and equipment.⁹³ Franchise agreement information should be disclosed as well, including franchisee obligations, franchisor assistance, exclusivity or other territorial issues, intellectual property issues, restrictions on the sale of goods or services, information on the renewal of the franchise agreement, termination of the franchise agreement, transfer of the rights and obligations arising from the franchise agreement, and dispute resolution.⁹⁴ Other information about franchised outlets used in advertising and financial performance information, such as past sales, income, and profits, falls under financial issues. This requires disclosure of the franchisor's financial statements for the last two years, as well as copies of all agreements related to the franchise offer, including the franchise agreement, any lease agreements, and purchase agreements.⁹⁵

It is common under franchise laws to give a franchisor the right to execute a confidentiality agreement with the franchisee before disclosing any information to him.⁹⁶ Some laws also require the franchisee to issue the franchisor a receipt, to be signed by both parties, that the franchisee received the disclosure documents.⁹⁷ Various legal systems provide that if the franchisor fails to comply with the basic disclosure requirements it may be liable for civil penalties and damages. In addition to remedies, some legal systems require the franchisor to take action to correct the breach.⁹⁸

Applying the above concepts on disclosure to the proposed Egyptian franchising law, the proposed Egyptian franchising law should require a thirty-day disclosure period before the fees are due. This will make it easy for the parties to decide when the thirty days start. To be flexible, the proposed Egyptian franchising law could always require

92. Scott, W. Andrew, Jeffrey H. Wolf, & Allan P. Hillman, *Franchising from A (Arbitration) to T (Termination)*, 22 *Franchise L.J.* 192 (2002).

93. § 436.6(h).

94. § 436.6(q).

95. § 436.6(w).

96. *See* Chinese Measures for the Administration of Information Disclosure, *supra* note 91, at art. 7.

97. *Id.* at art. 8.

98. *Id.* at art. 28.

disclosure of all relevant information without requiring an exclusive list of information. Under such a system, additional information may need to be disclosed if required by the franchisee and material to the transaction. Requiring relevant information without listing it exclusively would provide the contracting parties with more flexibility and protect franchisees that may need access to information which varies according to the nature of each transaction.

Further, the proposed Egyptian franchising law should require the franchisee to issue the franchisor a receipt for the disclosure documents and guarantee protection of the confidentiality of information disclosed by the franchisor. As for remedies, in cases where the franchisor is in breach of disclosure obligations, the proposed Egyptian franchising law could require civil penalties as is common among various legal systems.

3.15.2 Registration

Registration typically occurs via ministries and relevant agencies (Registrar).⁹⁹ Registrar could be agencies established for the purpose of receiving and ruling on registration applications.¹⁰⁰ Alternatively, it could be a unit within the relevant ministry concerned with general issues including receiving registration applications by franchisors.¹⁰¹ Registration applications usually consist of a list of documents that the franchisor must submit.¹⁰² These documents cover primary information on the transaction, potential franchised outlets, working licenses, trademark registration certificates, a copy of the franchise agreement, a description of the operations manual, any required approvals, and a commitment certificate issued and sealed by the franchisor's legal representatives.¹⁰³

The process of registration usually starts with the franchisor submitting all required documents followed by the competent authority archiving these documents, unless the documents are found to be incomplete.¹⁰⁴ Some other systems require submitting registration applications before making any offer to sell a franchise, and non-compliance with

99. Rochelle B. Sandorf & Mark B. Forseth, Franchise Registration, in *FUNDAMENTALS OF FRANCHISING* 140 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed., 2008).

100. In the United States, for example, franchisors submit registration applications to state agencies competent with receiving and deciding upon registration applications submitted by franchisors. The registration agencies are usually granted the right to deny an application in various situations such as the franchisor's failure to comply with the state's law. *Id.*

101. *FUNDAMENTALS OF INTERNATIONAL FRANCHISING*, *supra* note 69, at 97. *See also* Chinese New Regulations, *supra* note 87, at art. 8; Chinese Measures for the Administration of Information Disclosure, *supra* note 91, at art. 6; SPENCER, *supra* note 28, at 182.

102. Chinese Measures for the Administration of Information Disclosure, *supra* note 91.

103. *Id.* at art. 5.

104. *Id.* at art. 10.

this requirement can be a penalized offense.¹⁰⁵ Most legal systems give the Registrar broad discretionary power to decide whether to accept or refuse registration and to impose conditions for approval.¹⁰⁶ In most legal systems, franchisor's failure to register disclosure documents does not make the franchise agreement null unless the law provides for the franchisee's right to void the agreement.¹⁰⁷ These other systems impose different penalties and procedures depending on the degree of the breach of registration rules.

Finally, some legal systems authorize the Registrar or its deputies to take enforcement action with written approval of the competent minister.¹⁰⁸ Enforcement investigations typically cover the activities of franchisors, franchisees, or brokers.¹⁰⁹ In such an investigation, authorized officials may enter premises to inspect, search, seize, or seal anything relevant to the inquiry.¹¹⁰ Exercising such powers may take place with or without a warrant.¹¹¹ Sometimes, a franchise advisory board is formed, composed of a maximum of fifteen persons experienced in franchising issues and chosen by the minister.¹¹² The role of the advisory board is to issue non-binding advisory opinions to the minister and Registrar on issues related to franchising when appropriate.¹¹³

The best model to follow in Egypt is the one that provides a detailed registration process and sets forth clear standards for all forms, applications, reports, and notices that need to be considered during registration. The Registrar should be established by a competent minister, and its duties must be specifically spelled out.

Further, the proposed Egyptian franchise law should require certain registration forms to be filed with the disclosure documents, including a copy of the franchise agreement, the operations manual, the training manual, financial statements, and any additional documents required by the Registrar. The law could also require that registration takes place before making any offer to sell a franchise. However, giving the Registrar broad discretionary power to accept or refuse registration and to impose conditions for approval may not be the best option in Egypt, as it may lead to abuse of power or corruption. There should, therefore, be supervision through the Ministry of Trade and Industry, or something similar, to provide oversight. It is also important to provide franchisors with the right to appeal the Registrar's decision to the Minister within a specific period of time, and the Registrar should be required to give reasons for declining a

105. Malaysian Franchise Act, *supra* note 59, at art. 6.

106. *Id.* at art. 8.

107. *TKO Fleet Enter., Inc. v. Elite Limousine Plus, Inc., Inc.*, 708 N.Y.S.2d 593 (Sup. Ct. 2000); CAL. CORP. CODE § 31300 (West 2005).

108. Malaysian Franchise Act, *supra* note 59, at art. 42.

109. *Id.* at art. 43.

110. *Id.* at art. 44.

111. *Id.* at art. 45.

112. *Id.* at art. 35.

113. *Id.* at art. 36.

registration. The law should also specify the effective date of registration, which will likely be the day mentioned in the written notice issued by the Registrar. The Registrar should be granted the right to withdraw registration if franchisors do not correct deficiencies after the Registrar notifies them. Finally, franchisors should be required to notify the Registrar of any modifications or changes to the submitted documents.

Submitting false or misleading documents should be a criminal offense to deter improper behavior. The law should provide penalties for violating the registration rules, whether by franchisors or the relevant employees. Furthermore, enforcement guarantees should be provided, such as allowing the Registrar to conduct investigations including, if necessary, the power to enter the premises and to inspect, search, seize, and seal anything for the investigation. An advisory board composed of experienced experts in franchising could be established to issue non-binding advisory opinions to the minister and Registrar on issues related to franchising when required.

CONCLUSION

Egypt is a rapidly growing and emerging market that is considered to be the franchising center of the Middle East. Egyptian business and legal protocols are quite consistent with those of the EU and North America, which opens the door to expanding franchising services between Egypt and other areas of the world. This could help promote foreign investment in the Egyptian franchising sector. Nevertheless, there is notably less awareness of the franchising business model in Egypt, because neither Egyptian laws nor its case precedents address franchise agreements. The time is ripe for establishing franchising laws in Egypt in order to face the economic, investment, and legal challenges that have arisen in the aftermath of the January Revolution.

In essence, this paper draws lessons from analyzing global models to assist in designing future rules that may create a legal framework for franchising in Egypt. This inquiry shows that, although there are certainly differences among the franchising laws of different legal systems, the number of material similarities is far greater. In particular, some critics argue that Islamic law will pose a barrier to the recommended changes to franchising industry in Egypt. Although Islamic law may affect the business needs of franchising, such as market demand and the types of franchised goods and services, it does not directly affect the legal requirements of a franchising law. Therefore, the fact that Islamic law is the main source of law in Egypt may not weigh heavily when drafting a franchising law in Egypt.

Moreover, comparing and analyzing the characteristics of franchising laws with varying perspectives favors an Egyptian franchise law that addresses the different franchising issues, including disclosure rules, substantive rules regulating the relationship between parties, and registration rules. The disclosure rules help to ensure that franchisees are

provided with proper information to assist them in reaching a well-informed investment decision, and the substantive rules guide parties to better conclusions and performance in their agreements. Registration rules guarantee the authenticity and transparency of franchising documents produced by franchisors and the credibility of others involved in the franchising process, such as franchise brokers.

It should be noted that a franchising law can still be comprehensive, even if it focuses only on the concepts that have a direct connection with franchising, aside from the other general issues dealt with through other laws. Examples of these include enforcement issues, consumer protection, force majeure, and tax issues. Accordingly, a proposed Egyptian franchising law can still be comprehensive by regulating franchising specialties and incorporating by reference the provisions of other laws that affect franchising.

This paper proposes a balance between the different interests that must be reconciled in franchising laws. A franchising law should not only address the needs of the local market, but should also address the expectations of business partners acting in more than one jurisdiction. In summary, the conclusions of this paper can contribute to the establishment of an Egyptian franchising law that would inclusively enhance franchising transactions in Egypt and the entire Middle East.