

Franchising in Ethiopian: The Need for Regulation

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Abstract

Franchising is a way of doing business in which the franchisor licenses its known business model or trademark for the use of the franchisee in return for consideration. It becomes a viable solution for business startups, especially for small and medium enterprises (SME), and to penetrate the foreign market. Franchising benefits not only those parties involved in the business but also the national economy. In order to create a leveling field and protect the interests of parties countries are on the move for regulating franchising. This article assesses the regulation of franchising in Ethiopia using comparative analysis method. Even though there are scattered laws pertaining to franchising, still the country lacks, compared to other countries, comprehensive and detailed laws on franchise regulation. The research identified several legal gaps in regulating franchising; essential aspects of franchising such as, pre-contractual disclosure, parties' relationship, and registration are not regulated in a comprehensive manner. Hence, the author recommends the adoption of comprehensive franchise laws that take into consideration the best international practice.

Keywords: Franchising, Trademark, Trade Name, IP, Regulation, Franchise Agreement

Introduction

Franchising is a method of doing business by licensing business processes and intellectual property (IP) rights to investors who will operate within an established business model.¹ The risks associated and the investment required for starting own business is one of the pushing factors that brings franchising into picture as a viable solution. Many persons have achieved great success

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¹ Donald P. Horwitz *et al*, Regulating the Franchise Relationship, *St. John's Law Review*, Vol. 54: 2, (2012), p. 221, available at: <http://scholarship.law.stjohns.edu/lawreview/vol54/iss2/1>, accessed on 8/10/2018

through franchising either by being a franchisor or a franchisee.² As a result, franchising becomes a widely known mechanism of doing business highly exploited in developed nations, while uncommon in many developing countries, even if the situation is rapidly changing recently.³ Given the large size of the Ethiopian population, coupled with its surging prosperity, successful businesses in the future will attract momentous demand for their goods and services, locally and abroad, which will result in the increased importance of franchise arrangements for the nation.⁴ In Ethiopia, however, franchising is not widely known, and international franchisors have not adequately responded to the franchising opportunity in Ethiopia.⁵ It is argued that the non-recognition of franchising as a viable business doing model is the major challenge for foreign investors,⁶ and SME development in Ethiopia.⁷ According to one research, lack of awareness on how to sell knowhow to the local market without losing goodwill, unfamiliarity with franchise business, and not realizing the benefits of developing local brands by local franchisors are the real challenge for Ethiopia.⁸

This does not, however, mean that there is no business practice of franchise in Ethiopia at all. Even if it is not in a satisfactory way, there have been small practices of franchise since the Imperial regime.⁹ The earliest form of franchise in Ethiopia had been products marketing, mainly of Petroleum Products, Hotels and Beverages.¹⁰ However, recently, business format franchising has also grown significantly, especially in the fast-food sector. Moreover, few international brands have opened their franchise businesses in Ethiopia.¹¹ Against this progress, however, Ethiopia still lacks franchise-specific law that regulates

² US Department of Commerce, Markets Top Report Franchising, Overview and Key Findings, International Trade Administration, (2016), available at: https://legacy.trade.gov/topmarkets/pdf/Franchising_Executive_Summary.pdf accessed on 10/09/2018.

³ Ibid.

⁴ Tagel Getahun, Franchise influx requires legislative demand, *Addis Fortune*, weekly newsletter, Vol. 13, No. 667, (February 10/2013), available at <https://addisfortune.net/columns/franchise-influx-requires-legislative-demand/> accessed on 1 March 2018.

⁵ Ibid.

⁶ Zeray Yihdego, *et al*, Ethiopian Year Book of International Law, (2017), Springer, p.40, available at <https://link.springer.com/book/10.1007/978-3-319-90887-8>, accessed on 01 September 2012

⁷ Federal Democratic Republic of Ethiopia Small and Medium Enterprise Development Policy and Strategy, (2012), available at: <https://www.cmpethiopia.org> accessed on 11 August 2018

⁸ African Development Bank Group, “Enhancing Development in Africa”, Report No.3, p.2, available at http://www.afdb.org/fileadmin/uploads/afdb/documents/gene-documents/003_franchising.pdf, accessed 27/01 2017.

⁹ Derese S. Bezawork, Franchising Law and Practice in Ethiopia, Unpublished, Addis Abeba University, (2003), p.46.

¹⁰ Dawit Endeshaw, Food Franchises: “Tasting” the Business, *Reporter weekly newspaper*, (19 May 2018), available at: www.thereporterethiopia.com/Article/food-franchises-tasting-business, accessed on 19 April 2019.

¹¹ Ibid.

franchising in detail and in a comprehensive manner. Currently franchising is regulated by different scattered and general laws. However, the application of these laws may not be adequate given the specific nature of franchising; such laws are not designed to address problems inherent in franchising, such as information asymmetry, and bargaining power imbalance.¹² Furthermore, it may be burdensome and difficult for the parties to comply with and manage their affairs in accordance with these diversified laws. This article aims at assessing how franchising is regulated in Ethiopia, identifying gaps, and propose plausible solutions to fill the voids. In this regard, Part I of the article gives a general overview of franchising, while Part II provides the current status of franchise regulation in Ethiopia. Part III explains comparative approaches in dealing with franchising issues around the globe. And the last part provides concluding remarks.

1. General Overview of Franchising and Its Regulation

1.1. The Meaning of Franchising

The term franchising has been defined in several ways from different perspectives. The International Franchise Association (IFA) defines franchising as follows:

*it is a contractual relationship between the franchisor and the franchisee in which the franchisor offers, or obliged to maintain, a continuing interest in the business of the franchisee in such areas as know-how and training: wherein the franchisees operate under a common trade name, format and procedure owned or controlled by the franchisor, and in which the franchisee will make a substantial capital investment in his business from his resources.*¹³

From this definition, one can understand that franchising is a contractual relationship that involves at least two parties through a legally binding contract, in which the franchisor has control over the way the franchisee runs the business and provides support to the franchisee in running the business. The franchisee has also the right and obligation to conduct the business through common trade

¹² Kendal H. Tyre, Legislative Outlook for 2017: Potential Changes in Franchise Legislation Across the World, *franchise law alert*, (2017), p.2, available at <https://www.nixonpeabody.com/media/Files/Alerts/2017>, accessed 09 May 2019.

¹³ Durban University of Technology, the Pros and Cons of Franchising for Chain Stores and Franchisee, (2019), p.7, available at <https://www.dut.ac.za/wp-content/uploads/2019/03/Full-report>, accessed on 8 December 2017.

name, format and procedure owned or controlled by the franchisor but by his investment.

On the other hand, the UNIDRIOT model franchise law defines franchising as follows: -

*franchise are the rights granted by a party (the franchisor) authorizing and requiring another party (the franchisee), in exchange for direct or indirect financial compensation, to engage in the business of selling goods or services on its behalf under a system designated by the franchisor which includes know-how and assistance prescribes in substantial part how the franchised business is to be operated, includes significant and continuing operational control by the franchisor, and is substantially associated with a trademark, service mark, trade name or logotype designated by the franchisor.*¹⁴

From this definition one can understand that the Model Law recognizes “business format franchising” than “traditional franchising”¹⁵ as it authorizes the franchisee to operate the business under the system designated by the franchisor. Business format franchising requires the control exercised by the franchisor to be “significant and continuing” and the franchisee conducts the business on his own behalf and investment. The definition also underlines that the franchise business is highly associated with a trademark, service mark, trade name or logotype of the franchisor. Moreover, the definition emphasized that the accumulated business experience and know-how of the franchisor and the assistance offered by him constitute the base for franchising. In return for this, the franchisee is duty-bound to pay a certain amount of money in the forms of royalty.¹⁶

¹⁴ International Institute for the Unification of Private Law, Model Franchise Disclosure Law, Rome, (2002), P.19-21 (UNDROIT model law), available at: <https://www.unidroit.org/instruments>, accessed on 18 December 2018.

¹⁵ In traditional franchising the franchisee will not produce the product or provide the service by itself; rather it distributes a product produced by the franchisor by using the franchisor's trademark. Since the product sold by the franchisee usually is manufactured by the franchisor, it is uniform throughout the system and does not need that much control by the franchisor. On the other hand, in business format franchising, a franchisor, who has a well-established system, licenses its well-known business system and provides the franchisee not only with its product and trademark but also an outstanding business formula comprising all areas of management including marketing strategies, business advisory support, quality controls, business administration manuals, and training. In this system, the franchisor must retain substantial controls over the franchisees to ensure uniform quality in the system. Nobuo Mlyake, Franchising in Japan, *Antitrust Law Journal*, Vol. 58, No. 3, (1989), p. 978, available at <http://www.jstor.org/stable/40843151>, accessed on 17 November 2017.

¹⁶ UNIDROIT model law, *supra* note 14, Article 2.

When we see the definition of franchising in Ethiopia it is defined ¹⁷ as

an agreement concluded for consideration between the franchiser and the franchisee in order to undertake business activities by using the trade name of the known product or service in order to share the nature and experience of the work under the leadership of the owner of the product that has got recognition.

The proclamation requires the franchisor to share his/her experience about the business while the franchisee is duty-bound to pay fee for the franchisor in return.¹⁸ The proclamation also calls for the products or service of the franchisee to be at the same level of quality as the franchisor,¹⁹ which is the hallmark of franchising. In general, franchising is explained as a system that typically includes the transfer of Intellectual property rights, access to business knowledge and methods in return for a fee. The franchisor commits herself to provide continuing support regarding the operation of the business while the franchisee agrees to abide by the standards set by the franchisor.²⁰

1.2. The Role of Intellectual Property (IP) Rights in Franchising

Franchising is about the utilization all aspects of the business of the franchisor, in particular the IP rights associated with the business.²¹ In franchising, several IP rights are exploited since the transfer of those intangible rights appears to be the base for franchise arrangements. In most case, these rights include trademarks, trade secrets (confidential information), patent, and copyright.²² In this regard, a trademark is an essential IP right in a business enterprise that can be licensed via franchising. It comprises of logos, designs, drawings, symbols, taglines, numbers, three-dimensional features, or a combination of any of

¹⁷ Commercial Registration and Licensing Proclamation no. 980/2016, *Federal Negarit Gazette*, (2016), Article 2(33)

¹⁸ Id., Article 37(2)

¹⁹ Id., Article 37(3)

²⁰ Tamara Milenkovic , The Main Directions in Comparative Franchising Regulation –Undroit Initiative and its Influence, *European Research Studies*, Volume XIII, Issue (1), (2010), P.104, available at https://www.ersj.eu/repec/ers/papers/10_1_p7 ,accessed on 17 November 2017,

²¹ Richard Gallafent, Role of Franchising of Intellectual Property Rights and other Technology Transfer Agreements for Enhancing the Competitiveness of Products and Services Of SMEs, WIPO Interregional Forum on SME (2002), p.7
https://www.wipo.int/edocs/mdocs/sme/en/wipo_ip_mow_02/wipo_ip_mow_02_10.pdf accessed on 17 November 2017,

²² Brand Protect Team, "Why IP Protection is Vital to Franchisors," available at <https://www.bptm.co.uk/franchising/why-ip-protection-is-vital-to-franchisors/>, accessed on 13 December 2019

these.²³ Moreover, franchising usually involves the transfer of valuable trade secrets to the franchisee, and it is essential to protect this secret from the general public. In a franchise agreement, trade secrets of the franchisor could be in the form of financial or technical know-how, business plans, implementation strategies, distribution techniques, operation manuals, pricing technique, customer lists, chemical formula, etc.²⁴ Copyright is another important IP right that can be impacted in franchising and would thus require sufficient protection. Copyrightable works in franchising include literary works like operation manuals, recipes, source codes; musical, audio-visuals and sound recordings; architectural works like template plans and designs of the franchised buildings, sculptural works, etc.²⁵ Finally, a patent is the other types of IP that can be a subject of a franchise. Some franchisors possess patented inventions that are licensed to franchisees in the form of business methods, computer software application, and equipment hardware. Franchise agreement should prescribe the mode of utilization of the patented inventions in order to prevent unauthorized exploitations, and determine who own inventions created during the course of the agreement.²⁶

1.3. The Benefits of Franchising

Franchising has many benefits for both the franchisor and the franchisee. On the side of the franchisor it enables him to create a diversified system of distribution for its product at a lower cost than operating individually.²⁷ It also decrease franchisor's risk of loss, allows the franchisor to shift technical risk, or the risk of obsolescence of tangible assets.²⁸ Quality control and innovation are the other advantages of franchisors. The franchisee, as an owner of his/her own business, strives to manage his/her business effectively by providing quality products to the consumers. This in turn benefits the franchisor to ensure the quality of products provided under its trademark. In addition to this, ownership incentives

²³ Sandra Eke "Why you need to Protect your Business Hashtags and Catchphrases," available at <http://www.spaajibade.com/resources/why-you-need-to-protect-your-business-hashtags-and-catchphrases/> accessed 13 May 2019

²⁴ John Onyido, The Role of Trade Secrets in the Protection of IP Rights, available at <http://www.spaajibade.com/resources/the-role-of-trade-secrets-in-the-protection-of-ip-rights/> , accessed 04 June 2019

²⁵ Sandra Eke, Protection of Intellectual Property Rights in a Franchise Agreement,(2020), available at <http://www.spaajibade.com/resources/protection-of-intellectual-property-rights/>, accessed on 10 June 2020

²⁶ Ibid.

²⁷ Curtis A. Loveland, Franchise Regulation: Ohio Considers Legislation to Protect the Franchisee, 3, *Ohio St. L.J.*, 1972, P.644, available at: https://kb.osu.edu/bitstream/handle/1811/69299/OSLJ_V33N3_0643.pdf , accessed on 12 May 2018

²⁸ Ibid.

may transform franchised stores into powerful engines of innovation, as the franchisee strives to improve the system by exerting his entrepreneurial skill.²⁹ In general, as stated by Zeidman, franchising provides for the franchisor several opportunities: - highly motivated management; additional income from royalty payment; the possibility of marketing at the remote site; rapid growth and scaling of business; the rapid launching of new modified goods/services; reducing the scope of involvement in day-to-day management; and easier, faster and less risky international expansion.³⁰

On the other hand, franchising enables the franchisee, especially SMEs startup, to compete more effectively than other competitors as a result of benefits driving from well-established and time-tested brands, and varied technical assistance. Since business startup for SME requires huge investment with the risk of losses at the initial stage, franchising has enormous benefit.³¹ In other words, it enables SMEs to cache the attention of customers and to win the competition exerted from well-established and financially capable businesses.³² In general, franchising offers the franchisee benefits such as:- following business methods successfully used and tested at a favorable price; preserving its economic and legal independence, and capability to compete with reliable profits that makes the business less exposed to the risk of bankruptcy.³³ However, even if franchising has different advantages, it has also many disadvantages for both the franchisor,³⁴ and the franchisee.³⁵

In addition to its benefit for the parties, franchising has also tremendous influence for the national economy in terms of output, job creation, an increase in the tax base, economic modernization, balance of payments' adjustments, and SMEs and entrepreneurship development.³⁶ Franchising often transfers

²⁹ Ibid.

³⁰ Philip F. Zeidman, With the Best of Intentions: Observations on the International Regulation of Franchising, *Stanford Journal of Law*, Vol 19: No. 2, (2014), pp.241-242, available at, <https://www.dlapiper.com › Zeidman Philip › Stanford Jou>, accessed on 12 April 2018; Kolesova, *infra* note 33, p 479

³¹ Loveland, *supra* note 27, P.644

³² Richard R. Spore, Planting the Franchise Seeds: For the Client Who wants to 'grow' a Business, Franchising Offers Certain Benefits, p.6, available at: <https://www.bassberry.com › professionals › spore-richard>, accessed on 19 May 2018.

³³ Kolesova, Advantages and Disadvantages of Franchising as a Form of Business, Tomsk Polytechnic University, Tomsk, p 479, available at: <earchive.tpu.ru › bitstream › conference>, accessed on 13 August 2018.

³⁴ Ibid.

³⁵ Zeidman, *supra* note 30, p.246; Kolesova, *supra* note 32, p 479.

³⁶ Ilan Alon, Global Franchising and Development in Emerging and Transitioning Markets, *Journal of Macromarketing*, Volume: 24 issue: 2, (2004), p.150, available at <https://doi.org/10.1177%2F0276146704269320>, accessed on 13 May 19.

knowledge, technology, human capital and skill, and enhances entrepreneurial success due to the transfer of a proven business format connected to a well-known brand.³⁷ For instance, in South Africa, franchising contributes 12% of the country's GDP.³⁸ Moreover, the economic development in Central European countries and expansion into emerging markets in Latin America, Eastern Europe, East Asia and the Pacific is partly attributable for the international expansion of franchising.³⁹ In Africa too, specifically in countries like Egypt, Tunisia, Morocco and South Africa franchising significantly contributed in job creation, export and foreign exchange earnings, growth of SMEs, poverty reduction, dissemination of technology, and boosting entrepreneurship.⁴⁰ Generally, franchise influences a country's development, not only economically but also socially and culturally.⁴¹ As a result, policy makers in emerging markets that observed the economic contributions of franchising have sought for ways to develop and regulate this form of business.⁴² However, it does not mean that franchising is free from critics. According to sociologists, franchising, through its adherence to standardized rules, robs workers of their need to think intelligently and forces people to function as mindless automatons. They argued that global franchising has the potential to create socio-economic tensions that adversely affect the host market consumers, and workers. They oppose global franchising, which they see as representative of the global capitalistic system, as it imposes commonalities across nations that deemphasize relativistic, nationalistic, and regional sentiments.⁴³

1.4. Regulation of Franchising

1.4.1. Private, Self and Public Regulation

An important aspect that should be considered in franchising is the issue of regulation. The regulation of franchising focuses on how the business relationship between franchisor and franchisee is controlled and governed.⁴⁴

³⁷ Mirela Alpeza *et al*, Development of Franchising in Croatia, Obstacles and Policy Recommendations, Vol.1, No.1, p.9, available at <https://core.ac.uk/download/pdf/>, accessed on 12 April 2018 and Id., p.161.

³⁸ Alon, *supra* note 36, P. 156.

³⁹ Ibid.

⁴⁰ Zeidman, *supra* note 30, p.243-244.

⁴¹ Cintya Lanchimba *et al*, The Impact of Franchising on Development, Universidad Nacional Autónoma de México, Vol. 49, No. 193, (2018), p.7, available at: www.scielo.org.mx/pdf/prode/, accessed on 12 April 2019.

⁴² Alon, *supra* note 36, p.160-161.

⁴³ Id., p.162-163

⁴⁴ Abell, Philip Mark, The Regulation of Franchising in the European Union, Queen Mary University of London, PhD, (2011), p84-85, available at <http://qmro.qmul.ac.uk/xmlui/handle/123456789/2326>, accessed on 10 December 2018

Even if there is no uniform practice of franchise regulation, private regulation, self-regulation and public regulation or the mixture of these are employed in different countries.⁴⁵ Private regulation refers to regulation of the parties by their own activities through the use of contractual agreements.⁴⁶ It usually regulates the grant, financial terms, term and renewal of the agreement, obligations of parties, confidentiality, restriction, transfer, purchasing ties, and termination.⁴⁷ Proponents of contractual regulation argue that governments should refrain, as much as possible, from regulating the private affairs of merchants as legislation would have a far-reaching effect upon the underlying principles of freedom of contract.⁴⁸ Hence, franchising requires effective general contracts laws to fully regulate the business and parties' relationship.⁴⁹ The supporters of this view do not fully accept bargaining power imbalance and abuse of power by the franchisor which is propagated by proponents of public regulation. Because franchisees and franchisors are equals in knowledge about the opportunity and the negotiation of the agreement, no one is forced to become a franchisee.⁵⁰ Moreover, while widespread termination and nonrenewal exist, there is no evidence that franchisors abuse their bargaining power.⁵¹ They believe that the enforcement of existing contractual remedies is sufficient to eliminate any proven abuses that may occur either by the franchisor or franchisee without the need for public regulation.⁵² In general, proponents believe that what is needed for franchising to thrive is recognition of the sanctity of contracts and strong IP protection.⁵³

However, opponents criticize private contract as it is not only ineffective at addressing existing abuses, but it sets up and reinforces imbalance of power and uncertainty in franchising.⁵⁴ They believe that franchisees do not have equal bargaining power with the franchisor.⁵⁵ The franchisor dominate the interaction

⁴⁵ Ibid.

⁴⁶ Elizabeth Spencer, *Reconceiving the Regulation of the Franchise Sector*, Macquarie L.J., Vol. 8, (2008), p. 109, available at <http://classic.austlii.edu.au/au/journals/MqLawJl/2008/7.pdf>, accessed on 12 March 2018

⁴⁷ Mark, *supra* note 44, p.102

⁴⁸ Donald, *Supra* note 1, P.272-273

⁴⁹ Eshetu Yadeta, Note on Laws Regulating Franchise Business in Different Jurisdictions, *Haramaya Law Review*, Vol. 5: No.1, (2016), P.146 available at: <https://www.ajol.info/index.php/hlr/Article>, accessed on 23 March 2019

⁵⁰ Peter C. Lagarias *et al*, *Modern Reality of the Controlling Franchisor: The Case for More, Not Less, Franchisee Protections*, p. 144, available at: www.boulter-law.com/2013/06/FLJ_29_3 accessed on 23 February /2019

⁵¹ Ibid., and Donald, *supra* note 1, P.262-263

⁵² Id., 277

⁵³ Zeidman, *supra* note 30, p.252

⁵⁴ Spencer, *supra* note 46, p.111

⁵⁵ Lagarias, *Supra* note 50, p. 144

using its bargaining power, and enter into franchising without having any formula or business format, and without providing the necessary information for franchisees.⁵⁶ Moreover, the obligation of the franchisor and franchisee are not balanced and equally regulated. The contract gives franchisor extensive discretion, but with few and not detailed obligations and limitations⁵⁷ while the duties of the franchisee are voluminous and cumbersome.⁵⁸ As a result, franchisees are exposed to exploitation, poor quality support and ultimately brand failure.⁵⁹ It is stated that franchisees will be at a disadvantageous position because of lack of information, expertise, experience, and finance. Hence, unlike public regulation, private regulation is not adequate to control power abuse and imbalance.⁶⁰

Self-regulation is the other mechanism to govern franchising. It focuses on how the relationship between parties in a franchise is governed through professional bodies that monitor conducts by prescribing and enforcing its own rules.⁶¹ It is stated that self-regulation is more reflexive, responsive, contextualized, sophisticated and efficient than public regulation.⁶² Supporters argue that it provides a balance between a too lax private and the rigid public regulation, as it is moderately flexible and can be easily revised. Code of conduct developed and constantly updated by a self-regulatory body will have a high compliance rate.⁶³ Moreover, the abuse and commercial failure in franchising cannot be addressed by private law remedies that are inadequate and too costly, and self-regulation is a better, cheaper and more focused option.⁶⁴ They believe that unlike self-regulation, public regulation will inevitably retard the success of franchising because of its cumbersome and commercially divisive nature.⁶⁵ In general, self-regulation, gives access to a greater degree of expertise, knowledge, commercially appropriate result that enable the franchise to grow ethically.⁶⁶

⁵⁶ Mark, *supra* note 44, p. P.88

⁵⁷ Id., P.111-112

⁵⁸ Id., p.102-105

⁵⁹ Id., p.107-108

⁶⁰ Spencer, *supra* note 46, p.111-113, 271

⁶¹ Economics and Sector Research Namibian Competition Commission, Market Study Report on the Development of the Franchising Industry and Recommendations for Regulation in Namibia, (2017), p.31-32, available at https://www.nacc.com.na/cms_documents/206_franchising_report.pdf, accessed on 20 July 2019.

⁶² Spencer, *supra* note 46, p.105-106.

⁶³ Id., P. 3-4.

⁶⁴ Mark, *supra* note 44, P.111-112.

⁶⁵ Id., P.113.

⁶⁶ Id., P.111-112.

However, those who criticized self-regulation stated that a sense of inadequacy is expressed towards this mechanism, since industry role-players that lacks funding, effective enforcement mechanisms, and capacity to promote their interests and impact on non-members, regulate themselves.⁶⁷ In order to show the ineffectiveness of self-regulation, different writers cite the British Franchise Association and the Australian experience that have achieved little, fails to meet the demands of its members, and unable to limit dishonest franchisors.⁶⁸ Moreover, it is believed that self-regulation can be insufficient in protecting the interests of franchisees,⁶⁹ as the franchisors wield the power in self-regulation, and self-regulators exploit their power to protect the interests of the franchisor as a member.⁷⁰ Such an entity does not always provide reliable and accurate information for the franchisee that evidenced by the existence of high deceptive conducts.⁷¹ In general, opponents believe that self-regulation that lacks transparency, consistency, accountability and proportionality will never be able to provide franchisees with the level of protection that they require.⁷²

The other mechanism employed to regulate franchising is public regulation.⁷³ Proponents of this mechanism believe that the uncertainty that is inherent in the private and self-regulation could be addressed by responsive regulators who have a point of reference within the law that provides clarity and certainty.⁷⁴ Public regulation requires the franchisors to provide information about the franchise business, and put a range of restrictions upon the franchisor in dealing with the franchisees with the view to enable the franchisee to make an informed decision.⁷⁵ Proponents of a public regulation claim that wide spread abuses that include misrepresentation, nondisclosure, unreasonable requirements, refusal to renew, and arbitrary termination arise from the disparity of bargaining power, which is not susceptible of correction by existing legal remedies.⁷⁶ Hence, only the adoption of franchise law can address such abuses by creating certainty in the industry, prescribe minimum standards of behavior and subject it to public scrutiny.⁷⁷ Andrew Terry concludes that a healthy franchising sector requires

⁶⁷ Economics and Sector Research Namibian Competition Commission, *supra* note 61, p.31-32, and Mark, *supra* note 44, p121-122.

⁶⁸ Mark, *supra* note 44, p.114.

⁶⁹ Economics and Sector Research Namibian Competition Commission, *supra* note, 61, p. 31-32.

⁷⁰ Spencer, *supra* note 46, p.107.

⁷¹ *Id.*, p.110.

⁷² Mark, *supra* note 44, p136.

⁷³ Spencer, *supra* note 46, p.109.

⁷⁴ Economics and Sector Research Namibian Competition Commission, *supra* note 61, p.31.

⁷⁵ Zeidman, *supra* note 30, p 247 and *supra* note, 61, p.31.

⁷⁶ Donald, *supra* note 1, P.244-245.

⁷⁷ Economics and Sector Research Namibian Competition Commission, *supra* note 61, p.31.

adequate and appropriate legal infrastructure,⁷⁸ as franchisees are damaged and franchising is diminished by the inappropriate practices of those who trade off the reputation of franchising. Therefore, an appropriate form of regulation which protects the interest of both parties in a manner that does not curb the entrepreneurial nature of franchising, or threaten its development, is critical.⁷⁹

On the other hand, opponents argue that franchising should not fall under the ambit of public regulation as it has been regarded an undesirable phenomenon, a costly and unwelcome intrusion into the optimal function of free markets.⁸⁰ According to this view, legislation can be rigid, restrictive and create unnecessary burdens that could discourage investors by serving as a barrier to entry.⁸¹ In addition to its costliness and requiring compliance cost, enforcement authorities may find it difficult to apply complex law that requires the high level expertise.⁸² Furthermore, opponents argues that in attacking the central core of freedom to contract, laws regulating franchising consider merchants as they do not know, and cannot be trusted to determine what is in their own best economic interests.⁸³ Moreover, regulation could set the franchisor against the franchisee, thus undermining the mutuality of effort necessary to franchising; deny the franchisor to conduct their business with flexibility, and interfere with the successful allocation of goods and services. In sum, regulations reduce and destroy the real benefits of franchising.⁸⁴ However, some opponents do not automatically reject public regulation; rather, they believe that regulation should be limited to addressing specific, proven abuses taking into account the nature of the industry, and the length of the agreement.⁸⁵

1.4.2. The Advent of Franchise Regulation and its Benefit

Franchising, which is treated as normal commercial contract between equal parties, is identified as vulnerable to abuse, as it is one-sided and mostly non-negotiable agreement solely prepared by the franchisor based on take it or leave it approach.⁸⁶ Due to economic and information disparity, business

⁷⁸ Andrew Terry, Franchise Sector Regulation: The Australian Experience, (2003/04), *LAWASIA Journal*, 57, UNDRUIT, p.58.

⁷⁹ Ibid.

⁸⁰ Spencer, *supra* note 46, P.104.

⁸¹ Ibid.

⁸² Economics and Sector Research Namibian Competition Commission, *supra* note 61, p.31

⁸³ Donald, *supra* note 1p.276.

⁸⁴ Id., p.267-266.

⁸⁵ Id., 278.

⁸⁶ Elizabeth C. Spencer, Consequences of the Interaction of Standard Form and Relational Contracting in Franchising, p.3, available at <https://www.jstor.org/stable/29542259>, accessed 22 December 2019; Eshetu, *supra* note 49, p.146.

sophistication, differences in knowledge and size of business, lack of experience, a franchisee is in a weak position to bargain effectively with a franchisor, regarding terms and conditions of the agreement, and how to operate the business.⁸⁷ This leads to different abuses by the franchisors that include failure to disclose material facts, unwarranted termination or variation, non-renewal of the agreement, and prohibition of transfer.⁸⁸ For this reason, franchisees and their advocates began to express discontent during the end of the 1960s and these concerns evoked a legislative or regulatory response.⁸⁹ Hence, in the 1970's, the first move of franchising regulation evolved in the US., California in response to marketplace abuses by the franchisor.⁹⁰ Later, other States and the Federal government in the US incorporated the regulatory measure in the 1990s.⁹¹ In the 1980s and 90s, there has been a proliferation of franchise laws that arose from genuinely felt concerns about abuses by franchisors.⁹² As of 2019, more than 44 countries in the world,⁹³ and 9 countries in Africa adopted franchise-specific law.⁹⁴ In general, franchise-specific law appears to be a slowly growing trend internationally in response to reported abuses of the franchisors.⁹⁵ However, it does not mean that there are no countries that ripe the fruits of franchising without having franchise-specific law; UK, Finland, Norway, Chile, and Check Republic are examples of those that have achieved franchising growth without franchising-specific law.⁹⁶

Franchise law is growing in importance and has been quickly developed in many countries as franchising becomes the more desirable business model.⁹⁷ Countries regulate franchising with the objective of enhancing the operation of the sector,

⁸⁷ Id., p.44; Lagarias, *supra* note 50, p.140.

⁸⁸ Lagarias, *supra* note 50.

⁸⁹ Alon, *supra* note 27, P.160-161.

⁹⁰ Lagarias, *supra* note 50, p. 139.

⁹¹ Stephen Giles *et al*, Australian Franchise Law: How to Avoid. Being a Shrimp on the Australian Franchising Barbecue, p.164, available at [heinonline.org > hol-cgi-bin > get_pdf > fchlj29](http://heinonline.org/hol-cgi-bin/get_pdf.fchlj29), accessed on 10 March 2019.

⁹² Zeidman, *supra* note 30, p.252.

⁹³ Id., p.252-260, United States, provinces in Canada, France, Brazil, India, South Korea, South Africa, Russia, Mexico, Albania, Spain, Indonesia, Moldova, China, Romania, Kirgizstan, Malaysia, Australia, Belarus, Turkmenistan, Taiwan, Azerbaijan, Latvia, Croatia, Georgia, Estonia, Lithuania, Japan, Kazakhstan, Italy, Mongolia, Vietnam, Sweden, Tunisia have franchise specific law.

⁹⁴ African Development Bank Group, *supra* note 8, P.2.

⁹⁵ Ibid.

⁹⁶ Alon, *supra* note 36, p.165.

⁹⁷ Rupert M. Barkoff, A Look at Franchise Regulation from Ground Level to 30,000 Feet Reviewed Work(s), p.15 Available at: [www.kilpatricktownsend.com > Files > Articles > FLJ_W13_32_3_Barkoff](http://www.kilpatricktownsend.com/Files/Articles/FLJ_W13_32_3_Barkoff), accessed on 11 July 2018.

to protect parties involved and consumers.⁹⁸ For this reason, regulation appears to be on the rise and is diverse worldwide.⁹⁹ In general, as stated by Andrew, franchising requires a law to support its orderly development.¹⁰⁰ Franchise law ensures that franchisees are provided with proper information that assists them to make a well-informed decision guides parties to better conclude and perform the agreements and guarantees the authenticity and transparency of documents produced by franchisors and the credibility of persons involved.¹⁰¹ Apart from this, franchise regulation has become a stimulus for business development in developing countries, as the law has the capacity to attract investors by ensuring predictability and adequate protection.¹⁰² It is argued that creating the right balance between parties, to minimize abuse and negative effects of having scattered rules, franchise-specific law is necessary and indispensable.¹⁰³ In general, franchising legislation would provide certainty and a clear framework for the relationship between the parties, addresses abuses within the sector, promotes enterprise development and contributes to the expansion of franchising business.¹⁰⁴

As identified by researches conducted in different countries, lack of franchise-specific law and the consequent inadequate protection for franchise relationships is the major obstacle for the development of franchising.¹⁰⁵ In Thailand, even if franchising is growing, lack of uniform legislation affects its significant expansion.¹⁰⁶ Moreover, in Ukraine, a poor legal framework was a major factor that discouraged foreign franchisors to enter into the market that forces the country to adopt commercial laws in 2001, in which franchising was specifically addressed and given extensive recognition.¹⁰⁷ Research conducted in Croatia¹⁰⁸ and Jordan¹⁰⁹ identifies that countries with specific franchising

⁹⁸ Imed Bekhouche, *et al*, An Overview of Franchising Law: Why is it Important? *International Journal of Law and Public Administration*, Vol.1, No.1; (2018), p.41-42, available at <https://www.researchgate.net/publication>, accessed on 01 February 2018.

⁹⁹ Mark Abell, *The Franchise Law Review*, Law Business Research Ltd, 4th ed., (2017), London, available at: https://thelawreviews.co.uk/wps/wps/wforms/verify_digital_asset, accessed on 11 July 2018.

¹⁰⁰ Bekhouche, *supra* note 98, p.43-44.

¹⁰¹ *Id.*, p.41-42

¹⁰² Barkoff, *supra* note 97, p.15; US Department of Commerce, *supra* note 2

¹⁰³ Pornchai Wisuttisak, *The Regulatory and Commercial Environment for Franchising in Thailand in the Wake of the Asian Integrating Market*, *Iium Law Journal*, Vol. 24, No. 1, (2001), p. 125-126, available at <https://journals.iium.edu.my/iiumlj/index.php>, accessed on 11 June 2018

¹⁰⁴ African Development Bank Group, *supra* note 8, P.4

¹⁰⁵ Bekhouche, *supra* note 98, p.41-42

¹⁰⁶ *Ibid.*

¹⁰⁷ Ukraine - Legislation and Regulations Relevant to Franchising, available at: <https://www.unidroit.org/131-instruments/franchising/guide/guide-2edition/national-information-2nd-franchise/country/292-ukraine-legislation-and-regulations-relevant-to-franchising> accessed on 11 July 2018

¹⁰⁸ Alpeza *et al*, *supra* note 37, p. 19 and 23

laws generally have the highest number of franchise systems the more franchise outlets, the more franchising impacts on the economy. In China, the adoption of franchise law in 2007, as a response to marketplace abuses, played an important role in improving the environment for franchising.¹¹⁰ The adoption of franchise law in Vietnam also became a turning point for the development of franchising.¹¹¹ Moreover, in Malaysia the adoption of franchise law in 1998 provide certainty and great protection for parties, and encourage good business practices by protecting the system and the franchisor's copyright.¹¹² According to a research conducted in Latin America, franchise laws have a significant impact on development as the law significantly influences economic agent, increase the confidence of the participants by providing adequate and equal protection, and creates better relationships and thereby leads to better results as both parties fully aware of their rights and duties.¹¹³ Generally, franchise law provides all parties with a clear framework to better understand the system and enhance the utilization of the model.¹¹⁴ Therefore, having observed the contribution of franchising for development, policymakers in emerging markets are increasingly looking for ways to develop and regulate franchising.¹¹⁵

1.4.3. Approaches of Franchise Regulation

When we come to the approaches of franchise regulation there is no uniform approach even within countries that adopt franchise-specific laws. In this regard, one can find the “disclosure” countries, the “relationship” countries, and the “registration” countries.¹¹⁶ In disclosure countries, the law typically obliged the franchisor to provide to a prospective franchisee a disclosure document setting forth specified information relating to the franchisor and the franchising business prior to signing the agreement and/or before any consideration is paid.¹¹⁷ In relationship countries, the law regulates some aspects of the relationship between franchisors and franchisees that include terms of the

¹⁰⁹ Bekhouche, *supra* note 98, p.43-44

¹¹⁰ *Ibid.*

¹¹¹ Yohanis Hailu, The Legal Framework for the Transfer of Technology in Ethiopian, *Journal of Law, Policy and Globalization*, Vol.55, (2016), p.122, available at <https://iiste.org/Journals/index.php/JLPG/article/view/34245/35217> accessed on 23 March 2019

¹¹² Franchising in Malaysia, 2018, available at: <https://www.lexology.com/library/detail.aspx?g=2c64640b-fa13-4f8d-a959-9f38ded3a4c0> , accessed: 08 May 2019

¹¹³ Lanchimba, *supra* note 41, p.7

¹¹⁴ African Development Bank Group, *supra* note 8, and Spencer, *supra* note 86, p.31

¹¹⁵ Bekhouche, *supra* note 98, p.41-42

¹¹⁶ Lagarias, *supra* note 50, p. 143-144

¹¹⁷ *Ibid.*

agreement, renewal, good faith, product tie, termination, and non-compete restraint.¹¹⁸ In registration countries, the laws merely spell out who and what must be registered in connection with a franchise operation; and in most cases, such laws require the registration of the franchise businesses and the agreements.¹¹⁹ However, in many countries like China, South Africa, South Korea, Argentina, Malaysia, and Vietnam, their franchise laws tried to regulate the above elements in single legislation.¹²⁰ Such types of franchise laws, therefore, typically cover pre-contractual disclosure requirements, rules governing the offer and sale of franchises, right and duty of parties, registration requirements, post-sale relationship of the parties, and dispute settlement mechanism.¹²¹

According to Development Bank of Africa, franchise regulation would be most beneficial if it includes a definition, a requirement for pre-sale disclosure and requires parties to act in good faith towards each other.¹²² Moreover, Timothy H. Fine stated that good franchise law should require registration of the franchise agreement; and to file a copy of the agreement or its revisions with the government organ. Through registration, it is possible to save franchisees' money that they otherwise would have lost for franchisors who failed to meet their obligations.¹²³ He also stated that a good franchise law requires parties to deal with in good faith and in a reasonable manner prohibits non-renewal of the agreement except on few grounds regulates the conditions to transfer the agreement and prevents a franchisor from terminating the agreement without good cause. He generally stated that good franchise law should be crafted by considering franchising as a special, long-term and continuing partnership, which is more than a commercial buyer/seller situation.¹²⁴

¹¹⁸ Ibid.

¹¹⁹ In US 20 states have relationship legislation with the objective of controlling franchise agreement and regulates terms related to termination, renewals, transfers, encroachment, and advertising funds; Ewelukwa, *supra* note 74, p. 1

¹²⁰ Abell, *supra* note 54

¹²¹ Uche E. Ofodile, Franchising Law: Does Nigeria Need one? Do other countries have them? Nigerian International Franchise Association, (2014), p. 1, available at [www.nigerianfranchise.org > images](http://www.nigerianfranchise.org/images), accessed on 23 March 2019

¹²² African Development Bank Group, *supra* note 8

¹²³ Timothy H. Fine et al, The Proposed Uniform Franchise Act: The Franchisee Viewpoint, p.10, available at [https://digitalcommons.law.seattleu.edu > cgi > viewcontent](https://digitalcommons.law.seattleu.edu/cgi/viewcontent), accessed on 01 February 2019

¹²⁴ Ibid.

2. An Overview of Franchise Business in Ethiopia and the Need for Regulation

Currently, though their number is limited, there are entities in Ethiopia that run their business under franchise agreements. Ethiopia's current major franchise agreements were first drawn up nearly 50 years ago. The first franchisors in Ethiopia were Coca-Cola, Pepsi cola and Hilton International Hotels that took place in the 1960s, and the Sheraton Addis in 1990s.¹²⁵ Currently known international brands like Marriott, Radisson Blue, the Golden Tulip, Crowne Plaza, Wyndham Hotel Group, Ramada Hotel, Pullman Hotel, Pizza Hut, and KFC are operating their franchise business in Ethiopia.¹²⁶ However, the current franchising market in Ethiopia is heavily concentrated in Addis Ababa, which accounts for 95% of all Ethiopian franchised outlets.¹²⁷ According to one research, lack of awareness on the enforcement agency about franchise business, weak and fragile protection for IP infringements, and lack of motivation and coordination on the part of government agency to promote franchising are the main challenges for the development of franchising in Ethiopia.¹²⁸ Moreover, the country lacks a law specifically designed to regulate the franchise business. Even the term "franchise" is not mentioned both in the civil and commercial codes, and there is no government organ explicitly authorized to regulate franchising business.¹²⁹ Overall, the legal regimes that govern franchise agreements are located in various statutes such as contract law, commercial law, investment law, IP laws, competition laws, and other laws.¹³⁰ However, after enactment of the new Commercial Registration and Business Licensing Proclamation in 2016, the term franchising is explicitly recognized with the regulation of some aspects of franchising even though many important concerns regarding franchising are left unregulated.

2.1. The Existing Legal Framework for Franchising in Ethiopia

Before directly going to the discussion on the legal framework, it is better to look at the policy direction in relation to franchising. Ethiopia has few policies that directly embrace franchising as a business doing model. Among these, the

¹²⁵ Yohannis, *supra* note 4 P.1.

¹²⁶ US. Commercial Guides; Ethiopia 2017, US Department of Commerce, p.19, available at <https://www.trade.gov/knowledge-product/ethiopia-market-overview?>, accessed on 20 November 2019.

¹²⁷ *Ibid.*

¹²⁸ Nibemicheal Fikre, Business Franchise: The Legal Framework and Practice in Ethiopia, unpublished LLM thesis, Bahir Dar University, (2016) p.67.

¹²⁹ Eshetu, *supra* note 49, P.145.

¹³⁰ *Ibid.*

FDRE Micro and Small Enterprise (MSE) Development Policy and Strategy clearly outlines the government's position with regard to franchising. According to this policy franchising is an important investment methodology that can significantly contribute to the development of SMEs in Ethiopia. As stated in the policy, if well utilize, franchising can help to speed up Ethiopia's economic growth by attracting foreign investment and creating a new job.¹³¹ Since franchising is the most effective mechanism for SME development, the policy emphasizes on enabling SME to work with an experienced local or foreign partner through franchising.¹³² In order to solve problems currently faced by SME, the policy underlined on the preparation of legal and regulatory frameworks for franchising. It is stated that due to the limited experience of franchising in Ethiopia, appropriate legal framework shall be prepared.¹³³

With the legal regime, the first important law that is applicable for franchise agreement is contract law parts of the 1960 civil code. A franchise comes into existence utilizing a contract. Hence, regulating franchising begins by regulating the contract that gives rise to it. Consequently, the contract has to be in strict compliance with the provision of the code and needs to fulfill essential conditions of the contract.¹³⁴ Moreover, the principle of good faith applies in the making,¹³⁵ interpretation,¹³⁶ and performance¹³⁷ of the franchise agreement. The rules that govern adhesive contract¹³⁸ and rules applicable for termination of the contract¹³⁹ will also govern franchise agreement. On the other hand, the Commercial Code is also the other law applicable to franchising. There are a number of provisions in the Code like those on goodwill,¹⁴⁰ trade name,¹⁴¹ distinguishing marks,¹⁴² and assignment of premises.¹⁴³ These provisions are, in one or another way relevant for franchising, and influence how the franchised business is run.

¹³¹ FDRE Small and Medium Enterprise Development Policy and Strategy, *supra* note7, P.23.

¹³² *Ibid.*

¹³³ *Id.*, P. 24.

¹³⁴ Civil Code Proclamation No.165, *Negarit Gzaeta*, (1960), Tittle XII, Article 1675 and ff.

¹³⁵ *Id.*, Article 1702.

¹³⁶ *Id.*, Article 1713 and Article1732.

¹³⁷ *Id.*, Article 1785(1).

¹³⁸ *Id.*, Article 1738(2).

¹³⁹ *Id.*, Article 1820, 1821, 1819-1825, 1820(1), 1822, 1823.

¹⁴⁰ Commercial Code Proclamation No. 166, *Negarit Gazeta*, (1960), Article 127(1), 130-134).

¹⁴¹ *Id.*, Article 127 (2) (a), Article 135.

¹⁴² *Id.*, Article 140 and 141.

¹⁴³ Commercial code, Article 139.

The other piece of legislation that may be relevant for franchising is the Trademark Registration and Protection Proclamation.¹⁴⁴ As per Article 26, and 29 (2) of this proclamation, it is only owners of a registered trademark who shall have the right to license the use of a trademark. Hence, in order to franchise the trademark, a franchisor is required to register the trademark and the franchise agreement at the Ethiopian IP Office. As per the proclamation, a license contract on a registered trademark or an application for registration of a trademark, as well as modification or termination of the same shall be submitted to the Office; otherwise, the license shall have no effect on third parties.¹⁴⁵ Moreover, any license contract on a registered trademark or an application for registration of same shall be null and void unless it contains a provision that enables the franchisor to effectively control the quality of the goods or the services provided by the franchisee.¹⁴⁶ The rationale behind for such requirement maybe the need to protect consumers, since the use of the trademark by a licensee may mislead consumers as to the quality of the goods or services unless there is effective quality control.¹⁴⁷ Moreover, the proclamation prohibits the inclusion of unjustified restrictions that are not necessary to safeguard the right of parties, for which the inclusion leads to the nullity of the contract.¹⁴⁸

The other relevant law is the Inventions, Minor Inventions and Industrial Design Proclamation, which comes in to picture when the franchise agreement involves the use of the franchisor's patent right.¹⁴⁹ Pursuant to Article 26 of the proclamation, the franchisor should have a patent granted by the Ethiopian IP office in order to license the use of its patent. A foreign franchisor that provides a patented invention for the franchisee can also use the option of acquiring a patent of introduction in order to acquire protection in Ethiopia.¹⁵⁰ However, the Ethiopian patent law has no clear provision on voluntary licensing of patent rights, the details of its registration, the form and nature of licence contract, grounds and procedures to revoke the contract, and duration of the licence.¹⁵¹ Apart from these, a manual containing the entire techniques and methods of running the franchised business and how to use the service or products is protected under the copy right law. In this regard, domestic and Ethiopian

¹⁴⁴ Trademark Registration and Protection Proclamation No. 501/2006, *Federal Negarit Gazette*, (2006).

¹⁴⁵ *Id.*, Article 16

¹⁴⁶ *Id.*, Article 30

¹⁴⁷ Yohanis, *supra* note 111, p.122

¹⁴⁸ Trademark Registration and Protection Proclamation, *supra* note 144, Article 31(1)

¹⁴⁹ Invention, Minor invention and Industrial Design Proclamation No. 123/1995, *Federal Negarit Gazette*, (1995),

¹⁵⁰ *Id.*, Article 21 and 28

¹⁵¹ *Id.*, Article 35(3) and 30(3)

resident franchisor's copyrightable work acquires automatic recognition, while foreign franchisor should publish its work in Ethiopia.¹⁵² The copyright law has some rules on licensing of economic rights. Such rules specifically require the agreement to be in writing and allow the termination of the agreement after five years unless parties agree to the contrary.¹⁵³ Failure to adequately exercise the rights by the licensee that prejudices the legitimate interest of the author could be revoked by the latter.¹⁵⁴ However, under the patent and copyright law issues like determination of royalty for licensing, voluntary licensing, implied warranty, and the fate of subsequent improvements of the licensed product are not clearly regulated.¹⁵⁵

The other category of law that governs franchise agreement is technology transfer aspect of the investment law.¹⁵⁶ In relation to an agreement that entitle the franchisee to use the methods of production, service and marketing, or entire business operation model of the franchiser, the technology transfer aspect of the investment proclamation is applicable, because such kinds of the agreement are being considered as technology transfer agreements under the proclamation. Accordingly, franchising agreements which have these elements are required to be registered before the Investment Commission. As per the proclamation, where an investor concludes a technology transfer agreement related to his investment, he shall submit the same to the Commission for registration and failure to do so result in the nullity of the agreement.¹⁵⁷ However, as one can understand from the contrary reading of Article 15(1), if the franchisor simply transfers its trademark or other designations that represent his goodwill without introducing certain patented machinery or technical information related to the production of specific goods, the agreement will not be subject to the investment proclamation.

Commercial Registration and Business License Proclamation is also the other relevant law which has direct application for franchising.¹⁵⁸ This law under its Article 2(33) explicitly introduces the concept of franchising in Ethiopian and

¹⁵² Copyright and Neighbouring Right Protection Proclamation No. 410/2004, *Federal Negarit Gazette*, (2004), Article 3

¹⁵³ Id., Article 23(2), and Article 24(3)

¹⁵⁴ Id., Article 24.

¹⁵⁵ Dagnachew Worku, Examining the Legal Regime Governing Commercialization of Patents, Copyrights and Trademarks in Ethiopia, *Developing Country Studies, IISTE*, P. 36, available at www.iiste.org, accessed on 1 May 2018

¹⁵⁶ Investment Proclamation No. 1180/2020, *Federal Negarit Gazette*, (2020), Article 2(9) of the proclamation clearly defined what Transfer of technology agreement refers

¹⁵⁷ Id., Article 15(1)

¹⁵⁸ Commercial Registration and Licensing Proclamation, *supra* note 17.

regulates the registration of the franchise agreement. As provided under the proclamation no person shall obtain any kinds of business license without being registered in commercial registrar.¹⁵⁹ Hence, parties to the franchise agreement should register the agreement before the competent authority by attaching documents listed under the regulation.¹⁶⁰ In this regard, an application for a special franchising registration should be submitted by filing a prescribed form and attaching documents listed under Article 48 of the regulation.¹⁶¹ As provided under Article 6(2) of the proclamation, the registering officer shall register the application upon payment of service fee and issue a certificate of registration to the franchisor and franchisee if the application is found acceptable. However, the law is not clear as regards who owes the duty to undertake the registration. Under the draft commercial code it is the franchisee that has the duty to register the franchise agreement.¹⁶²

As one can understand from the proclamation and the regulation, prior to registration the franchisor and the franchisee should have a valid business registration and trade license, as no one can engage in any business activity without having a license.¹⁶³ Moreover, any amendment or alteration in the original registration shall be registered with the registering office.¹⁶⁴ In this regard, the regulation provides the procedure for renewal,¹⁶⁵ and getting a substitute certificate if the registered franchise certificate is damaged.¹⁶⁶ Moreover, in order to cancel the franchise certificate, parties should submit an application with the approved cancellation agreement and the original certificate.¹⁶⁷ Finally, the proclamation enumerates criminal acts. If parties to franchise prepared or used false franchising certificate; or engaged in the business without having a license, or obtain or renew franchising certificate by submitting false documents and fails to notify changes that warrant amendment of the registration, shall face penalties prescribed under Article 49 of the

¹⁵⁹ Id., Article 5(1&2).

¹⁶⁰ Commercial Registration and Licensing Regulation, No. 392/2016, *Federal, Negarit Gazette*, (2016), Article 48-51. In this regard the regulation, among other things, incorporated rules that govern the registration, renewal, and cancellation of franchise, and provides the documents that should be attached for this effect.

¹⁶¹ A notarized franchising contract and its authenticated original and copy; a notarized registration certificate of the franchisor; a photocopy of the valid trade license of the franchisee; two passport size photographs, original and necessary copies of valid identification card or valid passport of the franchising manager; and the power of attorney, valid identification card or passport of the principal and the attorney when it is submitted by an attorney

¹⁶² የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የንግድ ህግ ረቂቅ ፣ (2011 ዓ.ም)፣ አንቀጽ 208

¹⁶³ Id., Article 6(1) & 22(1); Commercial Registration and Regulation, *supra* note 160, Article 48(2&3)

¹⁶⁴ Commercial Registration and Business Licensing Regulation, *supra* note 160, Article 10.

¹⁶⁵ Id., Article 49.

¹⁶⁶ Id., Article 51.

¹⁶⁷ Id., Article 50.

proclamation. Generally, the Proclamation was expected to pave the way for legitimizing franchising and clarifying the grey area. However, it failed to regulate basic features of franchising like contents of the agreement, pre-sale disclosure, rights and duties of parties, and as such it has been criticized for being too general.¹⁶⁸

There are also different tax laws relevant to franchising. Withholding tax regime is one of the prominent taxes that apply to the franchise in Ethiopia.¹⁶⁹ Hence, by virtue of Article 51, 53, 54 the Income-tax law royalty payment be subject to 5% of withholding tax. If a foreign franchisor gives technical services for a domestic franchisee in Ethiopia, his payment is subject to 15% VAT, and if he renders the service for Ethiopian franchisee but outside Ethiopia, his payment is subject to withholding tax of 10%.¹⁷⁰ For the enforcement of this tax liability, a domestic franchisee has an obligation to act as a withholding agent for Schedule D royalty payment and for the VAT.¹⁷¹

Finally, it is also worthy to look at the current draft Commercial Code prepared by the FDRE General Attorney Office,¹⁷² as it shows the current position of the government. Under the draft code, there are provisions specifically devoted to the regulation of franchising. The draft code under Article 204 provides a definition for franchising, even if the types of IP rights subject to franchising are not clearly incorporated. Apart from this the draft law clearly provides the scopes of the right of the franchisee under its Article 204(2). Hence, lease right over the franchised business in no way has the effect of providing for the franchisee ownership right over the franchised business. Moreover, it requires mandatory registration of the franchise contract,¹⁷³ and the designation of specific place or surroundings dedicated to the franchise business.¹⁷⁴ Corporal or incorporeal goods can be subject to franchising agreement, even if the details are left for the determination of subsequent legislation.¹⁷⁵

Apart from this, the draft code devotes a provision that regulates the right and duty of the franchisee and the franchisor. In this regard, Article 207 specifically deals with the duty of the franchisor. Accordingly, the franchisor has the duty to provide detailed information as to its trade activity, the financial position of the

¹⁶⁸ Tyre, *supra* note 12, p.2.

¹⁶⁹ Income Tax Proclamation No. 979/2016, *Federal Negarit Gazetta*, (2016).

¹⁷⁰ Value added Tax Proclamation No. 285/2002, *Federal Negarit Gazeta*, (2002), Article 7(1)(c).

¹⁷¹ Id., Article 32(1) and 23(3); Income tax Proc. *supra* note 169, Article 64(3).

¹⁷² የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የንግድ ህግ ረቂቅ ፣ (2011 ዓ.ም.).

¹⁷³ Id, Article 204 (4).

¹⁷⁴ Id, Article 205).

¹⁷⁵ Id, Article 206).

business, and other related information that helps the franchisee to make informed decisions within 30 days from the conclusion of the contract or from taking payment.¹⁷⁶ However, the law does not provide for private actions during the violations of disclosure rules, and does not impose ongoing disclosure obligation on the franchisor with the limited condition. The other duty of the franchisor is the duty to protect the franchisee from trademark fraud. Hence, if any third party infringes on the trademarks that subject to the agreement, the franchisor has the duty to bring an action against the violator with the view to discontinue the illegal act and to get redress. Apart from this, the law imposed on the franchisor general duty to provide assistance and appropriate training for the franchisee on how to operate the business besides other duties that will be provided by other laws and the franchise agreement.¹⁷⁷ As far as the duty of the franchisee is concerned the code imposed only the duty to make the registration of the franchise agreement before the relevant government authority.¹⁷⁸ Obviously, in addition to this duty, the franchisee may also have other duties provided under the franchise agreement. Finally, the draft code mandated the determination of other duties of the franchisor and detailed regulatory matters for legislation to be issued later.¹⁷⁹

2.2. The Need for Comprehensive Franchise Regulation in Ethiopia

As one can understand from the aforementioned discussion, Ethiopia doesn't have comprehensive franchise law even after the introduction of franchise concept under 2016 commercial registration law. In other words basic elements of franchising such as pre-contractual disclosure, contents of the agreement, parties relationship and basic protection left unregulated under the current laws. This will inevitably create legal uncertainty, and partly attributable to the lack of interest among international and local franchisors to do business with other firms in the country.¹⁸⁰ This is detrimental to the country's endeavor to access and adapt foreign technologies, attract foreign investment, and promote SMEs. According to some writers, lack of specialized laws still results in real challenges for investors who are seeking to franchise their businesses in Ethiopia, led to the copying and misappropriation of well-known and established Ethiopian brands in the local market and a big challenge for SMEs.¹⁸¹

¹⁷⁶ Id, Article 207 (1)).

¹⁷⁷ Id, Article 207 (2)).

¹⁷⁸ Id, Article 208.

¹⁷⁹ Id, Article 209.

¹⁸⁰ Yohanis, *supra* note 111, p.24.

¹⁸¹ Yohannes, *supra* note 4.

On the other hand, in developing countries like Ethiopia, a small business failure is highly correlated with product quality, and franchising creates a stringent product quality control system, guarantees a business success, and reduce overall operational risks. It also enables small business to use the name, goodwill, marketing systems, support facilities and business experience of a renowned brand owner.¹⁸² In Ethiopia there are many successful local brands and home grown franchising concepts operating in different industries like Selam Baltina, Tomoca Coffee, Shewa Bakery, Yohannes Kitfo, and Saay Pastry. Although these businesses were invented and have grown over the years, they are not well duplicated and distributed in all region of the country. Instead of duplication these businesses still operated by the original owners, mainly in the capital city.¹⁸³ In Ethiopia, most known Brand owners prefer to open an outlet by themselves than franchising their business. For instance, though there was a franchise request from US, Germany, Ghana, and Djibouti to franchise Tomoca Caffé, the response was not positive due to fear of losing its good will. In general, inability to know how they can sell and protect knowhow, how to transfer their ways of doing business to others, and how to exploit their trademark and good-will is a critical problem that Ethiopian brand owners encountered.¹⁸⁴ Hence, legal support for franchising would have allowed better multiplication of successful business across the regional states, and to increase the competitiveness of local brands that can be sold to other countries.¹⁸⁵

Apart from this, effective enforcement of IP rights is one basic condition for commercialization of IP through licensing for others.¹⁸⁶ In Ethiopia apart from gaps in the legal framework, the inability to enforce IP rights is a big challenge for franchising. Many in the field stated that the main problem of the Ethiopian IP regime lies on ineffective enforcement due to lack of strong institutions and lack of awareness about the nature of IP on the part of relevant actors.¹⁸⁷ In this regard, Ethiopia is a country with a high rate of piracy of IP in the creative industry that makes Commercialization of IP right by the owner, assignee or

¹⁸² Franchising Unlocks Ethiopian Small Business Potential, *Addis Fortune, Weekly Newspaper*, Vol.12, No.283, (July 3 2011) available at https://www.printversion.addisfortune.net/resource/vol_12_num_583/index.html#p=2, accessed on 11 February 2020.

¹⁸³ Ibid.

¹⁸⁴ Nibemicheal, *supra* note 128, p.80.

¹⁸⁵ Ibid.

¹⁸⁶ Getachew Mengistie, The Contribution of Creative Industry for Economic Development, (2013), p.32, available at <http://etd.aau.edu.et/bitstream/handle/123456789/16125/Dagnachew%20Worku.pdf?>, accessed on 28 June 2015.

¹⁸⁷ Elias N. Stebek *et al*, Property Rights Protection and Private Sector Development in Ethiopia, *Mizan Law Review* Vol. 7 No.2, (2013), available at <https://www.ajol.info/index.php/mlr/Article/view/108310/98129>, accessed on 02 July 2019

licensee is unthinkable.¹⁸⁸ It is not surprising to see international acclaimed trademarks used by local investors without the recognition or permission of the rightful holders of the brand. One example could be the case of In-N-OUT Burger, Kald's coffee, Kentake Krunchy Fried Chekin, Intercontinental Hotel, and Crown Hotel who is still using the name of the known international brands in Ethiopia.¹⁸⁹ There is also unauthorized McDonald's restaurant in Adigrat, a Starbucks in Mekelle, and Burger King, Subway sandwich in Addis Ababa.¹⁹⁰ All these are examples to show the wide spread infringements of international brands in Ethiopia. In general, difficulty of enforcing intellectual property rights, product quality control, and cumbersome banking regulations make franchising difficult in Ethiopia.¹⁹¹ Hence, given the pivotal role of franchising to the local economy, it seems like a perfect time to discuss a comprehensive franchise law in Ethiopia that address various issues commonly dealt with under franchising laws. Such legal reform and other initiatives that promote franchising may have its own contribution to Ethiopia to recover from the economic impact of the past years' instability and to alleviate the acute problem of unemployment.

3. The Lessons for Ethiopia from the Experience of Other Jurisdiction

As mentioned earlier, in respect of the statutory regulation, franchising franchise laws around the globe typically cover one or more of the following topics: pre-contractual disclosure, rules governing offering and sale of franchises, registration requirements, requirements relating to the contents of franchise agreements, the post-sale relationship between the parties, and dispute settlement.¹⁹² Concerning legal and regulatory framework for franchising in Ethiopia, it would be worthwhile to consider the approaches of countries such as China, Argentina, Malaysia, South Korea, Australia, Vietnam, and South Africa.¹⁹³ Therefore, this part of the article tries to identify the gaps in the law

¹⁸⁸ Getachew, *supra* note 186, p.33.

¹⁸⁹ Due to trade mark infringements of the known US. brand, the U.S Embassy in Ethiopia has led a quiet protest against InterContinental Addis, refusing to do business with it and advocating a stricter IP protection in Ethiopia. Dawit Endeshaw, Rising trademark debacle, *Ethiopian reporter weekly newsletter*, (September 2, 2017), available at <https://www.thereporterethiopia.com/content/rising-trademark-debacle> accessed on 11 March 2018.

¹⁹⁰ Ibid.

¹⁹¹ Ethiopia – Franchising, Discusses Opportunities for U.S. Franchisers and Legal Requirements in the Market, International Trade Administration, (2019), available at <https://www.trade.gov/knowledge-product/ethiopia-franchising> accessed 01 February 2020.

¹⁹² Spencer, Elizabeth, The Regulation of the Franchise Relationship in Australia: a Contractual Analysis, *Doctoral thesis*, (2008) available at: https://research.bond.edu.au/_files_, accessed on 18 February 2019 and *supra* note 62, p.120

¹⁹³ African Development Bank Group, *supra* note 8, p.3

and the possible lessons that Ethiopia could draw from the experience of other jurisdictions.

3.1. Definition of Franchising

A definition on franchising needs to clarify that the franchisee is granted a license to operate a business using the franchisor's trademark and other IP rights in return for fee/royalty while the franchisor holds administrative rights and control over the business as distinguished from distributorship, and agency.¹⁹⁴ Moreover, whether the law adopts traditional or business format franchising or both should be clearly indicated under the definition. When we see the Ethiopian experience in this regard, the definition provided under the Commercial Registration Proclamation is not without a problem.¹⁹⁵ Even the draft commercial code does not rectify this gap of the proclamation.¹⁹⁶ In the first place, the definition narrows down the scope of franchising as it is not recognized licensing of other IP rights other than trade names. Even if franchising normally covers licensing of goodwill, trademark, trade secret, patent, and copyright, similar indication is not incorporated under the definition. Moreover, it is not clear whether the law recognizes business format or traditional franchising. In general, the coming commercial code should provide a definition that clarifies factors such as the community of interest, types of franchising, the possibility of licensing different types of IP rights; and excludes other forms of business model that have similar features with the franchise like distributorship and agency.

3.2. Disclosure Requirement and Liability Arising There from

Disclosure scheme is designed to prevent fraud and misrepresentation by obliging franchisor to provide for the franchisee information necessary to make an informed decision before entering in to the agreement.¹⁹⁷ Countries with disclosure rules require substantial information to be disclosed to the potential franchisees, although the details tend to vary.¹⁹⁸ The information generally includes: - details of the franchisor and the franchise business; financial information of the franchisor; details of the franchise network; details of litigation; different payable fees; restrictions imposed on the franchisee; the

¹⁹⁴ Bruce S. Shaeffer *et al*, *Franchise Regulation and Damages*, Wolters Kluwer Legal & Regulatory U.S., (2005), p.88, available at <https://rus.wolterskluwer.com/store/product/franchise-regulation-and-damages/>, accessed on 1 June 2012

¹⁹⁵ See Commercial Registration and Licensing Proclamation, *supra* note 17, Article 2(33)

¹⁹⁶ የንግድ ህግ ረቂቅ አንቀጽ 204

¹⁹⁷ Loveland, *supra* note 27, P.652.

¹⁹⁸ *Ibid*.

obligations of parties; purchase ties, term, termination, renewal of the agreement; details about franchisor's IP right; details of financing arrangements, and exclusivity clause.¹⁹⁹ In many countries, the laws also require the franchisor to disclose its and associate's corporate details; its business experience; the history of prior bankruptcy; details of any restrictions on IP use; list of current and former franchisees; details of the initial and associated costs; and details of purchasing requirements.²⁰⁰ In a similar manner, the Model Law requires the franchisor to provide basic information similar with the above-mentioned one including the franchisor IP right; the franchise business and its business experience; any criminal convictions relating to fraud or similar acts; any bankruptcy proceeding; the total number of franchisees; financial information; information related to any affiliates of the franchisor; and purchasing requirement.²⁰¹ In this regard, the model law requires the franchisee to acknowledge in writing the receipt of the disclosure document upon the request of the franchisor.²⁰² In a similar manner the franchise laws of China,²⁰³ Australia,²⁰⁴ South Africa²⁰⁵ and the USA²⁰⁶ regulate pre-contractual disclosure in detail and in a comprehensive manner.

In Ethiopia, currently, there is no law that regulates the pre-contract disclosure apart from the draft commercial code, which imposes on the franchisor the duty to disclose certain information before the conclusion of the contract.²⁰⁷ However, the list of the information required to be disclosed is not detailed and the draft code is still insufficient as compared with the disclosure laws of other jurisdiction like China, US, Australia, South Africa, Argentina, and the Model law. Since the lists are not detailed, it is not as such enough to protect the franchisee from fraud and abuse, and does not enable him to make an informed decision. For this reason, the coming law should require the franchisor to give some basic information in a similar fashion with the model law and the laws of the aforementioned countries. Most importantly, the coming Ethiopian

¹⁹⁹ South Africa Consumer Protection Act, *infra* note 221, and China Franchise 2020, *infra* note 213.

²⁰⁰ Stephen Giles *et al*, *supra* note 91, 166.

²⁰¹ UNDROIT Model law, *supra* note 14, Article 6(1).

²⁰² *Id.*, Article 7.

²⁰³ Paul Jones *et al*, Franchise Regulation in China: Law, Regulations, and Guidelines, p.57-58, available at: www.jonesco-law.ca/files/pdf, accessed on 14 April 2019.

²⁰⁴ Overview of Australian Franchise Regulation, Wiley Rein's *International Franchise Development Series*, available at <http://www.iclg.com/practice-areas/franchise-laws-and-regulations/australia>, accessed on 14 April 2019

²⁰⁵ The South African Consumer protection Act Regulation, Regulation no. 3, available at <https://www.gov.za/documents>, accessed on 12 October 2017

²⁰⁶ U.S. Federal Trade Commission, Trade Regulation Rules, Article 436, available <https://www.ftc.gov/sites/default/files>, accessed on 12 March 2016

²⁰⁷ የንግድ ህግ ረቂቅ አንቀጽ 204

commercial code should require disclosure of all relevant information without requiring an exclusive list. Under this approach, additional information which is material to the transaction may need to be disclosed when required by the franchisees. This approach would provide parties with more flexibility and protect franchisees that may want to access the information which varies according to the nature of each transaction. Furthermore, the law should require the franchisee to issue a receipt as far as the disclosure is concerned, and guarantee to protect the confidentiality of information disclosed by the franchisor. Moreover, the coming law should also take a clear position as to whether the duty of disclosure is a one-time obligation or not. In some countries like Australia, the duty of disclosure is continuing obligation, in which disclosure document must be updated within a certain period of time, on the happening of major changes or when the franchisee requested.²⁰⁸ However, some countries like United State and South Africa do not impose continuous disclosure obligation.²⁰⁹ In this regard, the coming Ethiopian law should adopt continuous disclosure obligation on the franchisor within a lapse of a certain period of time, and happening of material change. Because if the obligation is not continuing, at least on certain basic information, it will affect the interest of the franchisee as the franchisor may hide basic information which has a detrimental effect on the franchisee.

The other important concern in relation to the duty of disclosure is good faith. Disclosing all material facts fairly and in good faith helps the franchisee to make an informed decision before concluding the agreement. Some countries such as the Canadian provinces, China, South Korea, Germany, and Malaysia imposed a strict duty of good faith on both parties.²¹⁰ The law of South Africa also requires the franchisor to avoid any fraudulent miss-presentation, which can lead to claims for damages by the franchisee.²¹¹ In Malaysia both parties are required to avoid unreasonable overvaluation of fees or price, and conduct that is not necessary for the protection of legitimate interest of parties.²¹² The franchise law of China requires franchising activities to be conducted in compliance with the principles of free will, fair dealing, honesty, and good faith.²¹³ Hence, the laws

²⁰⁸ Giles *et al*, *supra* note 91, 169,

²⁰⁹ Danie Strachan *et al*, *Franchising in South Africa: Overview*, *Practical Law Global Guide* (2016/17), available at global.practicallaw.com/8-632-7998, accessed on 12 March 2019

²¹⁰ Abel, *supra* note 99, p. 18-19.

²¹¹ Strachan *et al*, *supra* note 209

²¹² Adhuna Kamarul Ariffin *et al*, *Franchising in Malaysia*, (2018), *Thomson Reuters, practical law*, available at <https://uk.practicallaw.thomsonreuters.com/>, accessed on 10 August 2018

²¹³ China Franchise 2020, *Law and Regulation*, (2019), China ICLG, available at <https://iclg.com/practice-areas> accessed on 09 January 2020

of many states recognize the principle of good faith in franchising that aims to avoid any fraudulent or negligent misrepresentation by the franchisor. In Ethiopia, however, there is no clear duty on the franchisor to disclose all material facts fairly and in good faith, though the laws of contracts require a contract to be performed in good faith.²¹⁴ Hence, Ethiopia should have a law that clarifies how broadly good faith can be interpreted in the context of franchising to ensure fair dealing, and protect the weaker parties from unfavorably drafted provisions.

Finally, many jurisdictions regulate the consequence of failure to observe the duty of disclosure. Hence, failure to comply with the disclosure obligation enables the franchisee to reject the agreement so long as it does so within a reasonable time. For instance, under the Model Law, if the disclosure document or material change has not been delivered or contain a misrepresentation, the franchisee can terminate the agreement and/or claim damages.²¹⁵ In South Africa, there are substantial penalties for failure to provide timely disclosure.²¹⁶ In China, failure to disclose material information or misrepresentation, in addition to the franchisee being entitled to terminate the contract, results in fines imposed by the government and a public announcement of the violation when the act is a serious one.²¹⁷ Hence, the Ethiopian law should clearly prohibit willfully making of untrue and misleading statement or omitting material fact in any disclosure. The law should also create a civil remedy for the injured franchisee due to franchisor's failure to observe the duty of disclosure. This gives the franchisee a cause of action for damages and to claim termination if the violation is willful.

3.3. Franchise Agreement and Registration Requirement

A number of countries insist that a franchise agreement should contain certain basic elements. In this regard, the Model law preferably requires the agreement to incorporate terms and conditions of renewal of the agreement; training programs; the extent of exclusive rights to be granted; conditions to terminate the agreement by both parties; the limitations imposed on the franchisee; in-term and post-term non-compete covenants; the fee imposed on franchisee; the conditions to transfer the agreement; and any dispute resolution processes.²¹⁸ Similarly, franchise laws of South Africa and China require the agreement to

²¹⁴ The 1960 civil code, *supra* note 134 Article 1732 and 1785

²¹⁵ UNDRIT Model Law, *supra* note 14, Article 8(1)

²¹⁶ Strachan and et al, *supra* note 209

²¹⁷ Jones *et al*, *supra* note 203, p.61

²¹⁸ UNDRIT Model Law, *supra* note 14, Article 6(2)

incorporate obligation of both parties; conditions to transfer the agreement; training and assistance provided by the franchisor; duration and renewal of the agreement; description of any trademarks and franchised IP rights and condition for their use; any restrictions imposed on the franchisee; and the financial obligation of the franchisee.²¹⁹ However, in Ethiopia, the existing laws are silent as far as basic items that should be incorporated under the franchise agreement. In this regard, the future franchising laws of Ethiopia should require the incorporation of some basic information in the agreement by drawing experience from the laws of the above-mentioned jurisdiction. The other important issue that should be regulated is whether the agreement must be in writing, and if not, the consequences of such agreement. In China²²⁰ and South Africa, their respective laws require the agreement to be in writing and signed by the franchisee.²²¹ However, the experience of Australia is different in this regard, as it requires the agreements can be a written, oral, or implied agreement, or a combination of all.²²² When we come to Ethiopia, a contract does not need to be in writing to be valid unless the law clearly requires so.²²³ Hence, to facilitate the process of proof of the transaction and to reduce any potential disputes, the Ethiopia law should clearly require a franchise agreement to be in writing.

The other important issue in franchising is registration. In this regard, China, Lithuanian, some state in US, and Malaysia require the registration of franchise agreement and IP rights.²²⁴ For instance, in China, the law requires the franchisor to register the agreement within fifteen days after the execution of the agreement.²²⁵ In Malaysia, franchisors must register their agreement before they can operate the business; otherwise it is an offense punishable with a fine and imprisonment.²²⁶ In the US, 10 states have formal registration and review processes, and 4 states have filing requirements. On the other hand, laws in Australia, Argentina, South Africa and federal law in the US do not impose filing or registration requirements. For instance, in Australia, there are no

²¹⁹ Strachan *et al*, *supra* note 209; China Franchise 2020, *supra* note 213.

²²⁰ Ibid.

²²¹ South Africa Consumer Protection Act No.68, 2008, sec.7 available at <https://www.saica.co.za/›Legislation›tabId>.

²²² Giles *et al*, *supra* note 91, 168.

²²³ The 1960 Civil code, *supra* note 134, Article 1723

²²⁴ Lena Peters, Franchising: Recent Legislation and the UNIDROIT Model Franchise Disclosure Law, (2004) p.46, available https://heinonline.org/HOL/Page?handle=hein.journals/blawintnl2004&div=5&g_sent=1&casa_token=&collection=journals, accessed on: 18 February 2019

²²⁵ Jones *et al*, *supra* note 203, p.60

²²⁶ Ariffin, *et al*, *supra* note 212

registration requirements for franchise agreement, even if several reports recommended the country to introduce the system.²²⁷

The best model to follow in Ethiopia is the one that provides a detailed registration process and sets forth clear standards for all documents that need to be considered during registration. Actually, the existing law requires registration of the franchise agreement, even if it does not exhaustively list the formality requirements and the forms, applications, and notices to be considered during registration. Hence, the future Ethiopian law should require the registration of the franchise agreement and IP rights, and list documents to be filed with the registration application, including a copy of the agreement, the operations and training manual, financial statements, and any additional documents required by the Registrar. The law could also require that registration should be effected before the conclusion of the agreement. However, giving the registrar broad discretionary power to accept or refuse registration may not be the best option in Ethiopia as it may lead to abuse of power. Finally, submitting false or misleading documents should be a criminal offense to deter improper behavior, and the law should impose penalties for violating the registration rules.

3.4. Rights and Obligations of Parties in Franchising

In most cases, determining the rights and duties of the parties is left for the agreement of the parties, since rights and obligations in franchise vary according to the nature of each transaction. However, there are legal systems that provide comprehensive lists of rights and duties of parties while many other countries provide certain rights and obligations as instances and leave others for the agreement of the parties.²²⁸ In Argentina, for instance, the law imposes a mandatory obligation on the parties that cannot be overridden by express agreement of the parties. Hence, the franchisee has the duty to carry out the franchised activity in compliance with the operational manual: provide any information that may be reasonably required by the franchisor and facilitate any inspection of same; not to carry out any act that may cause a risk to the prestige of the franchisor or his IP right and to keep the specific technical knowledge confidential, and to comply with the agreed consideration.²²⁹ The franchisor also has the duty to provide pre-contractual information, technical knowledge and operational manual required to carry out the business; ensure the provision of

²²⁷ Giles *et al*, *supra* note 91, p.169 ; Lynch *et al*, *infra* note 229

²²⁸ Peters, *supra* note 224 p.46

²²⁹ Valeriano Guevara Lynch *et al*, Regulation of Franchise Agreements in Argentina: Overview, Thomson Reuters, *practical law*, (2017), available at: <https://uk.practicallaw.thomsonreut>, accessed on 13 April 2019

goods or services in a timely manner and good practice; and defend and protect the use right of the franchisee.²³⁰

In Malaysia, the franchise act requires both parties to act honestly and lawfully, to pursue best franchise business practice of the time and place, protect the consumers' interest, and to avoid unnecessary and unreasonable conducts.²³¹ Furthermore, the franchisor is obliged to give a written notice for the franchisee about breach of contract and allow him to remedy the breach; and to assist a franchisee to operate its business.²³² On the other hand, in South Africa the law does not specify any ongoing obligation on the parties; but requires the obligations and the rights of both parties to be recorded in the agreement, and not to be unfair, unreasonable or unjust.²³³ In Vietnam, the general rule is that parties have the right to freely negotiate the terms and conditions of the agreement including their rights and obligations.²³⁴ When we come to Ethiopia, in addition to what is provided under the draft code, the law should require the franchise agreement to incorporate minimum rights and obligations of parties that are common in most jurisdictions such as non-competition, fair dealing, and prohibition of unnecessary and unreasonable conduct, protection of IP rights and confidential information, franchisor's assistance, and training.

3.5. Transfer of Franchise Agreement

Transfer clause enables both parties to transfer rights arising from the franchise agreement to a third party. Franchise laws in most cases incorporate the franchisee's obligation not to transfer the business without prior approval of franchisor.²³⁵ Some laws also prohibit the franchisor from unreasonably withholding its consent to the transfer made by the franchisee, if the transferee meets the legitimate qualifications of the franchisor.²³⁶ Some other laws require franchisees to notify the franchisor of his intent to transfer the franchise, in order to enable the franchisor to decide upon the transfer.²³⁷ Under the model law, the

²³⁰ Ibid.

²³¹ Ariffin, *et al*, *supra* note 212

²³² Ibid.

²³³ Strachan *et al*, *supra* note 209

²³⁴ Tu Ngoc Trinand *et al*, Regulation of Franchise Agreements in Vietnam: Overview, *Thomson Reuters, practical law* 2017 available at: <https://uk.practicallaw.thomsonreut>, accessed on 21 April 2019

²³⁵ UNDROIT model law, *supra* note 14, Article 6 (2)(k)

²³⁶ Arkansas Code Title 4, Business and Commercial Law § 4-72-205, available at <https://law.justia.com/codes/arkansas/2012> accessed 21 May 2019

²³⁷ Iowa Code Chapter 523H, Franchise, (2011), available at <https://www.legis.iowa.gov/docs/code/523H> accessed 21 May 2019

franchisor is required to disclose the conditions under which both parties can assign or transfer the agreement for third parties. Such conditions include whether the franchisor's consent must be obtained or approve the new franchisee, or the franchisee must compensate the franchisor for the training that the new franchisee will be required to undergo.²³⁸ The laws of Malaysia allows the franchisor to require its prior consent before the franchisee transfer the business if this is incorporated in their agreement.²³⁹ South African law also requires parties to incorporate in their agreement the conditions under which the franchisee can transfer the franchise business.²⁴⁰ Hence, the coming Ethiopian law could require parties to incorporate in the agreement conditions to the transfer like obtaining the prior consent of the franchisor since this protects the franchisor from accepting the transferee that he/she did not choose. However, to avoid abusive denial, the law may require a franchisee to grant the franchisor the right of first refusal before the transfer.

3.6. Term, Termination and Renewal of Franchise Agreement

Many franchising laws require a minimum term for the agreement, the violation of which may result in invalidation. For instance, in China and Malaysia, their laws impose mandatory minimum duration of three and five years respectively.²⁴¹ In South Africa and the Model law, parties are obliged to incorporate the terms of the agreement whose failure leads to invalidation.²⁴² The rationale behind this rule is to protect the franchisee that needs a proper amount of time to see the fruits of its investment. When we come to Ethiopia, the law of contract recognizes freedom of parties to set terms of their contract unless the law itself mandates a minimum term.²⁴³ Therefore, the coming Ethiopian law, in line with the franchise law of other countries, should provide a minimum term for the agreement with a view to protect the franchisee against abusive or wrongful termination. Or to the minimum, the law should require parties to incorporate the terms in the franchise agreement.

Termination is the other important issue regulated under franchise law. In most cases, franchise agreements provide a long list of instances in which the franchisor is entitled to terminate the agreement without providing such right for

²³⁸ UNDROIT model law, *supra* note 14, Article 6 (2)(k)

²³⁹ The Franchise act of Malaysia 1998, available at <http://www.mfa.org.my/newmfa/regulation-under-the-franchise-act-1998> accessed on 10 August 2019

²⁴⁰ Regulation 2, South Africa Consumer Protection Regulation, *supra* note 205

²⁴¹ China Franchise, *supra* note 213; The Malaysia franchise act 1998, *supra* note 239

²⁴² Strachan an et al, *supra* note 209

²⁴³ The 1960 civil code, Article, 1711, *supra* note 134

the franchisee.²⁴⁴ Generally, many franchising laws across the globe have strict rules on termination of the agreement to protect the franchisee from abusive termination.²⁴⁵ In Malaysia, the franchise act allows both parties to terminate the agreement only for a good cause that includes failure to comply with the agreement and to remedy breaches, abandonments of business.²⁴⁶ The Model Law also requires the franchisor to incorporate in the disclosure document the conditions under which the agreement may be terminated by both parties and its effects, and the term and conditions of renewal of the agreement.²⁴⁷ Moreover, it allows the franchisee to terminate the agreement if the disclosure document or notice of material changes is not delivered, contains a misrepresentation and an omission of a material fact.²⁴⁸ In Argentina, termination without cause is not permitted during the term of the agreement except for material breach of essential obligations by the other party. Moreover, the franchisor has the right not to renew the agreement by notifying his decision for the franchisee, one month in advance for each year.²⁴⁹ The Korean franchise Acts allows the franchisor to terminate the agreement when a bankruptcy proceeding is filed against the franchisee, and unable to manage the franchise outlet due to force majeure. Moreover, the law required the franchisor to provide a notice of non-renewal, 90 days prior to the expiry of the agreement.²⁵⁰ The future Ethiopian law should provide rules about termination, and provide for the franchisors the right to terminate the agreement for good cause and should explain precisely what constitutes good cause. Moreover, to create equilibrium, the law should allow a franchisee to terminate the agreement in certain cases such as franchisor's failure to meet disclosure requirements. In addition, the future law should also require the franchiser to incorporate in the agreement the term and conditions of renewal of the agreement.

Conclusion

Franchising could be one of the viable strategies of doing business especially for small business. For this reason, regulating franchising is on the rise. Such laws are designed to regulate pre-contractual disclosure and its content, the relationship of parties, registration of the agreement and documents required to be attached, and basic elements that should be incorporated in the agreement and

²⁴⁴ UNDROIT Model Franchise Disclosure Law, Commentary, *supra* note 241

²⁴⁵ Ibid.

²⁴⁶ The Malaysian Franchise Act 1998, *supra* note 239

²⁴⁷ UNDROIT model law, *supra* note 14, Article 6 (2) (D) and E

²⁴⁸ Id., Article 8(1)

²⁴⁹ Valeriano Guevara Lynch and et al, *supra* note 229

²⁵⁰ Peters, *supra* note 224, p. 48-49

its form. Though the concept of franchising has been introduced in Ethiopia since a long time, and its economic and commercial importance makes it one of the viable methods of investment and SME development, still the country lacks a law that comprehensively regulates franchising. Hence, basic issues of franchising like pre-contractual disclosure, parties' relationship, franchise agreement and its basic content, trade restraint and other similar matters are not regulated. Due to the lack of special law addressing these basic elements, certain aspects of franchising are regulated by different laws that are not in line with the specific nature and peculiar features of franchising. Generally, lack of specific law to regulate franchising and inadequate IP protection in Ethiopia may hinder the development of franchising. It may create disincentive for foreign investors, halt development of local brands, obstruct technology transfer, and hamper the development of SME. For the successful expansion and smooth functioning of franchise businesses, a separate and comprehensive law that governs franchising is preferred instead of the existing clauses which are found flung in different legislations. Hence, Ethiopia needs to adopt a franchise-specific law that regulates, among other things, precise definition; pre-contractual disclosure; formality requirement of the agreement; registration of the agreement; and the relationship of the parties that include their respective rights and obligations including termination, transfer and renewal of the agreement, and restriction imposed on the franchisee.

