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Franchising Regulation In Emerging Markets: Kuwait As A Case Study

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Franchising Regulation In Emerging Markets: Kuwait As A Case Study

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ABSTRACT

This paper starts by examining what franchising means, how it works, and what makes a good franchise. In addition, this paper aims to provide guidelines for the franchising regulations that are relevant in the State of Kuwait; in doing that, the paper begins by examining the generally applicable laws that regulate the different issues related to franchising agreements since there is no specific franchising law in Kuwait. Furthermore, this paper presents the different matters related to franchising that are not yet regulated in the Kuwaiti laws. Moreover, it examines the rules and regulations that franchisors and franchisees must take into consideration before entering the Kuwaiti market. Ultimately, these paper analyses laws related to franchising in different jurisdictions to determine the best practices regarding franchising. As a result of this analysis, the paper provides some recommendations based on the comparisons.

Keywords: Franchising – Commercial Law – Intellectual Property – Agency – Emerging Markets.

INTRODUCTION:

Over the years, franchising has become highly prevalent in the United States and other countries around the world.

Moreover, franchise systems are being used by franchisors to expand their businesses to reach new markets in different countries. This franchising trend is expected to continue and increase in the future⁽³⁾.

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(3) Niazmettin, A. and M. Kacker, «International Outlook of U.S.-Based Franchisors,» International Marketing Review, 7 (2), 43-53(1990).

In general, there are two forms of franchising: The first is product/trade name franchising, which involves the use of franchisees to distribute a product under a franchisor's trademark and is generally used in the retail industry. The second form of franchising is business format franchising, in which the franchisor's entire business concept is duplicated, including the marketing strategy and plan, the operating standards and the quality control of the business; this form of franchising is used in the service industry⁽⁴⁾. These franchising forms (relationships) consist of three pillars that franchisors must consider. The first pillar is the business relationship (day-to-day activities undertaken to provide acceptable products and services to customers); the second pillar is the non-business relationship, which is related to the cooperative association between the parties to a franchise agreement; and the third pillar is the legal relationship, which is basically the contract that exists between a franchisor and its franchisees that prescribes their rights, responsibilities, and obligations⁽⁵⁾. Furthermore, the International Franchise Association (IFA), the largest organization in the world representing franchises, defines franchising as follows: A method of distributing products or services. At least two levels of people are involved in a franchise system: 1) the franchisor, who lends its trademark or trade name and business system; and 2) the franchisee, who pays a royalty and often an initial fee for the right to do business under the franchisor's name and system⁽⁶⁾.

It has been submitted that franchising as a concept was established in the mid-1800s by Isaac Singer when he distributed his sewing machine in the United States⁽⁷⁾.

In general, franchising is one of the essential tools for doing business for entrepreneurs, family businesses, and small businesses, which often act as franchisees in the relationship. It is also a good way for franchisors to rapidly expand their businesses through well-organized distribution systems and with

(4) Preble, John F. and Richard C. Hoffman, «Franchising Systems Around the Globe: A Status Report,» *Journal of Small Business Management*, 33 (2), 80-88 (1995).

(5) Hunt, Shelby, D., «The Socioeconomic Consequences of the Franchised System of Distribution,» *Journal of Marketing*, 32-38 (36 July 1972).

(6) Honey V. Gandhi, *Franchising in the United States*, 20 *Law & Bus. Rev Am.*3 (2014), pp:3-4

(7) Honey V. Gandhi, *Franchising in the United States*, 20 *Law & Bus. Rev Am.*3 (2014), at p:5

less risk from the franchisors' perspective⁽⁸⁾. In addition, franchise arrangements allow franchisors to gain fast and selective product distribution and enable franchisees to start businesses with limited resources and to learn from the experience and brand recognition of the franchisors; franchising can also be considered a network of interdependent business relationships that allows people to share brand trademarks, successful methods of doing business and proven marketing and distribution systems⁽⁹⁾. From the franchisee perspective, franchising enables franchisees to become part of successful business chains already mastered by the franchisors and to receive the technical assistance necessary to operate the franchised businesses efficiently and successfully, such as guidance on store layout, design, and site selection⁽¹⁰⁾.

International franchisors usually consider emerging markets to be excellent destination targets for investments. Several surveys conducted by franchising industry experts have shown that more franchisors are seeking opportunities in these emerging markets. Those franchisors who can establish a business in these emerging markets can do very well, but the risks are great⁽¹¹⁾. It has been suggested that having an appropriate market entry strategy for franchising requires knowing and studying the barriers in the home market, such as stiff competition, high costs, and legal restrictions⁽¹²⁾.

From the franchisor's perspective, several conditions must be satisfied to succeed in international markets. Franchisors always need to improve their understanding of the diverse cultural forces at work around the world.

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- (8) Welsh, Dianne HB, Ilan Alon, and Cecilia M. Falbe. «An examination of international retail franchising in emerging markets.» *Journal of Small business management* 44, no. 1: 130-149 (2006).
 - (9) Growing the Arab Family Business (1): Hybrid Organizational Arrangements Georgios Palaiologos Zainab Al Khunaizi. College of Business & Financial Sciences Royal University for Women Kingdom of Bahrain (2017).
 - (10) Eisaman, Radwa S. Franchising in the Middle East: The Example of Egypt. (*Pacific Basin Law Journal*, 35(1) (2017).
 - (11) Amies, Michael, "The Wilder Shores of Franchising," *Franchising World*, 27-28 (1999). In Welsh, Dianne HB, Ilan Alon, and Cecilia M. Falbe. "An examination of international retail franchising in emerging markets." *Journal of Small business management* 44, no. 1: 130-149 (2006).
 - (12) Hawkes, Charles Keith, and Soumava Bandyopadhyay. «International growth of US franchising: Cultural and legal barriers.» *International Franchising in Emerging Markets: Central and Eastern Europe and Latin America* (2002): 199-207.

It is always wise for franchisors to understand the differences between the cultures and countries in which their franchises do business and to obtain as much information about local laws as possible, which should serve as extensive guidelines for formulating agency and distributorship agreements⁽¹³⁾. Sometimes, a franchisor's concept will not fit in a foreign cultural lifestyle, and this may affect the relationship between the franchisor and franchisee. For example, an American restaurant franchisor allows its Egyptian franchisees to develop special food products for their restaurant menus during the Muslim holy month of Ramadan. In Kuwait, this franchisor cannot sell alcohol or food that contains pork in local restaurants. In the early days, in the Kingdom of Saudi Arabia and Qatar, where local customs required women's seclusion in public places, this franchisor had to alter its restaurants to include "family areas" where women could visit⁽¹⁴⁾. It is often necessary for a franchisor to know and adapt to the local rules and regulations in addition to the cultural norms, based upon which the franchisor may have to adjust its systems, products, and human resource policies to reflect these norms⁽¹⁵⁾.

Thus, this paper will provide guidelines for the regulation of franchising matters in the State of Kuwait. The paper will examine the general laws that regulate several issues related to franchise agreements. In addition, this paper will examine comparative approaches to managing franchising issues between several countries, and based on these comparisons, it will provide recommendations based on such comparisons in connection with proposed legislation that will fit into the Kuwaiti legal system. In addition, it will illustrate the main rules and regulations that franchisors must consider before entering the local market in Kuwait. Finally, this paper will explore several matters that should be related to franchising agreements that are not yet regulated under Kuwaiti laws.

(13) King Jr, Henry T. «Legal Aspects of Appointment and Termination of Foreign Distributors and Representatives.» Case W. Res. J. Intl L. 17: 91 (1985).

(14) Martin, Josh, «Franchising in the Middle East,» Management Review, 88 (6), 38-42 (1999).

(15) Welsh, Dianne HB, Ilan Alon, and Cecilia M. Falbe. «An examination of international retail franchising in emerging markets.» Journal of Small business management 44, no. 1: 130-149 (2006).

FRANCHISING IN KUWAIT: THE CURRENT SITUATION

There are several types of franchising contracts, such as direct franchises, multiunit franchisees, joint ventures, and development agreements. In Kuwait, it could be said that the method most commonly used by international franchisors to enter the local market is direct franchising, in which the franchising parties typically enter into a franchise agreement for the operation of the franchise business in the local market. However, the franchisor in some cases grants a local franchisee regional franchise rights as a master franchise; these rights typically cover the whole Gulf Co-operation Council countries or the Middle East and North Africa region. The local laws do not specify the type of franchise model that should be implemented in the franchise agreement. However, the law leaves the decision of the franchise model to the contracting parties. In addition, there is no one model for the franchise agreement around the world, in other words, the franchise agreement may include or encompass any provision the parties agreed upon⁽¹⁶⁾. Thus, to protect their rights, franchisors and franchisees must carefully read their franchise agreements.

The decision concerning which franchising model to implement is a commercial matter and is not impacted by local laws. In this vein, it is worth mentioning that any foreign individual or entity may enter the market and carry out business in Kuwait by establishing a company fully owned by the foreign individual or entity⁽¹⁷⁾, entering into a joint venture agreement, appointing a commercial representative⁽¹⁸⁾, or appointing a commercial agent⁽¹⁹⁾.

Kuwait does not have a specific law on franchising that regulates the specific aspects of franchising agreements. Similarly, Dubai has no specific law on franchising; however, since Dubai is like the other countries in the region

(16) Franchise In Dubai, Business Information Series, 2012/Vol.1/No.4, published by the Business Support Department in Dubai Chamber of Commerce and Industry, at p 10 <https://www.dubai-chamber.com/documents/Franchise%20in%20Dubai.pdf>

(17) According to Kuwait Direct Investment Promotion Authority Law No. 116/2013

(18) According to Kuwait Commercial Law No.68/1980

(19) According to Commercial Agencies Law No.13/2016

in that it is not industrial, franchising as a business model is attractive⁽²⁰⁾ and thus the development in Dubai is attracting international businesses, especially international franchisors, to the market. Franchise agreements in Dubai are governed by agency law, which favors franchisees over franchisors⁽²¹⁾. Moreover, many laws in Dubai can be applied to franchising agreements, such as Federal Law No. 18 of 1981 on the organization of commercial agencies, which is amended by Law No. 13 of 2006⁽²²⁾; Federal Law No. 5 of 1985 on civil transactions⁽²³⁾; and Federal Law No. 18 of 1993 on commercial transactions⁽²⁴⁾.

In general, franchising laws, such as the newly enacted commercial franchise law in the Kingdom of Saudi Arabia⁽²⁵⁾, usually address franchise agreement-related issues such as 1) the definition and essential elements of a franchise; 2) the protection of intellectual property rights granted by franchisors to franchisees; 3) the protection of confidential and trade secret information provided by franchisors to franchisees; 4) non-competition and non-solicitation matters; 5) the disclosure of all relevant information by franchisors to franchisees before the franchise agreement is finalized; and 6) the day-to-day operation of franchised units by franchisees, among others matters related to the franchise agreement⁽²⁶⁾. The situation is different in Kuwait; the non-existence of specific regulations that govern franchises leaves them to be governed by a combination of other laws, such as those governing general commercial contracts, intellectual property, tax, insurance, and labor⁽²⁷⁾.

(20) Franchise In Dubai, Business Information Series, 2012/Vol.1/No.4, published by the Business Support Department in Dubai Chamber of Commerce and Industry, at p 15 <https://www.dubai-chamber.com/documents/Franchise%20in%20Dubai.pdf>

(21) Franchise In Dubai, Business Information Series, 2012/Vol.1/No.4, published by the Business Support Department in Dubai Chamber of Commerce and Industry, at p 15 <https://www.dubai-chamber.com/documents/Franchise%20in%20Dubai.pdf>

(22) Federal Law No.18 of 1981 on the Organization of Commercial Agencies which is amended by Law No.13 of 2006

(23) Federal Law No.5 of 1985 on Civil Transactions

(24) Federal Law No.18 of 1993 on Commercial Transactions

(25) Such as the new Commercial Franchise Law 24/2/1441 that was enacted in the Kingdom of Saudi Arabia.

(26) Eisaman, Radwa S. Franchising in the Middle East: The Example of Egypt. (Pacific Basin Law Journal, 39(1) (2017).

(27) Eisaman, Radwa S. Franchising in the Middle East: The Example of Egypt. (Pacific Basin Law Journal, 39(1) (2017).

For more than fifty years, commercial agencies in Kuwait were governed and regulated by Law No. 36 of 1964. Recently, the long-standing law was overturned and superseded. After several years of deliberation and research, the Kuwait National Assembly approved the new Commercial Agency Law⁽²⁸⁾ to address the developing issues and inquiries that relate to the country's commercial agencies⁽²⁹⁾. This law ostensibly governs franchise agreements in Kuwait since the definition in Article 1 mentions franchise agreements as one of the categories of business types governed by the law. However, unfortunately, this law treats franchisors as principals and franchisees as commercial agents although there is a major difference between the two legal concepts.

In 2017, the new Commercial Agency Law and ministerial executive regulations came into effect and were considered the primary development in the franchising industry⁽³⁰⁾. These regulations provide several new requirements and obligations that are applicable to commercial agencies and that regulate product/trade name franchising and business format franchising, including the compulsory registration of franchise agreements made by franchising contract parties⁽³¹⁾. In addition, the aforementioned Kuwaiti law requires foreign entities, including franchisors, to conduct business in Kuwait through either a Kuwaiti agent or a Kuwaiti "partner", as mentioned above⁽³²⁾. Limited exceptions apply to these restrictions, including if an investment license is obtained under the Foreign Direct Investment Authority Law⁽³³⁾. Unless an exception applies or a Kuwaiti agent or "partner" is used, a foreign entity will not be able to directly carry on a franchise business in Kuwait.

(28) The Commercial Agency Law, No. 13 of 2016.

(29) Parts of this alert were based on excerpts from *International Franchising 2016: Legal and Business Considerations*, a book edited by Tyre, Kendal H. "Franchising in Africa." *Int'l J. Franchising* L.11 (2013): 23.

(30) Ministry of Commerce and Industry (Ministerial Resolution No 565 of 2017) the Commercial Agencies Law (Law No 13 of 2016).

(31) David Walker and Christopher Walugembe, 2017 "Franchising in Kuwait: Overview", Thomson Reuters practical law. (December 2017) [https://uk.practicallaw.thomsonreuters.com/8-631-5764?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/8-631-5764?transitionType=Default&contextData=(sc.Default)).

(32) This is generally facilitated through the establishment of a Kuwaiti company, with Kuwaiti participants owning at least 51% of the capital of that company.

(33) The Foreign Direct Investment Law (Law No 116 of 2013).

FRANCHISING REGULATIONS IN KUWAIT

Countries around the world regulate franchising in two different ways. The first way is by enacting special laws to regulate franchising, such as in the United States, where franchising is regulated at the state and federal levels. Regulatory development and the need for an adequate legal system to regulate franchises in the United States emerged after the growth and proliferation of the use of franchise agreements in the 1970s⁽³⁴⁾.

In 1979, the Federal Trade Commission (FTC) legislated franchise regulations to regulate the franchise industry and to protect franchisee interests. These regulations are called Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures. They require franchisors to disclose approximately 23 items to franchisees before entering into a legal agreement. Such disclosure combats many wrongful acts, such as fraud and deception, committed by franchisors⁽³⁵⁾. Moreover, these franchise disclosure requirements were amended by the franchise disclosure document (FDD) requirements, which require franchisors to disclose the required information fourteen days before signing the franchise agreement⁽³⁶⁾.

It could be argued that to apply the regulations that govern the franchise agreement, some elements need to be identified, but such elements will be subject to each country's legal system.

It has been argued that there is a relationship between franchise law and some other laws that implement or provide a sound legal environment that protects franchisee rights over the rights of franchisors, who are usually the parties that draft franchise agreements with provisions that favor themselves over the franchisees.

The other way of regulating franchises is to include provisions related to franchising in existing laws that regulate aspects of economic life other

(34) Honey V. Gandhi, *Franchising in the United States*, 20 *Law & Bus. Rev Am.*3 (2014), at p: 6

(35) Honey V. Gandhi, *Franchising in the United States*, 20 *Law & Bus. Rev Am.*3 (2014) , at p: 7

(36) Honey V. Gandhi, *Franchising in the United States*, 20 *Law & Bus. Rev Am.*3 (2014) , at p: 8

than franchising, which is the practice in most countries, such as Turkey⁽³⁷⁾, Egypt⁽³⁸⁾, Thailand⁽³⁹⁾, Mexico and Spain⁽⁴⁰⁾. However, no specific law regulates franchising in Kuwait. Thus, because of this lack of formal legal guidance in Kuwait, other laws, including contract, commercial, intellectual property, and agency laws, have had a substantial impact on franchising. As mentioned above, in Kuwait, the Commercial Agency Law, the ministerial executive regulations and other laws mention several matters that relate to franchise agreements, including the registration and de-registration of franchise agreements (commercial agency agreement), intellectual property, and distribution agreements that have been signed-in Kuwait.⁽⁴¹⁾

The new Commercial Agency Law's definition of "commercial agency" was revised and clarified to explicitly include the terms "franchisee" and "licensee." Due to their current reference in the commercial agency definition, franchisees and licensees are now treated as commercial agents and are explicitly subject to all applicable restrictions and requirements and to the protections afforded by that law⁽⁴²⁾. Although the law does not expressly address franchise arrangements, in practice, practitioners and legal writers believe that agency is the closest analogy to franchising and recommend these fran-

(37) The Turkish Court of Appeal, in its decision dated 25 June 2001 and numbered 819/4917, defined franchising as a long-term and continuous contractual relationship between two independent parties where the party who holds the concession right of a product or service grants this right to the other party by providing information and support relating to the commercial business to be carried out under certain conditions, limitations and for a definite period. See Ilknur Peksen, Leyla Ulucan, Yusuf Mansur Özer and Şule Akkuş. "Franchising in Turkey: overview." Thomson Reuters practical law.(July 2016), available at: [https://uk.practicallaw.thomsonreuters.com/3-631-1645?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/3-631-1645?transitionType=Default&contextData=(sc.Default)) .

(38) Eisaman, Radwa S. Franchising in the Middle East: The Example of Egypt. (Pacific Basin Law Journal, 35(1) (2017).

(39) Alan Adcock, Franchising in Thailand: overview, Tilleke & Gibbins, (2016). Available at: [https://uk.practicallaw.thomsonreuters.com/7-631-5397?__lrTS=20180804042147854&transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/7-631-5397?__lrTS=20180804042147854&transitionType=Default&contextData=(sc.Default))

(40) Overview of franchising internationally and domestically, Al Oula Law Firm (may 2014).

(41) The Commercial Agencies Law (Law No 13 of 2016). Executive Regulations (Ministerial Resolution No 565 of 2017).

(42) Kendal Tyre, Nia Newton, New commercial agency law enacted in Kuwait (franchise alert, Nixon Peabody LLP, 2016)

chise agreements be subject to the provisions of the new Kuwaiti Commercial Agency Law governing agency and the Commercial Agency Law. Kuwaiti courts and governmental authorities have shown an inclination not to distinguish between agencies and franchises when applying the provisions of the new law. This issue has been addressed in different countries, such as the countries in the Cooperation Council and the Middle East and North Africa region⁽⁴³⁾. One crucial aspect must be addressed by comparing the franchise and agency relationships under Kuwaiti Law: agents are not legally independent from principals. Instead, a principal is liable for its agent's actions that are done for the benefit of and on behalf of the principal. On the other hand, a franchisee is a legal entity that is independent of the franchisor, or principal. Here, the franchisor will not be liable for the actions conducted by the franchisee in its name or for its benefit⁽⁴⁴⁾. Based on the difference regarding where liability lies, the two relationships are considered distinct. Moreover, agency laws provide rules that govern termination that is specific to the nature of the agency relationship rather than the franchise relationship. Thus, upon the expiration of a defined-term agency contract, renewal is compulsory under Kuwaiti commercial law. The principal must decide not to renew the contract and pay compensation to the agent, even if the contract provides otherwise. However, this compulsory termination rule does not fit with the nature of a franchise relationship, as compelling a franchisor to remain within the contractual relationship after its expiry might result in harming the franchisor's trademark and business.

Consequently, the agency relationship is very different from the franchise relationship, and they are incompatible with each other⁽⁴⁵⁾. This is significant because certain protections that are granted to agents and exclusive distributors under the new law, the most notable of which is the entitlement to compensation on the expiration or termination of the agency or exclusive distribution relationship, are typically applied to franchisees as well.

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

(44) Eisaman, Radwa S. Franchising in the Middle East: The Example of Egypt. *Pacific Basin Law Journal*, 39(1) (2017).

(45) *Ibid.*

REGISTRATION OF THE FRANCHISE AGREEMENT

In Kuwait, the parties to a franchise agreement should register the franchise with the Commercial Agency Registration Department in the Ministry of Commerce and Industry (MOCI) within two weeks of executing the agreement⁽⁴⁶⁾. Furthermore, any unregistered commercial agency, including a franchise agreement, will be considered invalid, and the agent of an unregistered agency agreement will no longer be permitted to bring any kind of compensation cases in the Kuwaiti courts. The application for the registration of a commercial agency can be made only by the Kuwaiti agent. It must include two original copies of the official MOCI form and must be accompanied by:

- An original copy of the agency agreement.
- A translation of the agreement into Arabic.
- A copy of each of the agent's commercial licenses.
- A copy of the agent's nationality document or a registration in the MOCI Commercial Registry.
- A certificate of registration for the franchise agreement from the Kuwait Chamber of Commerce and Industry.

Upon registration, the MOCI gives the commercial agent (the franchisee) a signed and stamped copy of the application and advertises the registration in the official gazette. In addition, any changes in the franchise (agency) agreement must be communicated to and registered with the MOCI within three months of the date of the change. The new Commercial Agency Law provides that any entity or person who undertakes the activities of a commercial agent without being registered will be liable for the following penalties:

- A fine of between KWD5,000 and KWD10,000 for a first offence
- A fine of between KWD10,000 and KWD20,000 for a repeat offence

(46) The new law does not differentiate between an agent, a franchisee, and a distributor; all are considered the same.

Accordingly, among other things, it could be argued that since the Commercial Agency Law in Kuwait includes a number of provisions that can provide sound protection for franchise parties but that are not linked to the franchise agreement, the strict registration required by it would be better off encompassed within a specific law for franchising.

THE CONTRACTUAL REQUIREMENTS FOR FRANCHISE AGREEMENTS IN KUWAIT

Franchise arrangements in Kuwait are governed by the general laws that regulate contracts⁽⁴⁷⁾. The Commercial Agency Law requires commercial agency agreements, including franchise agreements, to incorporate the following information:

- The name and address of the agent or dealer (the franchisee), whether the agent or dealer is an individual or a legal entity, and the name, address, and nationality of the principal (the franchisor).
- The activity of the business or the type of commodities, products, or services that are the subject of the agreement.
- The rights and obligations of the contracting parties and the extent of the principal's liability for the obligations of the agent.
- The territory in which the agent or dealer is granted rights, i.e., whether the territory is only in Kuwait or covers the GCC or the MENA region.
- The duration of the agency agreement, including a franchise agreement, and the mode of renewal.
- The modes of termination and expiration of the agreement.
- All other terms and conditions agreed upon by the franchise contracting parties do not contradict the Commercial Agency Law.

(47) The Civil Code (Law No 67 of 1980) and the Law of Commerce (Law No 68 of 1980).

Franchise contract parties can agree to any terms in a franchise agreement, and such terms will be enforceable to the extent that they do not violate Kuwaiti public policy.

The Commercial Agency Law also requires certain terms and information to be included in commercial agency agreements⁽⁴⁸⁾. However, it is unclear from the Commercial Agency Law whether the commercial agency agreement will be invalid if the agency (franchise) contracting parties fail to include these terms and information in the agreement.

In practice, one of the requirements for an agreement to be registered at the commercial agencies registry is that the signature of the foreign party (the franchisor) on the agreement must be notarized and then legalized and verified by the department of foreign affairs (or its equivalent body) of the country in which the foreign principal is located and by the Kuwaiti Embassy in the franchisor's country⁽⁴⁹⁾. The registration of agreements at the commercial agencies registry in Kuwait is typically attended to by the local party, that is, the franchisee (law or commerce 1980)⁽⁵⁰⁾.

FRANCHISEE OBLIGATIONS UNDER KUWAITI LAW

The new Commercial Agency Law imposes several obligations on commercial agents (franchisees); two of the main obligations are to register commercial agency agreements and to de-register commercial agency agreements within three months of the termination of the franchise⁽⁵¹⁾. Additional requirements are imposed on commercial agents (franchisees), including the following:

1. Commercial agents must comply with the instructions of their principal and compensate the principal for any damage and monetary losses if they fail to comply with the franchisor's instructions.

(48) The Commercial Agencies Law (Law No 13 of 2016).

(49) David Walker and Christopher Walugembe, 2017 "Franchising in Kuwait: Overview", Thomson Reuters practical law.(December 2017) [https://uk.practicallaw.thomsonreuters.com/8-631-5764?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/8-631-5764?transitionType=Default&contextData=(sc.Default)).

(50) The Kuwaiti Law of Commerce No 68/1980.

(51) Kuwaiti Commercial Agencies Law (Law No 13 of 2016).

2. Commercial agents must provide the franchisor with information regarding the status of their business and an account of that business.
3. Commercial agents must notify the Kuwaiti Ministry of Commerce and Industry if the contractual parties intend to renew an agency agreement, even if the contract provides for automatic renewal.
4. Commercial agents must notify the ministry of the appointment of a manager and of the name of the manager within three months of the appointment.
5. Commercial agents may request that the ministry of commerce de-register an agency's registration within three months of the expiration of the agency's term or of its termination.
6. Franchise contract parties are obligated to deal with each other in good faith and in a manner that is consistent with accepted industry practice and honourable dealing⁽⁵²⁾. These obligations apply to all kinds of contractual relationships, are implied by law, and will apply even if they are not expressly included in the franchise agreement⁽⁵³⁾.
7. The Commercial Agency Law also obligates agents and distributors to carry out their duties of supplying, maintaining, and repairing the goods of the principal for a period of six months after their agency agreement expires or is terminated or until a new agent or distributor is appointed, whichever occurs first.

FRANCHISOR OBLIGATIONS UNDER KUWAITI LAW

As mentioned earlier, in practice, the Kuwaiti courts treat franchisees as agents. The obligations of principals under the Kuwait Commercial Agency Law are very likely to be applied by Kuwaiti courts to franchisors. On this basis, the Kuwaiti courts are, in practice, likely to award compensation to franchisees upon unfair termination by the franchisor of the franchise relationship. Since this right to compensation is a matter of public policy under Kuwaiti

(52) David Walker and Christopher Walugembe, 2017 "Franchising in Kuwait: Overview", Thomson Reuters practical law. (December 2017) [https://uk.practicallaw.thomsonreuters.com/8-631-5764?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/8-631-5764?transitionType=Default&contextData=(sc.Default)).

(53) The Law of Commerce (Law No 68 of 1980).

law, it is not possible to contract out of this right. Additional obligations may be imposed on franchisors under other laws, such as the Consumer Protection Law in Kuwait (Law No 39 of 2014)⁽⁵⁴⁾. In addition, an overseas franchisor or its officers and directors will not be liable for a breach by the local sub-franchisor of its obligations⁽⁵⁵⁾.

REGISTERING INTELLECTUAL PROPERTY

The Commercial Agency Law does not require that franchisors or intellectual property owners be registered with a professional or regulatory body before setting up a franchise system in Kuwait. However, the Commercial Agency Law requires commercial agents, which are defined to include franchisees, to be registered with the Commercial Agencies Registry at the Ministry of Commerce and Industry (Commercial Agencies Law 2016)⁽⁵⁶⁾. The Commercial Agency Law and the MOCI's executive regulations also require the registration of a commercial agency to be published in the official gazette (Commercial Agencies Law 2016)⁽⁵⁷⁾. If the product that is the subject of a commercial agency has another registered commercial agent, the new commercial agent must also publish the registration of the commercial agency in two Arabic daily newspapers. Although the new Commercial Agency Law does not require that trademarks and other intellectual property of franchisors be registered in Kuwait, it is advisable for franchisors to register all intellectual property in the local Ministry of Commerce and Industry to enhance the protection of the intellectual property. To register intellectual property in Kuwait, the authority requires confirmation or an authorization letter from the franchisor that the franchisee is entitled to use the franchisor's trademarks in Kuwait for signage purposes.

(54) Consumer Protection Law in Kuwait Law No. 39/ 2014

(55) David Walker and Christopher Walugembe, 2017 "Franchising in Kuwait: Overview", Thomson Reuters practical law. (December 2017) [https://uk.practicallaw.thomsonreuters.com/8-631-5764?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/8-631-5764?transitionType=Default&contextData=(sc.Default)).

(56) The Commercial Agencies Law (Law No 13 of 2016).

(57) The Commercial Agencies Law (Law No 13 of 2016) and the Executive Regulations (Ministerial Resolution No 565 of 2017).

FRANCHISE AGREEMENT DISPUTE RESOLUTION UNDER THE APPLICABLE LAWS IN KUWAIT

On many occasions, a dispute may arise between franchise parties⁽⁵⁸⁾, and if there is a conflict between the parties, the parties may agree upon the dispute resolution mechanism between the franchisee and franchisor. Frequently, each party to the franchise agreement will seek to resolve the dispute by using arbitration or court procedures in its home jurisdiction (or another jurisdiction agreed upon by the contractual parties, i.e., neither the franchisor's jurisdiction nor the franchisee's jurisdiction) for the sake of convenience and familiarity. If the contracting parties choose a foreign jurisdiction and governing law for a business operating in Kuwait, the agreement will generally be enforced in Kuwait⁽⁵⁹⁾. However, a foreign governing law will be enforced only under limited conditions and to the extent that an exequatur by the Court of First Instance (the "Kuwait Court") is granted, and the judgment must not violate local public policy, ethics, order, or morality⁽⁶⁰⁾.

However, if a franchise agreement provides that foreign courts will have jurisdiction to resolve disputes, even if such jurisdiction is exclusive, the Kuwaiti courts may assume jurisdiction in the event of a dispute arising under the agreement, mainly if the performance of the agreement is to take place in Kuwait⁽⁶¹⁾.

To enforce a foreign judgment in Kuwait, the judgment should be issued by a competent court in conformity with the law of the country wherein the judgment is issued. In addition, the foreign judgment or order must have the force of an adjudicated order, following the law of the court that issued it. Furthermore, the foreign judgment must not be contradictory to a previous

(58) Some of the more common disputes relate to compliance with development obligations by the franchisee, how royalty payments are to be calculated by the franchisee, trademark rights, the operation of competing businesses by the franchisee, and compliance with franchise system standards. See. David Walker, 2013 "Kuwait Popular with Foreign Franchisor" world franchise associates.

(59) This is unlike the UK legal system, where the local courts will recognize a choice the foreign jurisdiction in a franchise agreement for a business operating in the UK.

(60) Article 199 of the Law of the Civil and Commercial Procedure Law (Law No 38 of 1980).

(61) The Civil and Commercial Procedure Law (Law No 38 of 1980).

judgment or order that was given by a court in Kuwait and must not be contrary to the ethics or the public order in Kuwait.⁽⁶²⁾

On the other hand, a franchise agreement may provide for arbitration as the dispute resolution mechanism, and arbitration is well recognized in Kuwait. The arbitration laws in Kuwait are developed in line with the prevailing international legal standards of arbitration and conciliation.

Furthermore, the Kuwaiti arbitration law is compatible with the principles of the United Nations Commission on International Trade Law (UNCITRAL). On the other hand, to enforce a foreign arbitral award in Kuwait, the foreign arbitration must satisfy a number of conditions⁽⁶³⁾. The first condition is that reciprocity reservations must be considered before any foreign arbitral award is enforced in Kuwait because some member states choose to only enforce awards from other states that enforce awards formulated under their civil law.

Second, the contractual parties must follow the legal process to make the arbitral award enforceable. Third, the foreign arbitral award must be issued as a final judgment pronounced by a competent arbitral tribunal in that foreign country. Fourth, foreign arbitral awards must not violate ethics or public orders in Kuwait. Finally, the case determined by the award must be capable of being subjected to arbitration under Kuwaiti law⁽⁶⁴⁾.

As a result, it could be said that any foreign franchisor desiring to grant its business to a Kuwaiti franchisee must be thoroughly informed about the system in Kuwait regarding the dispute resolution provisions that the franchisor wants to stipulate for in the franchising agreement.

(62) The Civil and Commercial Procedure Law (Law No 38 of 1980).

(63) Court of Cassation Appeal No 39 of 1987 Civil, Hearing 22

(64) Saad, Badah, 2014, The Enforcement of Foreign Arbitral Award in Kuwait, AGORA International Journal of Juridical Science, No.2 at p: 13.

FRANCHISING MATTERS THAT ARE NOT REGULATED BY THE KUWAITI LEGAL SYSTEM

Several countries have not issued specific laws to regulate franchising agreements in their territories. For example, eight EU member states have issued franchise-specific regulatory regimes, but no two of those laws are the same. The remaining nineteen member states regulate franchising entirely through the application of their general laws, again with little homogeneity, in contrast with the well-established franchising regulatory regimes found in the United States and Australia⁽⁶⁵⁾.

Since Kuwaiti law does not include a specific law to regulate franchising matters, it is worth mentioning the important issues related to franchising agreements that are not properly provided for in Kuwait's legal system.

1. Like most of the laws of other countries around the world, Kuwaiti law does not have a specific definition of the terms “franchising” and “franchise”. However, as mentioned earlier, “franchising” is included in the definition of the term “commercial agency” under the Kuwaiti Commercial Agency Law. Consequently, the rules and regulations set out in the Commercial Agency Law that apply to commercial agencies will similarly be applied to franchising agreements, which makes the legal environment for franchising in Kuwait unattractive.
2. The Kuwaiti legislature does not apply a code of ethics or other means of promoting ethical franchising under Kuwaiti law. These codes do exist in other countries, such as the United Kingdom, where the British Franchise Association (BFA) has issued a code of ethics and requires all its members to comply with its code. The BFA's Guide to the Code of Ethics provides guidance on its requirements for compliance with the code⁽⁶⁶⁾. However, in Kuwait, it is common in franchise (commercial agency) agreements to

(65) Mark Abell, “Which EU Jurisdictions Most Heavily Regulate Franchising?” Field Fisher Waterhouse LLP, who's who legal, November (2012) available at: <http://whoswholegal.com/news/features/article/30097/which-eu-jurisdictions-heavily-regulate-franchising>

(66) Chris Wormald, Franchising in the UK (England and Wales): Overview, Thomson Reuters practical law. (December 2017). [https://uk.practicallaw.thomsonreuters.com/0-632-9722?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/0-632-9722?transitionType=Default&contextData=(sc.Default))

require the franchisee to comply with the franchisor's code of ethics and any related internal policies and guidelines.

3. Franchisors and intellectual property owners are not subject to any pre-contract disclosure requirements under Kuwaiti law. The same is true in a number of countries, such as Turkey, Thailand, and the UK. On the other hand, the Italian legislature imposed some requirements on franchisors before selling a franchise in Italy, which include requiring that the franchisors' business concepts be tested on the local market. This testing period must last at least one fiscal year, and testing carried out abroad by a foreign franchisor is considered suitable to fulfill the requirement⁽⁶⁷⁾.
4. Kuwaiti law does not expressly address the issue of restrictions on purchasing and product tying. From a contractual perspective, provisions requiring the franchisee to buy products and services, including those for resale to customers of the franchisee, only from the franchisor or its nominated suppliers should be enforceable under Kuwaiti law⁽⁶⁸⁾.
5. Like other countries around the world, Kuwaiti law does not have any restrictions on parties' freedom to set fees and payments or any other payment requirement, as is the case in Germany, Italy, Turkey, and Thailand. In Kuwait, the law does not have any restriction on the fees that are usually paid by franchisees but instead leaves these matters to the agreement of the parties. In practice, the parties can set the fees and payments as they wish. Usually, the franchising fees consist of:
 - A one-time fixed fee.
 - Ongoing royalties and development fees (a percentage of the revenues or profit made by the franchisee).
 - A contribution to the marketing funds (marketing fee). Advertising ob-

(67) Aldo Frignani and Alessandra Sonnati, *Franchising in Italy: overview*, Frignani Virano e Associati, (2017). Available at: [https://uk.practicallaw.thomsonreuters.com/9-631-0105?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/9-631-0105?transitionType=Default&contextData=(sc.Default))

(68) David Walker and Christopher Walugembe, 2017 "Franchising in Kuwait: Overview", Thomson Reuters practical law. (December 2017) [https://uk.practicallaw.thomsonreuters.com/8-631-5764?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/8-631-5764?transitionType=Default&contextData=(sc.Default)).

ligations may also be imposed on franchisees, which require them to spend a prescribed amount of money on advertising the franchise business.

6. The terms of franchise agreements vary significantly depending on the nature of the business. In the United States, no law imposes a specific term for franchise agreements. Under current practices in the United States, it is rare to grant a franchise agreement with a term of more than 20 years or less than five years⁽⁶⁹⁾. In Thailand, as another example, there is also no specific period of time for franchise agreements⁽⁷⁰⁾.

Similarly, under Kuwaiti law, there are no specific term requirements for franchise agreements. The franchise contracting parties are free to agree on the term of the franchise agreement under Kuwaiti law. In contrast, Italy has set a minimum term of not less than three years⁽⁷¹⁾.

7. Kuwaiti law does not expressly address the issue of the renewal of franchise agreements or any charge for renewal fees. The Kuwaiti legislature left this matter to the agreement of the franchise contracting parties. This practice has been applied in other jurisdictions, such as Germany, Turkey, Thailand, and Italy.

However, in Italy, franchisees can be protected against the non-renewal of a contract by provisions prohibiting situations of abuse of economic dependence, including the arbitrary or unfair termination of contracts⁽⁷²⁾.

(69) Will Woods and Ann Hurwitz, Franchising in the United States: overview, Thomson Reuters practical law.(January 2018), [https://uk.practicallaw.thomsonreuters.com/8-631-2421?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/8-631-2421?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)

(70) Alan Adcock. 2016. "Franchising in Thailand: overview" Thomson Reuters practical law (July 2016), available at: [https://uk.practicallaw.thomsonreuters.com/7-631-5397?__lrTS=20180804042147854&transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/7-631-5397?__lrTS=20180804042147854&transitionType=Default&contextData=(sc.Default)).

(71) Alan Adcock. 2016. "Franchising in Thailand: overview" Thomson Reuters practical law (July 2016), available at: [https://uk.practicallaw.thomsonreuters.com/7-631-5397?__lrTS=20180804042147854&transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/7-631-5397?__lrTS=20180804042147854&transitionType=Default&contextData=(sc.Default)).

(72) (Article 9, Law No 192 of 18 June 1998). See Aldo Frignani and Alessandra Sonnati. "Franchising in Italy: Overview" Thomson Reuters practical law. (December 2017). Available at:[https://uk.practicallaw.thomsonreuters.com/9-631-0105?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/9-631-0105?transitionType=Default&contextData=(sc.Default)).

8. The Kuwaiti Commercial Agency Law does not expressly regulate the termination of franchise agreements, but it applies the provision of the commercial agency agreement, which is not suitable for franchising relationships. In addition, the Kuwaiti civil code provides that the automatic termination of a contract requires a court order. Other countries do not expressly regulate the termination of franchise agreements, although Thailand and Turkey require that termination of a franchise agreement be governed by the terms of the agreement⁽⁷³⁾.
9. In relation to intellectual property rights (IPRs), a number of countries do not require franchisors to register their intellectual property rights. This matter is left solely to the discretion of the franchisors. In practice, franchisors register or license their IPRs to have adequate protection of their IPRs related to patents and trademarks. Kuwaiti law imposes no legal requirement that franchisors' IPR licenses be registered. In addition, there are no legal restrictions that prevent franchisors from limiting the rights of their franchisees to use the franchisors' intellectual property and confidential information.
10. Under the Kuwaiti Commercial Agency Law, which governs franchising agreements in Kuwait, there is no provision prohibiting franchisors from preventing franchisees from establishing their own websites to promote their businesses on the Internet or engaging in e-commerce. The Kuwaiti legislature left this matter to the contracting parties to agree on in the franchise agreement.
11. The Kuwaiti legislature did not add any restrictions, such as exchange control or currency restrictions, that are applicable to payments to overseas franchisors other than relevant anti-money laundering regulations under which banks will monitor payment transactions. This principle is also applied in the Italian and German legal systems. However, in Thailand, for example, Thai law restricts the ability of local franchisees to

(73) Aldo Frignani and Alessandra Sonnati, Franchising in Italy: overview, Frignani Virano e Associati, (2017). Available at: [https://uk.practicallaw.thomsonreuters.com/9-631-0105?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/9-631-0105?transitionType=Default&contextData=(sc.Default))

convert Thai baht into US dollars⁽⁷⁴⁾. Commercial banks are authorized by the central bank (Bank of Thailand) to approve the transfer of certain foreign exchange transactions.

Ultimately, the aforementioned issues must be addressed in Kuwait by enacting a new specific franchising law similar to the new commercial franchise law in the Kingdom of Saudi Arabia.

Since several franchising matters are not regulated under Kuwaiti law, it is advisable for franchisors to examine the local laws that are meant to regulate franchise matters before entering the local market. A well-structured franchise agreement must cover all of the subject matters that are important for the franchisor and that are not regulated under Kuwaiti law.

In particular, before entering any international markets, especially the markets in the Arabian Gulf countries or the MENA region, franchisors need to take into consideration several things: First, franchisors need to conduct a sufficient “due diligence” of the local agent to determine whether the agent (franchisee) is able to deliver on its commitments and will enhance the brand in the local market. Moreover, franchisors need to ensure that the terms of their franchise agreements are compliant with and enforced under the local laws. In addition, franchisors need to ensure that the laws protect their main trademarks in the targeted markets. Finally, franchisors need to study the local laws and regulations that are meant to regulate the relationship between franchise contractual parties, especially the laws that regulate the termination of franchise agreements.

CONCLUSION:

International growth opportunities for international franchisors are currently increasing, but franchisors face many challenges in penetrating foreign markets with traditional business concepts. Therefore, this paper examined the impact of cultural and legal factors on the international growth of international franchisors. In addition, this paper showed the legal development of

(74) The rules regulating exchange control in Thailand are prescribed by the Exchange Control Act B.E. 2485 (1942) and Ministerial Regulation No. 13 B.E. 2497 (1954) issued under this Act.

franchising regulations and the main practical issues concerning franchising, such as franchising regulations and contractual issues relating to franchise agreements, including pre-contract disclosure requirements and formalities, parties' rights and obligations, fees, and payments in franchising contracts, term requirements, renewal and termination of franchising contracts, intellectual property, and dispute resolution, and compared such issues with the situation in Kuwait. Furthermore, this paper conducted a comparison between Kuwait and other jurisdictions regarding a number of issues related to franchising agreements. Accordingly, has become apparent that there are matters relating to franchising a business that is not yet regulated by the legal system in Kuwait. Notably, there is less awareness of the franchising business model in Kuwait; as a result, neither Kuwaiti law nor case precedent addresses franchise agreements. In conclusion, the time is ripe for establishing franchising laws in Kuwait (such as the law in the Kingdom of Saudi Arabia) to address the economic, investment, and legal challenges that franchising in Kuwait may face. A franchising law should address not only the needs of the local market but also the expectations of business partners acting in more than one jurisdiction.

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قوانين الامتياز التجاري

في الأسواق الناشئة: الكويت كحالة للدراسة

د. أحمد الدرباس

د. محمد الوسمي

ملخص:

يلقي هذا البحث نظره على تعريف عقد الامتياز التجاري وعلى كيفية عمل مثل هذا العقد وما هي العوامل التي من شأن توافرها أن تساعد على الحصول على عقد امتياز محكم. كذلك يسعى هذا البحث لإيجاد الأحكام القانونية المطبقة على عقود الامتياز في دولة الكويت وفحصها، وفي سبيل تحقيق ذلك فقد تم في هذا البحث مراجعة وفحص عدة قوانين تتعلق أحكامها بتنظيم عملية الامتياز التجاري في دولة الكويت وذلك بسبب عدم وجود قانون خاص للامتياز التجاري. بالإضافة إلى ذلك فإن هذا البحث يسلط الضوء على عدة أحكام مهمه في عقد الامتياز التجاري لم تعالجها القوانين الكويتية، علاوة على أن هذا البحث كذلك يقترح لأطراف عقد الامتياز التجاري (مانح الامتياز التجاري وصاحب الامتياز التجاري) الأخذ بعين الاعتبار بعض الأحكام المطبقة على عقود الامتياز التجاري في دولة الكويت قبل الدخول في سوقها. وفي النهاية وبعد إجراء مقارنات مع أفضل التطبيقات القانونية حول العالم فإن هذا البحث يقدم بعض الاقتراحات التي من شأنها تحسين المنظومة القانونية المطبقة على عقود الامتياز التجاري في دولة الكويت.

كلمات رئيسية: امتياز تجاري، قانون تجاري، ملكية فكرية، وكالات

تجارية.

مجلة الحقوق

فصلية علمية محكمة - تصدر عن مجلس النشر العلمي - جامعة الكويت

قوانين الامتياز التجاري في الأسواق الناشئة:
الكويت كحالة للدراسة
د. أحمد الدرياس - د. محمد الوسمي



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العدد ٣ - السنة ٤٥

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