

Providing Service in Platform Economy as Franchisee: An Analysis

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Concerns about work conditions in the platform economy have been a common topic of scholarly and judicial debates for quite a long time in the West. Anyone keeping an eye on the international news outlets in the past few years should at least for once come across reports of drivers suing ride-hailing platforms like Uber and Lyft in USA and UK, where drivers demanded 'employee' or 'worker' status. Those that provide transport or last-mile logistic service through online platforms as independent contractors are often exposed to workplace volatilities like unlimited liability, harsh ergonomics, sudden termination from work etc. Hence, this article aims to look into the 'franchise' law which will keep the default construction of the platform economy intact while at the same time, will also provide service-providers with limited liability and a considerable protection mechanism safeguarding them from uncertainties at the beginning and at the end of their service contracts with the platforms. Pertinent laws of the USA and the UK will be primarily considered in the article, as these two common law jurisdictions have by far the most harmonized franchise legal system.

Introduction

Perhaps the most familiar example of platform economy is 'Uber', which is why many people also refer it as 'Uberized' economy.² Till date, the platforms that facilitate ridesharing and last-mile logistic service like Uber, Pathao, Foodpanda etc., are the ones that comprise of a considerable portion of today's workforce.³ Work in these platforms comes with some serious concerns,⁴ some of which have become specially worth-considering due to the COVID-19 pandemic. After all, a

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² Charles Towers-Clark "The Uberization of Work: Pros And Cons of the Gig Economy," *Forbes* July 8, 2019, www.forbes.com/sites/charlestowersclark/2019/07/08/the-uberization-of-work-pros-and-cons-of-the-gig-economy/?sh=4e917e6e1cc7

³ Riitta Juntunen, "Does the worker have a say in the platform economy?" *SAK*, 1, 6.-7, (2017).

⁴ *Ibid*, 10.

deliveryman or a ride-sharer losing his personal belongings and those of his consumer's to a mugger should not be surprising at ordinary times, let alone during the quiet hours of lockdowns. The concern here is that the default contractual arrangements between the service-provider and the platform usually stipulate me service-provider as 'independent contractor' who is presumed to be solely liable for any unexpected loss in the course of his work.⁵ Such arrangements are impractical for service-providers as they are mostly individuals with rather cheap means of transport aiming to earn their livelihoods, for whom making good of any loss is a hardship. Another issue that plagues the platform economy is the sudden termination of service-provider from the platform.⁶ Denial of access to the platform without any prior notice or negotiation is a horrific event for service-providers who depend entirely on platforms for their livelihoods at any given time.⁷ Then, there are the instances of service-providers where they would invest their resources in the platform life with the hope to earn their bread at ease, but would ultimately go through dehumanizing conditions to make each buck.⁸ In such cases, big promises by platforms would play a major role.⁹

This article contends that there is enough characteristic similarity between the 'franchise' model and the 'platform economy' model to consider franchise-specific laws in solving service-provider's issues. The article shall proceed with elaborating on the reasons for which franchise model has been chosen in Part I. Part II will discuss about third-party liability regime of service-provider as franchisee, which will follow possible personal loss protections in Part III. Part IV shall put forward franchise-specific disclosure mechanism giving out some important informational resources that can be of assistance to a franchisee-service-provider. Part V looks into the scope of franchise law to examine whether it covers instances of platform economy. Finally, Part VI points out the flaws of franchise model in its current form.

American laws and practices shall primarily be considered in this article with few references to British laws and practices, wherever necessary and applicable. American law has been chosen

⁵Brishen Rogers, "Employment Rights in the Platform Economy: Getting Back to Basics," *Harvard Law & Policy Review* 10,(2017): 479.

⁶Tribune Desk, 'Coronavirus: Accounts of Infected Uber Riders, Drivers Might Get Suspended' (2020) *Dhaka Tribune*. www.dhakatribune.com/world/2020/03/12/uber-may-suspend-accounts-of-riders-and-drivers-who-test-positive-for-coronavirus accessed June 05, 2021.

⁷Ibid; Carolyn Said, "Uber, Lyft Drivers Fear Being Booted From Work," *San Francisco Chronicle*, (2018), accessed May 24, 2021, www.sfchronicle.com/business/article/Uber-Lyft-drivers-fear-getting-booted-from-work-13304052.php.

⁸Vanessa Katz, "Regulating the Sharing Economy," *Berkeley Technology Law Journal* 1067, 1071(2015): 30; Peter Hinssen, "What We Can Learn From Platform Disruptors," *Forbes*, May 31, 2017, accessed May 28, 2021, www.forbes.com/sites/peterhinssen/2017/05/31/what-we-can-learn-from-platform-disruptors/#3a17a16435f2.

⁹Ibid.

because it is the jurisdiction that has the most extensive franchise legal regime.¹⁰ Besides, it is the jurisdiction that has also extensively dealt with issues associated with platform economy.¹¹

Why ‘Franchise’ as Opposed to the Dominant Discourse of ‘Employment’?

Breaking Down the Trouble with ‘Employment’ Solution

Stipulation of an ‘employer-employee’ relationship between service-provider and platform has been the dominant argument in discourse concerning work in platform economy.¹² Indeed, service-provider as employee instead of independent contractor, can gain access to some basic protections that are friendly for a weaker party in any contractual arrangement.¹³ Besides, initiation and termination of an employer-employee relationship is heavily regulated to sufficiently safeguard the interest of service-provider as an employee.¹⁴ But the problem with the ‘employer-platform and employee-service-provider solution is that it creates further anomaly in exchange of solving the existing ones.

The legal definition of ‘employee’ itself is imprecise as per the current legal regime provides.¹⁵ Sometimes it appears to be too broad and sometimes too narrow.¹⁶ The ‘common law control’ test is the primary test for determining employment status. Because, the factors ruled out by this test are *prima facie* the ones to be considered to examine the legal validity of an ‘employment’ claim.¹⁷ This test mainly include requirements of specified skills, employee’s engagement in the venture for a specified duration, employer’s ability to terminate the employee at will, and most importantly employer’s control or right to control.¹⁸ A typical service-provider’s nature of work would never ordinarily fall within the scope of an ‘employee’ if ‘control’ test be applied.¹⁹ Attempts have been made and will be made to extend employee-specific protections to cover service-

¹⁰ See e.g. 16 CFR 436.

¹¹ Cate Konger, “Uber’s Self-Driving Cars Are Valued at \$7.25 Billion by Investors,” *The New York Times*, April 18, 2019, accessed May 29, 2021, www.nytimes.com/2019/04/18/technology/uber-atg-autonomous-cars-investment.html; Orly Lobel, “The Law of the Platform,” *Minnesota Law Review* 87(2016): 101.

¹² E. Gary Spitko, “A Structural-Purposive Interpretation of Employment in Platform Economy,” *Florida Law Review* 409, (2018): 70.

¹³ Edward Taylor, “Vicarious Punishments: An Employer’s Vicarious Liability for Exemplary Damages,” *King’s Student Law Review* 1, 3-4(2008): 1.

¹⁴ Radu-Stefan Patru, “Theoretical and Practical References Regarding Applicability of Employer’s Obligation to Inform Employee,” *Juridical Tribune* 160,(2017): 160-164.

¹⁵ Ibid, 484-489.

¹⁶ Ibid.

¹⁷ Martin H. Malin, “Protecting Platform Workers in the Gig Economy: Look to the FTC,” *Indiana Law Review*, 51, (2018): 377- 382.

¹⁸ Ibid, 392.

¹⁹ Rogers, “Employment Rights” 481.

providers.²⁰ But it is a fact that the platforms would always go on adjusting their terms to sustain their favorable employment arrangement, by virtue of their inherent control over the platform service terms, each time they will qualify as employer.²¹

‘Franchise’ and ‘Platform’ Similarities

Assumption of dealings between two ‘independent’ business initiatives is the basis of the platform economy model.²² In principle, by virtue of this model, service-providers are their own bosses who are in control of their own working hours, ergonomics and business growth.²³ Such level of workplace freedom and flexibility are preferred by most service-providers, but can hardly be made available to them if they are stipulated as employees.²⁴ So, a better solution is the one which does not require basic changes in the ‘independent’ status of any parties involved. On such note, the franchise model has been considered, as it can provide some reasonable protections to service-providers while keeping their workplace freedom and flexibility intact.

Franchise is a model that assumes business between two independent parties, franchisor and franchisee, both of whom are engaged in the same line of business, as is the case between platform and service-provider.²⁵ Both franchisor and platform run their businesses by shifting certain risks to franchisee and service-provider.²⁶ Both franchise and platform economy models are based on utilization of others’ properties.²⁷ Take the cases of KFC and Uber for instance; Uber uses the vehicles owned by ‘driver-partners’ around the globe to provide ridesharing services, which is similar to KFC headquartered at Louisville using the properties owned by franchisees all over the world to sell fast-foods.²⁸ In the process, both KFC and Uber are shifting their risks associated with the properties used to serve their consumers, to franchisees and service-providers.²⁹

²⁰Malin, “Protecting Platform Workers in the Gig Economy,” 384-385.

²¹ Ibid.

²² Ibid.

²³JeremiasPrasl, *Humans as Service: The Promise and Perils of Work in the Gig Economy* (U.K: Oxford University Press 2018), 11.

²⁴Malin, “Protecting Platform Workers in the Gig Economy,” 392.

²⁵“Franchising,” *Business Jargons*, accessed May 29, 2021, <https://businessjargons.com/franchising.html>.

²⁶Malin, “Protecting Platform Workers in the Gig Economy,” 390.

²⁷Lobel, “The Law of the Platform,” 87, 90.

²⁸Fiona Simpson, “Imitation is The Sincerest Form of Flattery: How the Chicken Franchise Called Out its Copycats” *Forbes*, April 14, 2019, accessed May 29, 2021 <https://www.forbes.com/sites/fionasimpson/2019/04/14/imitation-is-the-sincerest-form-of-flattery-how-the-chicken-franchise-called-out-its-copycats/#4c65b87cdd9b>.

²⁹Malin, “Protecting Platform Workers in the Gig Economy,” 390; “Franchising,” BJ.; “U.S Terms of Use: Section 03,” *Uber* (2017), accessed May 25, 2021, www.uber.com/legal/terms/us/.

Tackling Third-Party Liability as Franchisee

Both franchisees and service-providers are the ones dealing with end-of-line consumers and most physical risks associated with the end-of-line services.³⁰ Hence, imbalances, as per third-party liability undertakings, exist between both franchise and platform parties.³¹ In the absence of any kind of regulation, being mere independent contractors, service-providers can be benefitted by some legal practices that are commonly applied in franchise-specific cases.

When it comes to conferring liability on any party to a contract, it is the financially stronger party on whom the burden of liability falls in case the loss occurs during the contract period, unless there exist serious wrongdoings like ‘gross negligence’ and ‘willful misconduct’ on part of the weaker party.³² One may contend this arrangement to be exclusive to ‘employment’ contracts, which is hardly correct.³³ In fact, it is applicable to any contractual arrangement where the parties do not stand on an equal financial standing.³⁴ After all, the aim always is to avail highest possible compensation to the injured third-party,³⁵ without putting the weaker contracting party at the risk of becoming insolvent in the process.³⁶ Needless to say that it is not different in case of franchise parties, as usually there is financial disparity between franchisor and franchisee.³⁷ So, based on the principle of compensating the injured party most while reasonably protecting the financially weaker party, let us consider the following franchise-specific means to limit third-party liability of service-providers as franchisees;

‘Franchisor’s Vicarious Liability’

Successful invocation of vicarious liability in the context of franchise, would require establishment of an agency relationship between franchisor and franchisee.³⁸ There are cases where vicarious liability can also be invoked establishing ‘employment’ relationship, but this would be very difficult to establish in case of service-provider and platform for their default nature of dealing with each

³⁰Ibid.

³¹Malin, “Protecting Platform Workers in the Gig Economy,”388.

³²Spitko, “A Structural-Purposive Interpretation” 35, 35.

³³Gregg Rubenstein, Francesca Turitto, Penny Ward and Larry Weinberg, “Vicarious and Other Franchisor Liability,” 3, 5.

³⁴Spitko, “A Structural-Purposive Interpretation” 422-423.

³⁵Ibid.

³⁶Ibid, 429.

³⁷Eddy Goldberg, “Weighing the Pros And Cons of Franchising vs. Traditional Business,”*Franchising.com*, accessed June 05, 2021,www.franchising.com/guides/weighing_the_pros_and_cons.html.

³⁸Rubenstein,Turitto, Ward, and Weinberg, “Vicarious and Other Franchisor Liability,” 3, 4- 10.

other.³⁹ However, common law assessment of agency relationship between franchise parties is predominantly done in two ways; the ‘authorization’⁴⁰ test and the ‘extent of control’⁴¹ test.

Establishment of agency relationship assumes the franchisor as the principal and the franchisee as the agent.⁴² As per the ‘authorization’ test, to held franchisor-principal vicariously liable for acts of franchisee-agent, existence of franchisor’s authority over the action arising third-party liability, needs be proved.⁴³ Now, it may not be possible to prove express authorization by platform-franchisor, but it should not be difficult to establish an implied authorization.⁴⁴ For instance, if a deliveryman meets an unfortunate incident involuntary losing the products purchased by a consumer on the way to his delivery point while being guided by the platform’s in-app navigation system, an implied authorization of the platform to take the route, a route that is probably marked risky for some reason, can easily be proved.⁴⁵ Hence, any liability arising out of such venture should at least be held subject to ‘apportionment’, if not shifted totally to the ‘stronger’ platform-franchisor, provided the case falls within the scope of pertinent legal principle.⁴⁶

Let us now review the ‘extent of control’ test to establish franchisor’s vicarious liability. In this test, the control which is to be assessed is the franchisor’s control over the *proximate cause* of damage in question.⁴⁷ Whether a ‘right to control’ existed on franchisor’s part, is also assessed.⁴⁸ In perspective, most platforms provide for the customers to rate the service-providers on the basis of their service quality.⁴⁹ Then, based on this rating, the platforms would promote or demote a particular service-provider if his service gets a lower rating.⁵⁰ The platform’s power of promotion or demotion of a provider⁵¹ connotes a certain level of control by platform over how a provider acts and will act in future.⁵² So, in cases where a consumer using ridesharing service suffers a loss arising out of one of the things for which the platform can demote or promote the service-provider,

³⁹Ibid.

⁴⁰Andrew L. Terry, Joseph L. Huan, “Franchisor Liability for Franchisee Conduct” *Monash University Law Review* 39 (2013): 388, 400.

⁴¹ Ibid, 394.

⁴²Rubenstein, Turitto, Ward, and Weinberg, “Vicarious and Other Franchisor Liability,” *Law* 5.

⁴³ Ibid.

⁴⁴Jay Hewitt, “Franchisor Direct Liability,” *Franchise Law Journal* 30 (2010): 35.

⁴⁵Ibid.

⁴⁶Rubenstein, Turitto, Ward, and Weinberg, “Vicarious and Other Franchisor Liability,” 35.

⁴⁷Hewitt, “Franchisor Direct Liability,” 35; Rubenstein, Turitto, Ward, and Weinberg, “Vicarious and Other Franchisor Liability,” 9.

⁴⁸Hewitt, “Franchisor Direct Liability,” 39-40.

⁴⁹Spitko, “A Structural-Purposive Interpretation” 412.

⁵⁰Nairi, “Feedback is Two-way Street,” *Uber Newsroom* (2014), accessed May 13, 2021, www.uber.com/newsroom/feedback-is-a-2-way-street.

⁵¹ Ibid.

⁵²Spitko, “A Structural-Purposive Interpretation” 411-414.

the platform can be held vicariously liable, if of course platform economy be conceived as a franchise contract.⁵³

Franchise as ‘Ostensible Agency’

When a third-party is put in the situation of belief that B is acting on behalf of or as A, A becomes an ostensible principal and B becomes the ostensible agent.⁵⁴ This ‘ostensible agency’ relation in franchise perspective is rather easier to establish, since often franchisor and franchisee would have same logos and brand-name.⁵⁵ It is the peculiarity of the franchise model that such identical or same logo and name, would lead a third-party to be in the presumption of existence of ostensible agency relation between franchisor and franchisee.⁵⁶ Besides, there may be instances of promotional activities like TV commercials by the franchisor on behalf of all its franchisees, which will only pave the basis for such presumption.⁵⁷ There are different tests that courts apply to assess the existence of such agency.⁵⁸ But the one fact that centers all of them is that whether the third-party could have reasonably been in the impression that the party he is directly dealing with, is in fact some way or the other under the control or supervision of another with whom he is not directly dealing with, but on who’s name or reputation he relied on while entering into the deal at the first place.⁵⁹ For instance, if Uber were a franchisor and a driver-partner were a franchisees, then if someone called an Uber and something had gone wrong during the ride causing a major damage, that someone would seek recourse against Uber for such damage and not against the driver-partner Mr. X.⁶⁰ Because, it will be the injured party’s argument that he was expecting ‘Uber’ service; which connotes that he presumed Uber to always maintain a certain standard (an ‘Uber’ standard) while choosing to request the service from Uber over other ridesharing platforms.⁶¹ Hence, the final outcome of franchisee-service-provider as ostensible agent of franchisor-platform is possible limited exposure to third-party liability.

⁵³Ibid.

⁵⁴John S. Ewart, “Exposition of Principle of Estoppel by Misrepresentation’ *HeinOnline*(1900): 238-239; “Black’s Law Dictionary,” 2ndedn, accessed May 17th, 2021, <https://thelawdictionary.org/ostensible-agency/>.

⁵⁵Heather Carson Perkins, Sarah J. Yatchak, Gordon M. Hadfield, “Franchisor Liability for Acts of Franchisee,” *Franchise Law Journal*29, (2010): 176-177.

⁵⁶ Ibid.

⁵⁷ Ibid, 176.

⁵⁸ Ibid, 176-177; Rubenstein, Turitto, Ward, and Weinberg, “Vicarious and Other Franchisor Liability,” 573-575.

⁵⁹Heather Carson Perkinset al, “Franchisor Liability” 176-177.

⁶⁰ Ibid.

⁶¹“Theories for Imposing Liability upon Hospitals for Medical Malpractice: Ostensible Agency and Corporate Liability” *William Mitchell Law Review*11, (1985): 576.

In fine, these are certainly not the only ways of limiting liability.⁶² In fact, there are other ways where establishing tortious liability on part of the franchisor is possible.⁶³ But these other ways have been kept outside the scope of this paper, because these do not easily fall in line with the principle of compensating the injured party most.⁶⁴

Service-Provider's Personal Issues

Franchisee Scenario of Personal Loss

There can be instances where service-providers will have to bear burdens for injuries suffered during work, and for loss of income due to illness. Service-provider cannot expect anything better from franchise regime on this note, at least on the basis of its current form. Because, franchise law assumes franchisees to be sophisticated enough to run an independent business with all reasonable hazards associated with it.⁶⁵ However, franchisee can be benefitted by establishing *negligence* on part of the franchisor.⁶⁶ To establish negligence, a franchisee-service-provider has to prove existence of breach of tortious duty by the franchisor-platform.⁶⁷ Also, there has to be existence of franchisor's control over the proximate cause of damage.⁶⁸ Both requirements are case-specific and cannot usually be established without court proceedings.⁶⁹ It translates to this that if a service-provider as franchisee gets injured himself, the only way he can recover his loss is through litigation against the platform as franchisor, which is probably not very practical as well as feasible for an ordinary service-provider.⁷⁰

Another way of personal loss mitigation is the establishment of a partnership between the franchise parties.⁷¹ Existence of partnership can be established, on the basis of ~~based on~~ two facts. First, franchising has to be a common profitmaking initiative between franchise parties, who are engaged in the same line of business.⁷² Second, both franchise parties' income has to be interdependent.⁷³ It is

⁶²Hewitt, "Franchisor Direct Liability," 38-41; Joachim Zekoll, "Liability for Defective Product and Services," *American Journal of Comparative Law* 50, (2002): 121-159.

⁶³Ibid; A. Mitchell Polinsky, Steven Shavell, "An Uneasy Case for Product Liability," *John M. Olin Center for Law, Economics, and Business*, (2009): 30-40, www.law.harvard.edu/programs/olin_center/.

⁶⁴Spitko, "A Structural-Purposive Interpretation" 429.

⁶⁵"What is Franchising" *IFA*, accessed May 21, 2021, www.franchise.org/faqs/basics/what-is-a-franchise.

⁶⁶David F. Johnson, "Employers' Liability for Independent Contractors' Injuries" *Baylor Law Review* 52, (2000): 1, 1-8.

⁶⁷ Ibid, 3.

⁶⁸ Ibid, 4.

⁶⁹ Ibid, 9-22.

⁷⁰ Ibid.

⁷¹Rubenstein, Turitto, Ward, and Weinberg, "Vicarious and Other Franchisor Liability," 23.

⁷²Ibid; "What is Franchising," *IFA*.

rather easier to establish for a franchisee-service-provider. After all, if service-providers do not provide services, platforms will lose money, as their income is essentially a portion charged from the earnings of service-providers.⁷⁴ On the contrary, if platforms do not provide leads to consumers seeking services, service-providers lose their income.⁷⁵ So, there is a possibility of establishing a common and joint interest-oriented relation like partnership.⁷⁶

Franchise Solution to Unnoticed Termination

Sudden termination of contract by the superior party in the contract-chain is a common concern for both franchisee and service-provider.⁷⁷ An ordinary franchisee would probably opt for recourse through litigation in case of unfair termination, but for an ordinary service-provider who would be nothing more than a small-scale franchisee, initiating litigation for unfair termination will never be an ideal answer to his concern.⁷⁸ The franchise model having long acquaintance with such small-scale franchise issues, has already managed to come forward with tools to tackle these issues.⁷⁹ An analysis of these franchise-specific tools regulating termination issues shall follow now;

The termination process in franchise is primarily subject to the pertinent contract provision, as agreed between the parties.⁸⁰ But recognizing the irregularities of the franchise model, authorities have put forward some requirements to ensure a fair and favorable termination process for the franchisees.⁸¹ In America, termination may not be regulated with a federal law, but law at the federal level does require franchisors to disclose certain basic information on termination in advance.⁸² It is in fact at the State-level where the rather detailed regulations exist. Generally, the provisions of these regulations are mainly dominated by the general contract law principle of *good faith and fair dealing* among contract parties, which contemplates an implied covenant between parties that they would not deprive each other in any way from enjoying their respective benefits out of the

⁷³David Peetz, “Workers’ Compensation doesn’t Cover Gig Workers – Here’s a Way to Protect Them,” *The Conversation* (2018), accessed May 21, 2021, <http://theconversation.com/workers-compensation-doesnt-cover-gig-workers-heres-a-way-to-protect-them-99946>.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷“Carolyn Said,” SFC; Carmen D. Caruso, David A. Harpes, “Handling Defaults and Terminations Effectively,” *International Franchise Association*, (2006), accessed May 24, 2021, www.franchise.org/handling-defaults-and-terminations-effectively.

⁷⁸ Ibid.

⁷⁹Mary L. Brown, Lynn K. Price, “The Federal Trade Commission Franchise Disclosure Rule,” *John Marshall Law Review* 13 (1980): 637- 638.

⁸⁰Eric Goldberg and Justin Csik, “Unintended Legal and Business Consequences of Termination of a Franchisee,” *Franchise Law Journal* 34, (2014): 53, 53.

⁸¹ Ibid, 53-54.

⁸² 16 CFR 436.5(s).

contract.⁸³This is actually a doctrinal provision as opposed to a procedural one, something that may become handy for a large-scale sophisticated franchisee, but for a service-provider franchisee who would rarely have any scope for negotiations before and after entering the contract, doctrinal provisions are not of much use.⁸⁴In contrast with the scenario in America, in the United Kingdom, the most noteworthy difference, aside the U.K not having a specific franchise termination regulation, is this that it does not have a *good faith and fair dealing* requirement embedded within their termination practices.⁸⁵But it is considering to adopt the principle lately.⁸⁶So, in that it is a promising development as there have been instances of many termination due to rather trivial reasons.⁸⁷After all, if anyone service-provider-franchisee suffers a major loss, so much so that it made him going to the court, this doctrinal provision can be of assistance.⁸⁸

At any case, procedurally speaking, there are four main types of provisions that regulates the ending phase of franchise relationship; these are *good cause*, *notice and cure period*, *incurable default*, and *buyback* provisions.⁸⁹ Now, good cause provision basically requires that a franchise can only be terminated on ground of reasonable justification.⁹⁰ The two most common factors that determines the existence of *good cause* are, ‘compliance with the terms of contract’ and ‘substantial compliance with the terms of contract’.⁹¹Now, both of these may sound identical except for the use of ‘substantial’ in the later one which is what brings significant differences between the two; being that for the former one, there requires franchisee’s continuous violation of any contract provision even after the franchisee being served with notice of such; whereas for the later one, it is franchisee’s violation of a ‘significant’ provision which will make the contract immediately terminated.⁹²In any case, it can be safely claimed that on the basis of ‘good cause’ provision one can never establish reasonable justification in termination due to discrimination, technical glitch of the platform during

⁸³Christine E. Connelly, Aron Friedman and Mark Inzetta, “Franchise Default and Termination- Best Practices to Enforce the Contract and Protect the System,”*International Franchise Association*(2016): 1, 7; Goldberg and Csik, “Unintended Legal and Business Consequences,” 54.

⁸⁴ Ibid.

⁸⁵“End of Franchise Agreement,”*Parliament of Australia*(2008): 6, 30, accessed May 24, 2021 www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2008-10/franchising/report/c06; Iain Bowler, “England and Wales: Franchising 2019”*International Comparative Legal Guides*(2018): 13.1, accessed May 24, 2021, <https://iclg.com/practice-areas/franchise-laws-and-regulations/england-and-wales>.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹Goldberg and Csik, “Unintended Legal and Business Consequences,” 55.

⁹⁰Connelly,Friedman and Inzetta, “Franchise Default and Termination,” 7.

⁹¹Goldberg and Csik, “Unintended Legal and Business Consequences,” 55.

⁹² Ibid, 56-58.

‘high demand’ hours, or any other similarly silly reasons for which service-providers have been terminated in the past.⁹³

A franchise cannot be immediately terminated only on the ground of *good cause*. Laws exist that require franchisors to give an opportunity to franchisee to rectify the default.⁹⁴ This opportunity comes in the form of a *cure period* of at least thirty days.⁹⁵ However, there are grievous violations which can eliminate the scope of any *cure period*.⁹⁶ These violations generally include, criminal acts by franchisee, acts that terminally affect the franchisor’s reputation and standard, franchisee’s insolvency etc.⁹⁷ These defaults are considered so grievous in nature that the ‘notice of termination’ requirement becomes optional here, even though it may prevail mandatorily regardless of existence of a preceding *cure period*.⁹⁸ Notice is required to be served typically between thirty to ninety days from termination, depending on the gravity of ground of termination.⁹⁹ Franchise-specific termination protections also extend beyond termination itself; there are provisions that require franchisors to repurchase/*buyback* items used in the franchised business by the franchisee, after termination.¹⁰⁰ These requirements would often be accompanied by further detailed provisions as to, items to be bought, price to be paid and circumstances upon which these provisions become mandatory.¹⁰¹ Now, essential to note at this point that this buyback provision can be very helpful for those service-providers who would acquire property on terms of lease or loan, for use in their services via platforms.¹⁰² Because, by virtue of this provision, these providers can attain more certainty with the burden being mostly eliminated or shifted, whatever the case maybe.¹⁰³

‘Franchise Disclosure Document’ and Service-Provider

Platform economy gives freedom to service-providers, but tend to put them in a lot of uncertainties, in exchange of such. In reality, most service-providers would always have to be in a haste to achieve

⁹³Goldberg and Csik, “Unintended Legal and Business Consequences,” 59-60; “Carolyn Said,”SFC.

⁹⁴Joseph J. Jr. Fittante and Meredith Bauer, “Defaults and Termination: An Unfortunate Reality of a Challenging Economy,”*Franchise Law Journal* 28, (2009): 214, 215.

⁹⁵Connelly,Friedman and Inzetta, “Franchise Default and Termination,” 17.

⁹⁶Ibid, 18.

⁹⁷ Ibid.

⁹⁸ Ibid, 17-18.

⁹⁹Goldberg and Csik, “Unintended Legal and Business Consequences,” 61.

¹⁰⁰Connelly,Friedman and Inzetta, “Franchise Default and Termination,” 20.

¹⁰¹ Ibid, 20-21.

¹⁰²Ibid; Noah Kulwin, “Big Promises,”*Vice News*, (2017), accessed April 29, 2019, https://news.vice.com/en_ca/article/j5d797/uber-will-pay-20-million-to-settle-with-ftc-after-promising-driversunrealistic-earnings.

¹⁰³ Ibid.

their targeted income,¹⁰⁴ whereas platforms would have probably lured them with non-representative and exaggerated income estimates to get them registered with them.¹⁰⁵ Now, given the current unregulated stature of platform economy, such deceptive practices of platforms, should not take anyone by surprise. Franchisees have been faced with similar malpractices as well, so franchise law came-up with mandatory disclosure of some necessary information by the franchisor to stop such malpractices, which will surely be of aid to service-providers in tackling the malpractices they are faced with.¹⁰⁶ The franchise disclosure mechanism is usually very comprehensive in nature.¹⁰⁷ It mandates provision of most possible information necessary for a prospective franchisee to make an educated decision regarding entrance into the pertinent contract.¹⁰⁸

However, the disclosure in its' current comprehensive form, will not be of any use to an average service-provider.¹⁰⁹ After all, service-providers have hard time even going through the standard contract before putting tick-mark on 'I accept' button while registering in the platforms. Disclosure documents are complicated legal work and often requires above average level of sophistication to understand.¹¹⁰ Sometimes it appears almost illegible to franchisees even, so much so that they often require specialist's advice to deal with it.¹¹¹ So when this is prevalent perception of those for whom it was originally promulgated, it is surely to be overwhelming for our deliveryman and ridesharing friends.¹¹²

There are some franchisors who after presumably contemplating this problem with legibility of the comprehensive disclosure document, came-up with a summarized version to efficiently comply with the mandatory disclosure law.¹¹³ This practice can serve as a solution to the service-provider's concern as well. The summary disclosure is not regulated by law yet, but a five phases information format is presented here (based on the practice) that would be of help to service-provider as franchisee.¹¹⁴ The first phase should mainly contain information relating to franchisor's business

¹⁰⁴Natasha Singer, "In the Sharing Economy Workers Find Both Freedom and Uncertainty" *The New York Times* (2014), accessed May 6, 2019, www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html.

¹⁰⁵Carolyn Said, "SFC; "Noah Kulwin" *VNs*.

¹⁰⁶Honey V. Gandhi, "Franchising in United States," *Law & Business Review of Americas* 20, (2014): 3, 7-9.

¹⁰⁷16 CFR 436.2.

¹⁰⁸Gandhi, "Franchising in United States," 7.

¹⁰⁹Malin, "Protecting Platform Workers in the Gig Economy," 401-404.

¹¹⁰Ibid, 400-401.

¹¹¹Ibid, 403.

¹¹²Eric H. Karp and Ari N. Stern, "A Proposal for Mandatory Summary Franchise Disclosure Document," *Franchise Law Journal* 541, 548; "Natasha Singer," *NYT*.

¹¹³Karp and Stern, "A Proposal for Mandatory Summary," 545.

¹¹⁴Chris Myers, "How to Read a Franchisor Disclosure Document," *Forbes* (2018) accessed May 29, 2021 www.forbes.com/sites/chrismyers/2018/07/08/how-to-read-a-franchise-disclosure-document/#504da2a33daa.

experience and involvement in litigations; projecting an overview of its franchise history.¹¹⁵ Secondly, the summary should provide information regarding investment, giving an overall cost estimate to become a franchisee.¹¹⁶ This should follow disclosure of the ‘would be’ obligations of the franchisees, and an overview of the assistances a franchisee maybe rendered by the franchisor.¹¹⁷ Finally, summary of ‘earning’ estimate should be provided based on experience of a certain number of existing service-provider.¹¹⁸

However, in the United Kingdom, it is a different scenario than the foregone one. Franchising here is self-regulated by *British Franchise Association* via its’ *Code of Ethics*.¹¹⁹ The authority apparently feels no necessity yet, to promulgate regulations for franchise disclosure and ongoing relationship, as there are not many complaints in the industry.¹²⁰ Now in principle, the Code that was struck-out by the Association is only mandated for its’ members, but Courts have not been conservative in considering the Code for those that have not been its’ members anyway.¹²¹ A possible reason behind it is that the Association is widely revered and subscribed by most franchisors in general.¹²² To put pertinent rules in contrast, the *Code of Ethics* does prohibit franchisors, from luring prospective franchisees, by misleading advertisement and earning prediction without factual basis; but does not provide for any obligatory disclosure mechanism.¹²³ So on this note, the legal environment of the United Kingdom, seems to be rather challenging and uncertain for service-providers as franchisees, when compared to America, at least in black and white.¹²⁴

Does Scope of Franchise Law Cover Platform Economy?

In general terms, franchise is a contract between two parties where one party grants the other commercial use of its goodwill, brand, trademark, business model etc. in exchange of monetary consideration.¹²⁵ Law would refer franchise as having three features; i) franchisee’s right to operate

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid; Malin, “Protecting Platform Workers in the Gig Economy,” 400.

¹¹⁹ John Pratt, “Franchising in The United Kingdom,” *Franchising Law Journal* 32, (2012): 95, 95.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Pratt, “Franchising in The United Kingdom” 96.

¹²⁴ Ibid, 95-97; Editorial Team, “Understanding Franchising Code of Conduct” *Point Franchise* (2018), accessed May 03, 2021, www.pointfranchise.co.uk/articles/franchising-code-of-conduct-1881/; Warren Pengilley, “Franchising Code of Conduct: Does Its Coverage Address The Need,” *Newcastle Law Review* 3, (1999): 1; Gandhi, “Franchising in United States,” 3.

¹²⁵ Malin, “Protecting Platform Workers in the Gig Economy,” 386.

under franchisor's trademark; ii) exertion of significant franchisor's control or provision of significant assistance in franchisee's operation; and iii) franchisee's commitment of a specified sum to be paid within a specified period of time.¹²⁶ So, basically, the precise connotation is that a relationship should qualify as franchise if there exists common commercial designation or trademark element, franchisor's 'control or assistance' element over franchisee, and 'required payment' element as consideration in the franchise transaction. In a nutshell, these elements collectively form the legal concept of franchising throughout the common law jurisdictions.¹²⁷

Now, in order to avail the franchise-specific solutions to service-providers, the relationship between the platform operator and service-provider must fall in line with the abovementioned legal elements of a franchise relationship.¹²⁸ So, whether or not, platform relationship satisfies the legal elements of franchise relationship, is what follows now through analysis of the elements and their purposes? However, this phase will not be dealing with 'control' element, as it has already been dealt with in the second part of this paper where issues regarding third-party liability have been discussed.

'Trademark' Element

To assess platform's likelihood to qualify as having the element, first we need to understand the basics of the element in legal terms. Franchise law does not provide for definition of trademark, rather it merely sets out a requirement of franchisee's certain rights in relation to such.¹²⁹ It does stress that 'trademark' may include designations like service mark, trade name, trade dress etc.¹³⁰ The absence of a definition in franchise law inevitably necessitates trademark-specific law to deal with this issue in its domain.¹³¹ Trademark here is defined as any word, name, symbol, device, or any combination thereof used to identify and distinguish service of one entity from the services of others (e.g. a smartphone app, website etc.); and also to indicate the source of a particular service rendered.¹³² Every trademark represents to consumers a specific expectation that they have toward a

¹²⁶ 16 CFR 436.1(h); Malin, "Protecting Platform Workers in the Gig Economy," 386; David Gurnick, "Franchise Elements in Business Transactions," *Barrister* 22, (1995): 22.

¹²⁷ Australian Competition and Consumer Commission, "Franchise Agreement," *ACCC*, accessed May 18, 2021 www.accc.gov.au/business/industry-codes/franchising-code-of-conduct/franchising-agreements British Franchise Association, "What is Franchising," *BFA*, accessed May 18, 2021, www.thebfa.org/about-franchising-the-bfa/what-is-franchising/.

¹²⁸ *Ibid*.

¹²⁹ 16 CFR 436.1(h) (1).

¹³⁰ *Ibid*, 436.1(v).

¹³¹ S. Jason Whatley, "The Basics of Internet Domains and Trademark Infringements," *American Journal of Trial Advocates* 21, (1998): 585, 597.

¹³² *Ibid*, 596.

specific source.¹³³The concept of trademark can easily be understood from our ‘brand’ choices. For instance, brands like Audi, BMW and Mercedes represent luxury to us, whereas, brands like Toyota, Nissan and Honda represent practicality.

To put things in perspective, prima facie a service-provider may not always be expressly granted the right to use the trademark of the platform.¹³⁴But in practice, it is not the case. The mechanism of platform economy is such that consumers can never avoid identifying both service-provider and platform as same.¹³⁵ For instance, even if the drivers are the actual source from where consumers receive their transportation, yet consumers shall always legitimately presume that the transportation is actually being provided by platforms like Uber and Lyft.¹³⁶Because, to the consumers, it is either the ‘Uber’ app or the ‘Lyft’ app they are putting their trust on, not some individual driver who is probably registered as drivers in both.¹³⁷And the fact that a service-provider can provide services using the app (carrying and/or being the trademark of a certain platform), shall be legally contemplated as the service-provider is operating under the trademark of the platform.¹³⁸In a nutshell, trademark as a franchise-specific element is seen to be found in platform economy.¹³⁹

‘Required Payment’ Element

The pertinent law requires service-providers to make certain payment to the platform in order to qualify as franchisees.¹⁴⁰ The ‘required payment’ element of franchise law includes all kinds of payments made to franchisor, except for those that have been made in connection with purchase of certain inventories that are not exclusive to franchise relation.¹⁴¹ Franchise law also requires the payment to be made only either to franchisor or to an entity that is under its’ control.¹⁴² To put this legal requirements in perspective, service-providers’ direct payments to platforms; mostly include

¹³³Chris A. Caseiro, “Basics of Intellectual Property,” *GPSOLO*17, (2000): 18, 21-22; Julius R. Jr. Lunsford, “Trademark Basics,” *Trademark Report*59, (1969): 873, 880; Whatley, “Internet Domains and Trademark Infringements” 597;Caseiro, “Basics of Intellectual Property,” 21.

¹³⁴Ibid; “U.S Terms of Use: Section 03” *Uber*(2017), accessed May 25, 2019, www.uber.com/legal/terms/us/.

¹³⁵Ibid.

¹³⁶Caseiro, “Basics of Intellectual Property,” 21; Lunsford, “Trademark Basics,” 879-880..

¹³⁷Ibid.

¹³⁸Ibid.

¹³⁹Ibid.

¹⁴⁰16 CFR 436.1(h)(3).

¹⁴¹16 CFR 436.1(s); Gurnick, “Business Transactions”22.

¹⁴¹ Ibid.

¹⁴²16 CFR 436.1(s).

the sum they pay before/after completion of each task as charges to platform.¹⁴³ This payments in the form of charges fall in line with the pertinent legal requirement.¹⁴⁴

‘Significant Assistance’ Element

The pertinent franchise law provision requires franchisor to assist franchisee significantly in the operating process.¹⁴⁵ The law does not stress on the ‘significant assistance’ element much, other than just mandating its’ presence in the relationship.¹⁴⁶ Assistance is considered significant when it relates to the overall operational conduct of franchisee, and not a portion of such conduct.¹⁴⁷ Assistance of such kind mainly includes franchisor’s assistances regarding site and location of operation, accounting system, and website access.¹⁴⁸ A typical service-provider should not have much trouble qualifying for this requirement.¹⁴⁹ The mobile application or website of platform and the support a service-provider can avail from such, easily suffice.¹⁵⁰ Platform’s online portals are indispensable for the entire operation, to which service-providers are granted access upon registration. These portals are mechanized in such a way that typically these would facilitate the entire service-specific transaction, and would also provide information regarding the location of the service to be performed.¹⁵¹ Then, the navigation system that most platform portal come associated with to provide its service-providers navigational support, can also be termed as a significant assistance in operation of franchisee-service-provider’s business.¹⁵²

The lawmakers intended for the scope of franchise law to be broad.¹⁵³ It is evident in the rulemaking record that the pertinent *ratio legis* allows the Courts to interpret the main elements of franchise in such a way that they reasonably encompass all purposively similar relations.¹⁵⁴ Yet, there may be some service-providers who would fall outside the scope of franchise law.¹⁵⁵ This is because, not

¹⁴³Lobel, “The Law of the Platform,” 97.

¹⁴⁴Ibid; 16 CFR 436.1(s).

¹⁴⁵16 CFR 436.1(h)(2).

¹⁴⁶ Ibid.

¹⁴⁷Howard Yale Lederman, ‘Franchising and Franchise Law- An Introduction,’ *Michigan Bar Journal* 92, (2013): 51, accessed May 21, 2021, www.thewriteattorney.com/wp-content/uploads/2016/08/Business-Law-Section_-Michigan-Business-Law-Journal-Fall-2015.pdf.

¹⁴⁸ Ibid.

¹⁴⁹Ibid.

¹⁵⁰Lobel, “The Law of the Platform,” 94-97.

¹⁵¹ Ibid.

¹⁵²Ibid.

¹⁵³Lederman, ‘Franchising and Franchise Law’ 51.

¹⁵⁴ Ibid.

¹⁵⁵16 CFR 436.8; Malin, “Protecting Platform Workers in the Gig Economy,” 391; Tony Marks, “The Hidden Franchise: Inadvertent Franchising Equals Inevitable Risk,” *Forbes* (2018), accessed May 26, 2021, www.forbes.com/sites/tonymarks/2018/06/04/the-hidden-franchise-inadvertent-franchising-equals-inevitable-risk/#5754b0796d22.

everyone needs to be protected. After all, there will always be some investments so trivial in nature which will not be worth protecting, and also there will be some so significant in nature that those will create a presumption of the investors being prudent and capable enough of protecting themselves by their own means.¹⁵⁶

Flaws of the Franchise Model

The main flaw of the franchise model is that it lacks harmony and uniformity. This is most felt while dealing with its liability regulations.¹⁵⁷ Most of the franchise liability regime is basically case-specific where hardly any harmony can be found.¹⁵⁸

Lack of legal uniformity is also a major concern for the part covering end of the franchise contract. Here, the situation is such that it can appear to affect legal certainty for the franchise model itself.¹⁵⁹ Issue being that there is not much harmony among the provisions regulating the at-end substances of franchise.¹⁶⁰ For instance, a termination may be in *good faith* under one jurisdiction and completely unlawful at another.¹⁶¹ Besides, simple objective provisions like when to serve termination notice and how many days should be allowed as cure period would also vary greatly.¹⁶² These inconsistencies among laws would often make the parties opt for litigation.¹⁶³ And in the litigations even, substantial issues are not those that get resolved first, rather courts have to first decide on procedural matters relating to the applicability of law, jurisdiction and so on.¹⁶⁴ Now, all these end-up in a costly venture for the parties involved.¹⁶⁵ If there were uniform regulations, the courts would not need to pay this much heed on the procedural part and rather could directly deal with dispute itself, saving both money and time.¹⁶⁶ Besides, costly litigations would also not be something economically favorable for a prospective service-provider as franchisee.¹⁶⁷ The point is, non-uniform and non-harmonized regulations are demoralizing for any economic initiative.¹⁶⁸ In fact, such an inconsistent certainty is no less bubbly than the one offered by platforms.¹⁶⁹ So,

¹⁵⁶Malin, "Protecting Platform Workers in the Gig Economy," 391; 16 CFR 436.8; 16 CFR 436.8(b).

¹⁵⁷David F. Johnson, "Employers' Liability," 1.

¹⁵⁸*Ibid.*

¹⁵⁹Goldberg and Csik, "Unintended Legal and Business Consequences," 54.

¹⁶⁰*Ibid.*, 55-65.

¹⁶¹*Ibid.*, 60.

¹⁶²*Ibid.*, 61-62.

¹⁶³Rupert M. Berkoff, 'Franchise Relationship Regulation'; "Noah Kulwin" *INs*.

¹⁶⁴*Ibid.*; Goldberg and Csik, "Unintended Legal and Business Consequences," 54.

¹⁶⁵*Ibid.*

¹⁶⁶Berkoff, 'Franchise Relationship Regulation'.

¹⁶⁷*Ibid.*; "Natasha Singer," *NYT*.

¹⁶⁸Goldberg and Csik, "Unintended Legal and Business Consequences," 70-71.

¹⁶⁹Berkoff, 'Franchise Relationship Regulation'; "Natasha Singer," *NYT*.

straightforward solution to this issue is to come-up with a uniform regime.¹⁷⁰ But the challenge here is a presumed conflict of interest specific to the current franchise legal model between franchisor and franchisee.¹⁷¹ Both sides are restrained from supporting legal uniformity, by a fear of unknown, as they share a perception of probable loss of current rights each enjoys.¹⁷² However, it can in no way be disputed that uniformity is significant to ensure better certainty. Because as franchise model has a default nature of expansion, and without legal uniformity, expansion would have to face uncertainty at great length.¹⁷³

Conclusion

The number of people providing full-time services through platforms is quite large and is growing as days go by.¹⁷⁴ The reason behind such can be attributed to certain behavioral changes of people towards work in the recent past.¹⁷⁵ Also scarcity of traditional employment and the ever increasing requirements to get a job, have equally contributed to people opting for work in the platforms.¹⁷⁶ Indeed, it makes sense for anyone who is in need of a job and getting such almost with a tap of a finger.¹⁷⁷ So, there should not be any question about regulating the work in the platform, especially when so many people's interests are getting involved these days.¹⁷⁸ The countries in the West have been trying to deal with it for quite long now, whereas, South Asian countries are yet to break the ice in this regard.¹⁷⁹ The franchise solution rendered herein is applicable to all platform service-providers regardless of their jurisdictions.¹⁸⁰ It may not be an ideal one yet, but it is surely worth considering as it comes with ample scope to be on par with people's changing approach toward work.¹⁸¹

¹⁷⁰Ibid.

¹⁷¹Ibid.

¹⁷²Ibid.

¹⁷³G. Frank Mathewson, Ralph A. Winter, "The Economics of Franchise Contracts," *Journal of Law & Economics* 28, (1985): 503-504; Goldberg and Csik, "Unintended Legal and Business Consequences," 70-71.

¹⁷⁴Prasl, *Humans as Service*, 16- 18.

¹⁷⁵Ibid.

¹⁷⁶SammiCaramela, "Communication Technology and Inclusion Will Shape the Future of Remote Work," *Business News Daily* (2018), accessed June 04, 2021, www.businessnewsdaily.com/8156-future-of-remote-work.html; "ILO: Unemployment and decent work deficits to remain high in 2018," *ILO*, (2018), accessed June 04, 2021 https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_615590/lang--en/index.htm.

¹⁷⁷Ibid.

¹⁷⁸Prasl, *Humans as Service*, 16-18.

¹⁷⁹Rogers, "Employment Rights," 479; Malin, "Protecting Platform Workers in the Gig Economy," 377.

¹⁸⁰Malin, "Protecting Platform Workers in the Gig Economy," 377.

¹⁸¹Ibid.