

Enforcement of Judgments in Commonwealth Countries

ENFORCEMENT OF JUDGMENTS IN COMMONWEALTH COUNTRIES

The question of the clause conferring jurisdiction is an essential component of an international business strategy, in particular in the franchise business. Indeed, the Franchisor's first order of business when venturing into Asia for example is to sign a master franchise contract (or franchise contracts) with an investor located in the given Asian country whose goal is usually to sign up for the franchise rights for the whole country or even all or part of Asia.

There are a great variety of combinations relating to the choice of the clause conferring jurisdiction: the Franchisor's Court, the Master Franchisee's Court, compulsory rules, third party Courts, arbitration courts.

Difficulties often derive from the fact that both parties want the designated court to be its own, or alternatively be an arbitration court. These options create more problems than they solve: if the Court is that of one of the parties, is it not an advantage to the said party? If the arbitration court is chosen, isn't its cost much too expensive and the process lengthy in case of extreme urgency?

It occurs that the Commonwealth of Nations offers an interesting alternative to international players, offering creative solutions through the mechanism of the reciprocal Enforcement of Foreign Judgments Acts. Such acts create procedural connections between Commonwealth States which are worth being known and used.

Indeed, one has to be reminded that 53 independent States are member of the Commonwealth among which Australia, Brunei, Canada, India, Malaysia, Pakistan, Singapore, South Africa, Cyprus, Jamaica...

There is a very powerful incentive among Commonwealth States to facilitate business relations between one and another, and hence to create bilateral or multilateral rules of conflict, given that the legal tradition of Member States derives from the Common law of England & Wales.

For example, if a European Franchisor wishes to move into Malaysia, one of the questions would be: should the relevant tribunal be that of the European country or the Malaysian Judge? The European party may well prefer the Court to be its own, viewing with some fear the choice of the Malaysian Judge as being in an excessive "proximity" to the Malaysian prospective Master Franchisee. Indeed, European Franchisors going to Asia are usually in contact with powerful families, whose local "influence" is often great, and which usually sign up to buy the franchise rights for the whole country or even several countries, capable of paying entrance fees and making investments in millions of dollars.

One of the best solutions in this case is to examine the mechanisms of enforcement of foreign Judgments in Malaysia, which brings us to study the Singaporean ENFORCEMENT OF COMMONWEALTH JUDGMENTS ACT (CHAPTER 264).

Article 5 of the Act, gives the following precision: ". —(1) *When the Minister is satisfied that reciprocal provisions have been made by the legislature of any part of the Commonwealth outside the United Kingdom for the enforcement within that part of the Commonwealth of judgments obtained in the High Court of Singapore the Minister may declare by notification published in the Gazette that this Act shall extend to judgments obtained in a superior court in that part of the Commonwealth in the like manner as it extends to judgments obtained in a superior court in the United Kingdom and on any such declaration being made this Act shall extend accordingly.* "

The interest for the Master franchisee of choosing in the clause conferring jurisdiction the Singaporean judge is dual: first, the Singaporean Court remains in the vicinity of the prospective Master Franchisee's cultural

environment; secondly, the law of the Land is very close to that of Malaysia since both states are members of the Commonwealth. The interest for the Franchisor is dual all the same: firstly, he avoids the Court to be that of the Master Franchisee. Secondly, the Court is that of a State known for its strict legal system and great proximity to Common Law, which is of European inspiration, and thus very close to the Franchisor's general legal culture (even if the Franchisor comes from a continental legal environment).

On a practical level, if Singapore is chosen in the clause conferring jurisdiction and a dispute arises where the Franchisor must take action to obtain from the Malaysian Master Franchisee that he refrains from using the tradesign for example, the Franchisor will file an *ex-parte* application before the Singaporean Judge so as to obtain a Court Order. It is obtained without the Master-Franchisee being heard of course. It would take two to three weeks to obtain the Court Order.

In parallel, an *in-parte* application is to be filed before the Judge, the parties hence debating and presenting their respective arguments to the Judge. During the *in-parte* Court debate the *ex-parte* injunction would remain valid. Within 14 to 21 days of issuance of the *ex-parte* Court Order, the Franchisor will have to enforce the *ex-parte* Court Order in Malaysia.

The Singaporean Reciprocal Enforcement Act would then be used to execute the *ex-parte* Court order within Malaysia. Indeed, the Singaporean Court Order will have to be registered before the Malaysian Court Registrar by filing a Certificate of Urgency which gives to the Singaporean *ex-parte* Court Order the legal power to be enforced within Malaysia, procedure which is accomplished within 2 to 3 days.

In conclusion, before signing any Master Franchise contracts, the Franchisor is recommended to analyze with precision all possible options, including those aforementioned. Only half the work will have then been accomplished: it would still be left to determine the law governing the contract.

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Gilles Menguy

Avocat & Solicitor, GM Avocats

gmenguy@avocats.com