

To implant in franchise in Asia

TO IMPLANT IN FRANCHISE IN ASIA: THE CHOICE OF THE RIGHT QUALIFIED COURT IS A CRUCIAL QUESTION: the Malaysia case

The question of the jurisdiction clause is essential in the frame of the retail globalization, in particular in the franchise sector. In fact, it is primordial for a franchisor, who wishes to venture in Asia for example, to sign a master franchise agreement or contract with a local investor. Generally, the latter wishes to obtain the right to operate the franchise for the whole country even for all of Asia.

The clause conferring jurisdiction helps to choose between the competent court of the franchisor's home, the competent court of the master franchisee's home, the public order, third-party State Courts and Arbitration Courts.

Difficulties often come from the fact that both parties want to see their respective court to be selected, or alternatively an arbitral court. These options give birth to more problems than they solve: if the court is that of one of the parties, does not it come to confer one advantage to the said party who would see its national court appointed (selected or designated). If both parties choose an arbitration, would not the cost of such an alternative be too high and the procedure too long in case of an extreme urgency?

It appears that the Commonwealth Nations offer an interesting alternative to international actors through the legal mechanism of the reciprocal recognition of the foreign judgments. Such laws have helped to create procedure ties between the Commonwealth Nations, which deserve to be recognized and worthwhile to be used.

In fact, it is important to be reminded that the Commonwealth Nations count 53 independent States among which Australia, the Brunei Sultanate, Canada, Malaysia, Pakistan, Singapore, South Africa, Cyprus, Jamaica...

Among the Commonwealth Nations there is a favorable climate for business relationships, a fortiori facilitating the adoption of bilateral or multilateral conflict rules, as the right of the Member States is born from the Common Law, as it is understood in England or in Wales.

For example, if a European franchisor wishes to move into Malaysia, one question is arising: should the competent (relevant?) court be that of the European contractor or the Malaysian judge? The European Nation may probably prefer the competence of its own court by fear seeing the Malaysian judge being too "close" to the Master Franchisee. In fact, European franchisors, who enter Asia, generally build business relationships with powerful local families, whose "influence" is often significant. Most of the time, they sign a contract in order to acquire the franchise rights for the whole country, or even for several countries. These families can pay the entrance fees and invest several million of dollars.

One of the best solutions in this case consist in scanning the mechanisms of the foreign judgment enforcements in Malaysia, which lead us to study the 264 Chapter of the Singaporean enforcement of Commonwealth judgments Act.

Article 5 of this said law specifies that (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 supreme court in the United Kingdom and on any such declaration being made this Act shall extend accordingly."

The master franchisee's interest in choosing the Singapore court under its competent jurisdiction clause is double: first, to choose the Singapore law helps the master franchisee to remain close to his cultural environment; then, the country law is very close to that in force in Malaysia as both States are Commonwealth members. The franchisor's interest is also double: first, he avoids that the competent court will be the Master Franchisee's, secondly, the competent court is that of a recognized country known for its strict legal system and very close to the Common Law, from European inspiration, and consequently from the franchisor's culture (even if the franchisor is from a continental culture).

From a practical point of view, if Singapore is selected under the jurisdiction clause and in case a trial-litigation-dispute arises pushing the franchisor to take a legal action to stop the Master Franchisee using the trademark for example, the franchisor will sue an "*ex parte*" application in the Singapore court so as to obtain a court injunction. This injunction order is of course obtained without the Master Franchisee is heard and it would take two to three weeks.

In parallel, an "*in-parte*" application is to be enlisted before the court; parties can then debate and submit their respective arguments to the judge. During the "*in-parte*" phase, the "*ex-parte*" injunction will remain valid. In a 14 to 21-day period, after the "*ex-parte*" making of the order, the franchisor will have to make the "*ex-parte*" court order enforced in Malaysia. In fact, the Singapore court order will have to be registered in the Malaysian court registry while filling "an emergency certificate", which gives the Singapore "*ex-parte*" court order the necessary authority of *res judicata* to be enforced in Malaysia. This procedure may take 2 to 3 days.

As a conclusion, before signing any master franchise contract, it is recommended that the franchisor analyses with precision all the options that are offered to him, including those above mentioned. Only half of the work will be done: it would still have to choose the law governing the contract.

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