

## EVERYTHING YOU NEED TO KNOW ABOUT FRANCHISE



## INTRODUCTION

The franchise industry plays a crucial role in Malaysia's economic growth. The industry in 2017 has contributed RM27 billion to Malaysia's gross domestic product. There are many reasons as to why many businessmen or even business groups who are now more interested than ever, to venture and invest in a franchise business. Among the reasons would be the business structure that would be ready, the established brand name and the positive market sentiments towards the brand.

This article will deliberate on the franchise systems in Malaysia, the Franchise Act 1998 ("FA 1998") and the recent court's approach towards the franchise regime in Malaysia.

The FA 1998 has mandated the industry players to register their franchise with the Ministry of Domestic Trade, Co-Operatives and Consumerism ("MDTCC") before he can operate a franchise business or make an offer to sell the franchise to any person (within or outside Malaysia). This is also applicable to the franchisee who has been granted a franchise from a foreign franchisor.

## GET STARTED RIGHT AWAY

**Q: What are the pre-requisites for a company to qualify as a franchisor?**

- must be a registered as a private limited company (Sdn Bhd) under the Companies Commission of Malaysia;
- to have a track record of at least 3 years with available audited financial reports for the preceding 3 years prior to the franchise application;
- records of the company held with the Companies Commission of Malaysia have to be updated to the latest 6 months' period; and
- Franchise business will have to have at least 6 months' of operating experience.

**Q: What are the documents or information required by the MDTCC?**

In furtherance to the above, the company would have to prepare the following dossiers to substantiate its application to the MDTCC:

- The franchise agreement;
- Operation manual;
- Training manual;
- Certified True Copy of the registered trademark or intellectual property;
- CTC of the corporate secretarial documents;
- Franchise financial projections;
- Prototype outlets/photographs of the franchise company;
- Brochure/pamphlet of the franchise company; and
- Such other documents or information as may be required by the registrar of franchises from MDTCC.

**Q: What is the ramification for failing to comply with the FA 1998?**

Any franchisor who fails to comply with FA 1998, if a body corporate shall be liable to a fine not exceeding RM250,000 and for a second or subsequent offence, to a fine not exceeding RM500,000 and if such person is not a body corporate, to a fine not exceeding RM100,000 or to imprisonment for a term not exceeding 1 year or a fine not exceeding RM250,000 or to imprisonment for a term not exceeding 3 years or to both.

**Q: What is the period of effectiveness upon registration?**

The registration of a franchise shall continue to be in full force and remain effective until or unless suspended, terminated or canceled by MDTCC pursuant to the FA 1998.

*"Though registration can be made by way of online application at [www.myfex.kpdnkk.gov.my](http://www.myfex.kpdnkk.gov.my), a certain level of assistance will be required to closely monitor the submission process and it involves providing various supporting documents to MDTCC (which in certain circumstances, might be over and above what is stated as required under the FA 1998 or relevant guidelines)."*

**DISTINCTION BETWEEN A FRANCHISE AND LICENCE**

In the usual business context, the criteria of a licence agreement have certain resemblance of a franchise agreement. A licence business model would entail the licensor to grant the right to use of the marks (ie. logo, symbol and tagline) to the licensee whilst retaining the ownership rights to the marks with minimal control over the management and operation of the business in using the marks. On the other hand, the franchising business model is subject to myriads of regulatory requirements and the franchisor is at the liberty to impose substantial and continuous degree of control over the operation and management of the business.



This can be seen in the case of *Dr. Premananthan Vasuthevan v. Permai Polyclinics Sdn Bhd [2014 10 CLJ 251]* whereby the court held that the licence agreement between the parties shall not be regarded as a franchise as there is only a minimal control over the operations of the business as a whole.

In contrast, the Federal Court in the case of *Dr H K Fong Brainbuilder Pte Ltd [2018 1 LNS 773]* held that a licence agreement shall be regarded as a franchise agreement as the former has a strong resemblance of the latter. Franchise is defined under the FA 1998 to include the following elements:

- a) *the franchisor grants to the franchisee the right to operate a business according to the franchise system as determined by the franchisor during a term to be determined by the franchisor;*
- b) *the franchisor grants to the franchisee the right to use a mark, or a trade secret, or any confidential information or intellectual property, owned by the franchisor or relating to the franchisor, and includes a situation where the franchisor, who is the registered user of, or is licensed by another person to use, any intellectual property, grants such right that he possesses to permit the franchisee to use the intellectual property;*
- c) *the franchisor possesses the right to administer continuous control during the franchise term over the franchisee's business operations in accordance with the franchise system; and*
- d) *in return for the grant of rights, the franchisee may be required to pay a fee or other form of consideration.*

In addition, the court has also discussed on matters related to knowledge qualification as the intention of the contracting parties is always equated with the meaning of a contract. A licensor shall deem to have knowledge of the licence agreement being a franchise agreement if communications between itself, the licensees or its advisers revealed and imputed that the licensor has knowledge of the arrangement being a franchise scheme.

In essence, the Federal Court in determining the nature of an agreement has paved a way to a strict interpretation towards the intention of the parties and the true nature of an agreement without having regard to the label or description of the agreement in question. Any deviation or circumvention of the FA 1998 will inevitable attract the issues inter alia, the enforcement of rights, declaration of agreement to be null and void and legal consequences under the FA 1998.

All information in this Newsletter is correct as at **September 2018** unless otherwise stated.

\*\*\*\*\*

The authors to this newsletter are [Clarence Tan](#) and [Jean Lee](#). Clarence is currently undergoing his internship with Donny & Ong. Jean was qualified as an advocate and solicitor since 2017 and is currently a Legal Associate of Donny & Ong. She mainly advises on corporate conveyancing matters with particular focus on pre and post development conveyancing project matters.

**Disclaimer**

Our publications or newsletters are for general guidance only and shall not be construed as a professional legal advice rendered by us. It is not intended to form the basis of your decision in respect of any transaction or matter contemplated. The content is updated as at the date of the Newsletter and it includes information from publicly available sources. Should you have any specific enquiry on the subject matter, please contact us for more information.

**CONTACT US**

| T +603 6211 1316  
 | F +603 6211 1876  
 | A A-2-10, Plaza Damas 3,  
 Jalan Sri Hartamas 1, 50480  
 Kuala Lumpur  
 | W [www.donnyong.com](http://www.donnyong.com)  
 | E [admin@donnyong.com](mailto:admin@donnyong.com)

  
**DONNY & ONG**  
 ADVOCATES AND SOLICITORS

柯王律师事务所