

Question 2:
What are essential terms of a Franchise Agreement?

The Malaysian Franchise Act 1998, which regulates the franchise industry in Malaysia, stipulates that a franchise agreement must contain basic clauses, without which the agreement will be considered null and void. A franchise agreement shall contain but is not limited to:

- a. the name and description of the product and business under the franchise;
- b. the territorial rights granted to the franchisee;
- c. the franchise fee, promotion fee, royalty or any related type of payment which may be imposed on the franchisee, if any;
- d. the obligations of the franchisor;
- e. the obligations of the franchisee;
- f. the franchisee's rights to use the mark or any other intellectual property, pending the registration or after the registration of the franchise;
- g. the conditions under which the franchisee may assign the rights under the franchise;
- h. a statement on the cooling off period;
- i. a description pertaining to the mark or any other intellectual property owned or related to the franchisor which is used in the franchise;
- j. if the agreement is related to a master franchisee, the franchisor's identity and the rights obtained by the master franchisee from the franchisor;
- k. the type and particulars of assistance provided by the franchisor;
- l. the duration of the franchise and the terms of renewal; and
- m. the effect of termination or expiration of the franchise agreement.

The two items listed above that may be difficult for franchisors to comply with are items (h) and (j), the first being the "cooling off" period. This is a requirement by the Act that is not exclusive



to Malaysia (Australia practices the cooling off concept as well). The cooling off period requires the franchisor to provide the franchisee with an option to terminate the agreement within at least seven (7) days of entering into the agreement. Upon such termination, the franchisor has to refund the payment made by the franchisee, after deducting the expenses incurred in preparing the agreement and other documentation for the purpose of franchising. The franchisee, in return, has to hand back all the documentation and information obtained from the franchisor with regards to the franchise.



This cooling off period is a term in the agreement that usually comes as a surprise to franchisors. Other agreements do not have such a term and it is natural as both parties should read the terms of an agreement prior to signing the agreement. This cooling off period allows a party to get out

of an agreement that he or she has committed to within seven (7) days, even after he or she has signed the agreement!

As for the second item that may induce reluctance in franchisors, i.e. the need to provide details of the master franchisor, this requirement, like the cooling off period, is intended to protect the franchisee. With these details, the franchisee can be assured that the franchisor is providing accurate details and does in fact own a master franchise for a specific territory. To safeguard the franchisor's interest and rights, the franchisor can limit the franchisee's contact with its master franchisor by including a term that restricts contact between the parties without prior consent from the franchisor.

On the whole, the specific requirements of the Franchise Act must be taken into account when the franchisor is preparing the documentation needed to register its franchise in Malaysia, be it the Disclosure Document, the Franchise Agreement or anything else. As technical and dull as the preparation of such documents may be compared to the actual job of opening the outlet, training the staff and running the franchise, you do not want to be caught out by simple technical glitches that could have been avoided!

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From the Desk of the Company Secretary



By Stanley Yap

JANUARY 2012. Ushering in year is the year of the Dragon. We shall be having lots of positive expectations from our businesses, anticipating plenty of positive energy flow into our universe but at the same time, not forgetting to send our very best wishes and hopes to our core business partners, shareholders as well as the many other stakeholders who have always taken an unfading interest in any of our business dealings.

Last year end (Dec 2011), I received a few e-mails from a director friend (who is also a loyal subscriber of Franchise Asia!) who runs his own franchise business in the education industry. He has his tuition centres established throughout Malaysia. His concerns were nothing more than ways to protect his business' trade secrets and how we, as their consultant can assist in their brand building and business performance. I submitted a final report to him on that matter and I believe that you will find the information contained hereunder helpful:-

*To: The Managing Director,
Let's Teach Tuition Centre Sdn. Bhd.**

Dear Sir,

Report on security policy on trade secrets and security of information circulated into and out from the company in a bid to control and reduce infringements of Trade Sensitive Information

A. On Trade Secrets

As the franchise industry grows, together with the increased understanding of the importance of trademark protection, directors from various industrial backgrounds are urged to offer deliberations on issues concerning the process of keeping their business secrets out of reach from third parties. A trade secret is information that business uses to gain advantage over competitors who do not know it or use it, for example, customer lists, pricing strategies, and business plans. A trade secret may consist of almost any type of information if it is valuable not known in the industry and is protected from public knowledge. Protection is vital because you may probably have spent some money for its development, business should take proactive steps to protect this important, sometimes intangible, property from being misappropriated or stolen.

To qualify as a trade secret, you need to ensure that the information possessed must (1) provide an economic value not being known or readily ascertainable to others who could obtain value from its use or disclosure; and (2) be maintained in secrecy through reasonable efforts. To recognise these 2 components is to understand and classify the kinds of sensitive information that belong to the company. Your trade secrets are:

- Confidential students' information (report cards, attendance sheet, registration forms, student's telephone numbers)
- Teaching handbooks, answer sheets,
- Logo designs, drawings, floor plans, education trademarks, printing copyrights
- Operation and Training manuals in each tuition outlet
- Business know-how (in this case how you teach or lecture, what you use to lecture, exam tips, e-mail or online tutoring etc)
- Your Franchise Agreement (which contain strains of methods you use to manage or govern your company's operations and they are useful tools for unknown competitors)
- Financial information (including pricing policies, material (tables, chairs, whiteboards) and overhead costs, and profit margins of the outlets, rentals)

B. On due diligence

Once you have established what your trade secrets are, reasonable efforts must be employed to maintain their secrecy. Your business should implement a written trade secret policy to prevent unauthorized disclosure. Your trade secret policy may include several policies directed at preventing intentional/unintentional disclosure of information by employees and non-employees eg. Vendors, suppliers, or contractors. Operating as a tuition centre, I suggest some exemplary policies which can be easily implemented below:

- Document control procedures - allowing access to trade secrets only on a "need to know" basis; marking confidential information "CONFIDENTIAL", "SECRET" or "PROPRIETARY"; storing confidential documents in a secure location.
- Employment Agreements - including (i) confidentiality clauses prohibiting employees from disclosing or using trade secret information outside the scope of their current employment; and (ii) no-competition clauses having a reasonable time and geographical restriction for which the employee cannot join a competitor.
- Non-disclosure Agreements - for vendors, consultants, customers, and any non-employee personnel who receives information containing trade secrets.
- Physical security measures - restricting access to facilities by non-employees; monitoring facilities; and electronic security measures including firewalls on computer networks and password protection for specified documents.
- Exit interviews - reminding departing employees of their continuing duty of confidentiality and retrieving all company material in their possession containing trade secrets.

C. On strengthening corporate administration and governance

Under S139 (1) of the Companies Act 1965, every company is required to have at least one or more company secretary. And the reason is apparent because an administrator is competent in trade issues apart from those relating to organizing board meetings, setting the agenda for general meetings, answering the concerns of the company's directors may have, acting as a facilitator between companies and the government authorities or regulatory bodies for grants, licenses, work permits and for certain companies, the inclusion of renewal of contracts.

Due to increased cases of trademark infringements, trade information being divulged without the consent of its owner, cyberlaw infringements (eg. 3rd party use of your website domain), the availability of insider's information, illegal contrivance and intrusion to company's server, mishandling of important documents, distrust in employer and employee relationships all contribute to how safe a piece of invaluable information can be protected.

Therefore, we play a role in assisting and advising you as the directors to ensure that at all times the company maintains a sound system of internal control through safeguarding your interests in business franchise, keeping proper registers and accounting records, helping you to make informed decisions in risk management, and to ensure higher regulated risk management policies are in place within the organization to prevent unauthorized use of trade secrets.

Thank you.

Yours sincerely,

Stanley Yap

Stanley Yap is the Company Secretary cum Business Developer of CM YAP Management Services (K.L.) Sdn Bhd., a firm that specialises in accounts, tax, company secretarial, franchise and trademark services with over 30 years of experience. More details at www.cmyapmanagement.com or reach Stanley directly at cmyapmanagement@gmail.com or 016-9578 785.