

THE INTERNATIONAL
HOTEL LAW
REVIEW

Editors

Mark Abell and Karen Friebe

THE LAWREVIEWS

THE INTERNATIONAL
HOTEL LAW
REVIEW

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors

Mark Abell and Karen Friebe

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Gavin Jordan

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Janina Godowska

SUBEDITOR

Martin Roach

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34-35 Farringdon Street, London, EC2A 4HL, UK

© 2020 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at October 2020, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-468-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AZB & PARTNERS

BIRD & BIRD

CMS VON ERLACH PONCET AG

MCCARTHY TÉTRAULT LLP

NAGASHIMA OHNO & TSUNEMATSU

TAY & PARTNERS

CONTENTS

PREFACE.....	v
<i>Mark Abell and Karen Friebe</i>	
Chapter 1	FRANCHISING IN THE HOTEL SECTOR..... 1
<i>Mark Abell</i>	
Chapter 2	CANADA..... 19
<i>Trevor Lawson</i>	
Chapter 3	CHINA..... 38
<i>Sven-Michael Werner and Grace Zhao</i>	
Chapter 4	DENMARK..... 54
<i>Soren Narv Pedersen, Ted Rosenbaum, Marie Grönlund, Mogens Dyhr Vestergaard and Claudia Vindbjerg Mortensen</i>	
Chapter 5	FRANCE..... 66
<i>Alexandre Vuchot, Ariane Mole, Bertrand Levy, Djazia Tiourtite, Boris Martor and Maroun Abinader</i>	
Chapter 6	INDIA..... 78
<i>Hardeep Sachdeva and Priyamvada Shenoy</i>	
Chapter 7	ITALY..... 89
<i>Antonella Ceschi</i>	
Chapter 8	JAPAN..... 102
<i>Makoto (Mack) Saito and Shinichiro Horaguchi</i>	
Chapter 9	MALAYSIA..... 109
<i>Chang Hong Yun, Lee Lin Li and Leonard Yeoh</i>	

Chapter 10	POLAND.....	119
	<i>Marcin Świerżewski, Kuba Ruiz, Maciej Georg, Marta Kwiatkowska-Cylke, Mateusz Dubek and Paulina Grotkowska</i>	
Chapter 11	SINGAPORE.....	132
	<i>Lorraine Anne Tay and Audrey Lim</i>	
Chapter 12	SWITZERLAND	145
	<i>Sibylle Schnyder</i>	
Appendix 1	ABOUT THE AUTHORS.....	157
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	171

PREFACE

The hotel sector has evolved. A lot.

It is now a far cry from the coaching inn and the ‘Mom and Pop’ motel, and those who wish to own a hotel no longer have to be involved in its operation. There is no need to put a mint on the pillow, fill the ice buckets or even visit the property. If an investor so chooses, a hotel can remain a line on a balance sheet and no more. This apparent cut in complexity is not, however, reflected in the sector’s legal demands.

What enabled this hands-off approach for the most hands-on of sectors was the move from asset-heavy to asset-light, a trend that began in the 1960s with the franchising of the Holiday Inn brand. This gained traction in the United States with the popularisation of real estate investment trusts, and in Europe with the adoption of various investment models, including sale and leaseback.

The largest hotel companies embraced the chance to sell assets and use them to fund expansion. In 2018, Hilton was one of the last groups to shed its assets: making good on a three-way split announced two years earlier, spinning off its timeshare business and moving 70 of its owned hotels into a REIT. Simplifying the businesses would, it was hoped, result in a higher net valuation multiple.

Part of the motivation behind selling off the family jewels was the need for valuation simplicity. Another was the growing appetite for the sector from investors – an increasing number of them being institutions, whose structure prevented participation in operations.

With companies such as Marriott International and Hilton freed from the rigours of ownership, focus turned to the rapid growth of their brand stables, embracing a wave of branding that has permeated every aspect of commercial life. At the last count, Marriott International had more than 30 brands, illustrating the expanded scope of the hotel sector, moving past those motels and reaching deep into luxury resorts, serviced apartments and even private residences. As the customer asserts the right to ‘their stay their way’, the number of flags available to owners will only multiply, with the new model less a stable of separate entities and more a big happy family, united by a loyalty programme.

When it came to franchising, size mattered. Marriott International, Hilton Worldwide, Wyndham Hotels & Resorts, Choice Hotels International and Intercontinental Hotels Group – the top five franchisors by total room count in the United States – collectively represent 82 per cent of the total franchised branded rooms according to STR and JLL Research.¹

Branding a hotel may look as simple as branding a chocolate bar, but the expansion of franchising out of the US was merely the start of the options for hotel owners, and the

1 <https://www.jll.co.uk/en/trends-and-insights/investor/why-more-hotels-are-owned-by-franchisees>.

number of players involved in each hotel has expanded with the number of brands. These players now include third-party operators, asset managers, franchisors and franchisees, managers, operators and, of course, owners in their many forms. Unlike a chocolate bar, a hotel night is a passing commodity: if you don't sell that room tonight, it, and its potential revenue, no longer exist.

Regional variances have grown within the hotel stack. Leases are popular in Germany, but much less so in other countries. It is a minefield for those companies that want to act globally but are forced to act locally. Owners and their demands also vary. The family office looking for a multi-generational hold has very different aspirations to the private equity house looking to flip an asset in five years.

A brand is no longer just reassurance that the shower will work and the breakfast will be the same. The customer wants more; wants experience; wants something unique backed by the security of the standard. Delivering this has become ever-more demanding.

There are those who buck the trend, including CitizenM in the Netherlands and Whitbread in the United Kingdom. They see their strength in the ability to control all aspects of the company, see assets not as a dead weight, but as the solid core that they can rely on and the source of their ability to act nimbly.

The considerations in every contract have expanded exponentially. With more brands come more concerns from owners about competition on their patch. Differences between flags must be defined to protect against accusations of cannibalisation and brand owners playing favourites with their new toys. The cost of the brand has grown past marketing; there are issues around investment and refreshing the offering. Just because an unseen person in HQ 5,000 miles away wants a new type of mattress as a new brand standard, is the owner required to pay for it? And a new neon sign? And a coffee machine in every room? The brands' insatiable appetite for expansion, and to enter into amenity wars with their rivals, threatens owners' returns and often leads to conflict.

Marketing a property is an art and a skill that comes at a cost, and distribution is now a hotel department in its own right. Hotels have been taught to fear the high fees of the online travel agents, but owners have complained that the response of the globally branded players – to fight fire with loyalty programmes – has also come at a cost. When the asset is properly aligned, a hotel can deliver glorious rewards as well as a wonderful stay.

Aligning the parties has become the priority for those helping to build the relationship and create an asset which works. Hotels have edged their way into the mainstream asset classes, joining retail, office and residential. With that has come increased scrutiny from investors and the need for thorough contracts between parties – not just a handshake at the bar. The skill involved in this search for balance has never been more demanding, nor the depth of knowledge required greater.

Mark Abell and Karen Friebe

Bird & Bird

October 2020

MALAYSIA

Chang Hong Yun, Lee Lin Li and Leonard Yeoh¹

I INTRODUCTION

The Malaysian government has always been proactive in promoting the country's tourism industry. One such initiative was the first Visit Malaysia Year campaign that was launched in 1990. As a result, Malaysia was lauded then as one of the most visited countries in Asia.

In 2018, Malaysia recorded the arrival of about 25.8 million international tourists, generating a tourist receipt of 84.1 billion ringgit. The average stay in the country is 6.5 nights and accommodation made up 25.7 per cent of the tourist receipt.

The Malaysian government encourages the development of hotels in line with its promotion of Malaysia as an attractive tourist destination as well as a regional centre for trade and commerce. Given the initiatives, the number of hotels in Malaysia has increased over the years.

Most of the premium hotels are located within the Klang Valley. New hotels that have recently entered into the market include Banyan Tree, Four Seasons Hotel, W Kuala Lumpur and St. Regis. More premium hotels are expected to be opening soon, which include Kempinski Hotel and So Sofitel Kuala Lumpur Hotel & Residences.

II MARKET ENTRY

In an effort to promote the country's tourism industry, the Malaysian government had liberalised the foreign equity participation for hotels services. Since 22 April 2009, foreign investors can hold 100 per cent of the equity in four and five-star hotels and up to 70 per cent in three-star hotels while one and two-star hotels will require 100 per cent Malaysian participation.

Ownership of property in Malaysia by foreign interest is, however, subject to the approval of the relevant State Authority. A locally incorporated company where 50 per cent or more of its voting shares are held by a non-citizen or a foreign company is considered a foreign interest.

With the exceptions of residential units, the approval of the Economic Planning Unit at the Prime Minister's Department (EPU) is also required for the acquisition of property that is valued at Malaysian currency 20 million ringgit and above and which would result in the dilution of ownership of property held by Bumiputera interest or government agencies. As a condition to its approval, EPU will require the purchaser to have at least 30 per cent Bumiputera equity interest in the company.

¹ Chang Hong Yun, Lee Lin Li and Leonard Yeoh are partners at Tay & Partners.

Malaysia maintains an overall liberal approach when it comes to foreign investment in the country. Under the foreign exchange administration rules regulated by the Central Bank of Malaysia, a non-resident has the freedom to invest in Malaysia in any form of ringgit assets. Non-residents are also free to remit out any divestment proceeds, profits, dividends or any income arising from investments in Malaysia in foreign currency.

Several tax incentives are provided under the Promotions of Investment Act 1986 for the hotel industry. Tax incentives in the form of Pioneer Status or Investment Tax Allowance are available for new investment in hotel projects. Investment Tax Allowance is also available for companies that are seeking to reinvest in existing one-star to five-star hotels for expansion or modernisation work.

III LEGAL STRUCTURE

A company may be incorporated in Malaysia as a company limited by shares or a company limited by guarantee or an unlimited company. A company limited by shares is the legal structure most commonly used to carry on a hotel business and to hold and own properties in Malaysia. The company will be subject to and governed by the Malaysian corporate laws, including income tax.

The laws governing lands are generally prescribed in the National Land Code 1965 (NLC). Under the NLC, alienated lands are subject to three categories of land use known respectively as 'agriculture', 'building' or 'industry'. Buildings erected on alienated lands subject to the category of 'building' can generally be used for residential or commercial purposes. The construction or use of a building for hotel businesses would be commercial in nature.

Alienated lands are also subject to such express condition or restriction in interest as may be endorsed on the document of title. The relevant State Authority may impose such conditions with respect to the building to be built on the land or the uses to which any building is to be put. The State Authority may also impose restriction against any transfer, leasing or charging of the land by the proprietor to any other party without its prior consent.

The Tourism Industry Act 1992 is the legislation that provides for the regulation and licensing of 'accommodation premises' in Malaysia. A hotel falls under the definition of 'accommodation premises'. MOTAC is the authority that is responsible for the registration and classification of tourist accommodation premises. All hotels are required to be registered with MOTAC and undergo classification by MOTAC according to its guidelines.

Any premises used for the operation of business (including a hotel) requires a business premises licence from the relevant local or municipal council. A signboard licence is also required where any signboard is displaced. Various other licences are also required depending on the types of business activities carried out in the hotel such as restaurant, entertainment, beauty and health centre. A liquor licence is required for the supply of liquor at the premises. These licences are subject to renewal.

Various real estate investment trusts (REITs) have been set up to operate and manage income-producing commercial real estate such as shopping complexes, hospitals, plantations, industrial properties, hotels and office blocks. REITs are regulated by the Securities Commission of Malaysia and governed by the Capital Markets and Services Act 2007. In REITs, a trustee company holds the assets and properties on behalf and for the benefit of the unit holders. One of the REITs in Malaysia is the YTL Hospitality REIT, which houses

a wide range of prime hotel properties under its portfolio such as the JW Marriot Hotel Kuala Lumpur, the Majestic Hotel Kuala Lumpur and the Ritz-Carlton Kuala Lumpur, with Maybank Trustees Berhad acting as the trustee.

Specifically for the hotel sector, tourism tax is levied on foreign tourists staying at any accommodation premises in Malaysia. The tax is collected by the accommodation operator at a rate of 10 ringgit per room per night.

IV LEASES

In Malaysia, state land may be alienated and disposed of by the state government either in perpetuity (commonly known as freehold land) or for a term of years of not exceeding 99 years (commonly known as leasehold land).

A person who is registered as the proprietor of a leasehold land enjoys the same rights and protection as a proprietor of a freehold land. Subject to the relevant approvals having been obtained, both freehold and leasehold lands can be used for the construction of any building to carry on any business and can be sold, transferred, leased or charged to any other person.

The principal difference between freehold and leasehold land is that upon the expiry of the tenure for the leasehold land, the leasehold land will revert to and vest in the State Authority and any rights or interest registered on the title of the leasehold land will extinguish. The proprietor of a leasehold land may, prior to the expiry of the term, apply to the State Authority for its approval to extend the tenure.

Many hotels in Malaysia are constructed on leasehold lands. For instance, the historic five-star Majestic Hotel Kuala Lumpur sits on leasehold land with a 90-year tenure, expiring on 11 May 2091 and the Sunway Resort Hotel & Spa sits on leasehold land with a 99-year tenure, expiring on 1 April 2097.

In contrast, a leasehold land is not a contractual lease. A contractual lease arises when a person enters into a lease agreement with the proprietor of the land to occupy and use the land (or a portion of the land) for such purposes and duration based on mutually agreed terms. The maximum term for a contractual lease is 99 years if it relates to the whole of the land or 30 years if it relates to a part of the land only. While NLC provides for certain implied conditions, leases are generally governed by the contractual terms made between the parties.

In the hospitality industry, there have been a number of projects involving a 'buy and leaseback' arrangement that provides profit sharing or a guaranteed amount of return to the buyer for a certain period of time. Under this arrangement, the buyer becomes the legal owner upon payment and the developer is granted a lease and exclusive right to manage the property for a certain period of time.

V INTELLECTUAL PROPERTY AND BRANDING

i Overview

Intellectual property rights in Malaysia are governed by various types of intellectual property laws, and regulated by the Intellectual Property Corporation of Malaysia (MYIPO) within the purview of the Ministry of Domestic Trade and Consumer Affairs (MDTCA). The main intellectual property rights that are applicable to the hotel sector are trademarks, copyright, confidential information, trade secrets and know-how.

ii Trademarks

Trademarks are protected by registration under the Trademarks Act 2019 (TMA). A trade mark is registrable provided it is distinctive and does not fall foul of the absolute and relative grounds for refusal whereby the former concerns the inherent registrability of a trademark while the latter relates to conflict with earlier rights. To constitute a 'trademark', a sign (which includes any letter, word, name, signature, numeral, device, brand, label, ticket, shape of goods or their packaging, colour, sound, scent, hologram, positioning, sequence of motion or any combination thereof) must be capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. Examples of trademarks that have been registered in Malaysia in relation to hotel services include Hilton, Pullman, Ibis, Ibis Styles, Mercure, Shangri-La and Mandarin Oriental.

Upon registration, the registered proprietor is conferred the exclusive right to use the mark in relation to the goods or services claimed for. Where a trademark is infringed, a registered proprietor may commence a civil action for trademark infringement, and where the mark has been used in Malaysia such that there is goodwill and reputation associated with it, there is additional recourse under the common law tort of passing off. The typical remedies available in a civil action are damages or an account of profits, injunction, delivery-up or destruction of the infringing goods, discovery of all relevant information and documents in connection with the infringement and legal costs.

A registered proprietor may also have recourse to administrative relief in the form of border protection measures to prevent the importation of counterfeit goods and criminal remedies under the TMA, whereby the Enforcement Division of the MDTCA may be moved to initiate a raid, seize infringing or counterfeit goods and prosecute the persons responsible.

Unregistered trademarks, which gain protection due to goodwill and reputation established thereunder through usage, are enforceable by the common law tort of passing off.

It is noteworthy that the High Court had recently in *Dorpan, S.L. & Anor v Nusajaya Sunrise Sdn Bhd*² fortified the common law position that common field of activity is not required in establishing misrepresentation in an action for passing off and recognised the right of a common law proprietor to restrain use of a same or confusingly similar mark in a related or associated field if it is shown that there is a trend of diversification into that field.

iii Copyright

Copyright is governed by the Copyright Act 1987 (CA). While there is no compulsory registration system for copyright that subsists automatically upon creation, a copyright owner may notify and deposit a work eligible for copyright protection with the MYIPO pursuant to the Copyright (Voluntary Notification) Regulations 2012. A work is eligible for copyright protection upon the fulfilment of certain requirements under the CA.

The CA confers on a copyright owner the exclusive right to control in Malaysia the doing of certain acts in relation to different types of copyright work. Where a copyright work is infringed, the copyright owner may initiate a civil action for copyright infringement and seek injunctive reliefs, damages, an account of profits or statutory damages of not more than 25,000 ringgit for each work but not more than 500,000 ringgit in aggregate.

2 [2019] 1 LNS 628.

iv Confidential information

Confidential information, trade secrets and know-how are protected through contract law and under the common law tort of breach of confidence. Where obligations of confidence are contractually imposed, the confider will have recourse to a civil action for breach of confidentiality under contract and common law.

VI DATA AND HOTEL TECH

i Ownership and management of personal data

Hoteliers (defined hereinafter) often deal with a high volume of personal data concerning their employees and hotel guests in the course of business. As such, hoteliers are expected to manage and deal with personal data in a careful and secure manner to ensure compliance with the Personal Data Protection Act 2010 (PDPA) and the Personal Data Protection Regulations 2013 (PDPR).

The issue of ownership of personal data remains unclear and is not addressed in the PDPA. As there is often an alignment of interest between hotel owners and operators, or in a franchise scenario, between franchisors and franchisees (collectively, hoteliers), to optimise the profitability of the hotel, it is typically contemplated that hoteliers have the right to access and use guest data for hotel operations. In the context of the PDPA, hoteliers are data users and hotel guests and employees are data subjects. Third party service providers such as information technology service providers and payroll service providers are data processors.

Hoteliers must register as a data user under the PDPA and comply with the seven personal data protection principles under the PDPA in the processing of personal data.

Non-compliance with the PDP Principles amounts to an offence under the PDPA. The Personal Data Protection Commissioner has commenced taking measures to enforce the PDPA. The first prosecution under the PDPA concluded in May 2017 whereby a local private college operator was charged for processing personal data without a certificate of registration issued by the Commissioner. Since this case, there has been several other data users charged for the same offence (failure to register as data user) in the past two years, including one hotel operator, one private higher educational institution and two job recruitment agencies.

ii E-commerce

E-commerce is regulated by various legislations in Malaysia, mainly the Electronic Commerce Act 2006 (ECA), the Consumer Protection Act 1999 (CPA), the Consumer Protection (Electronic Trade Transactions) Regulations 2012 (CPETTR), the Communications and Multimedia Act 1998 (CMA) and the PDPA.

The ECA applies to commercial transactions conducted through electronic means and recognises the validity and enforceability of electronic correspondence and the formation of contracts expressed and concluded by electronic means.

The CPA applies in respect of all goods and services offered or supplied to consumers in trade including electronic trade transactions. The CPETTR strengthens the protection for e-consumers as it governs specifically online businesses and applies to any person who operates a business through a website or an online marketplace for the purpose of supplying goods or services (online business supplier and any person who provides an online marketplace (online marketplace operator)).

Essentially, the CPETTR requires an online business supplier to disclose certain information on the website where the business is conducted, and provide the appropriate

means to enable the buyer to rectify any errors prior to the confirmation of the order and acknowledge receipt of the order without undue delay. The CPETTR also provides that an online marketplace operator must take reasonable steps to keep and maintain a record of the names, telephone numbers and the address of an online business supplier for a period of two years.

Electronic marketing is governed by the CMA and the PDPA. The CMA prohibits the provision of content that is indecent, obscene, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person and this arguably applies to sending marketing messages via electronic means such as text and email.

Where electronic marketing involves the processing of personal data, the individuals must be notified of the processing of their personal data for direct marketing and must give consent. The individuals may, at any time by written notice, require the data user to cease or not to begin processing their personal data for direct marketing.

VII FRANCHISING OF HOTELS

i Overview

Franchising in Malaysia is a regulated industry governed by the Franchise Act 1998 (FA), and regulated by the Franchise Development Division (Franchise Registry) of the MDTCA. The FA applies to any franchised business operated or to be operated in Malaysia. A business arrangement that constitutes a franchise under the FA must procure regulatory approval or registration of the franchise and ensure that specific terms of agreement prescribed by statute be in place prior to offering for sale or sale and commencement of the franchise business in Malaysia. The FA will be subject to various amendments introduced under the Franchise (Amendment) Act 2020 (Amending Act) for conformity with the current developments of the franchise business in Malaysia. The Amending Act was published in the Gazette on 6 March 2020 after receiving its royal assent on 20 February 2020. It has yet to come into force but is anticipated to do so at the end of this year or early next year.

ii Franchise agreement

The FA prescribes certain mandatory terms to be included in a franchise agreement, without which the agreement will be rendered null and void. The Franchise Registry has also, in practice, required the certain specific terms to be incorporated in the agreement including, *inter alia*, the following:

- a whether the franchisee must concentrate on the business on a full-time basis;
- b whether the franchisee must sign any secrecy covenant;
- c whether the franchisee is prohibited from doing a similar type of business;
- d the length of time between execution of the franchise agreement and the opening of the outlet; and
- e the extension period for the franchisee to recoup on its investment and the conditions for the grant of the extension right.

iii Non-discrimination

The FA prohibits discrimination between franchisees. A franchisor must ensure that the terms of the franchise agreement signed with different franchisees are the same. If there are material changes to the terms of the franchise agreement that have been approved by the

Franchise Registry, the franchisor must notify the Franchise Registry of the changes and provide justification to the changes before signing the amended franchise agreement with the franchisees.

VIII HOTEL MANAGEMENT AGREEMENT

Hotel management agreements (HMAs) are contractual documents and are, therefore, subject to contractual principles many of which are codified in the Contracts Act 1950 of Malaysia. Contractual principles are also derived from common law cases. A HMA is generally a long-term contract with options for renewal. It can be terminated in the manner as agreed in the HMA.

Typically, under an HMA, the management company will have exclusive control of the operation of the hotel, which includes overseeing staff, operating bank accounts, preparing budget and estimates, maintaining books and records, establishing prices and charges for guest rooms and services, purchasing supplies, scheduling repair and maintenance, supervising sales and marketing, assisting owner to obtain and maintain all licences and approvals. In return for its services, the management company is entitled to the payment of a management fee that is usually an agreed percentage of the gross revenue or operating profit.

The brands, logos and trademarks (trademarks) used in the business of the hotel are usually the property of the management company or its affiliates. The owner will be granted a non-exclusive and non-transferable licence for the use of the trademarks at the hotel. All goodwill and benefits arising from the use of the trademarks belong to the management company or its affiliates. In return, the management company or its affiliate will be entitled to the payment of a royalty. Upon termination, the management company or its affiliates will have the rights to remove all trademarks.

Under the HMA, the owner will be responsible in complying with all relevant laws applicable to the property, funding the operation and capital expenditure when it is required, obtaining the relevant licences and permits with the assistance of the management company and entering into any contracts for leases, concessions, service contracts, employment contracts and other agreements necessary for the operation of the hotel.

In the event of the owner transferring or disposing of its interest in the property, a third party taking over the interest in the property (transferee) will not be bound by the HMA as it is not a party to the HMA. The HMA will usually contain clauses that restrict any such transfer or disposal by the owner without the management company's consent and oblige the owner to procure the transferee to enter into such agreements with the owner and the manager to be bound by the terms of the HMA. It is in the interest of the management company to ensure that the transferee has sufficient financial resources to fulfil the obligations of the owner under the HMA and that the transferee is not carrying on any business that competes with the management company or its affiliates.

IX FINANCING

Lands in Malaysia are valuable assets and can be used as security for financing. Under the NLC, the whole (but not a part only) of any alienated land and the whole of the undivided share (but not a part only) in any alienated land can be charged as a security for the repayment of any debt.

Under the NLC, the charge will take effect upon registration on the titles of the lands. The charge confers upon the chargee the right to apply for an order for sale in the event of a default of repayment by the borrower. The order for sale by the court will provide for the sale to be by public auction. The highest bidder will upon payment of the purchase price be entitled to a certificate of sale that will on registration confer upon the purchaser the title and interest of the lands freed from any liability under the charge.

In addition, the financier may also take other forms of security such as a charge over fixed deposit, a corporate or personal guarantee or a debenture incorporating a fixed and floating charge over the assets and properties of the company. A debenture is particularly useful as it confers upon the chargee the right to appoint a receiver and manager to sell the assets and properties of the company and use the proceeds of sale to repay the debts. The receiver and manager acts as the agent of the company and may execute the sale as the attorney of the company under the powers granted under the debenture.

On foreclosure of the lands, the successful bidder or purchaser becomes the rightful owner of the lands subsequently upon registration thereof (subsequent owner). The subsequent owner is not bound by the HMA or any other agreement to which it has not been made a party. The manager would often seek to impose as a condition to the owner encumbering the lands that the chargee and the owner enter into a non-disturbance agreement with the manager. The non-disturbance agreement will provide in the event of a foreclosure that the rights of the manager and its affiliates will not be disturbed and that the chargee and the subsequent owner will recognise the rights of the manager and its affiliates under the HMA and the other related agreements.

However, banks and financial institutions in Malaysia are generally not receptive to entering into a non-disturbance agreement as such an agreement may limit the options that they have in the exercise of their remedies. They would also likely impose more stringent terms and conditions for the financing that may not be as commercially favourable to the borrower.

IX EMPLOYMENT LAW

The primary legislation relating to employment law is the Employment Act 1955 (EA) under the purview of the Ministry of Human Resources. With the exception of the provisions on maternity leave, it should be noted that the EA only specifically protects the following categories of employees (EA employees):

- a* employees with a monthly salary below 2,000 ringgit; or
- b* any person is are employed as follows, irrespective of wages:
 - as a manual labourer;
 - to operate or maintain any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes;
 - as a supervisor of manual labourers;
 - in any capacity in any vessel registered in Malaysia; or
 - as a domestic servant.

The EA prescribes minimum terms and conditions of employment, for instance, the maximum hours of work on a daily and weekly basis, paid annual and sick leave, overtime payment for work outside the normal hours of work, termination notice period and payment

of termination benefits. Although non-EA employees do not come within the ambit of the EA, employers generally use the EA as a reference to fixing any minimum terms and conditions.

Apart from the EA, employers are also required to adhere to the payment of minimum wages to its employees under the Minimum Wages Order 2020. With effect from February 2020, two different sets of minimum wage rates will apply in Malaysia. The minimum monthly wage payable to an employee has been revised to 1,200 ringgit for major cities in Malaysia. The minimum monthly wage for other parts of the country will be 1,100 ringgit. There is also the Minimum Retirement Age Act 2012, which prescribes that the minimum retirement age of an employee is 60 years. Any contract of service or collective agreement that excludes or limits the provisions of the Minimum Retirement Age Act 2012 will be void.

In the hospitality industry, service charge is imposed on bills issued to customers. The service charge referred to here is not the government tax but money to be distributed among the service crew of the hotel for the services provided.

In the case of *Crystal Crown Hotel and Resort Sdn Bhd*,³ the Industrial Court rules that hotels could not incorporate and convert a portion of the employees' service charge to form part of the minimum wages to meet the minimum wages requirement. This decision was affirmed by the High Court as well as the Court of Appeal. The case is now pending its appeal to the Federal Court. The approach adopted in *Crystal Crown* was followed in almost all subsequent decisions of the Malaysian courts. On the other hand, a recent court case has held that the service charge forms part of the 'wages' for purpose of computing retrenchment benefits.

The Industrial Relations Act 1967 (IRA 1967) provides ways for settlement of disputes between employers and workmen respectively. Employees can only be dismissed or terminated with just cause or excuse. In filing a claim for wrongful dismissal, an employer will seek an order for reinstatement or compensation in lieu thereof. When the dismissal is challenged by the employee, the employer has the burden of proof to show that such dismissal is with just cause or excuse.

The IRA 1967 does not have extra-territorial jurisdiction. Therefore, it has no territorial jurisdiction over foreign employers. For a claim to be brought before the Malaysian Industrial Court, the employer in question must be a Malaysian entity. The Industrial Court cannot entertain claims against foreign employers even if the employee is a Malaysian or is based in Malaysia.

XI DISPUTE RESOLUTION AND MANAGEMENT

Upon an event of default, the non-defaulting party may initiate legal proceedings including actions for specific performance, injunctive relief, declaratory relief or to terminate the agreement. Some of the events of default include material breach of a term of the agreement, non-payment of any money due, bankruptcy, insolvency or winding up of either party.

Injunction and specific performance are governed by the Specific Relief Act 1950. An injunction is a judicial remedy by which a person is ordered to refrain from doing or to do a particular act or thing. On the other hand, specific performance is an order of the court directing a party to a contract to perform his or her obligations according to its terms.

3 *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2017] 9 MLJ 11.

Specific performance is a discretionary remedy. The court has the discretion to consider whether it is proper and just to grant it. In some circumstances, the court may deny specific performance where money would adequately compensate the plaintiff for the loss or where the court would be unduly burdened with the task of supervising the performance. As a general rule, the court will consider granting specific performance only when the common law does not provide an adequate remedy.

Upon a breach of contract, the non-defaulting party is entitled to claim and receive from the defaulting party compensation for any loss or damage caused that naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Many commercial disputes are resolved through litigation in courts. However, increasingly, alternative dispute resolution has been used by many parties to settle their disputes without resorting to court proceedings. Arbitration is the most common form of alternative dispute resolution and is generally regulated by the Arbitration Act 2005. Parties to a contract may agree by way of an arbitration clause to refer any dispute arising from the contract to arbitration. An award made in respect of an arbitration may on an application made to the High Court be recognised and enforced as a judgment.

Mediation is another form of alternative dispute resolution and is regulated by the Mediation Act 2012. It is a voluntary process where a mediator facilitates communication and negotiations to assist the parties in reaching an amicable settlement. If the mediation is successful, the agreement will be recorded in the form of a settlement agreement signed by the parties. If the mediation is not successful, parties may proceed with litigation or arbitration.

The courts of Malaysia respect and have consistently recognised the choice of law clause in contracts. The courts are generally prepared to decide on the merits of the law of a foreign jurisdiction with the help of respective foreign law experts. Notwithstanding the choice of law clause, certain Malaysian laws can still apply, such as laws governing land, shares, insolvency as well as rights of employees. The courts will not give effect to a choice of law clause that is against Malaysian public policy.

Although the courts of Malaysia have the power to decide otherwise, Malaysian courts are generally prepared to uphold and enforce the exclusive jurisdiction clause by granting a stay of proceedings. A judgment creditor may sue on a foreign judgment in the Malaysian court as a debt due. Foreign judgments obtained in countries such as Singapore, Hong Kong, the United Kingdom, Sri Lanka and New Zealand can, with the leave of the court, be registered and enforced as a judgment of the Malaysian High Court under the Reciprocal Enforcement of Judgment Act 1958.

XII OUTLOOK

Year 2020 is supposedly Malaysia's fifth 'Visit Malaysia Year' but this has had to be cancelled in the wake of the covid-19 outbreak. Due to entry restrictions, the number of foreign tourists visiting Malaysia has declined and this has affected the hotel industry. To assist the hotel industry in this difficult time, the Malaysian government is taking steps to encourage more domestic tourism by giving special incentives. The Malaysian government is continuing to put in a lot of effort to control and manage the outbreak. Despite the pandemic, the Malaysia government will continue to pay special focus on the tourism industry and will continue to develop Malaysia as an attractive destination.

ABOUT THE AUTHORS

CHANG HONG YUN

Tay & Partners

Graduated from Monash University with an LLB and a BSc (computer science), Hong Yun was admitted as a barrister and solicitor of the Supreme Court of Victoria in 1991 and as an advocate and solicitor of the High Court of Malaya in 1993.

Hong Yun heads the mergers & acquisitions as well as the banking and finance practice groups. He also handles real estate, personal data protection, regulatory compliance and other corporate and commercial matters for a variety of clients, both local and foreign.

Apart from being a regular contributor to the Malaysia chapters for the World Bank Group on *Doing Business in Malaysia 2017* and *Enabling The Business of Agriculture 2017* on laws and regulations that affect agricultural markets and productivity, Hong Yun is also the co-author for the Malaysian chapter of *Mergers & Acquisitions* 2nd edition, published by Global Legal Insights and *Private Mergers & Acquisitions in Malaysia* by Practical Law Global.

Hong Yun is consistently rated and ranked for corporate/M&A and banking and finance by *International Financial Law Review (IFLR) 1000*, *The Legal 500 Asia Pacific* and *Asialaw Profiles*. Hong Yun was named in 'The A List – Malaysia's Top 100 Lawyers'.

LEE LIN LI

Tay & Partners

Lin Li graduated from the University of Leeds with an LLB (second class upper honours) in 1999. She obtained her certificate in legal practice in 2000 and was admitted to the Malaysian Bar as an advocate and solicitor in 2001.

She is a registered patent, trademark, industrial design and geographical indications agent in Malaysia and heads the IP and technology practice group. She handles contentious matters involving patent, trade mark, copyright and industrial design infringement and passing-off, including anti-counterfeiting actions.

Lin Li frequently speaks on franchising and personal data protection and writes for international publications on various issues. She is the author of the Malaysian chapter of *The Franchise Law Review*, 3rd edition by Law Business Research and *The International Comparative Guide to Copyright, 2016* by Global Legal Group. She co-authored the Malaysian chapter of *The Life Sciences Law Review*, 3rd edition by Law Business Research Ltd, *The International Comparative Guide to Copyright, 2017* and *The International Comparative Guide to Patents, 2017* by Global Legal Group.

Lin Li is consistently rated and ranked for intellectual property by *Chambers and Partners*, *WTR 1000*, *Asia IP*, *Managing IP*, *The Legal 500 Asia Pacific* and *Asialaw Profiles*. Lin Li was also named in 'The A List – Malaysia's Top 100 Lawyers'.

LEONARD YEOH

Tay & Partners

Graduating from the University of Leeds, UK with an LLB (Hons) (second upper) in 1994, Leonard was admitted as a barrister to the Bar of England & Wales in 1995 and is a member of the Honourable Society of Lincoln's Inn, London. He was admitted as an advocate and solicitor of the High Court of Malaya in 1996 and the Supreme Court of Singapore in 2001. He is a patent agent in Malaysia.

Leonard has substantial trial, appellate and arbitration experience and has litigated as counsel at all levels of the Malaysian and Singaporean court hierarchy as well as domestic and international arbitrations, representing mainly blue-chip corporate clients and foreign multinational companies. From 2001 to 2002, he practised with one of Asia-Pacific's premier law firms, based in Singapore and has acted as counsel in numerous cases before the High Court of Singapore and conducted domestic and international arbitrations held in Singapore.

Leonard is consistently rated and ranked as Malaysia's pre-eminent dispute resolution and employment lawyer by *Chambers Asia*, *the Asia-Pacific Legal 500*, *Asialaw Leading Lawyers*, *The Guide to the World's Leading Labour and Employment Lawyers*, *The International Who's Who of Management Employment Lawyers* and *Asian Legal Business (ALB)*. Leonard has also been nominated as one of the Disputes Stars at the Asia-Pacific Dispute Resolution Awards in Hong Kong for consecutive years. In 2019, Leonard was also named in 'The A List Malaysia's Top 100 Lawyers'.

TAY & PARTNERS

6th Floor, Plaza See Hoy Chan

Jalan Raja Chulan

50200 Kuala Lumpur

Malaysia

Tel: +603 2050 1888

Fax: +603 2031 8618

hongyun.chang@taypartners.com.my

linli.lee@taypartners.com.my

leonard.yeoh@taypartners.com.my

www.taypartners.com.my

an LBR business

ISBN 978-1-912228-80-5