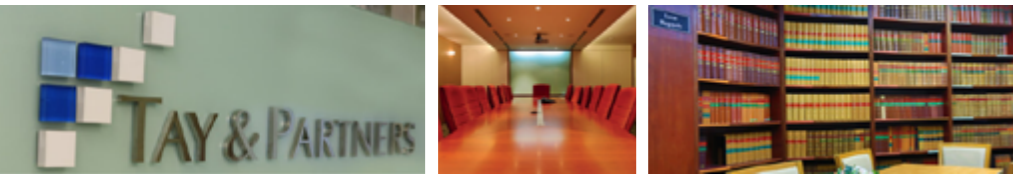


# LegalTAPS

## **MALAYSIAN AIRLINE SYSTEM BERHAD (ADMINISTRATION) ACT 2015**

- **A BANKER'S DUTY OF SECRECY**  
and Confidentiality in Malaysia
- **FRANCHISING CASES**  
in Malaysia
- **RETRENCHMENT**  
in Malaysia





KKDN:PQ/PP/1505(13829)

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# MALAYSIAN AIRLINE SYSTEM BERHAD (ADMINISTRATION) ACT 2015

by Yip Jia Hui

**T**he Malaysian Airline System Berhad (Administration) Act 2015 ("MAS Act") came into effect on 20 February 2015. The legislation will be in force for a period of 5 years from the date of coming into operation or until the listing and quotation of the shares of Malaysia Airlines Berhad ("NewCo") on the official list of Bursa Malaysia Berhad, whichever is earlier.

The MAS Act provides special laws for the administration of Malaysian Airline System Berhad ("MAS"), its wholly owned subsidiary companies and its partially owned subsidiary companies which are providing goods or services or both which are essential to the operations of MAS (collectively referred to as the "Administered Companies").

The MAS Act also provides for the appointment of an administrator ("Administrator") who will have powers to administer and manage the Administered Companies and further provides for the establishment of a new entity, NewCo, which will replace MAS as the national carrier.

The Administrator is given powers under the legislation to manage the property, business, liabilities and affairs of the Administered Companies which includes the disposal of property and liabilities and to make any arrangements or compromise on behalf of the Administered Companies with their creditors and has the power to transfer any property, business or liabilities of the Administered Companies to the NewCo or any of the NewCo's subsidiary companies.

A moratorium period of 12 months shall apply when the Administrator is appointed and no steps may be taken to create, perfect or enforce any security over any property of the Administered Companies and to re-possess any property in the possession, custody or control of the Administered Companies except with the prior written consent of the Administrator during this period. The Administrator is not liable to an action or other damages in respect of a refusal to give this consent. The moratorium period can be extended for a further 12 months under certain circumstances.

Immunity is granted to the Administrator, amongst others, against any action, suit, proceeding or prosecution for any loss or damage in respect of any act or matter done in good faith in the exercise of any power conferred under the MAS Act.

The Administrator is empowered under the MAS Act to prepare a proposal with respect to the Administered Companies or any claims and liabilities against the Administered Companies. Whilst the MAS Act provides assurance that the implementation of a proposal by the Administrator shall not release or discharge any security provided by any person to secure any duty or liability owed by the Administered Companies to any of its creditors, it is unclear at this stage what the consequences would be if the creditors do not agree with the Administrator's proposal, particularly where the contracts are not governed by Malaysian law.



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# FRANCHISING CASES IN MALAYSIA

by Lee Lin Li

June 2015



The Malaysian Franchise Act 1998 (“FA”), among others, provides for registration of the franchise agreement and the automatic renewal of franchise agreements at the end of the term. The penalties for contravention of the FA have been amended by prescribing different penalties for offences committed by a body corporate and that of non-body corporates such as natural persons or partnerships. This article analyses 2 court cases, which provide an insight into how Malaysian courts interpret the FA’s provisions.

The FA is a complex regulation which, *inter alia*, provides for registration of the franchise agreement and the automatic renewal of franchise agreements at the end of the term.

The penalties for contravention of the FA have been amended by prescribing different penalties for offences committed by a body corporate and that of non-body corporates such as natural persons or partnerships. A body corporate may be liable to a fine of not less than RM10,000 and not more than RM50,000 for a first offence, and a fine between RM20,000 and RM100,000 for a second or subsequent offence. A person who is not a body corporate will be liable to a fine not less than RM5,000 and not more than RM25,000 or an imprisonment term not exceeding 6 months for the first offence, whilst for a second or subsequent offence, the fine shall not be less than RM10,000 and not more than RM50,000 or imprisonment for a term not exceeding 1 year. These penalties apply to offences where no penalty has been prescribed. The penalty for failure by a local franchisor to register its franchise is on the other hand provided, namely, a body corporate may be liable to a fine not exceeding RM250,000 for a first offence, and a fine not exceeding RM500,000 for a second or subsequent offence.

A person who is not a body corporate will be liable to a fine not exceeding RM100,000 or an imprisonment term not exceeding 1 year or to both for the first offence, whilst for a second or subsequent offence, the fine shall not be exceeding RM250,000 or imprisonment for a term not exceeding 3 years or to both.

The following 2 cases cast light upon how the Malaysian courts interpret these 2 provisions:

#### SP Multitech Intelligent Homes Sdn Bhd v Home Sdn Bhd

The plaintiff (franchisee) is in the business of operating a retail smart home concept chain store. It entered into a franchise agreement with the defendant (franchisor) to operate the business on 15 October 2001. When the plaintiff was offered the franchise business, the business had not been registered with the Registrar of Franchise as stipulated under section 6 of the FA. The application to register the franchise business was only approved 5 months later, on 22 March 2002. The plaintiff also asserted that the defendant had failed to submit a copy of the disclosure documents at least 10 days before the plaintiff signed the agreement as required under section 15 of the FA.

The plaintiff filed an action in the High Court against the defendant for breach of sections 6 and 15 of the FA. The plaintiff asked for a declaration that the franchise agreement is unlawful and void *ab initio* and for restitution in the form of a refund of all payments and benefits received by the defendant.

The defendant argued that it was the parties’ intention that the agreement would commence after the registration of the franchise business and the plaintiff was aware that the application to register the business was pending approval at the time the agreement was

signed. The defendant further argued that notwithstanding this knowledge, the plaintiff had carried out his obligations under the agreement.

The issue before the High Court was whether the franchise agreement is null and void *ab initio* by reason of illegality for failure to register the franchise prior to making an offer to sell the franchise and for failure to provide disclosure documents to the plaintiff.

The Court held that the franchise agreement is tainted with illegality as the defendant had contravened sections 6 and 15 of the FA. The Court ordered that all payments made or benefits given to the defendant be refunded to the plaintiff. In coming to this decision, the Court took into account the fact that the plaintiff had made a number of payments to the defendant after the agreement was made but before the approval was granted and concluded that both parties had intended for the business to commence on 15 October 2001 when the franchise

agreement was signed.

On the defendant’s assertion that the plaintiff was aware the application to register the business was pending and nevertheless had continued to carry out the business, the Court held that the issue of waiver and estoppel is inapplicable in cases of illegality and section 28 of the FA provides that waiver of compliance with any provisions in the FA is void.

#### Noraimi bt Alias v Rangkaian Hotel Seri Malaysia

The defendant (franchisor) entered into franchise and premises management agreements with the plaintiff (franchisee) on 18 April 1995 for the plaintiff to manage the hotel chain ‘Seri Malaysia’. The initial term of franchise was for 8 years, from 21 January 1995 until 21 January 2003. The agreement provided for a renewal of the franchise for a further term of 8 years subject to terms and conditions. The term of the franchise was extended for another 3 years in 2003. Subsequently, the defendant informed the plaintiff that both agreements which had expired on 21 January 2006 would not be renewed.

The plaintiff sued the defendant for breach of both agreements and claimed that the non-renewal of the agreement was a breach of the franchise agreement and a violation of the safeguards under the FA.

The defendant asserted that the franchise had simply come to an end and decided not to renew it. The defendant also claimed that the FA is not applicable since the agreements were made prior to the FA coming into force.

The issue before the High Court was whether the non-renewal of the franchise was a breach of agreement by the defendant or an exercise of a right conferred on the defendant under the terms

and conditions of the franchise agreement.

The Court held that:

- (i) The FA is applicable as its application is not dependent on when a franchise agreement is made. Contractual agreements must be read subject to the FA and give way where there is conflict and found support for this in section 61 of the FA which provided that franchises granted or sold prior to the coming into force of the FA are required to be registered within a grace period of 12 months from the enforcement date of the FA.
- (ii) The extension of the term of franchise by 3 years merely meant that the agreement had been mutually varied and the other terms and conditions of the agreement would continue to apply.
- (iii) The expiration of the franchise agreement was a reason for termination as provided under the franchise agreement, but not for the refusal to renew. Therefore, the defendant’s refusal to renew on the ground that it had expired was invalid as it violated the terms of the franchise agreement.
- (iv) The Court noted that under section 32 of the FA, it is an offence not to renew and extend a franchise term without compensation in 2 circumstances, namely (a) the franchisee is barred by or the franchisor has refused to waive the operation of a restraint of trade clause in the franchise agreement 6 months before expiration of the agreement; or (b) the franchisee has not been given at least 6 months’ notice of the franchisor’s intention not to renew the franchise (second circumstance being held applicable in this case).

The Court also recognised that under section 6 of the FA, the franchise business is required to be registered. From the facts, the franchise business was not registered. Instead of finding that the franchise agreement was illegal and therefore null and void for failure to register under section 6, the Court went on to apply the provisions of the FA and held that there was indeed a breach of the agreement and the provisions of the FA. The Court awarded damages calculated on the net profit per month of the plaintiff for a term of 5 years for which the agreement should have been renewed. The High Court decision has been affirmed on appeal by the Court of Appeal. It is worth noting that neither the High Court nor the Court of Appeal considered the issue of whether non-registration of the franchise under the FA would render the agreement illegal even though the High Court had specifically noted that registration of the franchise is mandatory even if the franchise had commenced prior to the coming into force of the FA. The outcome may have been quite different if this issue was considered.



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# A BANKER'S DUTY OF SECRECY AND CONFIDENTIALITY IN MALAYSIA

DO YOU KNOW YOUR RIGHTS AS A CUSTOMER?

by Joey Tan

**A** banker's duty of secrecy in Malaysia is statutory as it is clearly provided under the Financial Services Act 2013 ("FSA"). This article will only focus and discuss the relevant provisions of the FSA. It will not include any analysis on the Islamic Financial Institution Act 2013.

A banker owes a duty of secrecy to its customers at all times, including a duty to keep information concerning its customers' affairs confidential. This duty is also contractual in nature and is to be implied by a banker and customer relationship.

Section 133(1) of the FSA stipulates that no person who has access to any document or information relating to the affairs or account of any customer of a financial institution, including the financial institution or any person who is or has been a director, officer or agent of the financial institution, shall disclose to another person any document or information relating to affairs or account of any customer of the financial institution.

*Tournier v National Provincial and Union Bank of England* is a landmark case which laid down and defined the scope of a banker's duty of secrecy and confidentiality to its customer. In this case, the Bank had disclosed to the Plaintiff's employer about the Plaintiff's information which he had obtained from the drawer of a cheque made in favour of the Plaintiff. After receiving the information from the Bank, the Plaintiff's employer did not renew the Plaintiff's contract of employment. The Plaintiff then commenced an action for breach of confidentiality.

Their Lordships held that the right of a customer to have his affairs kept confidential is a legal right, which is not absolute but qualified. It was further held that the duty of secrecy is not only

confined to the actual state of the customer's account but it also extends to information derived from the account itself.

In other words, a banker's duty to maintain secrecy and confidence not only encompasses information and facts that he learns from the state of the customer's account but includes and extends to all information gained from other sources than the customer's actual account by virtue of the banking relationship. The same principles were enunciated in our local case of *Wong Yeng Mun v CIMB Bank Berhad*.

The next concern is whether an ex-employee of a bank is also bound by the duty of secrecy. The answer is simply, yes. According to section 133(1) which is read together with section 133(3) of the FSA, the duty of confidentiality encompasses a person who is not just a bank officer but even a third party. Section 133(3) of the FSA states that a person who has any information or document which to his knowledge has been disclosed in contravention of section 133(1) of the FSA is prohibited from disclosing the same to any other person. The duty of secrecy continues even after the termination of the banker and customer relationship.

As a result, in the event that a banker breaches his duty of secrecy, the customer may be entitled to claim for damages, if he has suffered losses. When a customer successfully sues a banker for breach of duty of secrecy, the amount of damages which he is entitled to recover depends on whether he is able to establish the actual extent of the damages he had suffered as a result of the disclosure.

In the case of *Tan Eng Seong v Malayan Banking Bhd*, the Plaintiff who was the Bank's employee had left and orally closed his bank account with the Bank without giving any written instruction.

The Bank did not close the account as there was no written authorisation from the Plaintiff. Lying dormant, the service charge and interest on the account accumulated to RM15. The Bank's credit officer subsequently informed the Plaintiff's brother and upon knowing, the Plaintiff commenced an action for breach of confidentiality. The Court held that the Plaintiff failed to close his account as the required written instruction was not given. The alleged statement made by the Bank's credit officer was not defamatory.

The Court further held that in the absence of clear authority, it is reluctant to find the act in contravention of section 97(1) of the Banking & Financial Institution Act 1989 ("BAFIA") (currently replaced by section 133(1) of the FSA which is *pari materia*), particularly as, in this case, the Plaintiff can succeed on the claim based on implied duty. In other words, it is sufficient to state

that the Plaintiff could even succeed based on an implied duty of confidentiality between him and the bank. The Court allowed the civil action and granted the nominal damages of RM15 to the Plaintiff.

The author opines that the principles from the abovementioned cases must be interpreted in the context of the statutory regime. As the duty of confidentiality is contractual between the banker and the customer, the remedy would be an action for breach of contract and possibly an action for defamation.

Under section 133 (4) of the FSA, any person who is found guilty of breaching his duty of secrecy to a customer, shall be liable to imprisonment for a term not exceeding 5 years or to a fine not exceeding RM10 million or both. This imposes a criminal penalty.

Despite aforesaid, there are qualifications which entitle the Bank to divulge and disclose the information:-

- 1) If directed by the court order or compulsion by law;
- 2) To protect the Bank's interest where the Bank initiates action to recover monies owed by the customer and the notice of demand and pleading tendered to the court contain the details of the debt;
- 3) Disclosure for public interest;
- 4) If consent is given by the customer either impliedly or expressly;
- 5) The exceptions provided under the statute are the following:-
  - (a) Section 133(2)(a) of the FSA where the disclosure is for the purpose of exercising any powers or functions of the Bank under the FSA or the Central Bank of Malaysia Act 2009;
  - (b) Section 133(2)(b) of the FSA where the document or information is in the form of a summary or collection of information set out in such a manner as it does not enable information to be ascertained from it;
  - (c) Section 133(2)(c) of the FSA where it is not applicable to the information lawfully available to the public from any source other than the bank;
  - (d) Section 134(1) of the FSA which is read together with Schedule 11 where it clearly stipulates that the information is permitted to be divulged:-

- (1) If written consent is given by the customer or his personal representative;
- (2) If the customer is declared bankrupt or wound up;
- (3) For the purpose of legal proceedings, either criminal or civil, where the financial institution is a party to it;
- (4) For the purpose of fulfilment of a garnishee order;
- (5) To comply with a court order made by a court not lower than a Sessions Court;
- (6) To comply with an order or request made by an enforcement agency in Malaysia under any written law for the purpose of an investigation or prosecution of an offence under any written law;
- (7) For the performance of functions of the Malaysia Deposit Insurance Corporation;

- (8) Disclosure by a licensed investment bank for the purpose of performance of relevant functions of:-
  - (a) the Securities Commission under the securities laws as defined in the Securities Commission Act 1993;
  - (b) the stock exchange or derivatives exchange approved under the Capital Markets and Services Act 2007;
  - (c) the clearing house approved under the Capital Markets and Services Act 2007; or
  - (d) the central depository approved under the Securities Industry (Central Depositories) Act 1991

(9) For the purpose of performance of functions of an approved trade repository under the Capital Markets and Services Act 2007.

(10) If documents or information are required by the Inland Revenue Board of Malaysia for taxation purpose;

(11) Disclosure of credit information of a customer to a credit reporting agency registered under the Credit Reporting Agencies Act 2010;

(12) For performance of any supervisory function, exercise of any supervisory power or discharge of any supervisory duty by a relevant authority outside Malaysia which exercises functions corresponding to those of the Bank under the FSA;

(13) To conduct centralised functions, which include audit, risk management, finance or information technology or any other centralized function within the financial group;

(14) For due diligence exercise approved by the board of directors of the financial institution in connection with a merger and acquisition, capital raising exercise or sale of assets or whole or part of business;

(15) For performance of functions of the financial institution which are outsourced;

(16) Disclosure to a consultant or adjuster engaged by the financial institution; or

(17) If a financial institution has reason to suspect that an offence under any written law has been, is being or may be committed.



It is only by the abovementioned qualifications or exceptions that such information may be disclosed legally to a third party. The bank can raise the applicable qualification(s) or exception(s) as a defence against any claim made by its

customers. In a nutshell, the author opines that such right of secrecy and confidentiality of a customer has been diluted by the abovementioned exceptions.



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# RETRENCHMENT IN MALAYSIA

by Leonard Yeoh & Chen Mei Quin

**IT** is settled law that a company has the right to organise and reorganise its business in the manner it considers best for better business management and efficacy. In this respect, the company may reorganise or restructure by *inter alia* retrenching surplus labour. However, in doing so, the company must act bona fide and not capriciously or with motives of victimisation or unfair labour practices, as held in William Jacks & Co (M) Sdn Bhd v S.Balasingam.

To justify retrenchment, there must first be redundancy. In proving redundancy, there must be a surplus of labour or the requirements of the job functions of the employee have ceased or diminished to the extent that the job no longer exists.

## Guidelines to the Procedure of Retrenchment

### (A) Providing the Employee Notice

The Employment Act 1955 ("EA") and the Employment (Termination and Lay Off Benefits) Regulations 1980 ("Regulations") govern the retrenchment exercise of employees who earn not more than RM2,000 monthly and manual workers irrespective of the amount of their monthly salaries. For employees who fall within the EA, the length of notice period depends on the employees' length of employment:-

Duration of employment on the date on which notice is given	Length of notice
Less than 2 years	Not less than 4 weeks
2 years or more but less than 5 years	Not less than 6 weeks
5 years or more	Not less than 8 weeks

For employees who do not fall within the EA, the length of notice period would be in accordance with their employment contract.

### (B) Compliance with Code of Conduct for Industrial Harmony 1975 (the "Code")

If it is found that there is redundancy, the Industrial Court ("Court") has encouraged for retrenchment exercise to be carried out, as far as possible, in accordance with the accepted standards of procedure and guidelines such as the Code. Clause 22(a) of the Code states that if retrenchment becomes necessary despite having taken appropriate measures, the employer should take among others, the following measures:-

- (i) Give early warning to the employees concerned;
- (ii) Introduce schemes for voluntary retrenchment and retirement benefits;
- (iii) Retire employee who are beyond their normal retiring age;

- (iv) Assist in co-operation with the Ministry of Human Resources, the employees to find work outside the undertaking;
- (v) Spread termination of employment over a longer period;
- (vi) Ensure that no such announcement is made before the employees and their representatives or trade union have been informed.

The Code also states that the selection for retrenchment should be based on the following:-

- (i) need for the efficient operation of the company;
- (ii) ability, experience, skill and occupational qualifications;
- (iii) length of service (Last in, First Out "LIFO" principle) and status (non citizens, casual, temporary, permanent);
- (iv) age;
- (v) family situation; and
- (vi) other criteria as may be formulated in the context of national policies.

**(C) Reporting the Retrenchment**

Employers are required to report the retrenchment, voluntary separation, temporary layoff or an employee's pay-cut, if applicable, to the nearest Labour Office before any said act termination action via the prescribed Termination Form.

Failure to submit the report within the stipulated timeline is an offence under the EA and the employer could be fined for not more than RM10,000 for each offence.

**(D) Retrenchment Benefits**

For employees who fall within the EA, the Regulations provide that an employee would be entitled to termination or lay-off benefits if the employee was employed under a continuous contract of employment for at least 12 months before the termination. Pursuant to the Regulations, the quantum of termination benefits to be paid is prescribed.

For employees who do not fall within the EA, the obligation to pay retrenchment benefits and the quantum of retrenchment benefits, if any, would be in accordance with their employment contract, if applicable.

Employers are also required to submit the prescribed form to the Inland Revenue Board of Malaysia at least 30 days before the date of retrenchment.

**A Guise to Dismissing the Employee?**

Having such a prerogative power, there have been circumstances where employers have dismissed their employees under the guise of retrenchment. In these circumstances, the Court may find that the employees are being dismissed without just cause or excuse.

For example, it was held that the retrenchment was not bona fide where the employee was made redundant but the job with the same duties and functions remain or where employees who were terminated were in fact all active union members .

If the Court finds that there is unfair labour practice under the guise of retrenchment due to abuse of prerogative power or there is no genuine retrenchment the Court, being a court of equity and good conscience may conclude that the termination or dismissal was without just cause or excuse. In this case, the Court may order reinstatement or compensation in-lieu of reinstatement and back wages of a maximum of 12 months of the employee's last drawn salary for a probationer or a maximum of 24 months for a confirmed employee.

It is important to comply with the requirements for retrenchment because the Court will not hesitate to protect the employees if it is found that the retrenchment was made mala fide or that the requirements for retrenchment were not complied with.



Tay & Partners had presented a talk entitled "Expanding Your Business Across Borders" together with Bird & Bird and KK Advocates. Our speaker, Ms. Lee Lin Li was joined by Dr. Mark Abel and Mr. Graeme Payne from Bird & Bird UK, Dr. Sven-Michael Werner from Bird & Bird China and Mr. Justisiari Kusumah from KK Advocates Indonesia. The talk was held on 20 January 2015 at Parkroyal Hotel Kuala Lumpur with 60 participants. The seminar outlined the various ways in which franchising can be used as part of an international growth strategy and focused on the regulatory issues that are encountered on entering both the Chinese and Indonesian markets. The seminar also highlighted the challenges that Malaysian companies face when bringing foreign franchise concepts into Malaysia.

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Tay & Partners together with Bird & Bird had presented a half day seminar on Data Protection Summit on 12 February 2015 at Parkroyal Hotel Kuala Lumpur with 53 participants. The seminar provided an overview of the EU data protection regime which was presented by Mr. Gabriel Voisin from Bird & Bird UK and the recent developments in Asia Pacific data protection laws which was presented by Mr. Dharma Sadasivan from ATMD Bird & Bird Singapore. Our partners Ms. Lee Lin Li and Mr. Chang Hong Yun spoke on the Malaysian legislation with particular focus on the transfer of personal data overseas. The seminar also outlined the various ways in which companies should handle issues relating to the transfer of personal data overseas. The speakers also explained the challenges faced by data users.





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6th Floor, Plaza See Hoy Chan  
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#### **Printed by**

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# T&P BreakfastTAPS

An exclusive and first of many breakfast talks was organised by Tay & Partners on 26 May 2015. Our speaker Ms. Nicole Leong presented the latest updates on competition law and discussed some selected case studies. While enjoying their breakfast, our invitees from different business sectors, engaged in interactive discussion and shared their valuable experience in relation to competition law in their relevant industry.

ISSN 1675-9729



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