

Legal TAPS

DEC 2021 ISSUE

Post-Employment Restrictions: Non-Compete, Solicitation & Confidentiality

Leonard Yeoh
Pua Jun Wen

Schrems II and the GDPR – where does Malaysia stand?

Lee Lin Li
Nurul Qarirah Md Kahar

Joint Liability vs Joint and Several Liability: A lawful distinction

Wong Weng Yew
Farina Hanim

Privileges for those Fully- Vaccinated in Malaysia – Is this a form of Discrimination?

Leonard Yeoh
Pua Jun Wen

Competition Case Update on the Court of Appeal Decision in MAS/AirAsia v MyCC

Nicole Leong
Heng Jia

CONTENT

Editorial Committee

- Leonard Yeoh
- Lim Bee Yi
- Lim Jing Xian
- Nurul Qarirah Md Kahar

02 Post-Employment Restrictions: Non-Compete, Solicitation & Confidentiality

by Leonard Yeoh & Pua Jun Wen



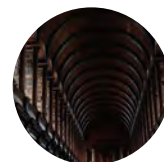
05 Schrems II and the GDPR – where does Malaysia stand?

by Lee Lin Li & Nurul Qarirah Md Kahar



09 Joint Liability vs Joint and Several Liability: A lawful distinction

by Wong Weng Yew & Farina Hanim



13 Privileges for those Fully-Vaccinated in Malaysia – Is this a form of Discrimination?

by Leonard Yeoh & Pua Jun Wen



16 Competition Case Update on the Court of Appeal Decision in MAS/ AirAsia v MyCC

by Nicole Leong & Heng Jia



Accolades





Post-Employment Restrictions: Non-Compete, Solicitation & Confidentiality

Gone were the days where employees stayed loyal only to one employer till retirement. Following the growth in living standards and education in Malaysia, employees tend to seek for better career opportunities and progression. Leaving a job to pursue a better opportunity and career progression are becoming social norms. The raging Covid-19 pandemic situation has also magnified the rate of workforce turnover in the market. Employers spend considerable time, money and effort in developing strong relationships with suppliers, customers and employees. These strong relationships contribute greatly to the success of the business.

In such circumstances, employers would require legal protection to protect their business interests to prevent poaching of customers and staff by their former employees. A non-solicitation agreement or clause is an agreement between employer and employee whereby employee agrees not to solicit any of the employer's business customers or colleagues after the employee leaves to join a competitor or be a competitor of the employer.

Non-Solicitation Clauses

Recently in Singapore, an insurance company's former top group agency manager and his company were sued by the insurance company for breaching contractual and fiduciary duties by poaching the agents for a competitor while he was still with the company.

The High Court in Singapore was of the view that it was an agency's instruction that the former manager had to abide by a non-solicitation obligation when he was with the company. However, such obligation was absent in the agency agreement he had signed with the company. Therefore, he was not subject to any non-solicitation obligation after he left the company. Due to how his agency agreement with the company was drafted, the company was only able to prove the breach of an express contractual obligation in his agency agreement that he had failed to "conduct his insurance business with integrity and honesty". Even though the Court found that he was not bound by any non-solicitation clause, it went on to opine that had the clause been in the agency agreement, it would have been reasonable and enforceable against him.

In light of the Court's finding, this serves as a reminder to employers that non-solicitation clauses should be validly incorporated to protect their business interests. The essential takeaway is that an express and properly worded non-solicitation clause needs to be validly incorporated in any employment contracts to be binding on employees. Otherwise, it would be difficult for an employer to seek recourse for the wrongful conduct of a former employee in soliciting his former customers or colleagues.

The Enforceability of Non-Solicitation & Non-Compete Clauses in Malaysia

The position is rather similar in Malaysia. Although post-termination non-compete clauses are clearly void and unenforceable in Malaysia, a non-solicitation clause may be upheld. A non-solicitation clause in an employment contract is binding on the employee during and post-



Background photo created by pressfoto - www.freepik.com

employment. A reasonable post-employment period should be set, to make the non-solicitation clause enforceable post-employment. Most importantly, a non-solicitation clause may be rendered ineffective if they are not clearly worded or properly incorporated. A poorly drafted non-solicitation clause can be tricky and employers should not leave it to chance.

Duty of Confidentiality & Trade Secrets

Employers would have legitimate reasons for employees to sign a non-solicitation agreement for the protection of trade secrets, client lists and employee-poaching during the term of employment and a reasonable post-employment period. An employee's duty for non-solicitation of customers and employees is often intertwined with the duty of confidentiality. Trade secrets are not only limited to manufacturing processes or secret formulae. In Malaysia, customers' names, lists and details have been judicially recognized as being confidential in nature and they can be trade secrets. Wrongful utilization of such particulars warrants injunctive protection from the Court.

Employers should also include a clause in the employment contract for the duty of good faith or fidelity of an employee. The duty of good faith or fidelity does not only require that the employee refrains from misuse or from disclosing confidential information whilst still in the employment of the employer. There is an implied duty that prohibits the employee from using any confidential information obtained during his employment, without the employer's consent, for his own or someone else's use after the employment contract ends.



LEONARD YEOH

Partner, Head of Dispute Resolution and Employment & Industrial Relations Practice Groups
leonard.yeoh@taypartners.com.my



PUA JUN WEN

Associate
junwen.pua@taypartners.com.my

For further information and advice on this article and/or on any areas of Dispute Resolution and Employment & Industrial Relations, please contact Leonard Yeoh at leonard.yeoh@taypartners.com.my



Schrems II and the GDPR – WHERE DOES MALAYSIA STAND?

Image by Gerd Altmann from Pixabay

The recent judgment of the Court of Justice of the European Union (CJEU) in C-311/18 (Schrems II) restates the far-reaching impact of the EU General Data Protection Regulation (“GDPR”) not only in the European Union, but also to the rest of the world. The key takeaway from Schrems II is that the protection of personal data under GDPR must travel with the data anywhere it goes in the world. In Schrems II, it was found that the laws in the United States which enable the US authorities to access and use personal data from the EU on grounds of national security, do not provide for adequate controls to protect the rights of the EU data subjects. Data subjects also lack actionable judicial redress or any effective remedy in the US, which is contrary to Article 47 of the EU Charter on Fundamental Rights. While the CJEU acknowledged that standard contractual clauses (SCCs) may be valid transfer tools, assessments must still be made on a case-by-case basis on the adequacy of data protection in a third country.

Although Schrems II relates to the United States, the decision binds all as a similar assessment must be made in all third countries where data of EU subjects are processed. The CJEU emphasized that data exporters and importers have the responsibility of ensuring that the processing of personal data of EU subjects should continue to comply with the EU data protection laws, regardless of where the processing takes place.

In line with the Schrems II judgment, the European Data Protection Board (EDPB) had published the recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data (“Recommendations 01/2020”) outlining six steps to be taken by EU data exporters to assess whether personal data may be transferred to third countries, including Malaysia. Data exporters are required to take active steps such as mapping all their transfers, verifying the transfer tools that they are relying on, making assessments on the law and adopting the necessary supplementary measures based on their assessment. If supplementary measures are needed, formal procedural steps must be taken for their adoption and at appropriate intervals the level of protection afforded to the personal data transferred to third countries must be re-evaluated and monitoring if there have been or will be any developments that may affect it.

Malaysian data protection laws will be put to test since the third step of Recommendations 01/2020 places the responsibility on data exporters to assess whether there is anything in the law or practices of third countries that may interfere with the protection of EU data subjects, in particular laws requiring disclosure of personal data to public authorities or granting access to public authorities for purposes such as criminal law enforcement, regulatory provision or national security purposes. Access to personal data by public authorities is considered a form of interference to the right to data protection, and any interference must therefore be justified.

WHERE DOES MALAYSIA STAND?

The Malaysian Personal Data Protection Act 2010 (“PDPA 2010”) provides for 7 principles of personal data protection but whether or not the level of protection under the PDPA 2010 is equivalent to the GDPR may require an additional assessment. For this purpose, the EDPB’s recommendations 02/2020 on the European Essential Guarantees for surveillance measures (“Recommendations 02/2020”) which provide for four European Essential Guarantees may be used to examine whether surveillance measures allowing access to personal data by public authorities in a third country can be regarded as a justifiable interference.

GUARANTEE A – PROCESSING SHOULD BE BASED ON CLEAR, PRECISE AND ACCESSIBLE RULES.

Recommendations 02/2020 explains that the right of public authorities to restrict the data subjects’ rights to data privacy must only be for specified purposes and exercised under a legitimate basis laid down by the law. The law should indicate in what circumstances and under which conditions may the restriction take place, the categories of people that might be subject to surveillance, a limit on the duration of the restricting measure, the procedures for examining, using and storing the data obtained, as well as the precautions to be taken when communicating the data to other parties.

At the outset, it is pertinent to note that the PDPA 2010 does not apply to the Federal Government and State Government. While “government” is not defined in the PDPA 2010, it may be argued that since most public authorities are under the administrative oversight of a governmental ministry, public authorities may not be regarded as a “data user” as defined in the PDPA 2010, and hence the data protection laws encapsulated therein may not be applicable to them.

Section 39 of the PDPA 2010 contains provisions allowing a data user to disclose personal data to a third party if, among others, the disclosure is necessary for the purpose of preventing or detecting a crime, or for the purpose of investigations, or if the disclosure was authorized by any law or a court order. While the exemptions for disclosure are wide in nature, the PDPA 2010 does not provide any guidance as to the extent of disclosure that may be required for a particular purpose, and nor does it outline any procedures on how the disclosed data may be processed, used and retained by the public authorities exercising their powers. There are also other legislations empowering public authorities to intercept communications, such as the Security Offences (Special Measures) Act 2012 and Communications and Multimedia



Act 1998. It would appear that without specific limitations placed on the public authorities' power to access and process data, Malaysia may not be able to satisfy Guarantee A of Recommendations 02/2020.

GUARANTEE B – NECESSITY AND PROPORTIONALITY WITH REGARDS TO THE LEGITIMATE OBJECTIVES PURSUED

According to Recommendations 02/2020, the principle of proportionality would require an assessment of the seriousness of the interference to the rights of data protection, against the importance of the public interest objective which is being pursued by the interference. The interference must be proportionate to the seriousness of the public interest. With regards to the principle of necessity, the legislation requiring the retention of personal data must establish a connection between the data retained and the objective. The circumstances and conditions under which the public authorities are granted access to data must also be defined.

The PDPA 2010 does not appear to specify the type of personal

data that may be subject to disclosure to public authorities, and there is also no requirement for public authorities to show the sufficiency or connection of the disclosure to their objectives apart from “preventing, detecting or investigating crime”. Hence, it could be argued that the PDPA 2010 may be leaving room for excessive personal data to be disclosed to public authorities even when they are not necessary for the particular crime that is being prevented or investigated.

GUARANTEE C – INDEPENDENT OVERSIGHT MECHANISM

An independent and impartial oversight system must be provided for either by a judge or by any other independent body. The keyword here is “independent”, which means that the supervising authority must be vested with sufficient powers to exercise an effective control over the public authorities' exercise of power. The supervisory body's activities must also be open to public scrutiny.

The Personal Data Protection Commissioner (“PDPC”) is the body responsible to monitor and supervise compliance with the provisions of PDPA 2010. However, it is unclear whether the activities of public authorities requiring disclosures from data user would be subject to the purview of PDPC. There are no provisions in PDPA 2010 imposing any form of obligations on public authorities, and thus it is arguable that there could be no offence committed by any public authorities under the PDPA 2010.

As such, it would appear that the only mechanism for oversight would be by way of judicial review of the public authorities' activities. Judicial review by the High Court could arguably satisfy Guarantee C of Recommendations 02/2020, since the judiciary is an independent body and its activities are open to public scrutiny.



Image by axbenabdellah from Pixabay



Image by mohamed_hassan from Pixabay

GUARANTEE D – EFFECTIVE REMEDIES AVAILABLE TO THE INDIVIDUAL

Recommendations 02/2020 explained that the question of an effective remedy is inextricably linked to the right of the data subject to be notified of the interference by public authorities once it is over. Without being notified, it would not be possible for a data subject to pursue any potential remedies if they did not know that they might have suffered a wrong in the first place.

A data subject's rights under the PDPA 2010 are relatively limited compared to the GDPR. Under PDPA 2010, data subjects have the right to access their own personal data, to correct the data or to withdraw their consent to the processing of the personal data. However, PDPA 2010 does not provide for an obligation on the data user to inform or a right of the data subject to be informed of any disclosure of his personal data to any identified third party by the data user. It would suffice for the data subject to be notified of the class of third parties to whom his personal data is or may be disclosed by the data user before the disclosure takes place without having to identify the specific third parties. Further,

there is no express statutory right under the PDPA 2010 that allows an aggrieved data subject to pursue a civil claim or seek compensation against a data user or data processor for non-compliance of the PDPA 2010. By relying on the PDPA 2010 alone, it seems that Malaysia may not be able to satisfy Guarantee D of Recommendations 02/2020.

CONCLUSION

In 2019, the Malaysian government had indicated its intention to revise the PDPA 2010 to be in line with the GDPR, and had published a public consultation paper in this regard. However, with the political changes in in the past year, it remains to be seen whether the revision would take place in the foreseeable future. Having regard to all of the above, EU data exporters may be required to consider additional measures when exporting personal data into Malaysia. A separate assessment would have to be conducted on a case-by-case basis, as the results may differ depending on the type of personal data, the nature and purpose of the disclosure, the recipients of the data in addition to the practices of the various industries and specific legislations.




LEE LIN LI
Partner, Head of IP & Technology Practice Group
linli.lee@taypartners.com.my



NURUL QARIRAH MD KAHAR
Associate
nurul.qarirah@taypartners.com.my

For further information and advice on this article and/or on any areas of IP & Technology, please contact Lee Lin Li at linli.lee@taypartners.com.my



Joint Liability vs Joint and Several Liability: A lawful distinction

In a relationship between a creditor and debtor, the issue of liability is always a cause of concern. This is made even more apparent when there is more than one debtor involved as the terms of liability is not necessarily clear. Among the popular issues of contention is whether the debtors' liability is joint or joint and several. In this commentary, we will explore this artificial distinction through the recent Federal Court case of **Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan @ Marie [2021] 1 LNS 928**.

1. Background facts

A suit was commenced by the Employee's Provident Fund Board against a company and its directors, Edwin Cassian and one other, for the failure of their company to make employer contributions on behalf of its employees. A consent judgement was recorded where each of the three defendants agreed to pay arrears amounting to RM133,697.00 together with dividends and interests.

However, the judgement did not expressly specify the type of liability to be borne by them i.e. whether the defendants would be “jointly and severally” liable for the judgement sum.

When the defendants failed to comply with the terms of the judgement, the EPF Board commenced a bankruptcy action solely against Edwin Cassian who then applied to set aside the action which was allowed by the Senior Assistant Registrar of the High Court. An appeal to the judge in chambers was dismissed by the judge of the High Court.

On appeal to the Court of Appeal, the main point of contention by the EPF Board is for the court to read in the words “jointly and severally” as stipulated in Section 46 (1) of the Employees Provident Fund Act 1991 (“**EPF Act**”) into the judgement which reads as follows:

Joint and several liability of directors, etc

*“Where any contributions remaining unpaid by a company, a firm or an association of persons, then, notwithstanding anything to the contrary in this Act or any other written law, **the directors of such company** including any persons who were directors of such company during such period in which contributions were liable to be paid, or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office-bearers of such association of persons, including any persons who were office-bearers of such association during such period in which contributions were liable to be paid, as the case may be, **shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contributions due and payable to the Fund.**”*

Despite the express statutory provision, this was unsuccessful in the Court of Appeal on the basis that the bankruptcy action commenced against Edwin Cassian was for the whole judgement sum, instead of only the portion owed by him.





2. Federal Court decision and the diverging authorities before it

The sole question posed before the Federal Court is on the point of law:

“Whether this Court should give effect to the liability on a “joint and several” basis as provided under Section 46 of the Employees Provident Fund Act 1991 in a situation where “joint and several” were not specially stated in the court judgement.”

The court unanimously answered in the affirmative and to analyse the court’s reasoning behind this, we must dive into the diverging authorities before it:-

- **Sumathy A/P Subramaniam v Subramaniam A/L Gunasegaran & Anor Appeal [2017] 6 MLJ 753**

In Sumathy, the court took the view that where bankruptcy proceedings were simultaneously initiated against two judgement debtors, they could not both be held liable for the whole judgement sum if the judgement did not specify that liability was joint and several.

In other words, the court cannot insert the feature of “joint and several” liability if such phrase were never inserted into the judgement in the first place.

- **Kejuruteraan Bintai Kindenko Sdn Bhd v Fong Soon Leong [2021] 2 MLJ 234**

In Kejuruteraan Bintai, Fong and four other petitioners were ordered to pay cost of RM50,000 to the company. When this was not paid, Kejuruteraan Bintai commenced bankruptcy proceedings against Fong for the sum of RM50,000. This was challenged by Fong on the basis that since the order for cost never specified that liability was joint and several, he was only liable for an equal portion of the sum with the rest of the petitioners.

Despite acknowledging the preponderance of judicial laws where unless stated otherwise, judgement debtors are regarded as jointly and severally liable under a judgement or order, the Court of Appeal abided by the doctrine of *stare decisis* and held that it is bound by the previous decision of Sumathy. The bankruptcy action was subsequently set aside.

3. Analysis in Edwin Cassian

The Federal Court in its reasoning drew a distinction between the intertwined terms:

Joint liability: Where two or more persons jointly promise to do the same thing. It refers to one obligation or promise and consequently, performance by one discharges all.

Joint and Several liability: Where two or more persons jointly promise to do the same thing and also severally make separate promises to do the same thing.

The important point to note is the difference in the number of promises made.

Critically, the Federal Court emphasised that the term “joint liability” in a judgement does not render liability of each of the debtors to be halved or divided into equal portion according to his interest or obligation, unless clearly and expressly stated to that effect.

The court went further and noted that although a judgement for joint and several liability does not prevent a creditor from bringing several actions against several debtors separately, if any of the debtors satisfies the whole judgement sum, the right of a creditor to bring an action against another is extinguished. This prevents double recovery by the creditor and addresses the issue of a creditor being “overpaid” in Sumathy.

In the instant appeal, Section 46 of the EPF Act has expressly made clear of the joint and several liability of the directors of a company for unpaid contributions and therefore must be fully implemented over the terms of the judgement.

Fortunately, the law is even made clearer on account of Section 44 of the Contracts Act 1950 which provides as follows:

Any one of joint promisors may be compelled to perform

(1) When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of the joint promisors to perform the whole of the promise

In short - all joint contracts essentially imposed complete accountability for the obligation on each of the promisors unless the contract expressly states otherwise. Therefore, when debts are incurred jointly, each promisor is responsible for the entire amount. There was no indication that a joint liability situation renders the obligation to be somehow halved or according to portion. This was the misconception that prevailed in Sumathy.

4. Conclusion

It is pertinent to note that the point of law in Edwin Cassian was decided in the context of Section 46 of the EPF Act which manifestly imposes joint and several liability. Nevertheless, adopting the court’s analysis above and by virtue of the statutory law provided in Section 44 of the Contracts Act 1950, it is reasonable to conclude that joint and several liability prevails in any contracts or agreement unless a judgement or order stipulates otherwise.



WONG WENG YEW
Partner
wengyew.wong@taypartners.com.my



FARINA HANIM
Associate
farina.hanim@taypartners.com.my

For further information and advice on this article and/or on any areas of Banking Litigation and Insolvency, please contact Wong Weng Yew at wengyew.wong@taypartners.com.my

Privileges for those Fully-Vaccinated in Malaysia – **Is this a form of Discrimination?**

In recent months, the government's effort in ramping up the vaccination rate has been achieved with commendable success. The Malaysian government has then announced for the relaxation of SOPs after taking into account the positive development that more than 50 per cent of adult population in the country have been fully vaccinated. It is hoped that the unveiling of the relaxation of restrictions for fully vaccinated individuals can help to revitalize the business sector.

The government's relaxation of SOPs essentially provides differentiated treatment or privileges for the fully-vaccinated people to go to the malls, enjoy restaurant dine-ins and attend prayers at houses of worship. Some retail operators have allowed only fully vaccinated people to enter their premises to kick-start the retail industry. Such policies may be effective in persuading at least some unvaccinated people to get the jabs, but they also attracted criticism and controversies, including potential law suits against the government for discrimination.

Promoting Social Responsibility

While vaccination is strongly encouraged in Malaysia, it remains voluntary. Some are ineligible for vaccination due to medical reason while some may see vaccination as a form of oppression. The carrot and stick approach may not be able to convince everyone to get vaccinated.

Faced with the pandemic which has caused economic sectors to remain stagnant for almost two years, the government's hands are tied and the only option left is to treat the vaccinated and unvaccinated differently to contain the spread of Covid-19. Many countries, including Malaysia, have introduced forms of Covid-19 vaccination certificates or vaccine passports which allow the vaccinated group more freedom and work opportunities than unvaccinated people. In the future, vaccination and jobs may even go hand in hand, especially for workplaces which are frequently inflicted with Covid-19 infections due to workers not taking the jabs. Employers, however, will need to be careful not to discriminate against unvaccinated workers or they risk industrial relation claims.

The differentiation in policies for the vaccinated and unvaccinated is necessary from the public health standpoint as the nation marches towards a sense of normality. The intention is not to discriminate or restrict personal freedom but to promote social responsibility to protect the unvaccinated people, including children.

From a public health perspective, policies which only provide freedom of movement for the vaccinated would be beneficial because it is undeniable that government has the obligation to protect lives. Any interference with personal freedom or rights by the government must be in accordance with the law. In such dire Covid-19 circumstances, the preferential treatment provided under such policies can be justified and should be considered lawful.

The freedom to travel, work, socialize and engage in social activities will only be increasingly determined by one's Covid-19 vaccination status.



Doctor photo created by freepik - www.freepik.com



Differentiated for the Greater Good?

In Malaysia, as the economic sectors are slowly opening up again, life for the vaccinated will slowly return to some level of normalcy. However, it remains unclear how life would play out for the unvaccinated in a long run. The divide between the vaccinated and unvaccinated is likely to become even deeper without a comprehensive policy in place.

It may be interesting to probe into the situation in Singapore. According to Singapore's Covid-19 Phase Advisory published on 19 August 2021, mask-off services such as massage parlours, spas and saunas are only allowed for fully vaccinated people. Unvaccinated people are not allowed to dine in at food and beverage establishments unless they have a negative pre-event Covid-19 result from an approved test provider.

Desperate times call for desperate measures. The government needs to curtail some personal freedom and rights in order to save lives and the economy. Some may have succumbed to the differentiated policies and gave up on the primacy of personal choice so they could resume activities like dining out and social gathering. Though many individuals are still unhappy about the trend toward differentiating between the vaccinated and unvaccinated, it will not change the fact that aspects of daily life will only be increasingly difficult for people who are not vaccinated against Covid-19. Having said that, for those who are not vaccinated for medical reasons, the government should try to facilitate their inclusion because they may not be given access to social activities so long as the virus remains prevalent.



LEONARD YEOH

Partner, Head of Dispute Resolution and Employment & Industrial Relations Practice Groups
leonard.yeoh@taypartners.com.my



PUA JUN WEN

Associate
junwen.pua@taypartners.com.my

Competition Case Update on the Court of Appeal Decision in MAS/AirAsia v MyCC

In April 2021, we wrote an article [here](#)¹ on the background facts and brief grounds of judgment delivered orally by the Court of Appeal. This is a detailed update on some of the important principles laid down by the Court of Appeal in its written judgment.

MyCC has no locus standi to apply for judicial review to challenge CAT's decision

1. The Court of Appeal (“**Court**”) ruled that Malaysia Competition Commission (“**MyCC**”) cannot be “a person who is adversely affected by the decision” within the meaning of Order 53 rule 2(4) of Rules of Court 2012 and hence, has no locus standi to apply for a Judicial Review (“**JR**”) against the decision of the Competition Appel Tribunal (“**CAT**”).
2. MyCC is a quasi-judicial body. After making a finding under Section 40 of the Competition Act 2010 (“**Act**”) (including an infringement decision), it became *functus officio* and has no personal interest in the proceeding save to assist the CAT to arrive at a fair and just decision. MyCC should take a neutral and impartial stand before the CAT. It has no personal or official interest in the confirmation or reversal by CAT of its order handed down in its quasi-judicial capacity.
3. Under the statutory scheme of the Act, the CAT is the appellate authority of the MyCC. MyCC must thus give due deference to, respect for and abide by its superior’s appellate decision. For MyCC to ignore or challenge the decision of its own appellate authority would be administrative insubordination of a kind repugnant to the whole statutory scheme of the Act.
4. In our view, practically, this would mean that if CAT disagrees with MyCC’s final decision in respect of an infringement finding, MyCC will not have any further legal avenues to reverse CAT’s decision. On the other hand, persons who are aggrieved by MyCC’s infringement decision will not be barred from appealing to the higher tribunal.

¹ See our article dated 27 April 2021 which is accessible at: <https://taypartners.com.my/insidertaps-27-april-2021/>.



MyCC has no jurisdiction on anti-competitive agreement in the civil aviation service market from 1.3.2016

5. As MAVCOM Act came into force on 1.3.2016, from that day, the MyCC's jurisdiction over anti-competitive agreement in the civil aviation service market came to an end. The JR application in the present case was filed by MyCC on 3.5.2016 when it no longer has the capacity to do so.
6. The jurisdiction over the civil aviation industry (including anti-competitive agreement in the civil aviation service market) has vested with MAVCOM with effect from 1.3.2016. Assuming that there was a right to file the JR, that right had been vested in MAVCOM by operation of law with effect from 1.3.2016.

MyCC must prove active collaboration or fresh agreement after 1.1.2012

7. The Court held that the Act has no retrospective effect. Prior to 1.1.2012, it was not unlawful for parties to agree on how they should compete or not compete. It was a matter within the contractual arrangement and agreement of parties.
8. The Court is the view that the Act by its operation rendered the collaboration agreement of the parties in the present case unenforceable upon the Act coming into force on 1.1.2012. The Act does not require the parties to immediately enter into an agreement to forthwith terminate any agreement that would now be caught by the Act. There would only be an infringement if parties enter into fresh collaboration or continue to agree to maintain the current agreement after 1.1.2012.

Conditional Agreement subject to MyCC's approval is legitimate

9. In response to MyCC's argument that the parties' intention to apply for exemption necessarily meant

parties are aware of the infringing nature of the collaboration, notwithstanding it being stated to be conditional, the Court held that where a conditional collaboration had been discussed and put into writing before the Act has come into force, it cannot be said that it immediately attracts liability when there was no implementation of the collaboration.

10. Otherwise, there would be no incentive to apply for relief or exemption since the applicant would run the risk of being punished with fines for having committed an offence under the Act if the application is rejected. Attempting to apply for exemption under the Act does not necessarily mean that the parties proceeded on the basis that the Agreement was anti-competitive.
11. The Court recognised that conditional agreement is a legitimate way for companies to plan and obtain prior antitrust clearance or exemption before they are implemented.

Deeming provision under Section 4(2) does not absolve MyCC from the burden of proving anti-competitive object

12. Under Section 4(2)(b) of the Act, an agreement can only be deemed to have the object of significantly anti-competitive when it is found that the agreement has as its object to share market.
13. Once the object is significantly anti-competitive, it is unnecessary to show or prove that the agreement will have an appreciable effect on competition. In this regard, only either an anti-competitive "object" or "effect" of an agreement needs to be established for a finding of infringement under Section 4(1).
14. However, there is the need to examine the anti-competitive effect when the anti-competitive object of an agreement is unclear.
15. The Court considered that the deeming provision under Section 4(2), unlike a presumption, was not

something that was rebuttable. The Court further took cognizance that deeming provision is a powerful one and due to its inherent bias in producing a certain set result, the conditions set for it to operate must be strictly complied with.

Identifying restrictions by object

16. Whether an agreement is restrictive by object, regard must be had *inter alia* to the context of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms part.
17. Whilst a declaration of intent is never final nor conclusive, the Court must nevertheless proceed from the basis as stated by the parties and then see whether what was indeed to be implemented would meet its stated objectives.

Relevant market needs to be properly defined by MyCC

18. Contrary to the averments of MyCC that the relevant market need not be defined, the Court held that the requirement to specify and identify the “market” is embedded in Section 4(1) and 4(2)(b) of the Act.
19. Without the identification of the relevant market, the deeming provision under Section 4(2) cannot be applied. It is only after having identified the relevant market that MyCC can assess whether a particular conduct (or agreement) is anti-competitive in nature.

Restrictions by object can be defended under Section 5

20. An agreement that infringes Section 4 (including those listed under Section 4(2)) of the Act may come within the exemption under Section 5 of the same Act if parties are able to demonstrate that the agreement yields a net economic benefit to consumers. The Court found in the case that the four criteria of Section 5 were satisfied and the collaboration qualified for relief of liability under the Act.

Concluding Remarks

The decision of the Court of Appeal has far-reaching impact on the development of competition law as it had provided much needed clarity to the interpretation of Section 4(2) of the Act as well as the jurisdiction and power of MyCC. Following the Court’s decision, we anticipate a more cautious and detailed approach on the part of MyCC before invoking Section 4(2) in its future enforcement cases.

Note: At the time of writing, MyCC has filed an application for leave to appeal to the Federal Court.

This article is authored by our Partner, Ms. Nicole Leong and Associate, Ms Heng Jia. The views and opinions expressed in this article are those of the authors alone and do not constitute any legal advice. For further information or advice on Competition Law and Antitrust, kindly contact our Partner, Ms Nicole Leong.



NICOLE LEONG
Partner
nicole.leong@taypartners.com.my



HENG JIA
Associate
heng.jia@taypartners.com.my

For further information and advice on this article and/or on any areas of Corporate and Commercial advisory work, please contact Nicole Leong at nicole.leong@taypartners.com.my



•Advocates & Solicitors•Registered Trade Mark•Patent & Industrial Design•Agents Notary Public•

6th Floor, Plaza See Hoy Chan, Jalan Raja Chulan,
50200 Kuala Lumpur, Malaysia.

Tel: +603 2050 1888 Fax: 603 2031 8618

mail@taypartners.com.my

www.taypartners.com.my

LegalTAPS is a collective effort of the firm to bring relevant legal updates and information to you.

PP19080/08/2016 (034573) KDN:PQ/PP1505 (19080)