

# **PAPER 6**

**A STUDY ON THE NEED FOR A COMPREHENSIVE  
LAW ON LANDLORD AND TENANT  
(RETAIL TENANCIES AND LEASES)  
IN PENINSULAR MALAYSIA**

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## **ABSTRACT**

The research project is an exploratory socio-legal research to find out whether there is a need for a comprehensive law governing Landlord and Tenant in retail tenancies in Peninsular Malaysia. There is no retail tenancy law that governs this relationship in Malaysia, unlike the position in Australia and the United Kingdom. In these jurisdiction, it has been accepted that there is inequality of bargaining power between the landlord of a retail premises and its tenant and so the law should, to a certain extent, interfere into this relationship. Another feature of retail tenancy law is dispute resolution provisions that allow retail tenancy disputes to be settled through alternative dispute resolution mechanisms like mediation.

The research employed both, quantitative and qualitative methods. The quantitative aspect was carried out through questionnaires administered to landlord and tenants of retail premises in the Klang Valley. As most shopping centres had only one landlord, the numbers of landlords sampled were only four while the number of tenant reached 542 from 3 shopping centres and shop lots in housing area. To further fortify the findings from the survey, the researchers carried out three case studies, a focus group discussion and structured interviews, all of which formed the qualitative part of this study.

The findings reveal that there are various issues and problems arising out of the relationship of landlord and tenant of retail premises in the Klang Valley, for both landlord and tenant and the both generally favour proposals to improve this relationship. Retail landlords in Malaysia are usually management companies (on behalf of owners who are REITs companies), public listed companies or GLCs. The majority of tenancies are for a period of three years and below. This research has found that a majority of respondents are agreeable to a special mediation body in settling disputes relating to landlord and tenant in retail premises so as to avoid court action. Further, a large proportion of respondent are also supportive of a specific law to regulate relationship between landlords and tenant.

## **EXECUTIVE SUMMARY**

### **1.0 RESEARCH PROBLEM**

There is no retail tenancy law that governs the relationship between landlord and tenant of retail tenancies in Malaysia, unlike the position in Australia and the United Kingdom. In these jurisdictions, it has been accepted that there is inequality of bargaining power between the landlord of a retail premises and its tenant and so the law should, to a certain extent, interfere into this relationship. Another feature of retail tenancy law is the dispute resolution provisions that allow retail tenancy disputes to be settled through alternative dispute resolution mechanisms like mediation.

### **2.0 OBJECTIVES OF RESEARCH**

The objectives of this research project are as follows:

- i. To identify and highlight the common legal problems faced by landlords and tenants of retail tenancies in Peninsular Malaysia.
- ii. To study the adequacy of the law relating to landlord and tenant (retail tenancy) as provided in the Malaysian statutes.
- iii. To analyse the practice and procedure in relation to landlord and tenant in Australia, including their rights and liabilities and the mechanism for dispute resolution.
- iv. To examine the views of landlords and tenants with regards to adequacy of the current law in providing protection to them.
- v. To make appropriate recommendations based on finding of landlords" and tenants" views relating to their relationship.

### **3.0 RESEARCH METHODOLOGY**

The research project is an exploratory socio-legal research to find out whether there is a need for a comprehensive law governing Landlord and Tenant in retail tenancies in Peninsular Malaysia. The research employed both, quantitative and qualitative research methods. The quantitative aspect was carried out through questionnaires administered to landlords and tenants of retail premises in the Klang Valley. As most shopping centres had only one landlord, the numbers of landlords sampled were only four.

The quantitative method used the Stratified Sampling Method. This was done by selecting categories of landlords and tenants depending on the type of retail premises. A survey through questionnaires to landlords and tenants of retail premises was carried out in order to find out the terms of the tenancy agreements and the problems they faced during the tenancy period. The data was analysed using SPSS and the findings have provided statistical data to answer the research questions.

The qualitative method applied three distinct methods, namely: the case study method, focused group discussion and structured interviews. Consultations were held with relevant stakeholders through a Focused Group Discussion ('FGD'). The stakeholders were:

- i) Malaysian Bar Conveyancing Committee,
- ii) SME Corp. Malaysia,
- iii) Malaysian Retailers Association,
- iv) Shopping Centre Owners,
- v) Chambers of Commerce, and
- vi) Academics.

Structured interviews were carried out in Australia and in Malaysia. In Australia, the researchers met with and interviewed Professor Emeritus Peter Butt of University of Sydney Law School, officers at the Office of the NSW Small Business Commissioner, Deputy President of the New South Wales Civil and Administrative Tribunal, Executive of the Australian Retailers Association as well as the Commissioner of Small Business in Victoria.

In Malaysia, structured interviews were carried out with a leader of the retail industry in Malaysia, namely, the CEO of Habib Group of Companies, Dato“ Meer Sadik Habib who was able to share his opinions, both as landlord and tenant; as well as two officers from the Ministry of Domestic Trade, Cooperatives and Consumerism (KPDNKK), namely, Puan Siti Rohani Omar, Assistant Director, Services Industry Division, and Encik Che Rahim Daud, Deputy Director, Policy and Strategic Planning Division who were able to provide input on the position of the Ministry.

#### **4.0 SCOPE AND LIMITATION OF THE RESEARCH**

‘Retail’ in this research refers to an outlet that offers goods and services directly to the public. This excludes office space, hotels and service apartments, recreational and entertainment outlets owned and operated by the owners of such premises, mixed uses in petrol stations. The survey was done in the Klang Valley only to represent the retail sector in Peninsular Malaysia. It specifically focuses on 2 types of retail outlets: (a) Shop lots in a shopping centre; (b) Shop lot in commercial areas. The term ‘tenancy’ is used interchangeably with the word ‘leases’ to describe the landlord-tenant relationship of retail outlets.

#### **5.0 MAJOR FINDINGS**

Unlike in Australia, there is a gap on issues relating to landlord and tenant of retail tenancies in Malaysia. The law regulating retail tenancy in Australia was developed based on the

consumer protection regime and fair trading/ competition law. The initial aim of retail tenancy legislation in Australia was to protect small businesses and retailers against big powerful landlords. Australia has in place a sophisticated and detailed legal and administrative framework regulating retail tenancies including mechanisms for dispute resolution and this legal framework has been revisited many times leading to amendments to the law but not repeal thus indicating its usefulness in the context of Australia. This indicates that Australia is a feasible jurisdiction to benchmark.

The legislation on retail leases in New South Wales and Victoria are comprehensive. Both have provisions relating to the type of premises that are subject to the law, those that are exempted, the requirement of providing a copy of the lease to the prospective tenant and the information brochure on retail leases, the need for disclosure statements to be submitted by both landlord and tenant within a specific time before executing the lease, prohibition on the payment of „key-money“, a clear definition of what amounts to „outgoings“, the provision relating to security bonds/deposits and the manner of payment thereof, provisions relating to determination of rent- whether base rent or rent based on turnover and what does not amount to turnover, provisions relating to assignment of leases and lastly and most importantly, provisions relating to dispute resolution which incorporates alternative dispute resolution.

It is also observed that both jurisdictions have a Commissioner of Small Business that functions as the Registrar of Retail Leases and is the main officer that prevents and resolves retail tenancy disputes in the state.

Both, New South Wales and Victoria have a Civil and Administrative Tribunal that allows retail tenancy claims that have failed mediation at the office of the Commissioner of Small Business to proceed to the Tribunal for adjudication. The purpose of the Tribunal is to encourage parties to represent themselves in the proceedings and to avoid court action.

There is much to be learnt from the retail leases legislation and dispute resolution mechanism in New South Wales and Victoria that will be able to be incorporated in the

recommendations and suggestions of this study.

Retail landlords in Malaysia are usually management companies (on behalf of owners who are REITs companies), public listed companies or GLCs. Only 1 out of 4 landlords interviewed belongs to an association for shopping complex owners/ management.

A large majority of the tenancy duration is for a period of three years with an option to renew. This indicates that the majority of retail tenancies in Malaysia is in the nature of a tenancy exempt from registration under the National Land Code 1965 and not a registered lease. It is a common practice to have a written tenancy agreement than an oral one. Oral tenancies may arise upon the exercise of the option to renew and the tenancy commences without a written agreement for the renewed period.

Although most tenants received a draft copy of the tenancy before executing the tenancy agreement, it is not a practice for the landlord to disclose any other information to the tenant.

The survey revealed some interesting findings on the nature and terms of a retail tenancy agreement. It is usual to require 2 months' deposit and outgoings upon entering into a retail tenancy. Most retail tenancies have provisions relating to use of the premise. More than half of the tenancy agreements do not allow sub-letting. An option to renew the tenancy is a common feature of retail tenancies. The survey also indicates that there is also no widespread practice of the landlord increasing the rent during the duration of the tenancy period, although there is a small percentage that allows this (4.8%). Out of all the tenancies surveyed, there was only one where rent was based on turnover.

Although the majority of the tenancy agreements had provisions allowing both parties the right to terminate the tenancy, there was also a case where a landlord reserved the sole right to terminate.

In regard to dispute resolution, a majority of the tenancy agreements did not contain any provision for dispute resolution.

From the case study, it is found that tenants of retail shoplots in a shopping complex may not be able to negotiate the terms of their tenancies.

The survey was also able to identify problems faced by landlords of retail tenancies which are delayed rental payments, failure to pay rent and unapproved subletting.

The survey found that problems faced by tenants are the following:

- i) Sales are below target, leading to delayed rent payments and inability to pay rents.
- ii) Complaints relating utilities and repairs not attended to on time.
- iii) Unclear as to responsibility to promotion of premises.
- iv) Access to facilities (parking/surau) to customers.
- v) Cleanliness and maintenance of common property.
- vi) Security of premises and common property.
- vii) Undesirable tenant mix.

A majority of respondents (73.8%) are agreeable to a special mediation body in settling disputes relating to Landlord and Tenants in retail premises so as to avoid court action. A large proportion of respondents (71.4%) are also supportive of a specific law to regulate relationship between Landlords and Tenants.

The Malaysian Bar supports the objectives of this research but is of the view that any law introduced to govern retail tenancies may have to face the question of state jurisdiction over land matters.

With regard to the second recommendation that retailers and owners of retail premises

should be represented by recognised associations, the Chinese Chamber of Commerce informs that there is already in existence two main retailers associations in Malaysia, namely, the Malaysian Chain Retailers Association („MCRA“) for chain retail stores and the Malaysian Retailers Association („MRA“) for bigger retailers and usually anchor tenants and retailers do usually belong to one of these associations. It is our finding from the interview of Dato“ Sri Meer Habib that these associations do not freely welcome membership applications and can be selective at times. It is also our finding from this observation that the existing associations do not cover smaller retailers which have been the subject of this study. Larger retailers are able to negotiate terms of the tenancy as opposed to smaller retailers who would usually sign the tenancy agreement without much negotiation so as to immediately operate their business.

One of the main problems faced by tenants in a shopping centre is relocation of their business to another lot upon renewal of the tenancy. The Malaysian Bar clarifies that relocation after expiry of the tenancy agreement is certainly a right of the landlord as no legal relationship arises anymore between landlord and tenant and the tenant should not demand possession of the same location as the landlord acts for the owner of the building who under the law has better rights over the building than the tenant.

The tenancy agreement for well managed shopping centres can be very comprehensive and thick as compared to the tenancy agreement of a shop house. This is because running a shopping centre is similar to running a small country where there must be „in house“ rules to govern the citizens.

Most shopping centres are managed by a leasing manager or a management company and a good tenancy mix is a very important consideration in running the shopping centre.

SME Corp Malaysia does not look into retail tenancy matters. It is concerned only on the rental of a retail premises being one of the cost factors in doing business.

In regard to tenants generally not being aware of the terms of the tenancy agreement, the Malaysian Bar is of the view that this is the risk that the tenants take when entering into a

tenancy agreement. Tenants can elect to consult a lawyer for legal advice but many do not. This is therefore a question of creating awareness on the part of retail tenants on the importance of legal representation at the negotiation stage.

According to Persatuan Pengurusan Kompleks Malaysia (PPKM), landlords of shopping centres who are members of PPKM share best practices, the latest updates and the association also organises training sessions on tenancy management.

According to Mid Valley City Sdn. Bhd., rent is based on base rent and percentage rent, whichever is higher. According to Ms. Valerie Choo of Malaysian Chain Retailers Association, the findings of this research represent fairly what is happening on the ground in regard to the common problems faced by landlords and tenants of retail premises.

In regard to a comprehensive law to regulate retail tenancies, the participants had mixed views. All the participants welcome any move to create a mediation option to resolve tenancy disputes.

The Ministry of Domestic Trade, Consumerism and Cooperatives (KPDNKK) officers are aware of problems faced by retail tenants in Malaysia, albeit those that are of higher profile. KPDNKK officers are aware that the majority of shopping complexes are owned by larger companies especially those in strategic locations. In KPDNKK officers view, the current association representing shopping complexes management companies are not representative of the whole industry, representing only a minority of members. The problems highlighted by the survey findings relating to both tenants and landlords are common problems faced within the industry. Additionally, two other problems were highlighted mainly short notice given for rental increase and unreasonable rental amount. KPDNKK officers agree that there should be a statute to govern the relationship between landlord and tenants to promote fairness and the best interest of both parties. KPDNKK officers are unsure of the enforcement mechanism if retail tenants and landlords association are to be made compulsory. KPDNKK officers are of the opinion that a dispute settlement mechanism is a good idea to implement for dispute settlement between landlords and retail

tenants. On the surface, KPDNKK does have authority to supervise the unregulated service industry such as rental and leasing of non-residential property but currently it is limited to foreign owned companies with no laws enacted. KPDNKK officers are positive on enactment of a statute to supervise the relationship between retail tenants and landlords in shopping complexes in Malaysia.

## **6.0 SIGNIFICANCE OF THE PROJECT**

In order to promote the growth of the Malaysian economy and attract business people both from local and international (investors), there should be a proper infrastructure to regulate the landlord-tenant relationship in retail tenancies in terms of law and policy and this research is a significant step towards this direction.

As retail tenancies are part of domestic trade, it is pertinent that the Ministry of Domestic Trade, Consumerism and Cooperatives should take up the position of caretaker of retail tenancies. A policy paper on the need to supervise retail tenancies should be prepared and discussed at ministerial level. The findings of this study could be referred to.

Malaysia should move towards creating awareness on the need to create a better landlord and tenant relationship for retail tenancies. SME Corp Malaysia could take up this role as retail tenancies legislation essentially seeks to create better market conditions for small businesses.

It is the opinion of the researchers that based on the survey and the focused group discussion, as well as the structured interviews, the idea concerning introducing a comprehensive law to regulate retail tenancy management in Malaysia is still a novel idea. Such idea has never been considered or explored before this research was conducted. Tenants have, by far and large, accepted all terms of a retail tenancy agreement due to location preference and very few actually consult solicitors on the terms. Landlords on the other hand, have the privilege of engaging solicitors to prepare their tenancy agreements

and in the case of shopping centres, the tenancies are managed by shopping centre management companies on behalf of the landlords and the majority of the agreements are the same for the retail premises in the same shopping centre. This creates an environment that does not facilitate negotiation of terms for individual tenants.

Malaysia still has a long way to go, beginning with education and awareness. This is where the role of retailers' associations as well as shopping centre owner associations will become significant. The government agency entrusted to supervise retail tenancies should engage with these associations and hold consultations before introducing the proposed law. At the same time, there is a need for the government to play a more pro-active role in creating a better legal environment to handle retail tenancy disputes. In this regard, it is opined that the Ministry of Domestic Trade, Consumerism and Cooperatives could propose the setting up of Mediation Centres at state and regional levels to handle retail tenancy disputes. As regard to whether Malaysia is ready for mediation as a form of alternative dispute resolution, the researchers believe that it is nothing new as mediation has been introduced as a formal method of dispute settlement in Malaysia since the setting up of the Financial Mediation Bureau (FMB) by Bank Negara Malaysia in January 2005 and the courts since October 2010. The position for mediation is further enhanced with the enactment of the Mediation Act 2012 that provides for voluntary mediation outside of court annexed mediation. Thus, the framework for mediation services already exists in Malaysia.

It is recommended that the proposed comprehensive law to govern retail tenancies will not subject retail tenancies to rent control, nor will there be any standard tenancy agreement. Similar like the position in New South Wales and Victoria in Australia, it is recommended that the legislation provide several prescriptions relating to the rights and obligations of landlord and tenant at the negotiations stage as well as minimum standards relating to the terms of the agreement particularly the prohibition of unfair terms for both parties. The overriding purpose of the legislation should be to create a better landlord-tenant relationship for retail tenancies.

The recommended features of the proposed legislation are as follows:

- i) The requirement for the landlord to provide a draft copy of the lease within a reasonable period (e.g. 7 days) before the parties sign the agreement.
- ii) Prohibition against the collection of 'key money' or 'tea money' or 'goodwill payment' or whatever payment other than rent and outgoings as provided under the agreement.
- iii) To provide for the obligation of the parties to submit disclosure statements before signing the lease.
- iv) To define clearly and expressly what amounts to 'outgoings'.
- v) To prohibit clauses that would have the effect of the amount of rent not being able to be lower than the amount of rent paid under the previous duration ('ratchet' clauses) in the tenancy agreement.
- vi) To clearly define 'base rent', 'percentage rent' and turnover rent' and to clearly stipulate the method of calculating turnover rent and what does not amount to turnover.
- vii) To prohibit only one party having the right to terminate the tenancy.
- viii) To stipulate clearly situations when the landlord is allowed to withhold consent to assignment of the tenancy.
- ix) To provide for dispute resolution mechanisms to handle any disputes arising from the tenancy.

The set-up of the Civil and Administrative Tribunal in New South Wales and in Victoria, Australia is an attractive option to enhance the civil justice system in Malaysia and is worth further research as to its feasibility within the Malaysian Legal System.

In conclusion, it is believed that the above recommendations would be able to enhance the landlord and tenant relationship in respect of retail tenancies in Malaysia, thus leading to a more conducive and business friendly environment for the retail sector in Malaysia.

## 7.0 RESEARCH OUTPUT

	<b>TITLE OF PAPER</b>	<b>NAME OF CONFERENCE</b>	<b>ORGANISER, DATE AND VENUE</b>
1.	“A Comparative Study on the Feasibility of Introducing a Law to Regulate Retail Tenancies in Peninsular Malaysia”	<sup>th</sup> 8 International Real Estate Research Symposium IRERS 2016	Valuation and Property Services Department, Ministry of Finance and National Institute of Valuation (INSPEN), 26- 28 April 2016 at Putra World Trade Centre.
2.	“Waqf Law and Tenants” Rights: Let Justice Be Done and Seen to Be Done”	<sup>th</sup> 4 Global Waqf Conference 2016	University Tun Abdul Razak (UNIRAZAK), International Centre for Waqf Research (ICWR) and Swansea University, 19-20 September 2016 at Swansea University Bay Campus, Swansea, United Kingdom.

Publication: “A Comparative Study on the Feasibility of Introducing a Law to Regulate Retail Tenancies in Peninsular Malaysia”, accepted for publication in Jurnal Teknologi, Special Issue (IRERS 2016(2)).

## 8.0 FUTURE PLAN OF THE RESEARCH

Publishing another article based on second seminar paper.