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LEGAL UPDATES

Restrictive Covenants and Financial Disincentive

Mano Vikrant Singh v Cargill TSF Asia Pte Ltd [2011] SGHC 241

In this case, the Singapore High Court had to decide whether a clause in an employee's incentive bonus plan, which allowed the employer to forfeit the employee's deferred bonus in the event he resigns and joins a competitor during the effective period of the non-compete clause, amounted to a restrictive covenant which was in restraint of trade.

The Court ruled that such clauses are not in restraint of trade as they do not prohibit the employee from competing with the employer, but merely set out what the employee would have to forfeit should he choose to compete upon his resignation and merely serve to operate as a financial disincentive for the employee to do so after he leaves his employment. If the employee decides to compete upon leaving his employment with full knowledge of the financial disincentive, being the forfeiture of his deferred bonus, he would have made a calculated decision having evaluated the detriment of losing the deferred bonus against the gain in joining the competitor. Such clauses therefore merely contractually define when the employee loses his entitlement to the deferred incentive payments and did not prohibit him from competing with the employer.

Restrictive Covenants and Employees' Duties

Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart [2011] SGHC 266

In this case, the Singapore High Court placed the onus of drafting a reasonable restrictive covenant on employers and held that the discretionary severance approach should not be applied in the employment contracts to save restrictive covenants which were too widely drafted. It opined that the best way for employers to protect their trade connections and customers would be to draft a reasonable restraint of trade clause rather than to try and get the maximum protection to which their employees would agree. The discretionary severance approach would only encourage employers to try their luck by initially imposing the maximum protection they could get an employee to agree to, and then to rely on a reading-down of the provision when confronted with the likelihood of an unfavourable result in court. Moreover, not every employee would have the courage or resources to resist the threats of an employer to comply with a restraint of trade provision.

The Court further held that an intention by a director to set up business in competition with the company after his directorship had ceased was not to be regarded as a conflicting interest, nor was the taking of any preliminary steps to investigate or forward that intention so long as there was no actual competitive activity while he remained a director. This applied a fortiori to an employee's duty of good faith and fidelity which was a less onerous duty than a fiduciary duty.

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Amendments to Telecommunications Act

The revised Telecommunications Act which was passed on 21 November 2011 came into force on 1 February 2012 and spells out the powers of the Info-communications Development Authority of Singapore ("IDA"), and the rights and duties of telecommunication licensees and persons involved in the provision of telecommunication services in Singapore.

The key changes include:

(i) increasing the maximum amount of financial penalty that can be imposed on a telecommunication licensee up to 10 per cent of the annual business turnover for licensable services, or $1 million, whichever is higher;

(ii) updating consolidation provisions to include new concepts and business models (e.g. voting shares, voting powers, the Business Trust structure) so as to ensure consistency with other domestic legislation and economic sectors;

(iii) providing powers for IDA to issue written orders to building owners and developers to ensure their compliance with code of practices issued for the provision, maintenance and use of, and access to, space and facilities for the installation and operation of telecommunication systems;

(iv) providing separation powers for the Minister to direct either the structural or operational separation of a telecommunication licensee, in order to promote competition in the provision of telecommunication services in Singapore;

(v) introducing special administrative orders to provide the Minister with the power to direct the takeover of a telecommunications network and business to ensure continuity of key telecommunications network(s) or service(s) for public and national interest (e.g. where the specified telecommunication licensee is unable to pay its debt and has to exit the market).

These amendments seek to ensure that the legislative framework remains relevant to regulate the rapidly changing telecommunications industry whilst encouraging vibrancy and competition in this sector.

Amendments to Arbitration Laws

On 9 April 2012, the Singapore International Arbitration (Amendment) Act and Foreign Limitation Periods Act were passed in Parliament. The amendments will come into force on 1 June 2012.

Amongst the amendments introduced by the International Arbitration (Amendment) Act is the relaxation of the requirement that arbitration agreements be in writing. The amended definition would encompass, for example, arbitration agreements concluded orally or by conduct and later recorded in writing, or by email or by audio recording. The change is intended to bring the legislative regime in line with commercial reality.

Other changes include power to the Singapore courts to review an arbitral tribunal's decision to decline jurisdiction whether the tribunal has refused jurisdiction at the outset of the proceedings or at any stage thereafter. Upon such review, it also enables the Singapore court to order costs against any party when ruling that a tribunal does not have jurisdiction.

Amendments also include clarification of the arbitral tribunal's powers to award interest on the claim as well as costs and recognition for an emergency arbitrator procedure. The amendments also bring out consequential amendments to Singapore's domestic arbitration legislation, the Arbitration Act.

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The Foreign Limitation Periods Act amendments clarify which country's limitation laws would be applicable to disputes which are heard in Singapore, but governed by the laws of another jurisdiction. In such circumstances (and subject to two exceptions), the amendments stipulate that limitation shall be determined by the law that governs the dispute. The first exception is where its application would conflict with public policy. Such a conflict with public policy would arise where the application of the rule "*would cause undue hardship to a person who is, or might be, a party to the action or proceedings*". The second exception stipulates that where the law of the relevant foreign jurisdiction provides for extension or interruption to a limitation period during the absence of a party to the proceedings from any specified jurisdiction, that part of that law shall be disregarded for the purposes of the proceedings in Singapore.