Reporter

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Business Bulletin

Impact of the EU-Singapore Free Trade Agreement

The EU-Singapore Free Trade Agreement (EUSFTA) was signed on Friday, 19 October 2018. When the EUSFTA enters into force in early 2019, businesses on both sides of the pact can expect to enjoy greater market accessibility and significant boosts in trade within the next few years.

EU – an important economic partner for Singapore and ASEAN

Amidst a time of trade tensions among the world's giants, the EUSFTA is a welcome development in the economic ties between Singapore and the EU. As an economic body, the EU has established itself as Singapore's largest foreign investor, the largest market for the nation's services exports, and our third largest trading partner (just after China and Malaysia). On the EU side, Singapore is the biggest trading partner in goods and services among the ASEAN countries, accounting for one-third of EU-ASEAN trade in goods and services in 2016 and 2017.

The EUSFTA joins Singapore's extensive network of over 20 existing free trade agreements (FTAs), but is significantly the first FTA signed between the EU and an ASEAN country. In fact, the EUSFTA is the second FTA concluded between the EU and any Asian nation, after South Korea. The signing of this pact potentially opens more trade and investment opportunities between the EU, Singapore and the larger ASEAN region.

Tariff concessions

Key benefits for Singapore and EU-based businesses include tariff elimination, reduced non-tariff barriers and improved trade in the services sectors.

Upon ratification, Singapore will remove tariffs on all EU products entering Singapore, and the EU will remove tariffs on 84% of all Singapore products entering the EU, with the remaining 16% to be removed over a period of 3 to 5 years.

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The EUSFTA will also provide for liberal and flexible rules of origin (ROO) for the EU's and Singapore's key exports to each other's markets. Of significance to Singapore manufacturers, materials sourced from ASEAN member states would be deemed as originating from Singapore when determining whether such exports can qualify for tariff concessions.

Removal of technical barriers to trade (TBT)

Unnecessary TBT for Singapore and EU exporters will be removed, making it easier for companies to sell their products in different markets, and in the service sector, there will be enhanced market access for service providers, professionals and investors.

Further benefits to businesses

Other benefits to local businesses include increased opportunities in government procurement, enhanced protection of intellectual property rights, and renewed commitment to sustainable development.

Ratification of the EUSFTA

The EUSFTA is forecasted to enter into force in early 2019, subject to the domestic administrative procedures for ratification on both sides. Once ratified, tangible results from the EUSFTA are expected to be reaped very quickly. Markets will be opened, opportunities will beckon – a clear step towards economic growth amidst the uncertain international trade climate in the world today.

FTA with UK post-Brexit?

As a post-script, it is noteworthy that PM Lee Hsien Loong had told British PM Theresa May that Singapore can extend the terms of the EUSFTA in a separate FTA with UK post-Brexit. Keep your eyes peeled for imminent developments in this direction.

How we can help

Our team of experienced lawyers in our Dentons Rodyk office, supported by our lawyers across the globe, is here to assist if you have questions relating to the EUSFTA and how it may affect your business. Please do not hesitate to reach out to the key contact or email to sg.academy@dentons.com.

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Litigation Briefs

Ignorance is not always bliss: a case study of Marty Limited v Hualon Corporation (M'sia) Sdn Bhd

Introduction

The case of Marty Limited v Hualon Corporation (Malaysia) Sdn Bhd (receiver and manager appointed) [2018] SGCA 63 was an appeal by the Appellant (Marty) against the decision of the Singapore High Court (the High Court) in BMO v BMP [2017] SGHC 127 which held that a sole arbitrator (the Tribunal) had jurisdiction over a dispute referred by the Respondent (Hualon) to arbitration (the Arbitration).

The question for the Singapore Court of Appeal (the Court of Appeal) was whether there was still a binding arbitration agreement between the parties, notwithstanding that Hualon had commenced litigation in respect of a dispute which should properly have been arbitrated.

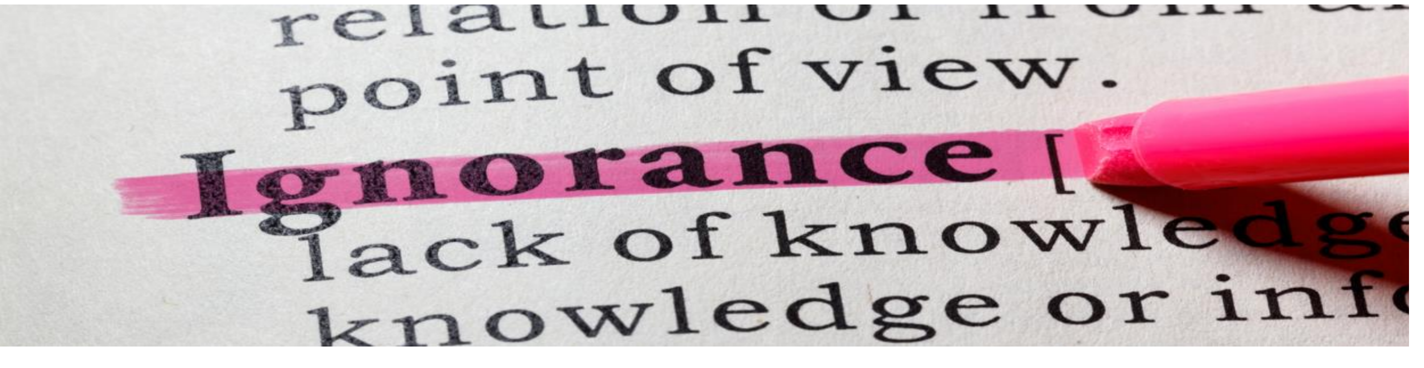
Marty was successfully represented by Senior Counsel Philip Jeyaretnam, Paras Lalwani, Chua Weilin, Tan Ting Wei and Alexander Choo of Dentons Rodyk & Davidson LLP. The Dentons team took over the matter after the initial challenge to jurisdiction had failed before the Tribunal, and ultimately persuaded the Court of Appeal to find that Hualon had indeed repudiated the arbitration agreement.

The case turned on whether Hualon, when it had earlier commenced proceedings in the British Virgin Islands, had known of the existence of the arbitration agreement on which it later relied to commence arbitration. Hualon claimed it had commenced court proceedings in ignorance of the arbitration agreement, and so should not be considered to have repudiated that arbitration agreement. However, its claim depended on asserting that the contract in which the arbitration agreement was contained was invalid, as having been entered into without authority. The Dentons team, upon taking on the matter, identified the inconsistency between relying on an arbitration agreement and disclaiming the parent contract, and pressed Hualon to make a choice – to reprobate or approbate. If Hualon approbated, then, the argument went, it could not claim ignorance, while if it reprobated, it could not rely on the arbitration agreement.

Eventually, before the Court of Appeal, Hualon was forced to make an unequivocal choice. It approbated the parent contract, and then following from that was held to have repudiated the arbitration agreement contained in it.

Brief Facts

Prior to commencing the Arbitration, Hualon sued Marty and its two former directors and shareholders, Mr Oung Da Ming and Mr Oung Yu-Ming (the Oung Brothers), in the British Virgin Islands (the BVI Litigation) for breaches of statutory and fiduciary duties in effecting a series of share transfers in 1999, 2007 and 2008 (the Share Transfers) in its Vietnamese subsidiary, Hualon Vietnam. These Share Transfers had the effect of substantially reducing Hualon's shareholding in Hualon Vietnam, and Hualon grounded its claim against Marty (the Dispute) in dishonest assistance, knowing receipt and unjust enrichment.



Hualon Vietnam was incorporated in December 1993 and re-registered by Mr Oung Da Ming in February 2008. This resulted in a new charter (the Revised Charter) being adopted, which included amongst other clauses, an arbitration clause at Article 22 (the Arbitration Agreement) providing for "all arising disputes" to be referred to arbitration administered by the Singapore International Arbitration Centre. Hualon's position at the BVI Litigation was that Mr Oung Da Ming's entry into the Revised Charter was "unlawful and ineffective" because he had entered into it without authority.

It was in the course of the BVI Litigation, which included *inter alia*, an application by Marty for summary judgment (the Summary Judgment Application) to strike out the BVI Litigation, that Hualon suddenly gave notice of its intention to stay the BVI Litigation in favour of Arbitration. Hualon claimed that despite having held the Revised Charter in its possession for at least 5 years, and despite having been advised by 5 sets of counsel and a due diligence report, it had no knowledge of the Arbitration Agreement.

At the Arbitration, Hualon maintained the position it took in the BVI Litigation that Mr Oung Da Ming's entry into the Revised Charter was invalid as he had acted without authority, but nevertheless sought to rely on the Arbitration Agreement contained within the Revised Charter, and thus requested that the Tribunal rule on the question of its jurisdiction as a preliminary issue.

At the time, Marty, represented by previous counsel, advanced a number of arguments to challenge the Tribunal's jurisdiction, including the fact that Hualon had waived and/or repudiated the Arbitration Agreement by commencing the BVI Litigation.

The Tribunal's decision and the decision below

On 19 April 2016, the Tribunal held that it had jurisdiction over the Dispute. In particular, the Tribunal was not convinced that Hualon had actual knowledge of the Arbitration Agreement at the time it commenced the BVI Litigation. Thus, the Tribunal disagreed that Hualon had waived and/or repudiated the Arbitration Agreement.

Marty then appealed to the Singapore High Court on the question of the Tribunal's jurisdiction, which had been decided as a preliminary issue. Dentons took over as counsel for Marty and began to press Hualon on the contradiction between denying the validity of the Revised Charter, and yet at the same time relying on the Arbitration Agreement contained within it. The law did not allow Hualon to both approbate and reprobate the Revised Charter.

Dentons added to the arguments on repudiation and waiver the critical point that Hualon could not have entered into the Arbitration Agreement because it had consistently taken the position that the Revised Charter was "unlawful and ineffective" given Mr Oung Da Ming's alleged lack of authority. Having denied the validity of the Revised Charter, it was simply not for Hualon to claim in the same breath that it had entered into Arbitration Agreement.

At the hearing before the High Court, counsel for Hualon was asked to clarify its position on the validity of the Revised Charter (the Clarification), to which counsel replied that Hualon would not challenge the validity of the Revised Charter or ask for any determination on it.

In her judgment, Ang J dismissed Marty's application. In particular, she found that the Clarification had disposed of Marty's reliance on approbation and reprobation, and that although Hualon had breached the Arbitration Agreement by commencing litigation, this did not amount to a repudiation because Hualon did not have actual knowledge of the Arbitration Agreement when it commenced the BVI Litigation, and therefore lacked the requisite repudiatory intent. Ang J also held that in any event, Marty had not accepted any repudiation by Hualon.

The Court of Appeal's Decision

On appeal, Marty asked for the Clarification to be repeated and any ambiguity in it resolved, and then pressed the argument that Hualon could not disclaim knowledge of a term of a contract which it had accepted it had validly entered into. Once Hualon had knowledge, it must be held to have had repudiatory intent when commencing the BVI Litigation.

The Court of Appeal allowed the appeal.

Approbation and Reprobation

The Court of Appeal agreed that Hualon could not both rely on the Arbitration Clause while challenging the validity of the Revised Charter as a whole for lack of authority. It accepted that where a party challenges the validity of the underlying contract as a whole – i.e. that the Revised Charter was entered into without authority, this amounts to saying that every clause within that contract (including the Arbitration Agreement) is invalid because it was entered into without authority. In short, Hualon could not both approbate and reprobate the Revised Charter.

In pressing Hualon to approbate the Revised Charter and thereby concede that Mr Oung Da Ming had acted with authority, Dentons successfully fixed Hualon with actual knowledge of the terms of the Revised Charter (including the Arbitration Agreement). This was because Mr Oung Da Ming's actual knowledge of its terms (as a signatory to the Revised Charter) would be imputed to Hualon itself.

Repudiation

The Court of Appeal accepted that Hualon had repudiated the Arbitration Agreement, and that Marty had accepted such repudiation.

It held that the assessment of repudiation is an objective inquiry, and the test is whether a reasonable man in the shoes of the innocent party would take the breaching party's actions as indicating that the breaching party no longer intended to perform its contractual obligations.

The Court of Appeal set out the principle that "*it is strongly arguable that the commencement of court proceedings is itself a prima facie repudiation of the arbitration agreement. This is because parties who enter into a contract containing an arbitration clause can reasonably expect that disputes arising out of the underlying contract would be resolved by arbitration and indeed have a contractual obligation to do so.*" Thus, a reasonable person in Marty's shoes, seeing that Hualon had commenced and maintained the BVI Litigation for some ten (10) months without reserving its right to arbitration, would have concluded that Hualon no longer wished to abide by the Arbitration Agreement.

Neither could Hualon explain-away its actions by claiming that it lacked actual knowledge of the Arbitration Agreement. As stated above, not only was Mr Oung Da Ming's actual knowledge of the terms of the Revised Charter (and Arbitration Agreement) imputed to Hualon as a result of its concession, but Hualon's alleged ignorance of the Arbitration Agreement was purely subjective. It would have been impossible for a reasonable person in Marty's shoes to know that Hualon had commenced the BVI Litigation because it was ignorant of the Arbitration Agreement.

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As for acceptance of repudiation, the Court of Appeal took the view that Marty had accepted the repudiation through its Summary Judgment Application in the BVI Litigation. By making this application, Marty clearly engaged the jurisdiction of the BVI courts because it requested the BVI courts to determine the claim on its merits. Through this, Marty had clearly and unequivocally indicated to Hualon that it was willing to accept the latter's invitation to litigate rather than arbitrate the merits of the claim.

In the circumstances, the Court of Appeal held that Hualon had repudiated the Arbitration Agreement, and Marty had accepted this repudiation. The Arbitration Agreement was thus brought to an end, and consequently the tribunal had no jurisdiction to hear the dispute.

Conclusion

The Court of Appeal's decision illustrates the importance of considering all angles to any procedural choice, and ensuring that conduct is consistent. Ignorance, as an excuse for inconsistent conduct, may not be bliss.

Dentons Rodyk acknowledges and thanks Senior Associate Chua Weilin, and Associates Tan Ting Wei and Alexander Choo for their contributions to this article.

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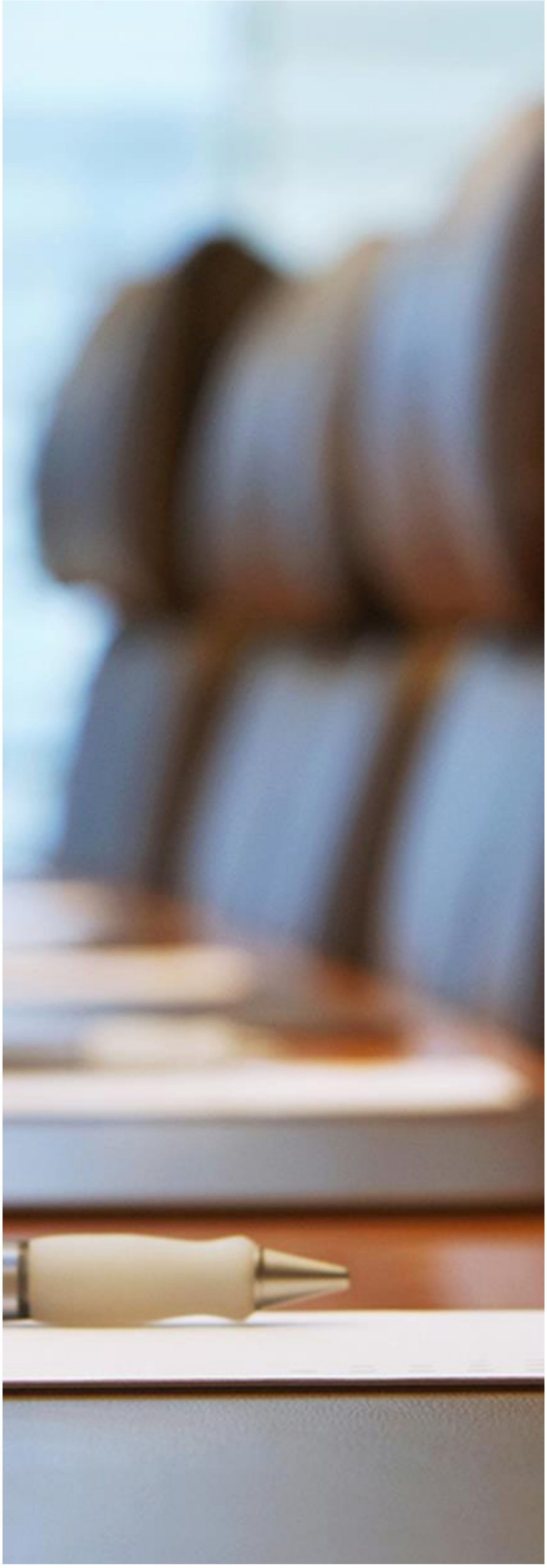

Understanding the new Singapore Infrastructure Dispute-Management Protocol

What happened?

On 23 October 2018, the Ministry of Law launched a new Singapore Infrastructure Dispute-Management Protocol to help parties involved in mega infrastructure projects manage disputes and minimise the risks of time and cost overruns. Minister for Finance Mr Heng Swee Keat announced the launch of the new protocol at Enterprise Singapore's Asia-Singapore Infrastructure Roundtable as part of efforts to establish Singapore as the infrastructure hub of Asia.

Based on an Asian Development Bank report, Asia will need more than US$1.7 trillion (S$2.3 trillion) of infrastructure per year from 2016 to 2030. As infrastructure projects are typically complex and involve multiple parties, differences and disputes are sometimes unavoidable and can result in delays and higher costs, if not managed well. It was found that infrastructure, mining and oil and gas projects have on average cost 80% more than budgeted and run 20 months late.

The new Singapore Infrastructure Dispute-Management Protocol will help parties proactively manage differences to prevent them from escalating into disputes, and minimise the risks of time and cost overruns. Under the new protocol, parties will from the start of the project appoint a Dispute Board comprising up to three neutral professionals who are experts in relevant fields such as engineering, quantity surveying and law. The Dispute Board will follow the project from start to finish and proactively help to manage issues that may arise, through a range of customised dispute avoidance and resolution processes.

What is it?

The Protocol is a set of contract terms and conditions which provide for the appointment of a Dispute Board in an infrastructure type project. It is intended to be incorporated into the EPC contract for the project. The Protocol recommends that a Dispute Board arrangement be considered where the project value exceeds S$500 million and allows for a Dispute Board comprising one, two or three members.

What is a Dispute Board?

Dispute Board usually refers to a person or a panel of individuals who under the terms of the contract either:

(a) provide non-binding recommendations to the parties on issues arising in the course of a project; and/or

(b) consider the issues and then make decisions which the parties are obliged to comply with.

The main function of the Dispute Board is to assist the parties to avoid disputes and where disputes cannot be avoided, to assist the parties to resolve the dispute in a speedy, cost effective and acceptable way so as to avoid arbitration or litigation.

The members of the Dispute Board will have to be experienced in the type of project under construction and have a thorough understanding of the contractual issues. They also need to be independent of the contracting parties.

The use of Dispute Boards first started in the US in the 1960s but only came to prominence in 1970s in the Eisenhower Tunnel project in Colorado. After that it went international with the El Cajon Dam and Hydropower Project in Honduras. Overtime, it has gained popularity and we see today that it is provided in most international infrastructure forms of contract. Dispute Boards have been a feature of the well-known FIDIC suite of contracts for two decades. The World Bank has mandated the use of Dispute Boards since the mid-1990s. The International Chamber of Commerce (ICC) has since 2004 published the necessary documents for use of Dispute Boards.

In this region, the use of Dispute Boards in international infrastructure projects is quite common place. In Singapore, the Court has considered the enforcement of the decisions of Dispute Boards under a FIDIC form contract in the celebrated *PT Perusahaan Gas Negara (Persero) TBK v **CRW** Joint Operation* line of cases.

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However, on the domestic Singapore construction scene, notwithstanding a substantial amount of infrastructure developments in last three decades, the use of Dispute Boards has not been common place. The advent of statutory adjudication in 2004 (with the enactment of the commonly known SOP Act) may have contributed to the slower development of the use of Dispute Boards in Singapore because the statutory regime is an attractive alternative in terms of costs, speed and enforceability. However, a big criticism of the statutory adjudication regime is the question of whether this method of dispute resolution is suitable for more technical and substantive disputes (statutory adjudication has been referred to as a rough-and-ready method intended to facilitate cash flow). This perhaps may explain the recommendation that the Protocol be adopted for project values in excess of S$500 million where one expects to find more complex technical disputes. As more infrastructure projects in Singapore adopt the Protocol (as one expects to see since the Protocol is an initiative of the Singapore government), Dispute Boards should establish a foothold in Singapore.

What are the significant provisions of the Protocol?

The Protocol builds on international best practices and introduces a few novel features to address the challenges faced in complex infrastructure projects.

First, it takes a proactive dispute prevention approach. The Dispute Board is appointed from the start of the project, rather than only after disputes have arisen. It helps anticipate issues and prevent differences from snowballing and escalating into full-blown disputes which become difficult and expensive to resolve. Historically, Dispute Boards have either been appointed from the start of a project or as and when disputes arise. The Protocol adopts the former approach which is generally acknowledged as the better approach to the use of Dispute Boards.

The Protocol requires the Dispute Board to hold meetings and site visits. The default position is that a minimum of three meetings and site visits are required every 12 months although parties are free to agree to a different prescription. The meetings allow issues arising in the course of the project to be discussed and hopefully resolved efficiently in terms of costs and time.

Second, should disputes arise; the dispute resolution process starts with one of the parties issuing a referral of dispute to the Dispute Board and the other party. In issuing the referral, the party can specify which method of dispute resolution it wishes or leave it to the Dispute Board to decide. The other party may object to the method specified. If there is an objection, the Dispute Board decides which dispute resolution method to adopt.

The Protocol provides a wide range of methods which can help address the disputes at hand. These include mediation, opinion and determination. This is different from the more prescriptive approach adopted by other forms – Europe/FIDIC provide for binding determinations and US provide for non-binding opinions – and similar to the ICC structure.

In mediation, the Dispute Board assists the parties to narrow their differences with the objective of reaching a settlement agreement. If the parties do not agree, the Dispute Board has no power to force a decision on the parties.

As for opinions, the Dispute Board is tasked to provide an opinion on the issue in dispute. The opinion is not binding on the parties (if any party objects to the opinion) but it carries significant weight since it is the view of a neutral panel comprising person(s) who are knowledgeable about the project, the contract and the issues. If there is no objection to the opinion, it becomes binding until or unless overturned later in litigation or arbitration (whichever is applicable to the project).

When a Dispute Board is asked to render a determination, it is required to consider the issue in dispute and render its determination, which will be final and binding on both parties unless any party indicates that it wishes to object to the determination. In the event of an objection, the party objecting shall have the right to refer the dispute to litigation or arbitration (whichever is applicable to the project) for final resolution but shall be required to comply with the Determination in the interim.

Third, the Protocol also provides for full professional and administrative support through the Singapore International Mediation Centre (SIMC) and the Singapore Mediation Centre (SMC) which can help with identifying and appointing Dispute Board members as well as with meeting, escrow and other administrative services.

Will Dispute Boards cost a lot of money?

Certainly, the engagement of experienced and knowledgeable professional(s) to form the Dispute Board will not be cheap especially when the engagement commences from the start of the project. However, Dispute Boards are widely accepted as effective to cut down costly disputes. On this basis alone, the expenditure to engage a Dispute Board should be easily justified. Even so, the recommendation in the Protocol that Dispute Boards be used in projects where the project costs exceeds S$500 million acknowledges the costs considerations by advising that it be used only in big infrastructure projects.

What do I need to do if I want to use the Protocol?

All that is required is to insert a clause in the EPC contract to incorporate the Protocol. The recommended clause is as follows:

[Parties shall establish a Dispute Board in accordance with the Singapore Infrastructure Dispute-Management Protocol 2018 (the SIDP), which is incorporated by reference. The Dispute Board shall comprise of [one/two/ three] member[s]. The Dispute Board shall assist parties in preventing, managing and resolving differences or disputes in accordance with the terms of the SIDP.]

Where can I find the Protocol?

A copy of the Protocol can be downloaded at http://www.mediation.com.sg/business-services/sidp/.

Dentons Rodyk provides full service legal advice to clients in the ASEAN infrastructure sector comprising transport (airports, maritime, highways), energy and natural resources, telecommunications, amongst others. Some of our projects are large, complex and cross border in nature. If you wish to discuss further on this development and the possible implications for your business, please contact Paul Wong.

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Crystallising the floating charge to preserve your clear interest – Looking beyond the crystal ball

Introduction

In Jurong Aromatics Corp Pte Ltd (receivers and managers appointed) and others v BP Singapore Pte Ltd and another matter [2018] SGHC 215, the Singapore High Court considered the effect of a no-assignment clause and a no-charging clause (in a contract between a chargor and a third party) on a pre-existing fixed charge and/or crystallised floating charge over the chargor's assets, and how this affected the chargee's (usually, a lender's) rights in an insolvency setoff situation.

We will first summarise the key points arising from the High Court's decision and then discuss why it is important for debenture holders, usually lenders, to regularly assess whether their right to crystallise their floating charges has arisen (or indeed has crystallised).

Relevant Facts

Jurong Aromatics Corp Pte Ltd (JAC) entered into various feedstock supply agreements and product offtake agreements with Glencore Singapore Pte Ltd and BP Singapore Pte Ltd (collectively, the Defendants), whereby JAC would purchase condensate from the Defendants, process them and then sell the processed output to the Defendants. Under this contractual arrangement, debts became due and owing both ways; from JAC to the Defendants, and from the Defendants to JAC.

JAC subsequently obtained a loan from a loan syndicate (the Senior Lenders), secured by a first fixed charge and first floating charge over all of JAC's assets, including its present and future receivables. The debts owed by the Defendants to JAC clearly fell within the scope of the Senior Lenders' floating charge. JAC also assigned to the Senior Lenders all its receivables that it was entitled to receive from the Defendants under the feedstock supply agreements and product offtake agreements.

After JAC ran into financial difficulties, the Senior Lenders appointed receivers and managers (R&Ms) over all of JAC's assets and the Senior Lenders' floating charge over all of JAC's assets was crystallised. Thereafter, JAC entered into further agreements with the Defendants which contained the relevant no-assignment clause prohibiting JAC from, amongst other things, assigning its rights under these agreements without the prior written consent of the Defendants. Under these agreements, the Defendants' debts owed to JAC also fell within the scope of the Senior Lenders' (crystallised) floating charge as JAC's receivables.

JAC and the R&Ms (the Plaintiffs) sought payment of the Defendants' debts. The Defendants resisted on the basis that they were entitled to set off their debts to JAC against the debts owed by JAC to them by way of insolvency setoff and/or equitable setoff. Given the impasse, the Plaintiffs sought a declaration from the High Court that the Defendants were not entitled to set off JAC's debts from the Defendants' debts.

Decision

The High Court agreed that the Defendants were not entitled to set off their debts against the debts owed by JAC to them by way of insolvency setoff or equitable setoff.

On insolvency setoff, the High Court held that one of the key elements to establish insolvency setoff was not satisfied, i.e. there was no mutuality between the debts sought to be set off. To satisfy the requirement of mutuality, there must be identity between the holder of the beneficial interest in the claim and the person against whom the cross-claim is asserted. The reasoning of the High Court in coming to its decision is important:

(a) a charge on an asset is not an assignment of the asset; it is instead an encumbrance on the full equitable ownership of the asset which does not require a transfer of the ownership, whereas an assignment involves a transfer of ownership or an interest, or some part of it. As the Defendants' no-assignment clause did not expressly include a prohibition against charging, the clause did not extend to prohibit JAC from creating over a charge over its assets;

(b) if a debenture holder's fixed charge or floating charge is expressed to cover future receivables, these receivables become subject to the debenture holder's fixed charge and/or crystallised floating charge as soon as they arise. A third party dealing with the debtor cannot simply invoke a contractual clause to prohibit the debenture holder's pre-existing charge from operating on the receivables. Therefore, even if the Defendants' no-assignment clause did extend to prohibit charging, it could not affect the Senior Lenders' fixed charge and crystallised floating charge which had already attached on JAC's receivables prior to the clause coming into effect. The Senior Lenders already acquired an equitable interest in JAC's receivables by reason of the crystallisation of the floating charge before the no-assignment clause came into existence;

(c) nevertheless, a charged asset may cease to be subject to the charge, e.g. the debenture holder may agree to release the charged assets, waive its rights to the charged assets, be estopped from asserting its rights to the charge assets, or where there is a decrystallisation of the crystallised floating charge. On the facts, none of these exceptions applied;

(d) furthermore, in addition to their interests under the charge, the Senior Lenders also already acquired an interest in the receivables pursuant to JAC's assignment of receivables to them before the no-assignment clause came into effect;

(e) given that the Defendants' claims were against JAC qua the company, but the holder of the equitable interest in the Plaintiff's claims were the Senior Lenders and not JAC, there was therefore no mutuality between the parties' claims and the Defendants were not entitled to assert insolvency setoff against the Plaintiff's claims.

On the point of equitable setoff, the High Court held that insolvency setoff did not bar the application of equitable setoff as a matter of principle. Equitable setoff applies where there is a close relationship or connection between the dealings and the transactions which give rise to the respective claims, such that it would offend one's sense of fairness or justice to allow one claim to be enforced without regard to the other. However, on the facts, equitable setoff did not apply because the parties' cross-claims against each other did not bear a close connection.

Practical implications, generally

Contracting parties must now bear in mind that if they wish to prohibit their counterparties from charging their own assets, they must use clear and express words to that effect in their contracts. A no-assignment clause prohibiting assignment per se is not sufficient. In the discussions that follow below, the term "no-charging clause" below will refer to a clause which specifically prohibits charging of assets, or in any way creating a charge, security interest and/or any encumbrances over such assets.

Practical implications for debenture holders with fixed and floating charges

Debenture holders may now be more assured that once they obtain a fixed charge over the chargor's assets and/or their existing floating charge crystallises and attaches on the chargor's assets, their equitable interests in the charge(s) are generally not affected in the event that the chargor subsequently agrees with a third party not to assign or create a charge over its assets.

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As demonstrated in this case, the timing of the crystallisation of an existing floating charge can be critical in determining whether the debenture holder's claims are affected by a no-charging clause.

In the banking context:

(a) It is common for lenders to include in their debentures (or security deeds) a power to crystallise their floating charges upon the occurrence of specified events. Such events usually relate to situations whereby the bank is aware or has reason to believe that a chargor is in financial distress, and/or which puts the chargor's assets subject to a floating charge at risk of being used by the chargor to satisfy its debts to other creditors, or to be used as collateral to obtain a loan from another bank to try to revitalise its business.

(b) It is also common for lending facilities to prescribe an obligation on borrowers to provide at regular intervals timely financial information about themselves, including financial ratios. The facility terms also usually empower the lenders to obtain relevant documents on request.

(c) It is therefore important that lenders request and/or review this information timeously so that they can decide whether they can, and if so, should, crystallise their floating charge to best preserve their security interest in the security provided because the borrower is usually free to sell, assign or otherwise dispose of the assets in the ordinary course of business as long as the floating charge has not crystallised.

This case is a timely reminder. While the oil and marine sector may be seeing the light after years of difficulty and oil prices are relatively high, the construction sector is experiencing a turn for the worst after many quarters of low margins and an increasingly competitive environment. According to The Business Times on 11 October 2018, at least 20 construction and engineering firms were involved in winding up applications in the third quarter of 2018 alone.

Lenders must also be careful after the crystallisation of the floating charge. As the High Court had recognised in this case, a charge may cease to operate if the chargor is able to show one or more of the classic situations of waiver, estoppel, or decrystallisation (if the charge is a crystallised floating charge). These may be shown if the chargee has agreed or represented that it will not assert its equitable interest in the charged assets. Outside of these three classic situations, the chargee's equitable interest may also be defeated if the charged assets are sold to a bona fide purchaser for value without notice of the charge.

Lastly, the High Court appears to leave open the possibility that a chargor may use very clear exclusionary words in a no-assignment or no-charging clause (in a contract with a third party) to prevent a chargee's crystallised floating charge (and/or its pre-existing fixed charge) from affixing onto the chargor's future receivables. It is unclear whether the Court will give full effect to such a clause when one considers that as soon as the receivables arise, they are immediately subject to the chargee's crystallised floating charge or fixed charge, as the High Court held in this case. Therefore, regardless of how unambiguous a no-assignment or no-charging clause may be drafted to prevent the operation of a crystallised floating charge and/or pre-existing fixed charge, and leaving aside for the moment any issues of tracing and following (from receivables to proceeds), it remains to be seen how the Singapore court will decide this specific issue in the future.

Dentons Rodyk acknowledges and thanks Associate Toh Cher Han for his contribution to this article.

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Regional Reports

Ensuring Compliance with the Myanmar Companies Law 2017

The Myanmar Companies Law 2017 (MCL), which entered into force on 1 August 2018, introduces a modern legal framework for foreign investment in Myanmar. The Draft Companies Regulations 2018 (DCR) was published by with the Myanmar Directorate of Investment and Company Administration (DICA) on 2 May 2018. The MCL replaces the abolished Myanmar Companies Act 1914 (MCA).

The MCL introduces a number of key changes to the regulation of companies of Myanmar that you need to be aware of, in order to avoid harsh penalties for non-compliance. Below is an outline of the most important changes introduced by the MCL.

Electronic Registration System and Re-Registration of Existing Companies

Upon the entry into force of the MCL, a new online electronic registration system called Myanmar Companies Online Registration (MyCR) will also be launched.

Existing companies have to re-register on MyCR within six months from the entry into force of the MCL (so called "re-registration period". **An existing company which does not re-register on the MyCR within the re-registration period will be struck off the companies' register.** Upon publication in the Gazette of the relevant notice by the Registrar, the company will then be dissolved.

Regulation of Foreign Companies

Foreign Shareholding in Myanmar Companies

The MCL changes the definition of a Myanmar company to include any company incorporated in Myanmar where foreign ownership does not exceed 35%.

This change will allow foreigners to hold a minority 35% interest in companies that are:

(a) engaged in sectors which are currently closed to foreign investors under paragraph 1(b) of the MIC Notification no. 15/2017 as well as banking and insurance sectors.

(b) listed on the Yangon Stock Exchange which is currently limited to local investors.

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(c) active in a wide range of import, export and trading activities, which were, until recently, largely restricted to Myanmar citizens and entities (see section on liberalisation of trade).

(d) own land – which is otherwise prohibited for foreigners under the Transfer of Immovable Property Restriction Act 1987.

Upon re-registration, existing companies with foreign shareholding up to 35% will be considered Myanmar companies.

Overseas Corporations

With the MCL in effect, overseas corporations that carry on business in Myanmar will no longer register as branch offices or representative offices, but rather as overseas corporations.

While the MCL does not define activities which constitute carrying on a business in Myanmar, it states that an overseas corporation is not deemed to be carrying on business in Myanmar merely because it maintains a bank account, conducts an isolated transaction that is completed within a period of 30 days (not being one of a number of similar transactions repeated from time to time), holds property, becomes a party to legal proceedings, or lends money.

Accordingly, overseas corporations that conduct an isolated transaction that is not completed within a period of 30 days or conducts an isolated transaction that is completed within 30 days but is related to a number of similar transactions repeated from time to time, the overseas corporation will need to consider registering with DICA as an overseas corporation in order to avoid penalties for non-compliance.

Overseas corporations registered with DICA must, among other things, comply with a number of obligations under the MCL upon (re)registration. These include the obligation to (1) appoint an ordinarily resident authorised officer who is authorised to accept the service of documents in Myanmar on behalf of the overseas corporation, (2) notify DICA of any changes relating to the overseas corporation and (3) annually file financial statements.

Non-compliance with the requirement to notify DICA of changes or to annually file financial statements renders the company, each director and the authorised officer liable to a fine of MMK250,000 (approx. USD160). The penalty for making a false statement in the application for registration – including in relation to the authorised officer – is MMK5,000,000 (approx. USD 3,200).

It is important to be aware that the above obligations will create new burdens for existing branch and representative offices - which will become overseas corporations upon re-registration – and also for overseas corporations with non-recurring, contract based work in Myanmar (that is not completed within 30 days or is completed within 30 days but is related to a number of similar transactions repeated from time to time) that will no longer be able to avoid registering a business presence in Myanmar by operating as foreign contractors.

Constitution

The Memorandum and Articles of Association (M&AA) used by existing companies under the MCA will be replaced by a company constitution in the Myanmar language.

In this regard, already existing companies may decide to:

1. Have the existing M&AA of a company take effect as its constitution following the commencement of the MCL, although provisions of the existing M&AA will have no effect to the extent that they are inconsistent with the MCL;
2. Adopt the model constitution (a draft model constitution was published by DICA in January 2018) by special resolution of members; or
3. Draft an individualised company constitution that caters to its needs and adopt this by special resolution of members. This option is particularly attractive for JV companies who will now have the opportunity to bring the company constitution in line with the JV or shareholders' agreement.

Existing companies as at 1 August 2018 will have six months to re-register their companies – which requires the filing of a company constitution or a statement that the company adopts the model constitution - on the electronic registry system.

Business Objectives

The MCL removes the requirement of including the business objectives of a company in its constitution (referred to under the MCA as the M&AA). This means a duly established company, which has the required permits or licences, is free to engage in any activities permitted by law.

The business objectives of an existing company will be automatically removed after the end of the 12 month transition period following the commencement of the MCL. A company has the option of removing its business objectives before the end of the transition period by way of special resolution passed by its members. A company can also decide to keep its business objectives after the end of the transition period by filing a special resolution with DICA along with a notice in the prescribed form. This option may be attractive to companies which require licences to operate in particular sectors as specific objects e.g. telecommunications services and microfinance services are required in order to obtain licences for these sectors.

In the interests of avoiding unnecessarily compromising the validity of contracts concluded by the company by virtue of the activity potentially being *ultra vires*, it would be beneficial for most companies engaged in commercial activities to remove objectives from their constitutions at the earliest opportunity.

Directors

Minimum Number of Directors

The MCL reduces the minimum number of directors of a company. A private company will be required to have at least one director, while a public company will need at least three directors.

Resident Director

According to the MCL, private companies must have at least one ordinarily resident director in Myanmar (Myanmar or foreign citizen), whereas public companies must have at least one director who is a Myanmar citizen and ordinary resident of Myanmar.

Existing companies must appoint a director who is ordinarily resident in Myanmar within 12 months from the entry into force of the MCL (so called “transition period”). “Ordinarily resident” is defined as a person who is a permanent resident of Myanmar or resident in Myanmar for at least 183 days in each 12 month period commencing from the date of the commencement of the MCL (for existing companies) or from the date of registration of the company (for new companies). Companies will have to file relevant forms with the DICA to show that the resident director requirement has been met.

Under the DCR if a company carries on business for more than six months without having at least one director who is ordinarily resident in Myanmar, each shareholder who has knowledge of this will be personally liable for the payment of all the debts of the company contracted during the period after the expiration of those 6 months for which no director was ordinarily resident.

Given the potential liability of shareholders of companies that do not comply with the resident director requirement, existing and new foreign investors need to start preparing for the long term appointment of a resident director as well as consider a contingency plan for a replacement resident director should that availability of the nominated resident director change.

Shareholders, Share Capital

Shareholders

The MCL, in line with other common law jurisdictions, will allow companies to be incorporated with one shareholder. This will provide the possibility for overseas companies to incorporate wholly-owned subsidiaries in the country.

In relation to the duty to act in good faith in the company’s best interest, directors of subsidiary companies or JVs will be able to act in the best interest of their holding company or the JV partner, respectively, rather than the best interests of the company where this is permitted by the constitution.

Share Capital Management

The MCL introduced new out-of-court procedures that can be used by a company to reduce its share capital provided that certain conditions such as solvency post share capital reduction, fairness to shareholders, ability to pay creditors and shareholders’ approval are satisfied.

Non-compliance with the share capital reduction requirements under the MCL renders the company and directors liable to a fine of MMK5,000,000 (approx. USD3,200). Directors of the company are also liable to the company’s creditors if the company becomes insolvent following the share reduction.

Abolition of authorised capital and nominal or par value of shares

The MCL abolishes the concepts of authorised capital and nominal or par value of shares. According to the DCR all shares issued by existing companies will be converted into shares with no par value and the authorised capital will no longer apply upon re-registration of an existing company.

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This means that concepts related to par value such as share premium and discounted issue are no longer necessary and are abolished. Companies with share premium accounts or capital redemption reserves will be able to transfer premiums and reserves to the share capital account.

Share Classes

The MCL allows companies to issue and determine the terms of different classes of shares and other types of securities. Shares can be of different classes, redeemable, and have special, preferential or restricted rights to distribution of capital and voting rights. Shares with no voting rights can also be issued.

Providing for different classes of shares in the constitution will enable companies to have more flexibility in regulating voting and capital distribution rights and will improve opportunities for venture capital or private equity funds to participate in the shareholding of a company.

Minority Rights

Under the MCL, any existing or former member, however small their part in the equity may be, may request the court to make an order if the conduct of the company's affairs or related act is oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members.

In order to avoid frivolous, vexatious or abusive minority shareholder actions, JV and/or shareholder agreements should be drafted to include a detailed description of what can be expected as a minority shareholder as well as details of what is unlikely to constitute "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members".

Dividends

The MCL enables dividends to be paid in cash, share issues, option grants or asset transfer and provides that a company cannot pay a dividend unless it meets certain requirements.

If the company issues dividends without complying with these requirements, it and each director who voted for the issue of dividends is liable to a fine of MMK500,000 (approx. USD320). Directors will also be liable towards the creditors of the company if they wilfully and knowingly permitted the issue of dividends without the company satisfying the above requirements.

As the payment of dividends is also subject to a company's constitution, companies which adopt the old M&AA as their constitution would need to pay dividends out of the profits of the year or any other undistributed profits. Companies wishing to avoid compliance with this provision should consider adopting either the model or a tailored constitution.

Compliance Obligations and Penalties

The MCL introduces significant penalties for non-compliance that range up to MMK10,000,000 (approx. USD6,400) and can be imposed on the company and each officer and director. DICA will also be able to impose penalties through penalty notices without court intervention.

Given the harsher penalties under the MCL for non-compliance, companies should consider appointing a company secretary who will deal with the company's legal and regulatory compliance matters.

Our team of experienced lawyers in our Dentons Myanmar Limited office, supported by our lawyers across the globe, are here to assist you with ensuring compliance with the MCL.

Please consult our lawyers for advice on the following aspects of the new corporate law regime:

(a) Investing as a minority shareholder in a Myanmar company and/or investing in economic sectors that have recently become available to foreign investors;

(b) Drafting an individualised company constitution that is tailored to your company's needs, including regulating voting and capital distribution rights through the creation of various share classes;

(c) Compliance with directors' duties codified in the MCL; and

(d) Share capital reduction and dividend declarations.

Our company secretarial and regulatory compliance team is also available to provide you with a broad range of services:

(a) Registration of companies, branches, representative offices, and overseas companies;

(b) Assistance with re-registration under the MCL;

(c) Obtaining other required licences;

(d) Obtaining CBM approval for cross-border shareholder loans and loans generally;

(e) Winding up companies, branches and representative offices;

(f) Building relationships and negotiating with relevant authorities;

(g) Foreign to Myanmar company conversions (for minority foreign shareholdings of 35% or less);

(h) Annual corporate secretarial and compliance services;

(i) Annual MIC compliance services;

(j) Registered office services;

(k) MIC permit and endorsement applications.

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Prohibition of Multi-Level Marketing in Myanmar

The Ministry of Commerce announced the prohibition of multi-level marketing in Notification No. 46/2018 dated 18 September 2018 (the Notification).

The Notification does not contain details on the definition of multi-level marketing or the specific activities that are prohibited under the Notification, but simply states that multi-level marketing is prohibited by the date of the Notification. It is also unclear how the prohibition will be implemented. The prohibition appears to be a broad one at this juncture to stop multi-level marketing activities across the board whilst the Ministry of Commerce decides how to proceed moving forward. There is no indication whether the prohibition will be a temporary one.

The intent and objective of the Notification is to stop all multi-level marketing activities and related transactions, in particular the pyramid sales model where profits are not shared equally across the various level of salespersons. The Ministry of Commerce has clarified that companies with wholesale and/or retail trading licenses can carry out wholesale and/or retail trading activities (as permitted under their respective trading licenses) insofar as they do not involve multi-level marketing activities.

Companies with wholesale and retail licenses previously carrying out multi-level marketing can proceed to carry out wholesale and retail trading without any multi-level marketing activities. They can carry out direct sales over the counter or via an e-commerce or online shopping platform. They can also do direct wholesale distribution to resellers. There is no need to obtain approval from or consent of the Ministry of Commerce. However, we would recommend that companies identified by the Ministry of Commerce as an MLM firm previously notify the Ministry of their business and operations, which do not involve any MLM activities, before proceeding with their wholesale and retail trading activities.

The Dentons Myanmar team is currently advising clients on the Notification, and is liaising with the Ministry of Commerce on issues relating to the Notification.

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Myanmar withholding tax abolished to support local businesses

The Myanmar government has taken steps to support local businesses by removing the need for withholding tax on domestic payments.

Pursuant to Notification 47/2018 dated 20 June 2018 (the Notification), which took effect from 1 July 2018 onwards, the 2% withholding tax on payments to resident citizens and resident foreigners for services rendered, purchases of goods and lease payments within Myanmar have been abolished.

The requirement to deduct 2.5% withholding tax from payments to non-residents will still apply.

The 2% withholding tax continues to be applicable on payments made by government organisations, ministries and state-owned enterprises where the total payment made within one year is more than MMK 1 million. This means that government organisations, ministries and state-owned enterprises will continue to deduct 2% withholding tax when making payments to resident citizens and resident foreigners (if the total payment made within one year is more than MMK 1 million).

Payment on interest to residents will continue to be exempted from withholding tax, while, subject to any double taxation agreement reduction, there will be a 15% withholding tax on payment of interest to non-residents.

There will be a 10% withholding tax on payments to residents of royalties for the use of licenses, trademarks and patents, while, subject to any double taxation agreement reduction, there will be a 15% withholding tax on payment of interest to non-residents.

The removal of withholding taxes on domestic payments (for sale of goods and services), will have an immediate positive cash flow impact on local businesses. It is good news that the Myanmar government is taking steps to improve the business environment.

The Dentons Myanmar team has experience in advising on tax issues, and would be happy to assist clients on tax related matters.

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Myanmar's Draft Employment Compensation Law 2018

The Draft Employment Compensation Law 2018 (the Draft), published on or around August 2018, aims to refine the existing Workmen's Compensation Act. The Workmen's Compensation Act was issued on 1 July 1924, and the Law Amending the Workmen's Compensation Act was issued on 11 May 2005.

Under the Draft, a committee will be established to oversee all employment compensation matters (the Committee).

Responsibilities of the Employer and Rights of the Employee

The proposed amendments or clarification set out in the Draft include:

(a) where an injury is caused to an employee arising out of his or her employment, the employer shall be liable to pay compensation and pay for medical treatment of the injury;

(b) the injured employee shall be examined by a qualified doctor (with valid accreditation / recognition) within 30 days of the injury;

(c) where death of an employee occurs within the workplace and/or whilst the employee is carrying out his or her duties during the course of employment, the employer must inform the relevant township officer within 24 hours of the death;

(d) all incidences of death, injury or disease suffered whilst the employee is carrying out his or her duties during the course of employment and/or arising out of the employee's employment must be notified to the Committee;

(e) an employee can file a complaint to the Committee if his or her employer fails to provide compensation or pay for medical treatment for injury arising from his or her employment.

The Draft Employment Compensation Law 2018 specifically provides that an employer will not be liable for injuries sustained by the employee during the course of his or her employment under the following circumstances:

(a) where the employee sustained the injury under the influence of alcohol or restricted drugs (as set out by the Ministry of Health);

(b) where the employee has breached safety regulations and/or rules aimed at ensuring the employee's safety; and

(c) where the employee fails to take safety precautions (including failing to wear or use safety devices provided for purposes of ensuring safety).

The Draft also sets out the compensation guideline in the event of permanent or partial disability.

Penalties

If compensation is not provided in accordance with the compensation guideline, the employer can face a fine of 500,000 to 3,000,000 Kyats or imprisonment of 3 months to 2 years, or both.

Conclusion

Where an employee has a valid employment contract establishing the employer-employee relationship, he or she will most certainly be able to exercise his or her right to seek compensation under the Employment Compensation Law when it comes into effect.

An employer must be aware of their duties under the Employment Compensation Law when it comes into effect, and must comply with the same.

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Amendments to the Singapore Employment Act - tips for Japanese companies

Amendments to the Singapore Employment Act

The Employment Act (Act) governs a relationship between an employer and an employee, including the terms of employment, rights and obligations on both parties. It was enacted in 1968 and amended several times. The current Act has limited application, especially for executives, professionals and managers (PMEs). They are precluded from the application of the Act (save junior PMEs who are protected by meeting certain requirements) and their relationships are governed by contract where the Act does not apply. Given the employment landscape changes over the years, PMEs make up almost half of the Singaporean workforce today. The amendments will extend the scope of application of the Act to all core employees including PMEs to provide them with minimum legal protection with respect to the conditions of work. Additional 430,000 PMEs will be covered by the Act after the amendments are implemented.

This article will introduce the key changes in relation to the PMEs with respect to leave and dispute resolution as well as provide insights for Japanese subsidiaries in Singapore in terms of compliance with the amended Act.

(1) Paid statutory leave for PMEs

The amended Act will apply to all employees including PMEs (excluding seamen, domestic workers and others, which are the same exclusions in the current Act) and the paid leave entitlements under the current Act would be extended to cover PMEs. The statutory leave entitlements applicable to the PMEs include:

(a) 7 days' paid annual leave (deleted from Part IV and set out under Part X).

(b) 11 days' paid public holidays.

(c) 14 days' paid sick leave (out-patient).

(d) 60 days' paid hospitalisation leave (inclusive of 14 days' medical leave).

(e) Maternity leave and childcare leave under the Act. (Parents of a Singaporean citizen child will be protected under the separate Act).

However, the provisions in Part IV of the Act would not apply to certain employees/PMEs because this part would only apply to those who earn monthly wages not exceeding S$2,600 (for non-workmen; threshold increased by S$100) or S$4,500 (for workmen) respectively. Part IV includes the basic welfare of employees and conditions of employment, and importantly, the hours of work, shift work and overtime payment as well as entitlement to retrenchment benefits. The PMEs would not be eligible for the Part IV benefits unless they earn less than S$2,600 or specific conditions are provided in their contract.

(2) Terms relating to salary payment

The other provisions under the current Act which are not under Part IV will also be extended to cover the PMEs, including the rules relating to timely payment of salary, calculation formula for daily wage rate and pro-rata, provision of an itemised payslip and written key employment terms.

(3) Dispute resolutions

Under the current Act, aggrieved PMEs who need help with respect to wrongful dismissal or non-payment of salary have no choice but to go to the court as they are not eligible to apply for their claims to be heard by the Employment Claims Tribunals (ECT), which will incur lower legal costs than litigation (provided all other general eligibility requirements are met). Under the amended Act, such PMEs will have access to the ECT.

(4) Checklist for the Japanese companies

Under the current Act, many Japanese expatriates are not covered by the Act as they are mostly executives earning more than S$4,500 per month. However, the amended Act will capture all PMEs, including Japanese or any foreign expatriates, too. There is no specific or general exclusion provided for foreign employees under the current and amended Act.

If a Singapore subsidiary of Japanese company adopts the Japanese terms of employment for their expatriates working in Singapore without any local modification, it may have to review and customise the local terms in order to comply with new Singapore's statutory requirements. For example, the standard Japanese employment terms do not provide paid sick leave as it is not mandatory in Japan. That will not comply with the amended Act and hence will be illegal in Singapore.

➢ **Read more on page 22**

Many Japanese subsidiaries hire Singaporeans and Singapore permanent residents who are PMEs, too. Although the current Act does not apply to them, their existing employment contracts may have already provided them with equivalent paid leaves for the local employees as the statutory leave looks fairly standard. However, Japanese companies should also check if other leave related conditions under the Act are met, such as payment of unconsumed annual leave on termination of employment (other than dismissal cases) and formula for calculating such payment, i.e. gross rate of pay as prescribed by the Act.

Japanese companies that wish to introduce paid statutory leave (including related conditions as set out above) for PMEs should also introduce an appropriate internal rules and procedures, which are clear and practical. It is to prevent such entitlements from being abused, misunderstood by employees or the management. For example, under the Act a medical certificate issued by an employer appointed medical practitioner must be produced for any paid sick/hospitalisation leave taken. Japanese managers may not be familiar with such certificate as it is uncommon in Japan. Japanese companies are therefore advised to have internal rules, including a list of the company's panel doctors, when and whom leave application should be submitted/approved/recorded and procedures of medical reimbursement. Expenses for medical fees should be borne by the employer for taking a sick leave under the Act

Japanese companies are advised to prepare themselves to ensure that their terms of employment applicable to their Japanese expatriates and local PMEs will meet the statutory requirements. Non-compliance will attract penalties. The existing employment contract and/or handbook, including their procedures, may have to be reviewed in order to ensure the compliance with the amended Act. The Bill was introduced on 2 October 2018 and will be implemented by April 2019.

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シンガポール雇用法改正について

シンガポール雇用法（Employment Act）は 1968 年に制定され、雇用主と労働者の法的関係や基本的労働条件を定める法律で、制定以来時勢に合わせた改定が重ねられてきました。従来のシンガポール雇用法では法の適用される被用者の範囲は「職種」や「月給額」によって一部あるいは全部の適用が除外されていました。投資を呼び込むことは天然資源や広い国土がないシンガポールにとっては不可欠であり、その為に法律もより企業が雇用し管理（解雇を含む）しやすい法制として設計されてきた経緯があります。このように労働契約の自由を原則としつつ、最低限の保護が必要なカテゴリーの労働者の場合のみ労働法による修正を行い、労働法の適用が限定されている点がこれまでのシンガポール雇用法制の特徴ともいえます。ところが昨今、シンガポール経済の発展に伴い、専門技能を持ち高給を得る専門管理職（PME）(Professionals, Managers and Executives の略）の割合が増え、人口の半分を超えたと言われています。法律の保護が及ばない労働者のほうが多くなる計算です。そこで今回の法改正では、PME を含む労働者の最低限の労働基準の確保と権利保護を図るため、従来法的保護がなかった PME 層にも法律の適用範囲を相当程度に拡張する狙いがあります。改正後は、約 43 万人の PME が新たに雇用法適用対象になると見込まれています。以下、PME 層に対して新たに適用される規定を中心に、改正法対応として日系企業が特に留意すべき点や対応について概説します。

(1) 管理職にも与えられる休暇の権利

改正法によって PME を含む被用者全般（＊但し船員や家事労働者等は現行法同様「被用者」の定義から除かれています）に拡張された項目のうち、法定有給休暇としては以下のような休暇が含まれます。

(a) 年 7 日以上の年次有給休暇の付与（改正後はパート 10 に規定）。

(b) 年 11 日の国民の祝日は有給として付与。

(c) 年 14 日間の有給の疾病休暇（入院を伴わない）の付与。

(d) 年 60 日間の有給の入院休暇（上記 14 日間を含む合計）の付与。

(e) 出産休暇・育児休暇（雇用法上定めるものに限る。シンガポール国籍の子の親は別途規定）。

なお、「雇用法第四章」は、現行法同様、全職員に対して適用されるわけではありません。現行法同様一定のカテゴリの従業員への限定適用です。第四章とは、労働時間の制限・シフト等、残業手当支給基準や整理解雇手当など主要な労働条件に関する規定を定める章です。改正後第四章の適用対象者は、事務系労働者で月給 2,600 ドル以下（給与限度額が現行法から 100 ドル引上げ）、肉体労働者や運転手等のいわゆるワークマンで月給 4,500 ドル以下（給与限度額は据置き）です。これらの条件に該当しない職員の第四章に定める権利、例えば残業代支給は、雇用契約に定めがなければ権利が発生しません。

(2) 重要な労働条件と給与支払いにかかる条件

上記のとおり、現行の雇用法の第四章「以外」に定められている項目は、改正によって PME を含む被用者全般に適用されることになります。特に注意すべき給与関連の項目を幾つか挙げるならば、例えば、給与支払いの時期（日付、月ごと等一定サイクルの遵守）、有給休暇の日割り計算式（グロス・レートの概念等）、個別明細の含まれたペイスリップの交付、給与や職務範囲、就労時間などの重要な就労条件についての書面による提示などが含まれます。

(3) 労働紛争解決

現行法では、不当解雇された場合や、給与の未払いを争いたい場合でも、PME を含む雇用法適用対象外の労働者は費用が低額な専門の労働紛争調停機関への申立てができず、多額な費用のかかる民事裁判で争う他方法がありませんでした。改正法では紛争解決に関しても法適用が拡張されることとなるため、PME も（その他の申立条件を満たす限り）労働紛争調停機関に申立てを行うことが可能となります。

(4) 日系企業 人事管理者のためのポイント

従来、駐在員の多くが、PME に該当するか非管理職で月給 4,500 ドル以上に該当しておりシンガポール雇用法全般について適用除外となることがほとんどでした。外国人駐在員はシンガポール雇用法は適用除外とするという規定はないため、駐在員たる PME にも改正法の適用が及ぶこととなります。

➢ **Read more on page 24**

日本からシンガポール拠点への出向者の場合、日本での労務契約・福利厚生条件がそのままで適用されて、シンガポールでの個別の労働契約・条件が特に定められていない場合も多くあります。例えば、日本の労働基準では、完全有給の外来疾病休暇が年 14 日間（入院は 60 日）も与えられていないことがほとんどですが、このままの基準をシンガポールで適用し続けた場合は改正後のシンガポール基準に適合しないことになります。

シンガポール人 PME や永住権をもつ外国人 PME を雇用している日系企業は大多数です。ローカル PME 従業員との間の既存の雇用契約が、改正後の基準を満たすかどうかは確認しておくべきです。例えば、法定休暇の「日数」に限ってみると、当地では極めて標準的ですのでこれを改定しなければならない会社は多くないと思われますが、併せて、他の休暇関連規定、例えば、退職時（懲戒解雇除く）の未消化有給の買取り義務、有給給与の日割りレート計算（グロスレートでなければならない）の規定などは標準的とまではいえません。改正後は、これらの関連規定も含めて雇用法への適合性を満たさなければなりません。

他の注意点としては手続き面です。契約書面の改定にとどまらず、実際の休暇申請や承認手続が明確かつ実行可能なことも確認すべきです。例えば、改正法では短期の疾病休暇の取得にも医師の証明書を要する規定があり、改正後駐在員や PME に対しても適用されます。外来の診断書取得は日本では一般的でなく、駐在員には周知が必要です。また、医師の証明書取得に必要な診察費用は雇用主に負担義務がある規定も PME に適用が拡張されますが、会社指定医のリストの整備、診察費用の限度額や請求方法、誰に申請し承認されるべきかなど、社内での具体的な規定や手続き方法についても具体的かつ明白に定めておかなければ管理に支障をきたす可能性があります。不明確な規定や規定の不備が誤解を招いて現場の混乱を生じさせたり、診察費用請求が従業員に悪用されるなどの問題ともなりえます。

上記を含め、雇用法適用対象者が PME にも拡充されたことに対する企業の対応としては、改正法の下で雇用契約が改正法の最低基準を満たすことの確認（場合によっては雇用契約や就業規則等の改定が必要）に加え、実務的な労務管理手続を整備することも要請されます。違反に対しては罰則も科されます。改正法草案は 2018 年 10 月 2 日付で提出されており、国会承認を経て施行は 2019 年 4 月頃に予定されています。

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Singapore Court of Appeal restates the law on exclusive jurisdiction clauses

STOP PRESS

Dentons Rodyk is pleased to announce that in a case it handled, the Singapore Court of Appeal has changed the law on exclusive jurisdiction clauses.

The Court has just handed down an extensive judgment saying that it will no longer follow its own previously-stated principle, namely, that the Singapore court is entitled to consider the merits of a defendant's case when it applies to stay Singapore proceedings on account of an exclusive jurisdiction clause. This previous principle was expressed in no less than four of the Singapore Court of Appeal's judgments.

The Singapore Court of Appeal has accepted the invitation by Dentons Rodyk, made on behalf of its client, that it should no longer follow such a principle. Instead, there should be more focus on party autonomy and the merits of a defendant's case is not relevant to the issue whether a stay should be ordered.

In the next full edition of Starboard (to follow shortly), we will discuss the judgment in detail and its implications for clients. In the meantime, readers should note that not only has the law changed, this change has been said by the Singapore Court of Appeal to have general retroactive effect.

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Accolades

IFLR1000 2019

Dentons Rodyk has achieved improved rankings in the 2019 edition of International Financial Law Review 1000 (IFLR1000), with 20 of our lawyers and 10 practice areas being recognised this year. Clients commended that the firm "(is) fast and strikes a good balance between risk management and achieving commercial objectives", "quick to respond, pro-active, and dedicated with a professional team", "offers precise and timely solutions", and "has excellent legal knowledge, with lawyers being commercial and pragmatic". Read more here.

Asian Legal Business (ALB) 40 Under 40 2018

Dentons Rodyk Banking and Finance Partner Wanqing Loke has been recognised in Asian Legal Business (ALB)'s 2018 40 Under 40 list of outstanding legal professionals in the region. Wanqing's "solution-oriented approach to address all parties' particular concern while securing interests of her clients makes her our preferred banking and corporate lawyer", said a client. Read more here.

About Dentons Rodyk

Situated at the southern most tip of Southeast Asia, Singapore is a massive regional hub for global commerce, finance, transportation and legal services. This important island city-state is a vital focal point for doing business throughout the Asia Pacific region.

As one of Singapore's oldest legal practices, trusted since 1861 by clients near and far, rely on our full service capabilities to help you achieve your business goals in Singapore and throughout Asia. Consistently ranked in leading publications, our legal teams regularly represent a diverse clientele in a broad spectrum of industries and businesses.

Our team of around 200 lawyers can help you complete a deal, resolve a dispute or solve your business challenge. Key service areas include:

- Arbitration
- Banking and Finance
- Capital Markets
- Competition and Antitrust
- Construction
- Corporate
- Employment
- Energy
- Franchising and Distribution
- Infrastructure and PPP
- Insurance
- Intellectual Property and Technology
- Islamic Finance
- Life Sciences
- Litigation and Dispute Resolution
- Mergers and Acquisitions
- Privacy and Cybersecurity
- Private Equity
- Real Estate
- Restructuring, Insolvency and Bankruptcy
- Tax
- Trusts, Estates and Wealth Preservation
- Trade, WTO and Customs
- Transportation
- White Collar and Government Investigations

Providing high quality legal and business counsel by connecting clients to top tier talent, our focus is on your business, your needs and your business goals, providing specific advice that gets a deal done or a dispute resolved anywhere you need us. Rely on our team in Singapore to help you wherever your business takes you.

About Dentons Rodyk Academy

Dentons Rodyk Academy is the professional development, corporate training and publishing arm of Dentons Rodyk & Davidson LLP. The Dentons Rodyk Reporter is published by the academy. For more information, please contact us at sg.academy@dentons.com.

About Dentons

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. www.dentons.com.

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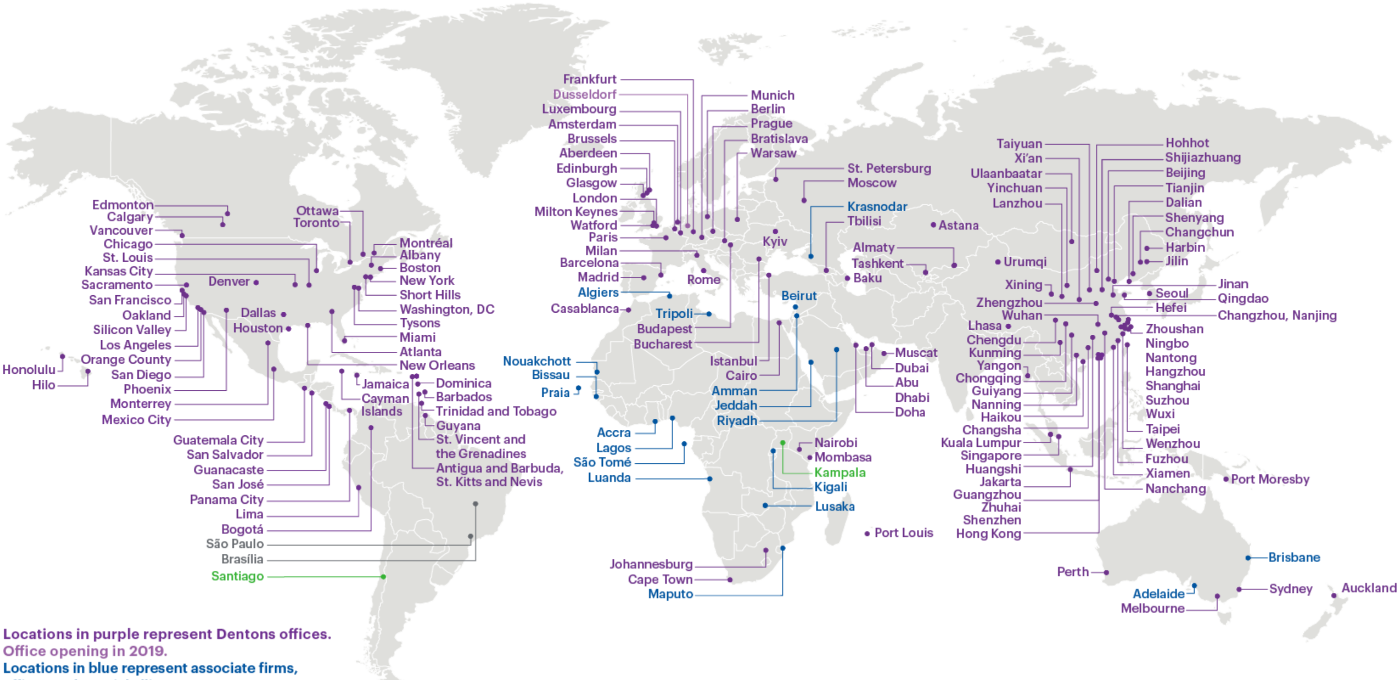
Our locations



Locations in purple represent Dentons offices.
Office opening in 2019.
Locations in blue represent associate firms, offices and special alliances.
Locations in green represent proposed combinations that have not yet been formalized.
Locations in gray represent Brazil Strategic Alliance.