Reporter

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DENTONS RODYK

Business Bulletin

Extensive amendments to the Employment Act in the pipeline

Introduction

In line with the swing towards greater employee protection in Singapore over the last few years, proposed revisions to the Employment Act (the Act) have been introduced by way of the Employment (Amendment) Bill (the Bill) tabled in Parliament on 2 October 2018. The Bill which will be raised in Parliament in November 2018, is targeted to take effect in April 2019.

We highlight here the key amendments proposed and the main implications for employers and employees.

Key amendments

(i) Removal of salary caps applicable to PMEs

The most significant change to the Act relates to the removal of the basic salary cap of S$4,500 per month for professionals, managers and executives (PMEs) to be covered by the Act. In short, the Act (save for Part IV) now applies to all PMEs.

With the proposed changes, an estimated additional 430,000 PMEs will be entitled to statutory benefits under the Act. Such benefits would include:

(a) redress for wrongful dismissal;

(b) automatic transfers of employment pursuant to a business transfer;

(c) minimum days of annual leave, paid sick leave and hospitalisation leave;

(d) timing for payment of salary;

(e) certain maternity and childcare leave benefits (subject to conditions and assuming the Child Development Co-Savings Act does not apply); and

(f) right to have key employment terms set out in their contracts.

Employers hiring PMEs earning more than S$4,500 in basic salary a month now have to comply with the Act rather than rely purely on negotiated terms of the employment contract.

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(ii) Dismissal claims

Currently, the Act defines dismissal as the termination of the contract of service of an employee by the employer, with or without notice and whether on the grounds of misconduct or otherwise.

Under the proposed amendments set out in the Bill, the definition of "dismiss" will be expanded to cover certain situations of involuntary resignations forced upon by the employer's conduct or omission. The common practice of employers terminating employees by getting them to submit a resignation on record may now come under greater scrutiny.

(iii) Increased salary caps for Part IV benefits

Currently, Part IV of the Act which regulates rest days, work hours and other conditions of work, applies only to:

(a) workmen who are in receipt of a basic monthly salary not exceeding S$4,500; or

(b) all employees who are in receipt of a basic monthly salary not exceeding S$2,500.

The Bill proposes to raise the salary cap of non-workmen to a monthly salary of S$2,600. The previous salary cap of S$2,250 for overtime payment calculations has also been removed. The proposed amendments will benefit an additional 100,000 non-workmen.

(iv) Statutory annual leave benefit

The Bill proposes to remove the annual leave provisions from Part IV of the Act and insert these provisions into the general section of the Act, making it applicable to all employees covered under the Act.

On first glance, employers may take the view that implications on them are limited, since it is common for PMEs' leave entitlement to be above the statutory minimum of 7 to 14 days. However employers should be minded to note the other provisions relating to annual leave that may now apply to previously excluded PMEs, for example the obligation to pay an employee for unutilised annual leave upon termination (except for cases of misconduct).

(v) Dispute resolution under the Employment Claims Tribunal

Currently, employees undergo two different routes to resolve their employment-related disputes. Wrongful dismissal claims are adjudicated by the Ministry of Manpower, while salary-related disputes are first required to undergo mediation at the Tripartite Alliance for Dispute Management and are then escalated to the Employment Claims Tribunal (ECT) if mediation is not successful.

The Bill proposes to empower the ECT to provide a one-stop service for all employment-related disputes as the ECT will now be empowered to adjudicate wrongful dismissal cases (in addition to its existing powers to hear salary-related disputes).

Conclusion

In light of the extensive amendments proposed to the Act, employers should conduct reviews of their employment agreements, handbooks and practices to ensure compliance with the Act once the proposed amendments take effect.

Please do not hesitate to reach out any of the contacts herein if you have any questions relating to the Bill and how these amendments will affect your business.

Dentons Rodyk acknowledges and thanks senior associate Nicole Teo for her contribution to this article.

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Competition Law Alert

Competition and Consumer Commission of Singapore (CCCS) issues record breaking S$27 million penalty against fresh chicken distributors

The Competition and Consumer Commission of Singapore (CCCS) has issued its highest ever financial penalty of almost S$27 million against 13 fresh chicken distributors (Chicken Distributors). The CCCS' investigations against the Chicken Distributors began in 2014 following information received from a secret complainant. The CCCS subsequently found that the Chicken Distributor had engage in anti-competitive agreements to coordinate the amount and timing of price increases and agreeing not to compete for each other's customers in the market for the supply of fresh chicken products in Singapore.

CCCS' record penalty highlights its growing enforcement prowess against cartel conduct particularly those involving parties with huge market shares and whose conduct were serious and protracted. The CCCS' latest decision against the Chicken Distributors comes in the wake of its proposed infringement decision against certain hotels for sharing confidential information issued in August 2018 and highlights its growing enforcement oversight and scrutiny of the various markets in Singapore. The trend of ever increasing financial penalties imposed by the CCCS (as evident from the penalties imposed against the Chicken Distributors) is likely to continue and will likely be superseded in other investigations involving huge markets and/or market players.

Importantly, businesses should pay heed to the increasing effectiveness of the CCCS' whistle blowing / reward scheme (which had triggered this investigation) and the availability of the CCCS' leniency programme (which can give rise to total immunity from financial penalties). The CCCS' decision against the Chicken Distributors highlights the immense risks and costs of engaging in any anti-competitive behaviour in Singapore and the growing clarion call for competition law compliance and education amongst employees and management alike.

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Singapore and Indonesia enter into cross-border competition enforcement agreement

As regulators continue to expand and entrench their cross border enforcement and coordination capabilities, businesses having operations in the ASEAN countries will do well to consider how any potential competition law infringement within a single jurisdiction may be eventually picked up and investigated by a regulator in another jurisdiction. In the age of globalised trade characterised by the seamless movement of goods and services, a silo mentality to approaching competition investigations and compliance by jurisdiction is no longer tenable and businesses are strongly encouraged to review the compliance with competition laws on a wider regional basis.

Background to cooperation with Indonesia

The Competition and Consumer Commission of Singapore (CCCS) has entered into its first ever Memorandum of Understanding (MOU) on competition enforcement with another ASEAN competition authority. The MOU with the Commission for the Supervision of Business Competition of Indonesia (KPPU) was entered into on 30 August 2018 and seeks to facilitate cooperation on competition enforcement between the CCCS and the KPPU. In particular, the MOU will encourage notification of enforcement activities that potentially affect the CCCS and the KPPU interests. Crucially, the MOU will also facilitate the exchange of information between the CCCS and the KPPU as well as enforcement coordination for cases of mutual interest.

Background to cooperation with Japan

This MOU follows the cross border enforcement agreement which the CCCS had entered into with the Japan Fair Trade Commission (JFTC) in June 2017 and signals the ever expanding cross-border cooperation on enforcement of competition related matters by regulators. This MOU will likely be replicated across the other ASEAN countries in line with the ASEAN Competition Action Plan 2025 which has, as one of its strategic goals, the establishment of regional cooperation arrangements between the ASEAN competition regulators.

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NRIC and Data Protection

Personal Data Protection Commission issues Guidelines to stop the collection of NRIC

Introduction

The Personal Data Protection Commission (PDPC) has issued Guidelines on 31 August 2018 governing the use and collection of NRIC and other identification documents, such as birth certificate, employment passes, work permits and passports (collectively referred to as "NRIC" in this article).

The Guidelines were implemented because the NRIC is a unique identifier of an individual and contains personal data. Indiscriminate or negligent handling of the NRIC increases risk of illegal activities such as identity theft and fraud, and potentially causes harm to the individual.

The Guidelines do not set new law, but merely clarify the legal position under the Personal Data Protection Act (PDPA). As the NRIC contains personal data, the collection, use and disclosure of the NRIC has always been subject to the provisions of the PDPA, which protects personal data.

The Guidelines state that organisations are generally not allowed to:

- collect and keep a physical copy of the NRIC;
- make a copy of the NRIC; and
- collect, use or disclose NRIC numbers.

Organisations may collect, use or disclose an individual's NRIC only where:

- it is required under the law, for example, when seeking medical treatment or when subscribing to a mobile telephone line;
- it is necessary to accurately establish and verify the identity of the individual to a high degree of fidelity, for example, in financial or real estate matters; or
- it falls under an exception under the PDPA, for example, a hotel providing the NRIC number of a guest to a hospital in the situation where the guest has to seek emergency medical attention.

Review of existing practices

The PDPC will enforce the Guidelines from 1 September 2019. Organisations will have to take immediate steps to review its practices and make changes which are necessary to ensure that any existing or proposed collection or use of the NRIC is either permitted under the law or is otherwise justified.

Generally, the PDPC considers that it is necessary to accurately establish or verify the identity of an individual to a high degree of fidelity where failure to accurately identify of the individual would:

- pose a significant safety or security risk, for example, the identity of a visitor entering a preschool has to be verified in order to protect the children;
- pose a significant impact or harm to an individual and/or the organisation, for example the identity of an individual must be verified to prevent fraudulent claims/activity in healthcare, financial or real estate matters.

Many existing practices will have to be relooked, and new procedures will have to be adopted. One example brought up by the PDPC is the collection of the NRIC for the purpose of a job application. There is no law which requires a prospective employer to collect the NRIC number of a job applicant, and the situation is unlikely to be one where it is necessary to establish the identity of the individual to a high degree of fidelity. Organisations may verify the identity of the applicant by merely having sight of the individual's physical NRIC. If necessary, organisations may consider taking down only the partial NRIC number. The PDPC considers that use of the last 4 characters of the NRIC would not be considered to be use of the NRIC.

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Organisations have to review their practices and consider whether it is possible to adopt another identifier in place of the NRIC. Such identifiers include:

- the use of partial NRIC numbers instead of the full NRIC number;
- mobile phone numbers;
- email addresses;
- QR codes;
- organisation or user generated IDs;
- combination of different identifiers, such as first name + part phone number + date of birth.

It would be useful to carry out a Data Protection Impact Assessment to:

- identify whether collection of the NRIC is necessary;
- consider the data flow – where the NRIC resides, and who has access to the NRIC etc;
- identify and assess risks; and
- create an action plan to either change the current practice, or to continue with the current practice.

The fact that an organisation may have to incur high costs to make changes to IT systems which currently use the NRIC as an identifier is not good justification for not making any changes, as the PDPC has made it clear that it expects changes to be made to IT systems.

If, having done a full assessment, an organisation determines that needs to use NRIC numbers for its purposes, it will need to ensure that it has sufficient physical and technological measures to provide a high level of security to protect the NRIC numbers. Organisations should also regularly review the NRIC numbers (or copies of NRIC) in its possession or control, to determine whether they are still needed. The PDPC has stated in the Guidelines that an organisation should not keep the NRIC number (of copy of the NRIC) “just in case”, when it is no longer necessary for the purpose for which they were collected.

Scanning of NRIC

Many organisations scan an NRIC in order to record the NRIC number as this is more accurate and efficient than manually recording the NRIC. In the Technical Guide to Advisory Guidelines on the Personal Data Protection Act for NRIC and other National Identification Numbers (published 31 August 2018), the PDPC states that when organisations scan a NRIC, care must be taken to ensure that complete NRIC numbers are not stored permanently. After scanning, the NRIC number must be converted to a format which only includes a partial NRIC number or a hashed NRIC number. The complete NRIC number should not be used.

How we can help

We help our clients to review their practices and processes, and to develop alternative practices and processes which are in compliance with the relevant laws.

We offer a full suite of services to help organisations comply with data protection laws of Singapore, and those of other countries which apply to them.

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Personal Data Protection Act – Need to review Privacy Policy when there are changes to an Organisation's business

Singapore's Personal Data Protection Act 2012 (PDPA) has been in force for a few years. By now, most organisations are familiar with the need to implement a privacy policy. However, organisations may not realise that their privacy policy needs to be reviewed from time to time to ensure that it remains relevant to the organisation as its business evolves.

Changes to the way an organisation does business may result in the following changes:

- the type of personal data which it collects;
- the manner in which it collects personal data;
- the purposes for which personal data is collected.

These changes may necessitate updating of the privacy policy.

The case of *Actxa Pte Ltd* [2018] SGPDPC 5, recently decided by the Personal Data Protection Commission (PDPC) highlights the need for an organisation to review its privacy policy from time to time.

Actxa Pte Ltd [2018] SGPDPC 5

Actxa operates a website which sells healthcare and fitness related Internet of Things (IoT) devices such as "smart" weighing scales and fitness trackers. These IoT devices collect data about the user.

The user can access the data collected by the IoT devices through the Actxa App (App) which may be downloaded and installed on a mobile device. To use the App, the user has to create a user account by providing certain personal data, such as name, email address, gender, date of birth, height and weight.

When the IoT weighing scale is used, it collects personal data such as weight, height, body mass index, total body water, total body fat, bone mass and muscle mass. The fitness trackers collect personal data such as an individual's goals, active minutes, sleep duration, start of sleep and end of sleep. These data which are collected through the user's use of the IoT device may be viewed by the user through the App, and are also collected and stored by Actxa's servers.

A complaint was made to the PDPC by a complainant alleging that Actxa has failed to notify him of, and obtain his consent for Actxa's collection of his personal data. The complainant's spouse had bought a weighing scale from Actxa's website, and the complainant had downloaded the App, and created an account.

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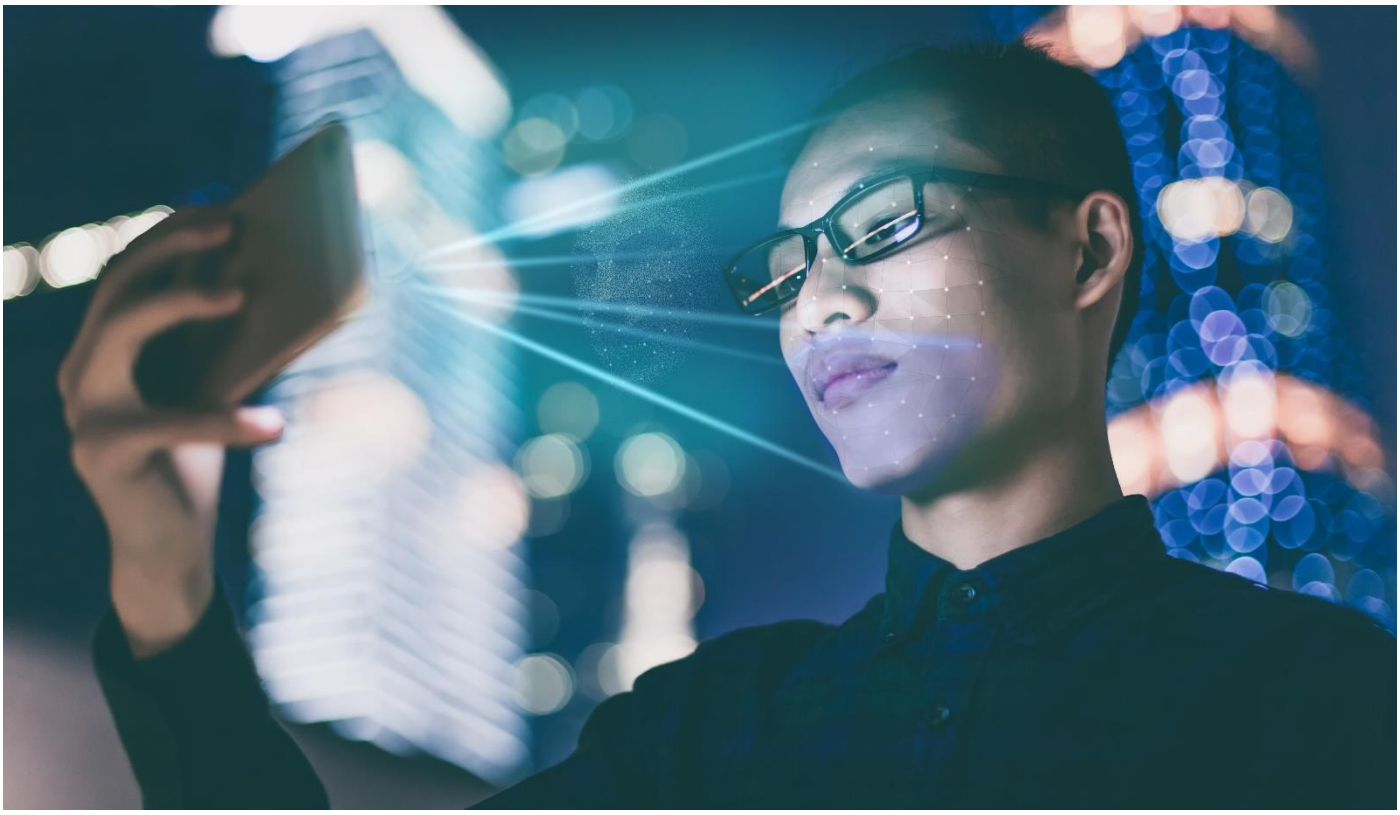

Actxa argued that users of the App were required to agree to Actxa's privacy policy before using the App, and that the privacy policy would have notified the user of the collection, use and disclosure of personal data.

However, the PDPC found that the wordings of Actxa's privacy policy only referred to data collection through Actxa's website, and did not address the collection, use and disclosure of personal data through the App or any of the IoT devices.

The first few sentences of Actxa's privacy policy reads as follows:

"This Privacy Policy discloses the privacy practices for the Actxa website (collectively, the "Website" located at www.actxa.com). Actxa, the provider of the Website (referred to as "use" or "we"), is committed to protecting your privacy online in compliance with Personal Data Protection Ordinance (PDPO) ("PDPO"). Please read the following to learn what information we collect from you (the "User" or the "End User") and how we use that information…"

The PDPC found that *"the complete absence of any reference to the Actxa App in the Privacy Policy shows that the Privacy Policy was only intended to govern the data collection activities undertaken through the Actxa Website, and not the Actxa App nor the IoT devices"*

Actxa tried to argue that the users would have known that the privacy policy was applicable to personal data collected through the use of the App since the privacy policy would have been shown on the App. However, this argument was rejected by the PDPC on the basis that *"displaying a privacy policy that has no relevance to the Actxa App cannot amount to proper notification".*

Hence, any acceptance of the privacy policy by a user of the App would not constitute valid consent for the collection, use and disclosure of the user's personal data.

Lessons learnt from Actxa's case

Actxa's privacy policy may have been adequate for personal data collected through its retail website. However, when Actxa started to sell IoT devices, which enable Actxa to collect different types of personal data and through means other than Actxa's website, Actxa should have reviewed its privacy policy to ensure that it is adequate for its new line of business.

This case highlights the need for an organsation to review its privacy policy regularly to ensure that it reflects the organisational practices, and is adequate for any new business the organisation wishes to undertake.

It also highlights the importance of having a carefully drafted privacy policy that is tailored to the needs of the organisation. Many web developers provide "cookie cutter" privacy policies when developing a website for their clients. Such privacy policies do not address the personal data which are collected by the organisation through means other than the website, and should not be adopted by the organisation.

Dentons Rodyk thanks and acknowledges Joshua Woo for his contribution to the article.

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Litigation Briefs

Will the trek to an injunction be a more difficult walk in the (Wrotham) Park now?

Negative covenants, also known as restrictive covenants, are contractual obligations not to do certain acts. They are a common feature in commercial contracts, and commonplace in banking / facility documents. For example, in the acquisition context, there will usually be non-compete and non-solicitation obligations on the part of the seller to preserve the buyer's benefit of acquiring the business. In the banking space, it is common to find negative pledge clauses. In many other contexts, non-disclosure agreements serve to protect the (often unquantifiable) value of confidential information.

In this article, we (1) recap the usual problems faced in enforcing a negative covenant; (2) summarise the legal remedy known as *Wrotham Park* damages (or *"negotiating"* damages as subsequently coined by the English court) and which was recently confirmed by the Singapore Court of Appeal in *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and anor appeal* [2018] SGCA 44 to be part of the Singapore legal landscape; and (3) discuss the potential practical implications of Turf Club.

The problem

When a party breaches a negative covenant, the aggrieved innocent party often finds itself without a real or meaningful remedy. There are essentially two aspects to this legal problem.

The first aspect is the inherent difficulty in proving damages. Ordinarily, damages for breach of contract are calculated to compensate the innocent party by reference to a counterfactual in which the innocent party receives the promised performance. This principle generally works well for positive obligations, but less so for negative obligations. In many cases, a breach of a negative obligation may not cause an identifiable financial loss - at least not immediately, and usually not obviously. The whole concept of performance (which is premised on an overt act) also becomes problematic in the context of negative covenants (which is premised on not acting). The result of not being able to adequately prove loss is a Pyrrhic victory of no, or at best nominal, damages.

The second aspect relates to the discretionary nature of final injunctive relief. An injunction is usually the best way to compel the defaulting party to comply with its contractual obligation not to do something that it had agreed not to do, assuming that it is not too late to shut the proverbial stable door (as would often be the case involving a breach of a non-disclosure agreement where the horse would have bolted). However, this equitable remedy is discretionary – it is not as of right unlike orthodox damages. Factors such as delay, the "clean hands" of the plaintiff, and competing considerations are relevant to the court's exercise of discretion.

This double whammy was precisely what happened in the English case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798. This case concerned a covenant not to develop land except in accordance with certain conditions. The plaintiffs conceded that the value of the land had not been diminished one farthing because of the defendant's development in breach of this negative covenant. In other words, they were unable to prove any financial loss. As for the injunction sought to restrain the development of the land, the English court ultimately declined to exercise its discretion to grant it as to do so would result in unpardonable economic waste.

Had the English court in *Wrotham Park* stopped there, it would seem that a party could effectively get an advantage by breaching its contractual obligation, entirely for free. This was an intuitively unjust outcome, and an unsatisfying blemish in contract law which is intended to hold parties to their agreed bargain.

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The solution

In response to the injustice that the plaintiffs in *Wrotham Park* faced, the English High Court adopted a new measure of damages by reference to the amount that might reasonably have been demanded by the plaintiffs from the defendant for relaxing the covenant. This birthed the concept of a notional release fee / license fee, famously now known as *"Wrotham Park damages"*.

Wrotham Park damages has been expressly confirmed to be part of the Singapore legal landscape by the Court of Appeal's decision in *Turf Club*. This case raised for determination, amongst other things, the remedies that should follow from the appellants' repudiatory breaches of certain express and implied terms in a consent order. In a nutshell, these terms involved not disturbing the status quo during the implementation of the consent order, not appropriating the benefit of a head lease pending full performance of the consent order, and not interfering with or hindering the valuers' discharge of their duties when they carried out valuation exercises as agreed under the consent order.

The Court of Appeal held that *Wrotham Park* damages was to be assessed objectively as at the date of the breach and by reference to a hypothetical bargain, rather than the parties' actual conduct and position. The Court of Appeal was also careful to set parameters for the award of this new head of damages. In the context of breaches of true negative covenants (i.e., not a positive obligation recast as a negative covenant in form), a plaintiff must meet several legal requirements:

(b) The plaintiff must first of all be caught in a true remedial lacuna. This can happen if the plaintiff did not suffer any financial loss, or if it is practically impossible to assess any such loss based on the orthodox measures. Crucially, mere difficulty in assessing such loss is insufficient. Further, specific injunctive relief is not available because the court cannot or will not grant such relief.

(c) Second, *Wrotham Park* damages would not be awarded if it would be irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even on a hypothetical basis. An example is if the agreement to release the covenant would be illegal.

On the facts of the case in *Turf Club*, the Court of Appeal decided that an award of *Wrotham Park* damages was not appropriate as these requirements were not made out. In particular, it was still possible to assess damages on the orthodox compensatory basis.

The potential practical implications

From the perspective of the party in whose favour a negative covenant is made, the availability of an alternative head of damages for breach of such a negative covenant should be good news – more options in the armoury.

But is this really the case? The most effective legal tool to hold a defaulting party to its contractual bargain is oftentimes still an injunction. Hence, the availability of *Wrotham Park* damages may potentially dilute this important remedy. A defendant may now argue that since *Wrotham Park* damages are available under Singapore law, damages would be an adequate remedy, and injunctive relief is not justified. The availability of *Wrotham Park* damages may also feature generally at the stage where the court considers whether to exercise its discretion to grant an injunction.

It will be interesting to see how the law of injunctive relief in Singapore will develop in the shades of *Wrotham Park* damages, and how they will interface.

Whatever it is, the availability of *Wrotham Park* damages is something that all lenders and businesses should take into account, as this affects both covenantor and covenantee.

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Regional Reports

Anti-corruption and anti-bribery laws in Myanmar

On 3 August 2018, the Ministry of Planning and Finance, Directorate of Investment and Company Administration (DICA) issued an announcement on the Anti-Corruption Code of Ethics for Companies and Body Corporates (the Announcement).

Jurisdiction

The Announcement applies to all companies and entities incorporated within the Republic of the Union of Myanmar, when they are dealing with ministries concerned or government organisations, and companies or organisation in the private sector.

Prohibited conduct – bribing

The prohibited activities are:

(a) making and offering, directly or indirectly, gift, entertainment and other preferential treatment;

(b) providing directly or indirectly, necessary assistance in travelling;

(c) conferring, directly or indirectly, a financial advantage to get a business opportunity;

(d) offering, directly and indirectly, charitable donations;

(e) conferring, directly and indirectly, political contributions; and

(f) providing, directly or indirectly, assistance to get employment in companies or organisations for personal interests.

The scope of the prohibited activities set out in the Announcement appears to very broad and of a general nature.

De Minimis

Pursuant to the President Office's Guidelines to Accepting Gifts effective from 4 April 2016 (the Guidelines), a single gift valued not more than 25,000 Kyats and multiple gifts of combined value not more than 100,000 Kyats per year can be accepted. For special occasions celebrated annually (e.g. Thadigyut present, Christmas), a gift valued not more than 100,000 Kyats can be accepted.

Receiving bribes

The activities expressly prohibited in the Announcement relates to the direct and indirect making, offering, providing and/or conferring of different forms of bribes. However, the Announcement did not address the receipt of bribes.

The act of receiving bribes is prohibited under the Guidelines. The Guidelines expressly prohibits public officials, government organisations and government employees from accepting any gift from a person or an organisation on account of their official positions. However, the Guidelines does set out situations where gifts may be received. In the event gifts are received in situations prohibited under the Guidelines, the consequences are as follows:

(a) the gift in question must be returned; or

(b) the recipient may compensate the equivalent of the value of the gift to the giver (i.e. provide reasonable consideration for the gift that is equivalent to market value); or

(c) the gift may be distributed to employees in the department where the gift is of perishable nature (fruits and flowers).

Moving forward

It is unclear, in deciding whether an activity falls within the broadly-worded scope of prohibited activities under the Announcement, whether there is a knowledge requirement (i.e. intent / mens rea element that the parties involved know or ought to have known objectively that their activities are corrupt).

It is also unclear if there is a presumption of bribery or when such presumption will arise.

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Although not specifically written in the Announcement, it is likely that reasonable and bona fide expenditures may not fall within the scope of the prohibited activities.

The Anti-corruption Commission has powers of investigation. DICA may make a report / complain if it suspects that any company and corporate body has violated the code of ethics.

We can expect DICA to issue further notifications or announcements to clarify the above issues in near future, as well as clarification on the penalties and consequences of violation of the anti-corruption and anti-bribery laws in Myanmar.

Conclusion

The Announcement signifies Myanmar's move to join in the world's anti-corruption efforts. Despite its lack of clarity in specific areas highlighted above, the Announcement is a progressive step towards improving Myanmar's business climate.

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Mining licences in Indonesia

Introduction

Home to the Grasburg mine, the largest gold mine and second largest copper mine in the world, and blessed with an abundance of substantial deposits, Indonesia's mining industry is a significant contributor to the largest economy in Southeast Asia, and is instrumental to Indonesia's strong economic growth in the past years.

To keep up with increasing investments in the mining sector, the licensing regime for the mining sector in Indonesia has also greatly evolved over the past years.

The Previous Regime – Contracts of Works & Coal Contracts of Work

Contracts of Work

Contracts of Work (COWs) were regulated under the Ministry of Energy and Mineral Resources Decision Letter No. 1614 of 2004 and largely regulated the mining industry excluding oil, natural gas, geothermal, radioactive and coal between the Indonesian Government and the relevant contract holders.

A COW is essentially a contract between the Indonesian Government and the contract holder setting out the company's rights and obligations in relation to all phases of a mining operation, including exploration, pre-production development, production and mine closure.

Under Indonesian law, a COW has the status of special law whereby the terms of the COW will override the applicable Indonesian laws like general tax law as the relevant subject matter will be specifically dealt with in the terms of the COW itself. For example, the taxation provisions of the COW will specifically provide for the tax regime applicable to the COW holder during the entire term of the COW, regardless of any changes to Indonesia's tax regulations.

A COW is valid for a period of 30 years as of the commencement of commercial production with extendable terms.

The terms of a COW would typically cover the following obligations:

(a) Expenditure obligations;

(b) Import and export facilities;

(c) Fiscal obligations;

(d) Reporting requirements;

(e) Submission of records, inspection and work programs;

(f) Preference to Indonesian suppliers;

(g) Environmental management and protection;

(h) Provision of infrastructure for the use by local population; and

(i) Payment of tax, royalty, dead rent etc.

Coal Contracts of Work (CCOW)

The legal framework for coal mining under a CCOW is similar to the general mining framework under COWs (eg. foreign ownership restrictions).

A CCOW holder is not permitted to engage in any other business activities other than coal mining i.e. the PMA Company which enters into the CCOW must be specially established and engaged in coal mining.

The New Regime post-2009 and the 2018 Update

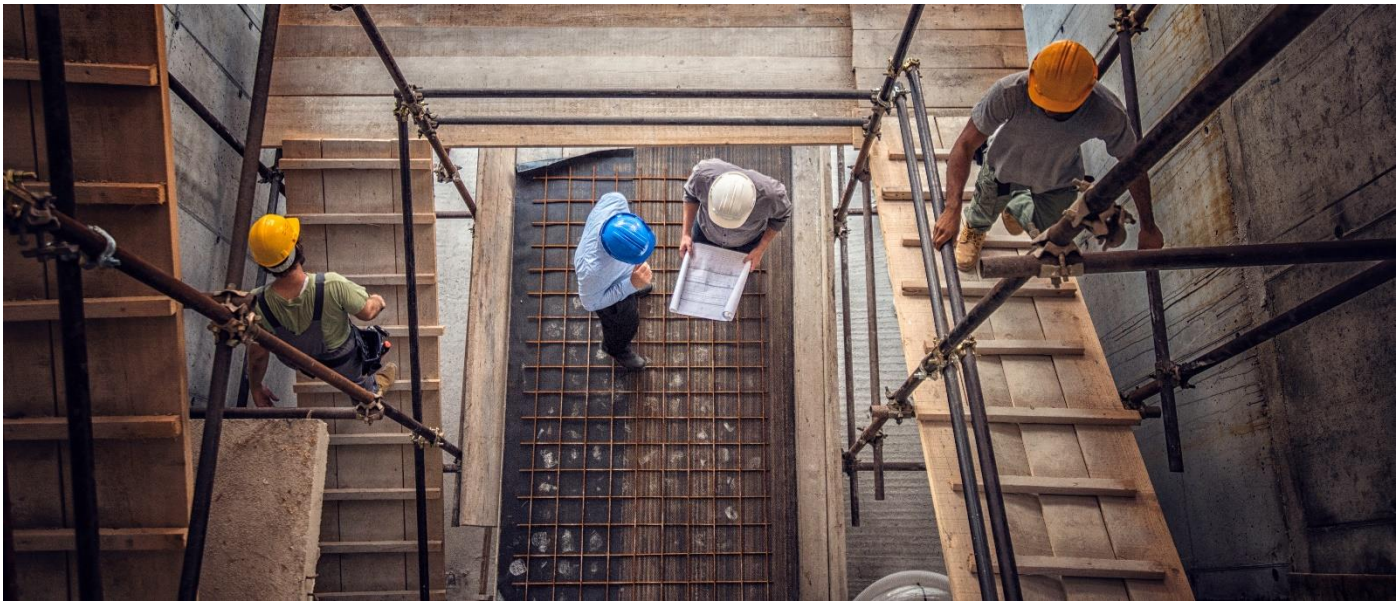
Under the Law of Mining and Coal Mining No. 4 of 2009, mining licences were separated into mining business licence *(Izin Usaha Pertambangan or IUP)* and special mining business licence *(Izin Usaha Pertambangan Khusus or IUPK)* and small scale mining permits *(Izin Pertambangan Rakyat or IPR)*. Further implementing regulations were then implemented to provide further guidance on the mining licences framework.

In February 2018, all the implementing regulations were revoked and replaced by Minister of Energy and Mineral Resources Regulation No. 11 of 2018 and which was then amended by Minister of Energy and Mineral Resources Regulation No. 22 of 2018 (together, MEMR Reg 11&22/2018). Under MEMR Reg 11&22/2018, the business licences were provided for as follows:

(a) **Exploration IUPs/IUPKs** are granted for performance of general surveys, exploration and feasibility studies within a Mining Business Licence Area (WIUP) and Special Mining Business Licence Area (WIUPK) respectively.

(b) To sell coal and/or minerals extracted during the exploration phase, the holder of Exploration IUP/IUPK must obtain a Temporary Licence for Transport and Sales from the MEMR, Governor, or regent/Mayor.

➢ **Read more on page 14**



(c) **IUP-OPs/IUPK-OPs** are granted for performing production operation activities such as construction, mining, processing and or refining, etc, within the WIUP and WIUPK respectively.

(d) **IUP-OPs Specifically for Processing and/or Refining** are granted specifically for purchasing, transporting, processing, and refining, as well as selling the mineral and coal commodities.

(e) **IUP-OPs Specifically for Transportation and Sales** are granted specifically for purchasing, transport, and selling the mineral and coal commodities.

(f) Business entities that are not engaged in the mining business but wish to sell their minerals or coals as a side impact of their mining activities are still required by MEMR Reg 11&22/2018 to obtain an IUP-OP for Sales. Examples of these business entities include those that run their businesses in the fields of construction of traffic facilities and infrastructures, port constructions, tunnel constructions, civil constructions, and/or dredging of river, lake, and/or sea.

(g) **Mining Service Business Licence (IUJPs)** are granted specifically for performing core mining service business activities in relation to certain phases/parts of the mining business activities, which include consultation, planning and implementation in a number of fields.

The 2018 Implementation Guidelines

The Minister of Energy and Mineral Resources (Minister) has, earlier this year, issued Decree No. 1796 K/30/MEM/2018 on Implementation Guidelines for the Application, Evaluation and Issuance of Licences for Mineral and Coal-Mining Activity (Decree 1796/2018) to implement MEMR Reg 11&22/2018. Decree 1796/2018 sets out the procedures for issuance of the various mining licences:

Decree 1796/2018 provides for the following guidelines in relation to application and evaluation of each mining licence:

Licence	Application	Evaluation
Exploration IUPs/IUPKs	Applications may be filed by business entities, cooperatives, individuals, firms or limited partnerships which have been awarded tenders (for Exploration IUP and Exploration IUPK), or a new joint venture established by state-owned/regionally owned enterprises (BUMN/BUMD) which have been given priority as regards WIUPKs or business entites which have been awarded tenders in priority as regards WIUPKs (for Exploration IUPK). Application to be submitted to Minister (both Exploration IUP and Exploration IUPK) or relevant governor (Exploration IUP only).	Administrative, technical, environmental and financial requirements will be evaluated within three business days. If the requirements are met, the licence will be issued within seven business days thereafter.

Licence	Application	Evaluation
IUP-OPs/IUPK-OPs	Applications may be filed by applicants awarded Exploration IUPs (for IUP-OP) or Exploration IUPK (for IUPK-OP). Applications to be submitted to Minister (both IUP-OP and IUPK-OP) or relevant governor (IUP-OP only).	Administrative, technical, environmental and financial requirements will be evaluated within six business days (for IUP-OP) or three business days (for IUPK-OP). If the requirements are met, the licence will be issued within seven business days thereafter.
IUP-OPs Specifically for Processing and/or Refining	Applicants (i.e., business entities, cooperatives etc.) which have obtained in-principle approval for capital investments are required to submit their applications to the Minister or relevant governor.	Administrative, technical, environmental and financial requirements will be evaluated within five business days. If the requirements are met, the licence will be issued within eight business days thereafter.
IUP-OPs Specifically for Transportation and Sales	Applicants (i.e., business entities, cooperatives etc.) are required to submit their applications to the Minister or relevant governor.	Administrative, technical, environmental and financial requirements will be evaluated within five business days. If the requirements are met, the licence will be issued within eight business days thereafter.
IUJPs	Applicants (i.e., business entities, cooperatives etc.) are required to submit their applications to the Minister or relevant governor.	Administrative, technical, environmental and financial requirements will be evaluated within six business days. If the requirements are met, the licence will be issued within seven business days thereafter.

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Retail and wholesale trading for foreign investors in Myanmar

Myanmar has taken steps to welcome foreign investments into retail and wholesale trading.

Pursuant to Myanmar Ministry of Commerce Notification No. 25/2018 dated 9 May 2018 (the Notification), wholly foreign-owned companies and joint ventures with foreign shareholdings are permitted to engage in retail and wholesale trading (of domestically produced and/or imported goods) in Myanmar, subject to compliance with requirements and investment criteria.

We set out below some of the key requirements and issues to take into consideration.

Minimum Capital Requirement	*Wholesale* Trading - For wholly-owned foreign companies or a joint venture company with more than 80% foreign shareholding, an initial investment amount of no less than US$ 5 million is required. - For a joint venture company in which at least 20% of the shares are held by Myanmar citizen(s) and/or citizen-owned companies, an initial investment amount of no less than US$ 2 million is required. *Retail Trading* - For wholly-owned foreign companies or a joint venture company with more than 80% foreign shareholding, an initial investment amount of no less than US$ 3 million is required. - For a joint venture company in which at least 20% of the shares are held by Myanmar citizen(s) and/or citizen –owned companies, an initial investment amount of no less than US$ 700,000 is required. The initial investment amount does not include monies paid towards land lease.
Registration with the Ministry of Commerce (MOC)	All wholly foreign-owned companies and joint ventures with foreign shareholdings are required to register with the Ministry of Commerce (MOC), and obtain an MOC permit before they can engage in trading activities. The following documents and information must be submitted to the Ministry of Commerce for purposes of registration: (a) certification of incorporation; (b) copy of Myanmar Investment Commission (MIC) permit or MIC endorsement (where applicable); (c) recommendation letter from the relevant City Development Committee or Township Development Committee in each region or state in which the company proposes to trade; (d) list of goods proposed to be traded; and (e) detailed business plan (including the initial investment amount, the proposed trading location(s), area of land use and proposed trade volumes).
Land Use Requirement	*Wholesale Trading* Companies (wholly foreign-owned companies and joint ventures with foreign shareholdings) engaging in wholesale trading must occupy the appropriate floor space for doing wholesale business (which are undefined at this juncture given that the new laws permitting wholesale trading have just been passed). We expect that the appropriate land use or floor space requirement for whole sale business will depend on the type of products traded and the volume of trading. *Retail Trading* Companies (wholly foreign-owned companies and joint ventures with foreign shareholdings) engaging in retail trading must occupy a floor area of at least 929 square meters, even if they are simply operating a mini mart or convenience store. This is in line with Notification 15/2017 issued by the MIC dated 10 April 2017 (containing general information on wholesale and retail trading).

Other requirements not set out in the Notification	*Import Permits* In addition to the requirements set out in the Notification, companies are also required to obtain all relevant and requisite import permits if they are trading imported goods. Goods which are prohibited or restricted under the applicable law (including prohibited imports listed on the Ministry of Commerce's Myanmar National Trade Portal) are not permitted to be traded. *Specific Product / Industry Requirements* The requirements stipulated in the Notification are in addition to the existing requirements for registration and approval under other applicable laws or regulations, including product-specific registration or licensing requirements. For instance, a company looking to trade agricultural products must obtain the necessary approvals and permits from the Ministry of Agriculture.

In addition to the above requirements, the company must also ensure compliance with the laws and regulations on employment matters and tax issues.

The Dentons Myanmar team is well positioned to advise on all issues and assist foreign investors in setting up companies for retail and wholesale trading in Myanmar.

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Accolades

Acritas Global Elite Brand Index

Dentons has once again ranked among the top 10 law firms in the Acritas Global Elite Brand Index. This year and last year Dentons ranked 10th, while the year before we held the 11th spot in the Acritas index. The previous year Dentons was 14th. Read more here.

Asialaw Profiles 2019

Dentons Rodyk has been ranked in 18 industry sectors and practice areas in the 2019 edition of *Asialaw Profiles*, including in Aviation and shipping, Banking and finance, Energy, Infrastructure, Competition/Antitrust, Construction, Dispute Resolution, Intellectual property, Real estate, and others. Read more here.

Asian Legal Business (ALB)

M&A Rankings 2018

Dentons Rodyk's M&A practice received top-tier recognition in the Asian Legal Business (ALB) M&A Rankings 2018. This year, the Firm was ranked Tier 2 for Asia's best firm in Domestic M&A work. 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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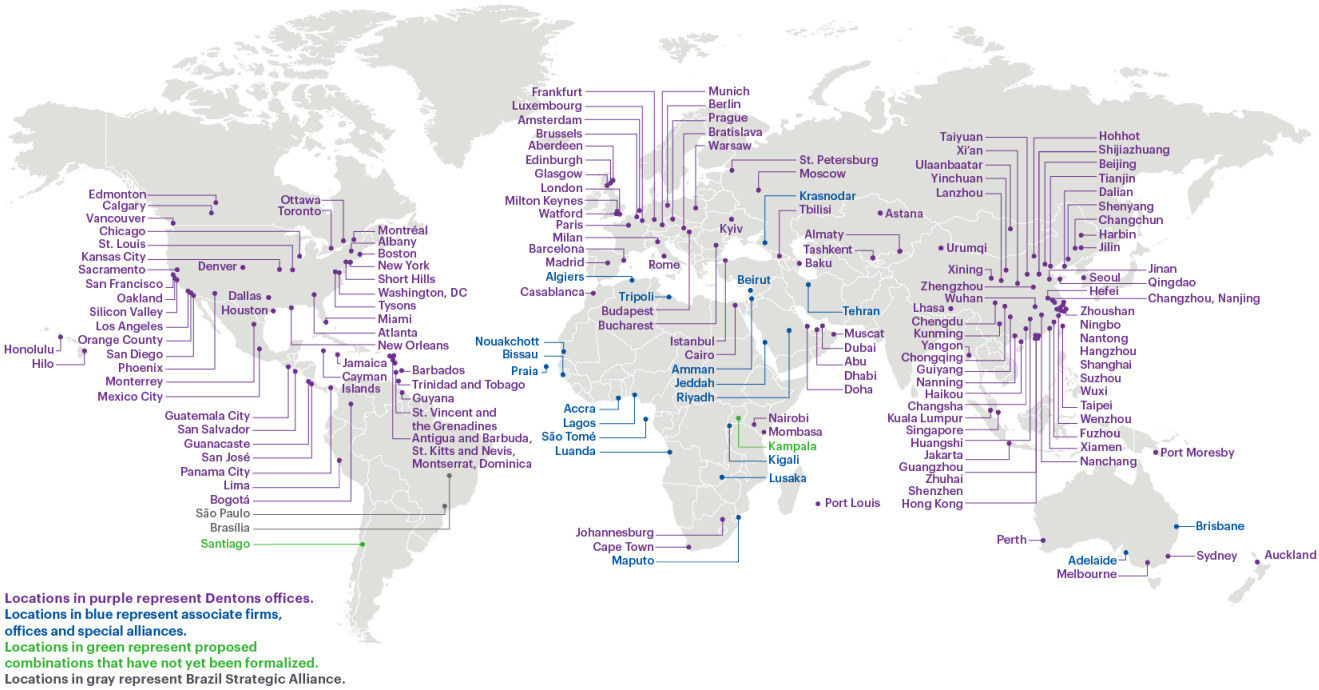
Our locations



Locations in purple represent Dentons offices.
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.