DENTONS RODYK

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Business Bulletin

The new Work Injury Compensation Act – steps towards enhanced protection for employees and employers

The Work Injury Compensation Bill 2019 (the Bill) was passed in Parliament on 3 September 2019. Broad amendments to the Work Injury Compensation Act (WICA) will be introduced to enhance protection for both employers and employees. The proposed amendments under the Bill are to take effect on 1 September 2020 to allow employers and insurers time to adjust. Related subsidiary legislation amendments are slated to take effect starting from January 2020.

Some key changes are highlighted below:

(i) Information sharing and differentiated premiums

Presently, employers' past claims records are not shared among the insurers. With the new changes under the Bill, employers' past claims data will be made available to all designated Work Injury Compensation (WIC) insurers. Employers with poor safety records would face higher premiums while those with good safety records would be rewarded with lower premiums. This not only incentivises companies to improve their safety standards, but also introduces a more equitable system of differentiated premiums based on safety records, where employers with good safety records would no longer have to "subsidise" those with poor safety records.

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(ii) Expanded mandatory insurance coverage

The Bill will extend mandatory insurance coverage to non-manual employees with a salary of up to $2,600 a month regardless of their workplace. Previously, it was only compulsory for those working in factories or earning below S$1,600 a month. The salary threshold will be raised in 2 stages: S$2,100 on 1 April 2020 and S$ 2,600 on 1 April 2021. Through this change, about 300,000 more employees will be covered under mandatory insurance from their employers.

(iii) Proper assessment of work injuries

The Bill addresses the concern of inadequate treatment or insufficient medical leave. Workers will be able to seek a different doctor without the employer's consent if they believe the medical assessment was not conducted fairly or the duration of the medical leave given was deemed to be insufficient. Employers are also required to report to MOM all work-related medical leave or employees placed on light duties. Such changes are made to limit the employer's influence on doctors to prescribe less medical leave.

Expanded scope of compensation and higher compensation limit

The Bill will ensure employees placed on light duties as a result of work injuries are able to receive at least their medical leave wages for up to 2 weeks and be compensated their average monthly earnings if the salary received during periods of light duties is lower. There will be an increase in the maximum compensation amount from 1 January 2020 onwards to S$225,000 for death and S$289,000 for total permanent incapacity, a 10% increase from the current caps to reflect rising wages and healthcare costs. Additionally, the maximum compensation for medical expenses has been raised from S$36,000 to S$45,000.

(iv) Expedited and improved claims process

Some permanent incapacity cases currently take more than 6 months to reach a resolution, due to lengthy permanent incapacity assessments. The Bill will allow for speedier compensation based on the current state of incapacity at the earliest opportunity after 6 months from an accident. For greater efficiency, all claims will now be processed by approved insurers, instead of the previous practice of the MOM processing death and permanent incapacity claims, and insurers processing temporary incapacity claims.

(v) Safeguards for employers in insurance coverage and fraudulent claims

Previously, employers may inadvertently buy WIC insurance policies that lack coverage for risky scenarios. With the introduction of a prescribed core set of standard terms for WICA-compliant insurance policies, employers will be assured of adequate coverage. A maximum fine of S$80,000 will be imposed onto persons who offer policies purporting to be WICA-compliant and they will be held responsible for compensation as though the policies offered were compliant. A maximum fine of S$80,000 will be imposed onto any unauthorised person who offers WICA-compliant policies.

Conclusion

The changes under the Bill are wide-ranging and are designed to not only enhance protection for employees, but also enhance protection of employers in certain respects. Employers should familiarise themselves with the proposed amendments and engage early with their WIC insurance providers to fully comprehend the impact of the Bill on their organisation and to prepare early before the proposed amendments take effect.

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Playing Fair: Avoiding Deceptive Pricing Practices

Executive Summary

In an age of intense market competition, businesses have resorted to various novel marketing and pricing practices to capture the attention of consumers. Many of these practices may potentially run afoul of the law and businesses are now put on notice that such practices are now being scrutinised and may be subject to enforcement action.

CCCS: The New Consumer Sheriff in Town

On 1 April 2018, the Competition and Consumer Commission of Singapore (CCCS) assumed the role of the administrator and enforcer of the Consumer Protection (Fair Trading) Act (Cap. 52A)(CPFTA) from SPRING Singapore. This additional role runs concurrent with its role as the competition watchdog pursuant to the Competition Act (Cap. 50B)(CA). Within days of assuming its new role, the CCCS announced that it was conducting market studies on the online travel booking sector in Singapore.

(Background: Competition watchdog to study online travel booking sector, data portability issues)

Flagging Out Deceptive Practices

True to its word, the CCCS released the findings of its market study on 30 September 2019 in which it flagged four common practices adopted by online travel booking operators which gave rise to consumer protection concerns:

- **Drip Pricing**: This involves the non-disclosure of both mandatory and optional charges upfront which then lures consumers into making a purchase based on incomplete price information. Examples include published prices that are initially stripped of taxes and fees to lure consumers before such charges are added to the final prices at the point of payment.

- **Pre-Ticked Boxes**: This happens when options for add-ons are pre-ticked for the consumer which can result in consumers buying unwanted add-on products (if they fail to opt-out by unchecking the pre-ticked boxes).

- **Strikethrough Pricing**: This involves the striking through of a previous higher price alongside the new and purported lower price offered. This can mislead consumers into making a purchase (or even paying a higher price) should the comparison between a current and a crossed-out price be false or misleading.

- **Pressure Selling**: Using false or misleading claims which can create a false sense of urgency for consumers to make a purchase based on inaccurate or misleading information. This may include assertions that the price is for a limited time only, that there are limited stocks remaining (when this is not true) or there being high demand or interest in the product or services that the consumer is seeking (thereby inducing immediate purchase on false information).

The CCCS signalled that it is concerned with these practices which are common in the Singapore context. Indeed, many of us would have had first-hand experience of such practices.

Online Travel Sector Not Alone

The online travel sector is not alone in being singled out for consumer protection issues. Since April 2019, the CCCS had commenced two separate investigations against food restaurant, *Charcoal Thai 1* and automotive retailer, *SG Vehicles* for unfair trading practices.

Not So Thai-rrific

In the former investigation, CCCS had found that *Charcoal Thai 1* had advertised discounts for meals which are either available for a “limited period only” or “Ending Soon! 50% Discount” when the discounts actually continued for a period of two years since February 2016. The CCCS found that such claims not only misled consumers into believing that there is a price benefit and scarcity in the availability of the promotional prices but also gave *Charcoal Thai 1* an unfair advantage over other businesses that complies with the CPFTA. The CCCS investigations was subsequently closed when *Charcoal Thai 1* agreed to cease the unfair practice and not to engage in unfair practices under the CPFTA.

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COE No Enough

In the latter investigation, the CCCS commenced investigations into complaints against *SG Vehicles* for unfair trade practices relating to misrepresentations over the terms and conditions of the sale agreement, mainly relating to the delivery dates of motor vehicles and the bidding for certificates of entitlement (COE). While the *SG Vehicles* did not dispute the CCCS's investigations, it declined to enter into a voluntary compliance agreement to stop engaging in unfair trading practices when it was requested to by the CCCS. The CCCS subsequently made an injunction application against *SG Vehicles* and a court order was subsequently issued by the parties' mutual agreement. The court order prohibits *SG Vehicles* from, among others, whether by itself, its directors, servants, agents or otherwise engaging in unfair practices under the CPFTA or doing or saying anything, or omitting to do or say anything, if as a result a consumer might reasonably be deceived or misled into believing that the purchase price and/or COE is/are fixed or guaranteed.

Play Fair or Be Prepared to Pay

Introduced in 2004, the CPFTA was enacted to provide consumers against unfair practices and to give consumers additional rights in respect of goods that do not conform to contract. The CPFTA stipulates the following as instances of unfair practices:

- To do or say anything, or omit to do or say anything, if as a result a consumer might reasonably be deceived or misled;
- To make a false claim; or
- To take advantage of a consumer if the supplier knows or ought to reasonably now that the consumer is not in a position to protect his own interests or is not reasonably able to understand the character, nature, language or effect of the transaction or any matter related to the transaction.

The above instances are not exhaustive and the Second Schedule of the CPFTA provides twenty-four specific instances that would constitute unfair practices. Consequences of breaching the CPFTA includes being subject to a declaration or injunction application taken out by the CCCS against the errant business. If granted, the courts can declare that the practice engaged in by the business (i.e. the supplier) is an unfair practice and an injunction is made to restrain the business from engaging in such unfair practice. Additionally, the courts can, when issuing such declaration or injunction make orders for the business to notify its customers in writing of the declaration or injunction that is in force against it and obtain the customers' written acknowledgment of the written notice. The court can also order that a statement that a court issued declaration or injunction has been issued against the business to be published on every invoice or receipt issued to a consumer. These are, without doubt, very catastrophic consequences for the business' market reputation.

(Background: Pursuant to Section 9 of the CPFTA)

Playing Fair

In its draft *Guidelines on Price Transparency*, the CCCS has outlined several actions that will help improve price transparency. These includes:

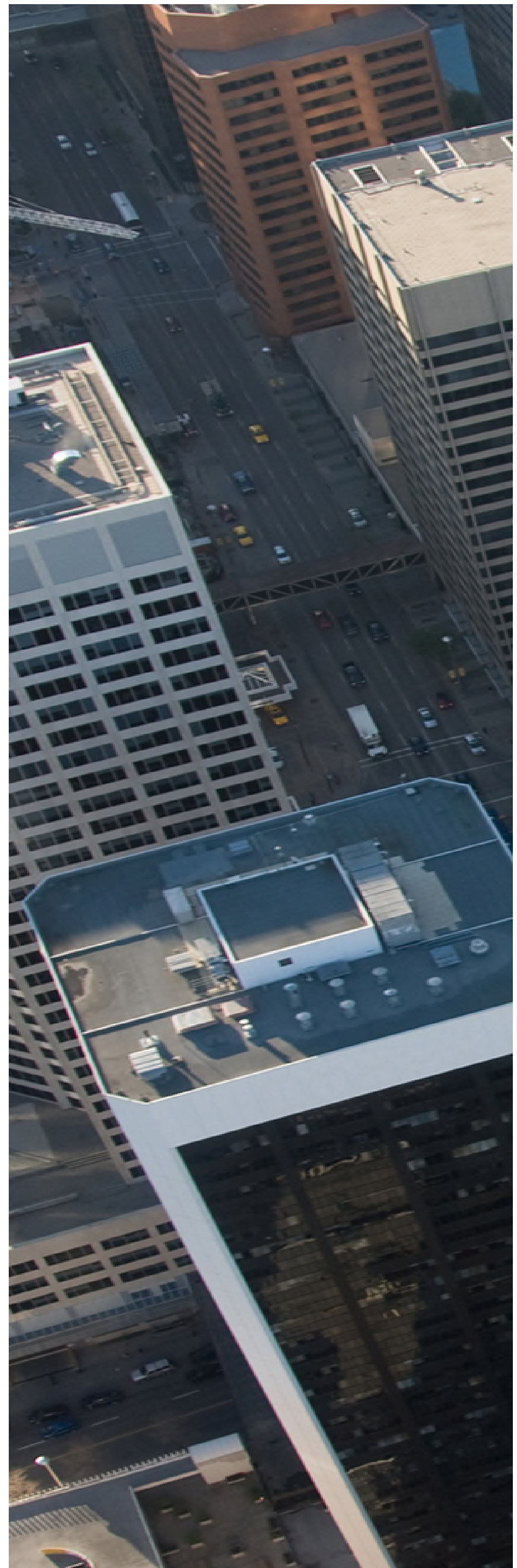
- ***Comprehensive Headline Pricing***: Businesses should ensure that any unavoidable or mandatory fees or charges are included in the total headline price or displayed prominently at the outset so that consumers can make informed decisions and are notified of all such fees and charges upfront.
- ***Adopt Opt-In Approach for Optional Add-ons***: Add-ons should operate on an opt-in basis (i.e. not pre-ticked) and where pre-ticked boxes are used, businesses should disclose their qualifiers, terms and conditions upfront.
- ***Using Genuine Price References***: Businesses should, when making price comparisons, use previous prices that has been offered on a regular basis or for a reasonable period. Here, businesses should also not raise prices before the discount period to create the impression of a greater price benefit when the discounts are eventually offered.
- ***State Terms Clearly***: All terms and conditions including the right of cancellation, the right of refund (including the specified period for refund), trial periods, etc. should be displayed upfront and prominently.

(Background: The Draft CCCS Guidelines on Price Transparency was released on 30 September 2019 and is presently undergoing a public consultation phase.)

It should be noted that the above is not an exhaustive list of action items that can help improve price transparency. Similarly, other types of misleading pricing strategies that are not flagged out by the CCCS are not to be considered legal or permitted. Admittedly, these action items are not unduly onerous or difficult to observe and businesses ought to carefully consider their commercial and pricing strategies and steer clear of conduct that may be ultimately flagged as an unfair or anti-competitive practice. Businesses should seek legal advice when in doubt if a commercial or pricing practice infringes the CPFTA and/or the CA.

Conclusion

All said, declarations and injunctions alone are not the most punitive consequences for being caught out for engaging in unfair or deceptive practices as against consumers. Any reputable business worth its weight would fear the loss of one thing above all else – it's hard earned market reputation. It therefore pays to play fair and all the more imperative for businesses to take heed of the practices that have been flagged out by the CCCS and take a fresh look at their selling and pricing practices. The new sheriff has, after all, only just started its rounds.



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Convertible Notes, SAFE or NOT SAFE?

Convertible Notes Summarily Explained

For any start-up, it is likely that the manner in which seed funding is raised will be every founder's paramount concern. As a matter of course, early stage investors provide an equity investment in return for shares in the capital of a start-up. In recent years, convertible notes are swiftly gaining favour as the preferred fundraising instrument. Convertible notes are popular because early stage investors have the option of being repaid their loans (plus interest) or becoming shareholders by converting the loans into shares. The former is preferred if the start-up is not likely to progress while the latter usually occurs if the start-up is able to secure a further round of fundraising in the near future.

Simply put, a convertible note is an evolutionary loan agreement. Along with the usual right of being repaid the debt owing (principal sum together with interest), there is also the option of issuing/receiving equity instead of repayment. Triggering events resulting in the issuing of equity include a subsequent fundraise, a trade sale, the effluxion of time (i.e. a maturity event) and voluntary conversion.

Cautionary Tale on Convertible Notes

Recent events concerning one Singapore start-up come to mind in a discussion on convertible notes. As recent as four years ago, this start-up burst onto the Singapore scene and swiftly scaled to regional markets, offering food and grocery services. Much of the capital raised was by way of the issue of convertible notes.

In an unfortunate turn of events, this start-up recently submitted an application to the High Court of Singapore to commence a court-supervised restructuring process as it seeks reprieve from creditors to which it owes more than US$180 million. It is understood from news reports that the start-up's major creditors are its convertible noteholders. How did these notes fail them?

As mentioned, the conversion mechanism in a convertible note is typically contingent on a triggering event. If the triggering event does not occur, the convertible note will remain as debt. A creditor may demand redemption, which would result in the start-up having to repay the first convertible note. This may send a signal to other creditors that may cause a "bank run" to commence on the start-up's kitty and usually leads to a state of insolvency. The over-zealous issuing of convertible notes paired with the fragility of a start-up could spell a recipe for disaster, if not, demise in certain circumstances.

Two Sides to a Note

The convertible note’s popularity is not unfounded. One of the biggest reasons a start-up might opt for a convertible note, is that the convertible note does not require the founders to give away command and/or control of their start-up before its first round of equity funding. Through the issue of a convertible note, the start-up delays giving up veto rights, control rights, or board seats. This initial freedom proves attractive to founders who yearn for the freedom to operate and express themselves.

Issuing convertible notes is seen as less costly and involving less complicated paperwork. Complex priced rounds take months to carry out, require issuance of preference shares and usually results in a higher outlay for costs and expenses.

The convertible note is also designed to be beneficial to "lottery" investors, those willing to bet on the start-up before pre-money valuation metrics are developed and financials are available. Young start-ups often find it difficult to determine their value, which in turn affects their ability to determine what shareholding portion of the company is to be offered in an equity fund-raising round. This results in founders turning to the "simpler" convertible notes to obtain funding. Hence, convertible notes are commonly seen as a good investment vehicle to postpone the detailed nature of equity rounds and free the founders to focus and develop the business.

However, it would be advisable for any founder to be warned that the convertible note comprises various clauses, which if partially written in favour of the investor and haphazardly agreed to by the founders without appreciating the implications, might prove both costly and critical for the start-up later on in its fundraising journey.

When issued with a term sheet for a convertible note, founders commonly come across terms such as valuation caps and valuation discounts. In the absence of such terms, the early convertible note investor receives shares upon conversion at the same price as an investor in the next equity round. This does not provide the impetus or incentive for the convertible note investor to invest at such an early stage. Hence, convertible note investors request the above-mentioned terms to create a "bonus" for themselves for the earlier investment.

Other terms which founders should consider the implications of include interest rates, maturity rights, veto rights, board seats, redemption rights, information rights, vesting/reverse vesting of founder equity and the status of loan (whether secured on unsecured) to name a few. There are also outcomes relating to triggering events, be it the start-up's next fundraising, corporate transactions, maturity date conversions, voluntary conversions, and discounts, which founders should also examine. These terms should be analysed and inspected thoroughly before agreeing to an investment. Depending on the drafting, these terms could work in the start-up's favour, or heavily against it.

Daunting as it is, investors and industry organisations in Singapore have come together to put up template agreements known as the Venture Capital Investment Model Agreements (VIMA) to assist start-ups. Other established accelerators such as Y-Combinator grant free access to SAFEs (Simple Agreement for Future Equity) online, an effort by industry players and accelerators to address some of the problems convertible notes bring with them. Yet, no two agreements are the same. Some investors offer these agreements with modifications. Whether the start-up uses a template or an interested investor provides one, it would be advisable for it to seek the advice of good and experienced counsel to understand the implications and impact of the various terms, which may prove difficult to navigate through.

Moving Ahead with Convertible Notes

The route to success is never easy, especially for start-ups. Convertible notes, at the earliest stage of a start-up, are very helpful in relieving some of these growing pains. To benefit from it in the long term, however, the start-up must understand all the implications of the various potential outcomes. It must consider the possible scenarios of its growth, the terms that it will now be subject to, and the suitability of use.

Convertible Notes can be a game changer for start-ups but it depends on how they are used. Proceed with caution, and they may prove to be exponentially beneficial for the start-up's growth. It would be advisable to ascertain all possible avenues of funding before proceeding with an investment (whether by way of a convertible note or an equity round). Start-ups in Singapore should always be reminded that there are many start-up grants and funding available in line with the Smart Nation Singapore initiatives. Startup SG, for one, provides mentorship and start-up capital grants to entrepreneurs, as well as non-financial support. ACE Startups Scheme is another helpful scheme by SPRING Singapore, which provides mentorship support and start-up capital grants. A quick Google search will most likely open doors for a potential or current founder.

It is oft repeated (but with good intentions and to avoid more cautionary tales) that as founders proceed along their start-up journeys, they should always seek advice, whether it be from older brothers and sisters in the ecosystem, mentors, investors or professional advisors. The terms of the convertible note can either protect you from the aforementioned dangers or be a source of danger itself. An advisor would be able to help ensure that it is the former. Every situation is unique, and an experienced advisor that you can trust to be on your side will prove to be very useful.

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MAS Consults on Regulating Payment Token Derivatives offered by Approved Exchanges

Introduction

The Monetary Authority of Singapore (MAS) issued a consultation paper on 20 November 2019 to consult on regulating payment token derivatives offered by Approved Exchanges with the aim of introducing a regulated derivative product referencing payment tokens that would be offered by Approved Exchanges. For the purposes of the consultation paper, a "payment token" refers to tokens intended to be payment instruments, such as Bitcoin or Ether, and does not include tokens which are used to access a good or service offered by the token issuer only.

(Background: In the consultation paper, "payment token" is suggested to refer to any digital representation of value that — (a) is expressed as a unit; (b) is, or is intended to be, a medium of exchange accepted by the public, or a section of the public, as payment for goods or services or for the discharge of a debt; and (c) can be transferred, stored or traded electronically, but does not include any payment token that is a digital representation of value where the value is fixed to any of the following in amounts that are determined at the time of issuance of the payment token and thereafter cannot be changed: (i) a single currency; or (ii) two or more currencies.)

In introducing the consultation paper, the MAS observed that trading of popular digital tokens intended for payment instruments such as Bitcoin and Ether has largely been on unregulated markets with allegations of fictitious trades and market manipulation. It recognised a growing demand from international institutional investors on regulated products that could mitigate such concerns and acknowledged regulated products such as Bitcoin futures that have been listed and traded on in the United States futures markets such as the Chicago Mercantile Exchange and the Intercontinental Exchange Futures US. MAS revealed that it has received queries on whether similar products such as derivatives referencing payment tokens are regulated under the Securities and Futures Act (Cap. 249) of Singapore (SFA), and indications of interest for these to be made available in Singapore. In particular, indications of interest are for payment token derivatives to be listed and traded on Approved Exchanges in Singapore.

Regulated Payment Token Derivatives

Under the SFA, a derivative contract is regulated if its "underlying thing" is either a unit in a collective investment scheme, a commodity, a financial instrument (including a currency, currency index or interest rate), the credit of any person, or an underlying thing prescribed by the MAS. Payment tokens are not included in the category of "underlying things" under the SFA, and accordingly payment token derivatives are currently not regulated unless the payment token is also any of the above-mentioned underlying things.

The proposed approach by the MAS is therefore to amend the SFA to include payment tokens as "underlying things" in respect of futures contracts and derivatives contracts (other than futures contracts) traded on Approved Exchanges.

The MAS took pains to highlight that it does not regard it as necessary or appropriate at this point to include all payment token derivatives within the regulatory scope of the SFA as it does not view them as a general asset class that poses systemic risks to the financial system, unless they are offered by an entity that is systemically important such as an Approved Exchange. It therefore emphasized that payment token derivatives not offered by an Approved Exchange would remain unregulated products.

Additional Measures for Retail Investors

MAS observes that even regulated payment token derivatives would not be without risks to investors as the underlying payment tokens tend to exhibit high volatility and are intrinsically difficult to value. In this regard, MAS indicated its intention to introduce measures for retail investors who trade in payment token derivatives offered or distributed by financial institutions regulated by the MAS, which is anticipated to be in place by 30 June 2020. The measures will be extended to cover products like debentures that are based on payment tokens. Again, these mitigating measures are not expected to apply if they deal with an entity which is not regulated by the MAS. Issuers are strongly encouraged to engage MAS in advance if they intend to offer such products to the public.

Conclusion

With the growing demand for investment products making use of distributed ledger and cryptographic technology, as well as allowing investors to enjoy the protective measures under the SFA, the consultation paper once again reveals MAS's progressive attitude, yet using a balanced and calibrated approach in determining how it intends to adjust its regulatory purview for such developments and products available in the market.

The consultation can be accessed here: The consultation ends on 20 December 2019.

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A timely reminder of the exercise of the Singapore Medical Council's independent prosecutorial discretion

A number of highly contentious Singapore Medical Council disciplinary cases has been reported since the start of this year. Can we learn anything from these cases?

Medical disciplinary proceedings begin life as a complaint lodged with the Singapore Medical Council, which is then inquired into by a Complaints Committee. If after due inquiry, the Complaints Committee determines that a formal inquiry is necessary, it shall order that an inquiry be held by the Disciplinary Tribunal. In some cases, although the Complaints Committee determines otherwise, the Disciplinary Tribunal is nevertheless ordered to be appointed to hear and investigate the complaint. This happens if the Minister for Health allows an appeal by the dissatisfied complainant against the order of the Complaints Committee, and directs that an inquiry be held.

It has long been assumed that once a complaint is referred for an inquiry by the Disciplinary Tribunal, it follows an inexorable trajectory. Charge(s) are preferred against the doctor by the Singapore Medical Council, the doctor either contests the charge(s) before the Disciplinary Tribunal or pleads guilty (sometimes, after entering into a plea bargain). Then, the Disciplinary Tribunal either convicts and sentences the doctor if the charge(s) are proven beyond a reasonable doubt, or acquits the doctor otherwise. This assumption is underpinned by the mandatory requirement that the doctor be sent a notice setting out the charge(s) against the doctor once a Disciplinary Tribunal is appointed.

The Singapore Medical Council is empowered to consider representations from the doctor to amend, withdraw, substitute, amalgamate or take into consideration charge(s) against the doctor. This is the plea bargain process mentioned above, one where the doctor agrees to plead guilty to fewer or less serious charge(s).

The Disciplinary Tribunal itself is empowered to discontinue further proceedings on the charge(s) against the doctor if it determines that the evidence brought forward is insufficient or there is no evidence to substantiate any or all of the charges. To our knowledge, the Disciplinary Tribunal has very rarely of its own volition exercised this power. Instead, the inquiry proceedings tend to run their usual course and the Disciplinary Tribunal acquits if the charge(s) are not proven beyond a reasonable doubt.

The prevalent scenario is that once a complaint is referred to a Disciplinary Tribunal, the proceedings will run its course and eventually end with a conviction or an acquittal, as the case may be.

Is the Singapore Medical Council compelled to prosecute a doctor to the end simply because a Complaints Committee or the Minister for Health (upon an appeal) has determined that a Disciplinary Tribunal inquiry be held? Is the Singapore Medical Council constrained from exercising its independent prosecutorial discretion?

The answer to this should be a "no". It is known that there have been cases where the Singapore Medical Council has withdrawn the charge(s) after representations are made on behalf of the doctor. But what if no representations are made by the doctor? Is the Singapore Medical Council obliged to review its case from time to time and determine whether it should continue with its prosecution of the inquiry case?

The recent Court of Three Judges' decision in ***Singapore Medical Council v BXR*** [2019] SGHC 205 (***SMC v BXR***) issued on 4 September 2019 gives some food for thought.

In an earlier landmark decision of ***Ang Pek San Lawrence v Singapore Medical Council*** [2015] 2 SLR 1179, the Court of Three Judges ordered the Singapore Medical Council to pay costs of the inquiry to a doctor following his acquittal before the Disciplinary Tribunal. In the Court of Three Judges' view, the ultimate objective is to render a cost order that is just and reasonable; while the fact that the Singapore Medical Council was performing a regulatory function was an important and sometimes overriding factor against an award of costs against it, the key question in determining the amount of weight to be placed on this factor was whether the decision to

prosecute was made by the Singapore Medical Council honestly, reasonably and on grounds that reasonably appeared to be sound in the exercise of public duty. If the answer to this is "no", there would be a stronger case for an adverse cost order on the Singapore Medical Council. Implicit in the Court of Three Judges' reasoning is the legal authority of the Singapore Medical Council to decide whether or not to prosecute. If the Singapore Medical Council had no say in the decision to prosecute, it stands to reason that it would be unfair to impose cost consequences against it.

This was made explicit in ***SMC v BXR***. This was an appeal solely on the issue of costs by the Singapore Medical Council against the decision of the Disciplinary Tribunal in ***Singapore Medical Council v Dr R*** [2018] SMCDT 7 (***SMC v Dr R***) issued on 27 August 2018.

In ***SMC v Dr R***, the key complaints against the doctor, a plastic surgeon, were that he had failed to obtain the patient's consent to use her unanonymised photographs, related and unrelated medical information in medical / scientific publications and presentations and that if he did, such consent had not been properly documented. The Singapore Medical Council preferred 4 charges of failure to obtain informed consent and 1 charge of inadequate documentation against the doctor. At the end of the Inquiry, the Disciplinary Tribunal acquitted the doctor of all the 5 charges against him and also awarded costs to be paid by the Singapore Medical Council to the doctor.

The evidence produced by the doctor in his defence included:

a) a blanket written consent signed by the patient stating "*I, [name of patient], hereby allow [name of doctor] to use my photos in medical/scientific publications & to describe my case*"; and

b) 4 e-mails from the doctor to the patient on the same day shortly after the written consent was signed attaching presentation slides containing the patient's unanonymised full face photographs.

The patient attempted to surmount the existence of the written consent by claiming that she and the doctor agreed to a contemporaneous oral "win-win" arrangement where she would receive treatment for her enlarged parotid glands at cost in exchange for the doctor featuring her case in only one medical paper without mention of her past cosmetic procedures with him. She claimed that the doctor also agreed to limit the scope of the consent by not showing her photographs without cropping her face above her eyes. It was on these bases, she claims, that she gave her consent.

However, there was no documentary evidence supporting the existence of such an alleged "win-win" arrangement. The treatment prices as recorded in the contemporaneous medical notes did not support the existence of such an arrangement. Instead, they showed the doctor had offered general discounts to the patient and the patient later asked for even more discounts on two occasions. This supported the doctor's account that he had offered a good rate for the treatment to the patient, but not "at cost". The Disciplinary Tribunal accepted the doctor's explanation that he would not have agreed to administer treatment "at cost" when the treatment had not yet begun and where it was unclear that the result of the treatment would even be sufficiently successful to be published.

The alleged "win-win" arrangement was also inconsistent with the patient and her husband's subsequent conduct. She continued to seek and pay for treatment for a period of over five years. This was inconceivable if the doctor had been overcharging them ever since the first treatment in breach of the alleged "win-win" arrangement.

Yet, in the face of the evidence of the documented consent and also the conduct of the patient, the Singapore Medical Council proceeded to prosecute the inquiry case to its conclusion, no doubt pursuant to the order of the Complaints Committee to hold an inquiry.

At the end of the contested inquiry hearing (lasting 10 days), the Disciplinary Tribunal concluded that the alleged oral "win-win" arrangement and limitation of the scope of the consent was incongruous with the contemporaneous medical notes and with the patient and her husband's subsequent conduct. Their oral testimony alone was not sufficient to prove the existence of the "win-win" arrangement or the limitation of the scope of the consent.

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However, the Disciplinary Tribunal found that the patient and her husband's account of events was utterly devoid of such compelling quality as to be provable beyond a reasonable doubt. Their account was inherently unbelievable. The patient claimed that the doctor voluntarily told her that he had presented her case at a medical conference in breach of the alleged oral assurances, causing her to tear up and he had to placate her. The doctor subsequently told her and showed her the textbook where he failed to anonymise her photographs and described her procedures to her consternation. The doctor even gave her a copy of the textbook chapter featuring the patient. Later, the doctor told her a third time that he had presented her case in another presentation in breach of his oral assurances. The Disciplinary Tribunal found it baffling that the doctor would have acted in such a manner if there was, as the patient had claimed, no consent given.

Further, this account by the patient was in stark contrast with the fact that there was no contemporaneous evidence of the patient's unhappiness with the doctor's alleged repeated breaches and how poorly it made her feel. The Tribunal found that her objective inaction despite the alleged breaches and the fact that she continued to seek treatment from the doctor even though she knew she had the option of ceasing treatment to be inconsistent with her account. The patient's behaviour was not consistent with someone who knew she had been tricked and played out by her doctor. The most plausible explanation is that she had willingly given her consent.

Quite apart from finding that the complaint by the patient had no factual basis, the Disciplinary Tribunal also found that the ethical yardstick used by the Singapore Medical Council for the Inquiry had no basis either. The Singapore Medical Council had relied solely on the opinion of an expert witness (a medical practitioner, with teaching experience in medical ethics). Unfortunately, the Disciplinary Tribunal found that this expert had no tangible basis or support for his opinion – which flew in the face of standard forms and published guidelines – and even questioned whether this "expert" had the relevant professional experience to give an opinion on issues relating to consent for the purposes of presentations or publications!

When completely acquitting the doctor of all the charges against him, the Disciplinary Tribunal ordered the Singapore Medical Council to pay the costs of the Inquiry to the doctor. As mentioned above, this power is exercised when the Disciplinary Tribunal is of the view that it would be just and reasonable to do so. The case of ***SMC v Dr R*** was the first time a Disciplinary Tribunal ordered the Singapore Medical Council to pay costs to a defendant doctor.

The Singapore Medical Council felt that costs ought not to have been ordered against it for the Inquiry. During the appeal in ***SMC v BXR***, the Singapore Medical Council sought to argue that the Disciplinary Tribunal did not take into account that the complaint was referred by the Complaints Committee.

The Court of Three Judges held that the mere fact that the proceedings were referred by the Complaints Committee did not necessarily lead to the conclusion that costs ought not to be awarded against the Singapore Medical Council. This was because the Singapore Medical Council still had an obligation to independently verify a complaint even if the matter is referred to it by the Complaints Committee. The Court of Three Judges did not think that the Singapore Medical Council had discharged this obligation in this case.

As the Court of Three Judges held that the decision by the Singapore Medical Council to prosecute the doctor was not made on grounds that reasonably appeared to be sound in the exercise of public duty, it dismissed the appeal against the costs order.

Therefore, the authors take the view that the Singapore Medical Council is not necessarily compelled to prosecute a doctor to the end and instead ought to exercise its independent prosecutorial discretion. If the Singapore Medical Council has a continuing obligation to ascertain whether a complaint has a proper factual basis with reference to objective contemporaneous evidence and whether the ethical yardstick has a proper basis and is supported by an expert with relevant expertise and proper qualification, it follows that the Singapore Medical Council must have the discretion to cease a prosecution and discontinue further proceedings. This, the Singapore Medical Council ought to do so whether or not the doctor makes representations or not. Both the recent widely reported case involving an orthopaedic surgeon (***Singapore Medical Council v Lim Lian Arn*** [2019] SGHC 172) and the current case of ***SMC v BXR*** serve as a timely reminder of this obligation.

The authors thank and acknowledge our senior associate Toh Cher Han for his contribution to this article. The authors and Cher Han represented the doctor in ***SMC v Dr R*** and ***SMC v BXR***. (It is the same doctor despite the different acronyms used in the title of the case.)

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Regional Reports

“Soft Opening” of Myanmar’s New Trade Mark Register

Myanmar’s Trade Mark Act will be the first of the 4 new intellectual property legislation to be implemented and is expected to come into force in the middle of next year.

Further details of the “soft opening” are expected to be released within the year, but trade mark proprietors should in the meantime get the following documents and information ready:

1. Declaration of Ownership registered with the Office of Registration of Deeds;
2. Date of first use and evidence of use of your mark in Myanmar;
3. Details of Proprietor (name, address, country / state of incorporation);
4. Specimen of the mark to be filed in soft copy;
5. Specification of Goods and Services

Details of the marks filed during the “soft opening” should be exactly the same as that previously registered with the Office of Registration of Deeds. No official fees will be collected during the “soft opening” period. All applications submitted during the “soft opening” period will be treated as submitted on the first day that Myanmar’s Trade Mark Register is established.

Trade mark proprietors who have prior registrations with the Office of the Registration of Deeds are strongly advised to utilize the “soft opening” to secure the earliest filing date. For those who have yet to register a Declaration of Ownership, you may wish to consider doing so as soon as possible to try to avail yourself of the early filing option during the “soft opening”.

Dentons Rodyk has an established presence in Myanmar and would be happy to assist you with the registration of your trade marks in Myanmar. Given the impending ‘soft opening” of the Myanmar Trade Mark Register, please contact us as soon as possible.

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“Soft Opening” of Myanmar’s New Trade Mark Register (Japanese)

ミャンマー新商標登録制度におけるソフト・オープニングについて

この度、今後施行予定の 4 つの知的財産法令のうち、初めてミャンマー新商標法が来年中頃に施行されるとの発表がなされました。

「ソフト・オープニング」に関するより詳しい情報は本年度中に公開される予定ですが、当面のところ既存の商標権者は以下のドキュメント及び情報につき準備をしておく必要があります。

1. Office of the Registration Deeds（以下、「証書登記事務所」）に登記された Declaration of Ownership（以下、「商標所有宣誓書」）。
2. ミャンマーにおいて商標が利用された最初の日付及び証拠。
3. 商標権者の詳細（名前、住所、及び設立国/州）。
4. ソフトコピーとして提出される標章の見本。
5. 商品及びサービスに関する明細書。

「ソフト・オープニング」期間に登記する標章の情報は以前に証書登記事務所に登記されたものと正確に一致していなければなりません。この「ソフト・オープニング」期間には所定の登録料は課されません。また、「ソフト・オープニング」期間に提出された全ての申請はミャンマー新商標登録制度の正式な施行日初日に提出されたものとみなされます。

証書登記事務所に過去登記をされた商標権者はこの「ソフト・オープニング」期間を利用し、最初の登記日を獲得されることを強く推奨いたします。また、商標所有宣誓書をいまだ提出されていない方につきましては、できる限り早い段階での登記を検討され、予定される「ソフト・オープニング」期間に早期提出ができるオプションの機会を逃さないようにすることをおすすめいたします。

デントンズ・ロダイク法律事務所はミャンマーにおいて確立したプレゼンスを誇っております。クライアント様のミャンマーにおける商標登録につき、喜んでサポートさせて頂きます。「ソフト・オープニング」が差し迫っていることから、商標権登記をご検討中の方につきましては、できる限り早く弊所にご相談ください。

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Ensuring your contracts are enforceable in Myanmar (Japanese)

ミャンマーにおいて契約書に法的拘束力を確実に持たせるということ

契約書とはあらゆる商業取引の要となるバックボーンを構成し、商業的かつ法律上の利益を確保するために有益な文書といえます。

ミャンマー法を準拠法として締結された契約書は、状況にも寄りますが、有効かつ法的拘束力を持った文書とするために、関連当局に登記され、公証を受けるか、又はビルマ語に翻訳される必要があります。

また、印紙税に関しては特定の取引文書に支払われる必要があります。それは、例えば不動産に関する売買契約書、土地のリース契約書等です。これを怠った場合、契約書が法的拘束力を持たなくなる可能性があります。

登記

ミャンマー法下では、契約書を有効かつ法的拘束力のあるものとするために関係当局に登記義務のある契約書の種類がいくつかあります。

Deed Registration Law において、以下の契約書、法律文書及び/又は証書に関して登記が義務付けられています。

a) 不動産贈与文書。

b) 1ラックミャンマーチャット以上の評価額の不動産のタイトル及び権益の申告、譲渡、制限、及び消滅を約因とした、1ラックミャンマーチャット以上の評価額の不動産の処分に関する非遺言文書。

c) 譲渡抵当権設定者（mortgagor）に加え最低2名の立会人（witness）によって真正に証明を受けた、モーゲージ捺印証書（mortgage deed）及びモーゲージ取消の捺印証書。ただし、モーゲージの価額は1ラックミャンマーチャット以上とし、タイトル証書の寄託を付したもの以外。

d) 累年又は1年以上の不動産リース契約、又は年間賃貸を保留するための契約。

e) 見返り担保（collateral security）を規定する法律文書で、不動産やその利益に関する一切の権利を、企業や組織等から受託者に提供する又は譲渡するもの。

f) 養子証明書（certificates of adoption）。

g) 政府 （Union Government）によって適宜規定される法律文書。

その他、雇用契約書に関しては関連する郡区の労働局に提出する必要があります。これを怠った場合、当該契約書は無効となる可能性があります。

公証

Deed Registration Law 第18条(a)及び(b)によると、Deed Registration Law に従って契約書を政府当局に登記する場合には、その契約書は公証を受けるべきとされています。

契約書当事者らがミャンマー裁判所に訴えを提起することを選択した場合、契約書はビルマ語に翻訳され、2008年制定のミャンマー連邦共和国憲法（the Constitution of the Republic of Myanmar 2008）第450条に従い、公証されなければなりません。これを怠った場合、当該契約書はミャンマー裁判所にて無効と判断される可能性があります。雇用契約書については公証の必要はありませんが、ビルマ語に翻訳され、関連する郡区の労働局に登記する必要があります。

言語

上記を除いては、当事者間で法的拘束力のある文書とするために契約書をビルマ語で表記する、又は翻訳しなければならないといった特定の要件は特段定められていません。契約書のビルマ語版が容易に準備できない場合、万一訴訟がミャンマー裁判所に提起された際に裁判所が翻訳を提出するように要求する場合もあります。

当事者一方がミャンマー法人又はミャンマー人である場合、当事者双方が同意内容をきちんと理解するために二か国語で契約書を締結することは一般的であるといえます。経験則から言うと、契約書は契約当事者によって理解される言語で結ばれるべきです。

立会人（Witness）による証明

全ての契約書に立会人証明（Witness）が必要であるといった一般規則はありませんが、万一の備えとして、これは最良慣行といえるでしょう。ただし、特定の規制はいくつかの契約書に立会証明を義務付けており、Deed Registration Law 第 16 条では全てのモーゲージ証書に 2 名の立会人を要件としています。

ご自身の利益保護のため、契約書を確実に有効かつ法的拘束力のある文書にしておく必要があります。

弊所ミャンマーチームは、作成された契約書をどのように有効かつ法的拘束力のある文書にするか等を含み、あらゆる契約上の問題に関しアドバイスをご提供させて頂きます。

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Accolades

asialaw Leading Lawyers 2020 edition

Eleven Dentons Rodyk lawyers have been recognized in the 2020 edition of asialaw Leading Lawyers (Singapore). asialaw Leading Lawyers features the most prominent lawyers in 14 practice areas and 14 industries, in 25 jurisdictions in the Asia-Pacific region. Read more here.

IAM Patent 1000 2019 edition

Dentons Rodyk has been ranked in the Gold Band under the Litigation category, in the IAM Patent 1000 2019 Edition. The firm is also listed as "Recommended" under the Prosecution and Transaction categories. Senior consultant Ai Ming Lee was the only lawyer to be ranked as a "Luminaries," and senior partner Chai Chong Low was ranked in the Silver Band in Litigation.

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Partner Kunal Kapoor has been recognized in Asia Legal Business (ALB)'s 2019 40 under 40 list of outstanding legal professionals in the region. Kunal "can be relied on blindly, because he works in-depth on the project and rarely misses a point, which is helpful in critical business deals like the ones we worked on together," said a client.

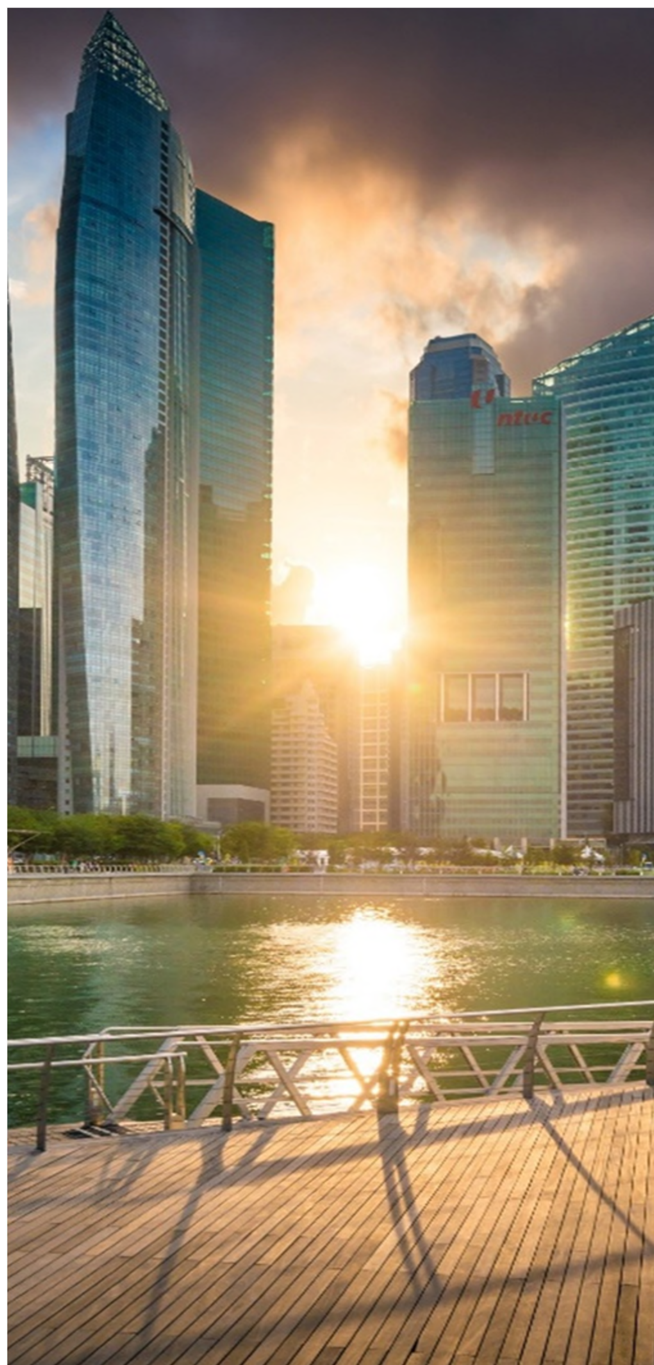
Who's Who Legal 2020

Five lawyers from Dentons Rodyk have been recognized by Who's Who Legal, in their respective practice areas – Philip Jeyaretnam SC (Arbitration), Lawrence Teh (Arbitration, Transport: Aviation - Contentious, Transport: Shipping), Christopher Chong (Healthcare), Gilbert Leong (Data) and John Dick (Mining).

Global Vice Chair & ASEAN CEO Philip Jeyaretnam SC was also recognized in Who's Who Legal's Thought Leaders: Global Elite 2020 guide, for Litigation. Lawyers identified in the guide are at the peak of their profession, who are worthy of special mention owing not only to their vast expertise and experience, but also their ability to innovate, inspire and go above and beyond to deliver for their clients.

IFLR1000 2020 edition

Twenty lawyers from Dentons Rodyk have been recognized in the IFLR1000 rankings. The firm is also ranked in several practice areas, including Banking and Finance, Capital Markets, Project Development, M&A, Project Finance and Restructuring and Development. Read more here.



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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.

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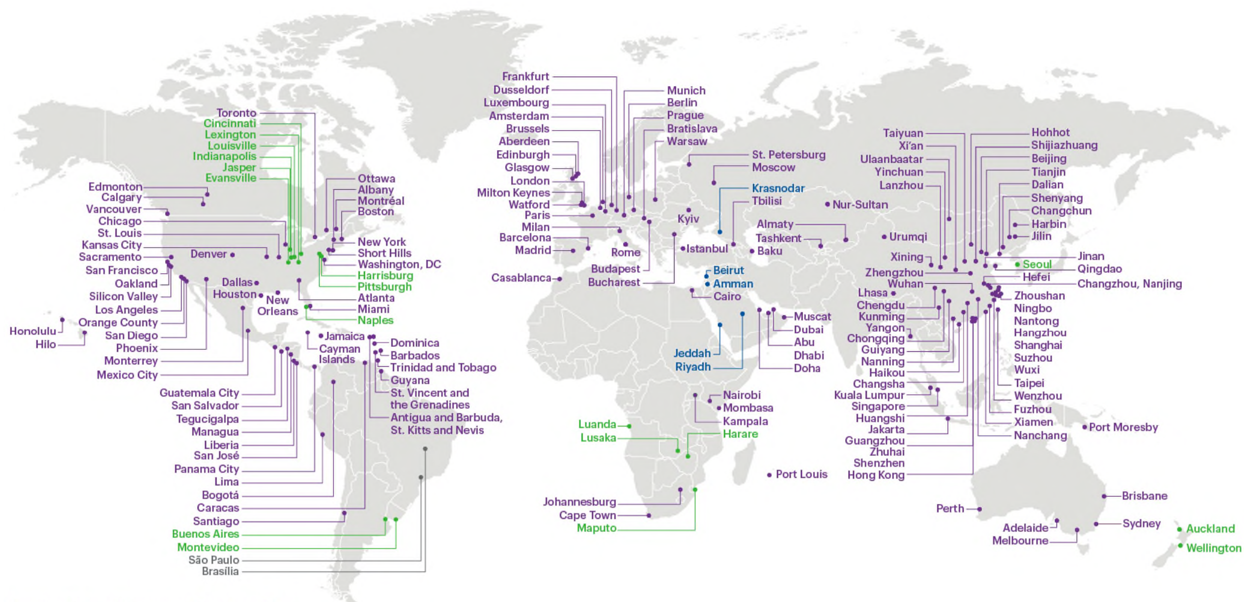
Our locations



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