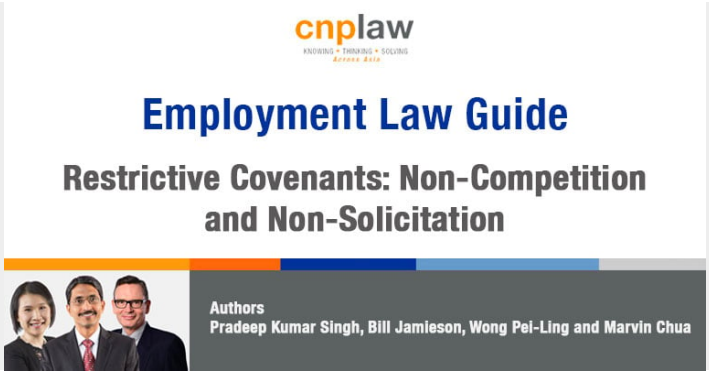
RESTRICTIVE COVENANTS: NON-COMPETITION AND NON-SOLICITATION

Posted on March 23, 2020



Category: Employment Law Guide

Date Published: 23 March 2020
Authors: Pradeep Kumar Singh, Bill Jamieson, Wong Pei-Ling and Marvin Chua.

Employers are increasingly inserting non-competition and non-solicitation (referred to broadly as "restrictive covenants" or "restraint of trade clauses") into employment contracts and/or termination agreements in an attempt to further exercise control over an employee's actions or obligations following the termination of his employment, to protect itself from unfair competition and to maintain a stable workforce. Where such restrictive covenants are sought to be introduced only upon or after the termination of an employee's employment, it should be noted that the employee is not obliged to agree to such non-compete, non-solicitation covenants and/or a confidentiality undertaking. If he does so, it is likely to be after negotiation on the basis that a payment amount, over and above what he is otherwise contractually entitled to, will be paid at a level compensating him for detriment he incurs in doing so.

(a) Validity of a restrictive covenant

In Singapore, restrictive covenants are generally prima facie unenforceable unless the employer is able to show: (1) that it has a legitimate proprietary interest to be protected by the restricted covenant and (2) such covenants are reasonable and not wider than is reasonably necessary to protect the interest.
First, the Court will determine/identify what the employer's legitimate interests are (if any). In this regard, Singapore courts have accepted the following as 'protectable legitimate interests' that merit protection in appropriate circumstances:

- trade secrets;
- trade connections; and/or
- workforce stability.

Usually, these legitimate interests are either expressly provided for in the employment agreement or inferred by the Court based on the surrounding circumstances (if unstated). The Court will also consider the position and seniority of the particular employee in question which will affect the weight given to the employer's interests to be protected.
Second, the Court will then determine whether the covenant does not go further than is necessary to protect such interests. In this regard, the scope, area and duration of restraint should be co-extensive with the protection of the legitimate interests of the employer, and the clause must be "reasonable".
Reasonableness of a restrictive covenant is assessed on 2 grounds:

- its reasonableness between the contracting parties (private interests); and
- its reasonableness in so far as the public interest is concerned (public interests).

The Court places the burden of proof on the employer to show that the covenant is reasonable between the parties, whereas the burden lies on the employee to show that the covenant is against the interests of the

public. Specifically, when considering the above test, the Court looks to reconcile the following core interests:

- the expectation of the employer that the knowledge and skills which have been imparted to or acquired by its employee during the course of its employment are not subsequently used by that employee to the employer's detriment following termination;
- the right of a former employee to use and exploit the skill, experience and knowledge acquired by him during the term of employment to make a living and to advance his chosen trade or profession; and
- the public interest in securing an environment in which freedom of trade and competition can flourish.

A specific and contested clause must pass both hurdles. Thus, while the Court may find that a given restraint of trade provision is reasonable as between the parties, they may nevertheless invalidate it on the ground that it is against public policy and hold the clause in question to be unenforceable.

Between the parties

There are two main points that the employers must keep in mind in determining whether the agreement is reasonable vis-à-vis the contracting parties.
First, there must always be a legitimate proprietary interest to protect that would warrant the court's protection. One of the more important interests in the court’s eyes is the need for employers to maintain a stable workforce. Another interest relates to the confidential information and trade secrets of the employer.
Second, the agreement must not be wider than is necessary to protect the interest concerned. To ascertain whether the clause as drafted is no wider that is reasonably necessary to protect the legitimate interest of the employer, following factors are important:
(a) Period of restraint:

- To be reasonable, the period of the restraint should not exceed the period that is necessary for the protection of the legitimate interests of the employer. For instance, the duration must not be longer than necessary for the employer to start a new employee at the task and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to customers.
- The employee’s seniority, degree of influence on the clients and access to confidential information are relevant considerations in judging whether the period of restraint is reasonable.

(b) Geographical area:

- The rule with regard to the geographical area / territory of a restrictive clause is that the area should be co-extensive with the protection of the legitimate interests of the employer.
- Thus, a restriction without geographical limit is generally not valid; an area must be clearly defined, although this may not be relevant in a situation where the employee operates in a global market.

- There must also be a connection between customers and the defined area.
- The restrictions must be to countries or areas in which the employee had actual significant customer contact.

(c) Scope of activities prohibited:

- A restraint in trade clause is not considered reasonable unless it is confined to protecting the legitimate interest of the employer.

It is worth noting that express acceptance by the employee that the clause is reasonable does not prevent the court from holding that the clause is unreasonable and thus unenforceable. Moreover, restrictive covenants will not be upheld in the event of a repudiation of the contract by the employer. For example, where an employee is wrongfully dismissed, the employee may treat the contract at an end and not be bound by the obligations in the restrictive covenants. Thus, a term in the contract of employment stating that the restrictive covenant will be enforceable even if the employee is wrongfully dismissed will be invalid.

Public policy

There is one broad question: is it in the interests of the community that this restraint should, as between the parties, be held reasonable and enforceable? This standard has hitherto primarily referred to anti-competitiveness. In one seminal case, for instance, the court held that a given clause would be detrimental to the community at large since it created a virtual monopoly of a certain type of work in Singapore on the part of the employer.
It should be noted that while the courts have increasingly upheld restrictive covenants in various commercial contexts, the same trend does not extend to restrictive covenants in employee contracts. In CLAAS Medical Centre Pte. Ltd. v. Ng Boon Ching, the court contrasted the liberal approach adopted in respect of restrictive covenants in the context of a sale of business with that adopted in the context of an employee contract, and asserted that the disparity in bargaining power demands a stricter approach in the context of restrictive covenants in contracts of employment.

(b) Severance

Where the clause is considered too wide to be enforceable, it may be possible to sever the clause if the part so enforceable is clearly severable, and even so, only in cases where the excess is of trivial importance or merely technical and not part of the main substance of the clause. Furthermore, in such a case, the two clauses must be intended to be two separate and independent obligations so that the part severed does not change the meaning of the part remaining.

(c) Remedies for breach

The two primary remedies available to an employer who has suffered loss by reason of a former employee's breach are:

- injunction against said employee; and/or
- damages to compensate for the injury or loss suffered. Note that as an alternative to damages, the remedy of an account of profits may in some instance be available.

Please note that this section of the Employment Law Guide is a summary provided for general information purposes, aimed at aiding understanding of Singapore's employment law as at the date of writing. It is not exhaustive or comprehensive and reading this memorandum is not a substitute for reading the text of the various statutes to fully understand the extent of the obligations owed. This guide should also not be relied upon as legal advice.