

# NON-COMPETE CLAUSES? – HOW ENFORCEABLE ARE THEY?

*Employment contracts are part and parcel of all employer-employee relationships. This article considers the enforceability of one specific aspect of employment contracts: non-compete clauses.*



## Introduction

Many employers include non-compete, also known as restraint of trade clauses in their employment contracts, especially with key employees. In the following article, we will discuss the recent case of *Shopee Singapore v Lim Teck Yong*,<sup>1</sup> *MoneySmart Singapore Pte Ltd v Artem Musienko*,<sup>2</sup> and the legal developments in this area of law.

## Previous Case Law

The Court of Appeal in *Man Financial (S) Pte Ltd v Wong Bark Chuan David*,<sup>3</sup> held that public policy dictates that restraint of trade clauses, particularly those that are found in employment contracts, are *prima facie* void and unenforceable.<sup>4</sup> It will first consider whether (1) the restrictive covenant protects a legitimate interest of the employer. Next, it will be enforceable if (2) it is (a) reasonable in the interests of the parties; and (b) reasonable in the public interest to do so.<sup>5</sup> There will be several factors

to determine whether such a restraint is reasonable or not. In doing so, the Court will consider several aspects such as trade secrets, non-solicitation and the area and duration of the clause

"The application of these principles by the Courts thus already ensures that restraint of trade clauses do not adversely impact Singapore's labour market flexibility and mobility, and that smaller firms such as startups are not unfairly disadvantaged by their competitor's use of restraint of trade clauses."

-MP Mr Yip Hon Weng, Non-Competition Clauses in Employment Contracts

For trade secrets, the Court will determine if the employee knows that the information he is dealing with are trade secrets that are protected. The court will distinguish between advantages obtained using such trade secrets, as opposed to those obtained through natural skill. The latter cannot be restrained. Next, the Singapore position for non-solicitation clauses requires the claimant to establish legitimate interest that merits protection such that the clause's enforceability can be justified. Regarding the geographical location and time period of restraint of trade clauses, it was held that it cannot be too wide in the cases of *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong*,<sup>6</sup> and *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart*,<sup>7</sup> respectively.

### ***Shopee Singapore v Lim Teck Yong ("Shopee")***

The case of *Shopee* was one that caused ripples regarding issues related to the enforceability of non-compete clauses. Lim was the Head of Operations for Shopee Brazil when he terminated his employment. Thereafter, he joined ByteDance, where he was the Leader for TikTok Shop Governance and Experience, Middle Platform.

Shopee relied on several contractual clauses that Lim signed over the course of his employment to build their case that the positions that Lim held and is now holding are "substantially similar". However, Lim argued that his managerial role in Shopee was geographically confined to Brazil, where the TikTok Shop does not currently operate.

The Court referred to the Restrictive Covenants and the Employee Confidentiality Agreement. It reaffirmed the position that restrictive covenants would be upheld only if it goes no further than necessary to protect the legitimate proprietary interest of the company. The Court held that Shopee did not show sufficient evidence to support whether there were legitimate proprietary interests, as well as, whether it was reasonable to have such an extensive geographical restraint.<sup>8</sup> Therefore, it would have been unreasonable to exclude Lim from being employed in all the markets where Shopee was operating even though he was not working in, had no responsibilities for, and had no specific information about these markets.<sup>9</sup> It was neither reasonable in the interests between parties or reasonable in the interest of public to do so.<sup>10</sup>

### ***MoneySmart Singapore Pte Ltd v Artem Musienko ("MoneySmart")***

This case involved MoneySmart seeking to enforce the Non-Compete Clause found in Mr Musienko's Employment Agreement. Mr Musienko was employed by MoneySmart and was responsible for creation and platform and mobile application for Bubblegum, an in-house insurance brand. He subsequently joined CAG Regional Singapore Pte Ltd, a subsidiary of MoneyHero, that also has an in-house insurance brand. MoneySmart sought to restrain Mr Musienko for breaching his Employment Contract and claim damages for the loss as a result of his alleged breach.

The High Court used the test laid in *Man Financial* to determine the enforceability of the clause. Notably, the Employment Agreement also contained a Confidentiality Clause. Since the confidential information or trade secrets that MoneySmart sought to protect was already covered by the Confidentiality Clause, there was no other legitimate proprietary interest that could be found. Therefore, MoneySmart did not satisfy the first limb of the test since they are not able to demonstrate that the Non-Compete Clause covers a legitimate proprietary interest.<sup>11</sup>

For the sake of completeness, the Court went on to consider the second limb of the test, the issue of reasonableness.<sup>12</sup> They arrived at similar conclusion, that the Clause was not enforceable nonetheless as it was not reasonable in its scope of activity, geographical and temporal scope. Regarding the scope of prohibited activity, the Court found that there was only at best, a very tenuous connection between the restriction against engaging with any business that happens to provide online financial products and the work done by Mr Musienko.<sup>13</sup> Next, it was held that there needs to be a close connection between the geographical scope of the restriction and the work done prior to leaving the company. In *MoneySmart*, the Clause was too wide since it covered Southeast Asia, when Bubblegum was only based in Singapore.<sup>14</sup> The temporal scope of 12 months and the cascading duration, that provided for shorter durations in the event the Court finds the duration unenforceable, was unfair and thus unenforceable.<sup>15</sup>

"The tripartite partners are committed to making sure that unreasonable employment contract clauses do not become a norm in our workplaces. We are working together to develop a set of tripartite guidelines to shape norms and provide employers with further guidance on the inclusion on restrictive clauses in employment contracts."

-MP Mr Desmond Choo, Written Answer to PQ on Regulating Non-Compete Clauses in Employment Contracts

### **Guidelines on Non-Compete Clauses**

From the above cases, we can see the generally adverse attitude towards restraint of trade clauses, them being viewed as unreasonably hindering freedom of trade. Additionally, the change in the UK legal regime propelled Singapore to make similar changes.

The UK government proposed a three-month statutory limit on non-compete clauses. This change was brought about by the research findings from the Competition and Markets Authority in the UK. The report stated that over 26% of workers are subject to non-compete clauses and that in certain sectors the number can be up to 40%.<sup>16</sup> Additionally, with the advent of the 'gig economy', gig platforms often hold a much larger, or even disproportionate power, compared to their workers. Therefore, when the changes are introduced, more freedom to these individuals will be given. However, it appears that there has not been much progress since the announcement in May 2023.

On the other hand, in Singapore, it is well established that the courts will strike a balance between the employers' need to safeguard their businesses and employee's freedom to earn a living, and that the clause should not be used to help businesses gain unfair advantages.<sup>17</sup> Similarly to the UK, it was announced by the Ministry of Manpower in February this year, that tripartite guidelines will be developed to shape non-compete clauses.<sup>18</sup> This will ensure that instances where there are unreasonable employment contract clauses are kept to the minimum, and employees are accorded sufficient freedom to seek employment elsewhere. It remains to be seen how these guidelines will impact the landscape of non-compete issues in Singapore, as they are being finalised in the midst, and released in the second half of 2024.<sup>19</sup>

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[1] *Shopee Singapore Private Limited v Lim Teck Yong* [2024] SGHC 29.

[2] *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94.

[3] *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2007] SGCA 53.

[4] *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2007] SGCA 53 at [45].

[5] *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2007] SGCA 53 at [70] and [79].

[6] *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR(R) 205 at [21].

[7] *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] SGCA 39 at [56].

[8] *Shopee Singapore Private Limited v Lim Teck Yong* [2024] SGHC 29 at [82].

[9] *Shopee Singapore Private Limited v Lim Teck Yong* [2024] SGHC 29 at [71].

[10] *Shopee Singapore Private Limited v Lim Teck Yong* [2024] SGHC 29 at [71].

[11] *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [28]-[41].

[12] *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [42].

[13] *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [45].

[14] *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [47]-[52].

[15] *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [53]-[57].

[16] Competition and Markets Authority, 'CMA research report on competition and market power in UK labour market', Press Release (25 January 2024), <https://www.gov.uk/government/news/cma-research-report-on-competition-and-market-power-in-uk-labour-market> <accessed on 13 June 2024>.

[17] Ministry of Manpower, 'Oral Answer to PQ on Responsible Retrenchment and Contractual Clauses', Notice Paper No. 2499 of 2024 for Sitting on or after 6 February 2024 Question No. 5591 for Oral Answer at [6].

[18] Ministry of Manpower, 'Non-Competition Clauses in Employment Contracts', Notice Paper No. 2617 of 2024 for the Sitting on 29 February 2024 Question No. 5585 for Written Answer.

[19] Ministry of Manpower, 'Oral Answer to PQ on Responsible Retrenchment and Contractual Clauses', Notice Paper No. 2499 of 2024 for Sitting on or after 6 February 2024 Question No. 5591 for Oral Answer at [7].