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CONTOURING REASONABLENESS AMIDST UNCERTAINTY: NON-COMPETITION CLAUSES IN THE SINGAPORE EMPLOYMENT CONTRACT

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In *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 and *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94, the Singapore High Court struck down two non-competition clauses for being unreasonably wide, once again casting the enforceability of non-competition clauses into the legal limelight. This paper reviews the relevant case law since the seminal case of *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 to clarify the ambit of an enforceable non-competition clause, as well as highlight several uncertainties regarding the restraint of trade doctrine in the employment context. In particular, this paper points out that: (a) it is unclear whether an employer is required to protect its interest in maintaining a stable and trained workforce exclusively via a non-solicitation clause; and (b) it is unclear whether the narrower scope of a broader clause may be pleaded and enforced.

I. Introduction

The non-competition clause has become a fairly standard term in the employment contract. Unlike other terms, however, non-competition clauses are *prima facie* void for being covenants in restraint of trade.[1] In order to enforce a non-competition clause, therefore, employers must prove that the clause is reasonable. When evaluating the reasonableness of a non-competition clause, courts seek to balance two competing ideals – the sanctity of contract and the freedom to work.[2] Leaning too far in either direction may have dire socio-economic consequences. For example, an overly permissive approach towards non-competition clauses may suppress labour mobility, worker's earnings, reduce job quality, inhibit new business formation and inhibit innovation.[3] Conversely, a stricter approach may create an investment hold-up problem, whereby employers are deterred from making productive

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1 *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 (CA) at [71] [*Man Financial*].

2 *World Fuel Services (Singapore) Pte Ltd v Xie Sheng Guo* [2019] SGHC 54 at [8].

3 Federal Trade Commission, *Non-Compete Clause Rule (Final Rule)* 16 CFR Part 910 at 135–195 [FTC, *Non-Compete Clause Rule*].

investments in training, client and customer attraction and retention, or in creating or sharing trade secrets and confidential information with employees.[4]

This tension was recently foregrounded in two decisions by the Singapore High Court. In *Shopee Singapore Pte Ltd v Lim Teck Yong*,[5] the SGHC held that a non-competition clause was unenforceable because it did not protect a legitimate proprietary interest and was unreasonable in its geographical scope.[6] Several months later, in *MoneySmart Singapore Pte Ltd v Artem Musienko*,[7] the SGHC applied similar reasoning when striking down another non-competition clause.[8] These decisions have been issued in the context of significant change in other jurisdictions. In the United States, for example, the Federal Trade Commission ("FTC") issued its Final Non-Compete Clause Rule to promote competition by banning non-competition clauses nationwide.[9] Under this rule, employers in the United States would be prohibited from entering, or attempting to enter, a non-compete clause with an employee.[10] Prior to the rule taking effect, however, the United States District Court for the Northern District of Texas granted summary judgment to the plaintiff in *Ryan LLC v FTC*,[11] finding that the FTC lacked statutory authority to create the rule. Until the Supreme Court of the United States renders a final, non-appealable judgment on the FTC's authority to issue such a rule, however, the state of law there remains uncertain. Change may also be on the horizon in the United Kingdom, where the Government has announced its plan to introduce a three-month statutory limit on the length of non-competition clauses.[12]

Set against this backdrop, this paper has two objectives. First, by examining the case law since the seminal case of *Man Financial*,[13] this paper aims to clarify the ambit of a reasonable non-competition clause in Singapore, identifying a set of guidelines for employers and employees alike. Second, this paper highlights two uncertainties regarding the restraint of trade doctrine in the employment context: (a) it is unclear whether an employer is required to protect its interest in maintaining a stable and trained workforce exclusively via a non-solicitation clause; and (b) it is unclear whether the narrower scope of a broader clause may be pleaded and enforced. In pursuit of these objectives, this paper will proceed in four parts. Part II will outline the present state of law concerning the restraint of trade doctrine in Singapore, reviewing both the general propositions laid down in *Man Financial*, as well as the application of this framework in subsequent cases since. Having done so, this paper distils the general principles which delineate the ambit of a reasonable

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4 *Ibid* at 282. See also *ibid* at 3505; *US v Addyton Pipe & Steel Co* 175 US 211 at 281 (6th Cir, 1898); *Polk Bros Inc v Forest City Enters* 776 F2d 185 at 189 (7th Cir, 1985).

5 [2024] SGHC 29 [*Shopee v Lim*].

6 *Ibid* at [61], [64], [68] and [71].

7 [2024] SGHC 94 [*MoneySmart v Artem*].

8 *Ibid* at [41] and [46].

9 FTC, *Non-Compete Clause Rule*, *supra* note 3.

10 *Ibid* at 910.2(a)(1)(*i*) and 910.2(a)(2)(*i*).

11 2024 WL 3879954 (ND Tex, 2024).

12 UK Department for Business and Trade, *Non-Compete Clauses: Response to the Government consultation on measures to reform post-termination non-compete clauses in contracts of employment* (Consultation Response, 12 May 2023) <https://assets.publishing.service.gov.uk/media/645e27612c06a30013c05c57/non-compete-government-response.pdf> accessed 28 June 2025.

13 *Man Financial*, *supra* note 1.

non-competition clause. Part III will discuss the aforementioned uncertainties, highlighting the practical consequences of preserving the status quo. Part IV concludes.

II. The Restraint of Trade Doctrine in Singapore

This part begins by outlining the present framework of law laid down in *Man Financial* and affirmed in *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart*.[14] It then proceeds to examine the relevant cases which have applied these principles over the past two decades, before distilling a set of general principles which guide the creation and enforcement of a reasonable non-competition clause.

As a preliminary point, this paper refers extensively to three types of restrictive covenants: non-competition clauses, confidentiality clauses, and non-solicitation clauses. Although all three clauses seek to protect an employer's competitive advantage, and are therefore sometimes collectively referred to as non-competition clauses,[15] maintaining the distinction between each clause is critical to the arguments of this paper. Thus, for the sake of clarity, the following general definitions are adopted: non-competition clauses seek to prevent a former employee from joining a competitor after they leave their employer; confidentiality clauses generally seek to prevent a former employee from divulging confidential information; and non-solicitation clauses seek to prevent a former employee from soliciting existing clients, suppliers and employees of the employer.

A. *The Current Framework of Law*

Originally developed by the Singapore Court of Appeal in *Man Financial*,[16] the present cumulative three-fold test for validating a restraint of trade clause was elucidated by the SGHC in *Smile Inc Dental* as follows:[17] (a) Is there a legitimate proprietary interest to be protected? (b) Is the restrictive covenant reasonable in reference to the interests of the parties? (c) Is the restrictive covenant reasonable in reference to the interests of the public?

When applied in the employment context, the law generally recognises two types of protected legitimate proprietary interests: (i) the employer's interest in protecting trade secrets or confidential information akin to trade secrets; and (ii) the employer's interest in protecting trade connections.[18] While the SGCA noted that *other* legitimate proprietary interests may exist,[19] the courts have yet to consider another legally justified legitimate proprietary interest in the context of a non-competition

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[14] *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 1 SLR 847 (HC) [*Smile Inc Dental* (HC)]; *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 (CA) [*Smile Inc Dental* (CA)].

[15] See, for example, the case of *Hengxin Technology Ltd v Jiang Wei and Another Suit* [2009] SGHC 259 at [113] [*Hengxin Technology*].

[16] *Man Financial*, *supra* note 1.

[17] *Smile Inc Dental* (HC), *supra* note 14 at [67].

[18] *Man Financial*, *supra* note 1 at [81].

[19] *Ibid* at [94].

clause.[20] If the non-competition clause protects a legitimate proprietary interest, the court will then determine whether it is reasonable "in reference to the interests of the parties concerned and reasonable in reference to the interests of the public."[21] Factors which affect reasonableness include the geographical, temporal and activity scope of the clause, although much ultimately depends on the facts and circumstances of each case.[22]

Furthermore, while non-competition clauses also appear in other commercial contracts, such as contracts for the sale of a business, the courts generally adopt a stricter approach towards non-competition clauses in the employment contract for three reasons.[23] First, the purchaser of a business is buying something tangible, the value of which would be necessarily depreciated if no restrictive covenant were permitted. Second, there is, more often than not, a disparity in bargaining power between the employer on the one hand and the employee on the other. Third, non-competition clauses impede the free flow of expertise in the context of the welfare of the country as a whole.[24]

B. *A Review of the Case Law since Man Financial*

Unsurprisingly, the restraint of trade doctrine predates the SGCA's decision in *Man Financial*.[25] Nevertheless, as the reasonableness of a contentious non-competition clause turns at the final stage on an ever-evolving conception of the public interest, this section will focus on published decisions since *Man Financial*. For convenience, this section will first examine decisions wherein the court struck down the non-competition clause as void and unenforceable, before turning to those decisions wherein the clause was upheld. Preliminarily, the Singapore courts strike down non-competition clauses more often than not.[26] Furthermore, there seems to be a shift in judicial attitude towards the enforceability of non-competition clauses over

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[20] With the notable exception of the SGHC in *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd and another* [2012] 4 SLR 36 [*PH Hydraulics*] which found that a non-competition clause could protect the employer's interest in maintaining a stable and trained workforce. This decision is evaluated below.

[21] *Man Financial*, *supra* note 1 at [70], citing *Thorsten Nordenfelt (Pauper) v The Maxim Nordenfelt Guns and Ammunition Company* [1894] AC 535 at 565.

[22] *Ibid* at [72], citing Michael Furmston, *The Law of Contract (Butterworths Common Law Series)*, 2d ed (London: LexisNexis, 2003) at [5.104]–[5.105] [*Butterworths Common Law Series*].

[23] *Man Financial*, *supra* note 1 at [48]; *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 (CA) at [45] [*CLAAS Medical Centre*].

[24] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 701.

[25] See, for *eg*, *Vernon Allen v Meera Pulla* (1877) 1 Ky 394; *John Little & Company Ltd v Wallace* (1902) 7 SSLR 53; *VSL Prestressing (Australia) Pty Ltd v Mulholland* [1971–1973] SLR(R) 159; *Heller Factoring (Singapore) Ltd v Ng Tong Yang* [1993] 1 SLR(R) 495; *Shell Eastern Petroleum (Pte) Ltd v Chuan Hong Auto (Pte) Ltd* [1995] 1 SLR(R) 902; *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR(R) 205 [*Buckman*]; *Stratech Systems Ltd v Nyam Chiu Shin (alias Yan Qiuxin) and others* [2005] 2 SLR(R) 579 [*Stratech Systems*].

[26] Of the relevant decisions, the courts enforced non-competition clauses five times, versus the ten times it opted to strike down the clause.

time, with the courts adopting a stricter approach towards non-competition clauses in more recent history.

1. *Decisions with Unenforceable Non-Competition Clauses*

Beginning with *Man Financial* itself. This case concerned a termination dispute between a brokerage company, the appellant, and its former chief executive officer, the defendant.[27] After many rounds of negotiation, parties agreed to a termination agreement which contained a "Non-Solicitation and Non-Competition" clause.[28] In essence, the clause sought to prevent the defendant from soliciting the employment of certain employees of the appellant and participating in or rendering advice to a competitor for a period of seven months.[29] Sometime prior to paying the defendant compensation as agreed under the termination agreement, the appellant alleged that the defendant had breached his non-solicitation and non-competition obligations, thereby refusing to pay compensation.[30]

The SGCA upheld the trial judge's finding in respect of the non-competition clause,[31] agreeing that the clause was unenforceable because it did not protect a legitimate proprietary interest, and was far too wide in its geographical scope.[32] In addition to finding that the appellant did not adduce sufficient evidence to demonstrate an underlying legitimate proprietary interest the non-competition clause was intended to protect, the SGCA also found that the clause was "simply far too wide, particularly with regard to the area covered"[33] because it sought to restrict the defendant's post-termination activity "anywhere in the world"[34].

Since *Man Financial*, the only other SGCA decision regarding non-competition clauses was issued in *Smile Inc Dental*.[35] In this case, the respondent was an associate dental surgeon employed by the appellant and assigned to work full-time at the appellant's clinic at Forum Shopping Mall.[36] The respondent's employment contract contained several restrictive covenants which sought to prevent him from soliciting the appellant's patients and competing with the appellant within a three kilometre radius.[37] This time, the SGCA upheld the trial judge's decision that the non-competition clause was unreasonable because it was unlimited in duration. While the SGCA recognised that a doctor's "special and intimate knowledge of the patients of the business" was a legitimate proprietary interest in the context of the medical

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27 *Man Financial*, *supra* note 1 at [3].
28 *Ibid* at [6].
29 *Ibid* at [7].
30 *Ibid* at [8].
31 *Wong Bark Chuan David v Man Financial (S) Pte Ltd* [2007] 2 SLR(R) 22 at [172]–[175].
32 *Man Financial*, *supra* note 1 at [15].
33 *Ibid* at [15].
34 *Ibid* at [6]. See also *Hengxin Technology*, *supra* note 15 at [125] wherein the court found that the words "within any jurisdiction" did not impose a territorial limit on the clause, and, therefore, constituted an unreasonable worldwide ban.
35 *Smile Inc Dental* (CA), *supra* note 14.
36 *Ibid* at [3].
37 *Ibid* at [4].

employment contracts,[38] the lack of any fixed temporal limit to the clause rendered it unreasonable as between the parties.[39]

The requirement for a non-competition clause to be reasonable as between the parties was examined in *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd*.[40] The plaintiff in this case was the sales manager of a gifting company specialising in customisable flowers and gifts.[41] Although her brothers were shareholders in the business, she was merely an employee.[42] In January 2008, the business was acquired by its main competitor, and the defendant was the vehicle for the acquisition.[43] After the acquisition, the plaintiff was employed by the defendant in order to continue carrying out the business.[44] Her employment agreement contained non-competition and non-solicitation clauses.[45] In November 2011, the plaintiff resigned before informing the defendant soon after that she intended to set up a competing business.[46] When the defendant threatened to sue on the restrictive covenants, the plaintiff sought a pre-emptive declaration that the restrictive covenants were void and unenforceable.[47]

The SGHC interpreted the non-competition clause as preventing the claimant from being "employed in the same or similar business as the relevant company, or in any other business carried on by the relevant company in Singapore, Malaysia or any country in which the 'relevant company' had offices on 31 December 2011."[48] The court found that the scope of the non-competition clause was too wide because it prevented the claimant from engaging in activities which had nothing to do with her employment, simply because the defendant's related companies engaged in those activities.[49] Furthermore, the court found that the geographical restriction of the clause, which extended to Singapore and Malaysia, was included to protect the defendant's parent company, rather than the defendant itself.[50] As the defendant only had plans to expand into Malaysia, the clause was unreasonable as between the parties.[51]

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38 *Ibid* at [22], citing *Routh v Jones* [1947] 1 All ER 179 [*Routh*]; *Routh, supra* note 38; *Koops Martin v Dean Reeves* [2006] NSWSC 449. See also *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter and others* [2013] SGHC 4 [CCL] wherein the SGHC found that although the respondent's personal knowledge and influence over the claimant's clients constituted a legitimate interest for the non-competition clause to protect, the non-competition clause was unnecessarily wide because an employee would be prohibited from soliciting the delivery of competitive programmes to a client office the employee had never dealt with before.

39 *Ibid* at [29]–[30], citing *Sir W C Leng & Co Limited v Andrews* [1909] 1 Ch 763 at 774 [*Sir W C Leng & Co Limited*].

40 [2014] 3 SLR 27 [*Lek Gwee Noi*].

41 *Ibid* at [5].

42 *Ibid* at [4].

43 *Ibid* at [10].

44 *Ibid* at [12].

45 *Ibid* at [14]–[15].

46 *Ibid* at [16]–[17].

47 *Ibid* at [18]–[19].

48 *Ibid* at [31].

49 *Ibid* at [96].

50 *Ibid* at [104].

51 *Ibid*.

The true purpose of a non-competition clause proved to be of critical importance in *Powerdrive Pte Ltd v Loh Kin Yong Philip and others*.[52] There, the SGHC examined a standard form non-competition clause which applied to all five defendants, despite the fact that they varied in seniority and expertise. The clause provided:

> [Notwithstanding] the above, you cannot *work for a rival company* and/or direct competitor *for two (2) years from your termination*. Management reserves the right to pursue on legal grounds if there is a breach of this condition. [emphasis added][53]

The SGHC found that since the claimant imposed the same clause on all its employees regardless of their seniority, nature of work or level of access to information, the true purpose of the non-competition clause was likely to restrain competition rather than to protect the claimant's trade secrets and confidential information.[54] Furthermore, interpreting the clause as restricting a former employee from working for a rival, regardless of the scope of his work,[55] the SGHC found that the non-competition clause was unreasonably wide.[56] Finally, the court found that the restricted two-year duration was "arbitrarily selected" and therefore unreasonable.[57]

At this juncture, we pause to note that so far, employers have generally succeeded in demonstrating that non-competition clauses protect one of their legitimate proprietary interests. As a result, courts have generally focused their attention on the reasonableness of the clause at the second and third stages of the analysis.[58] This was not the case in *HT SRL v Wee Shuo Woon*.[59] Here, the non-competition clause prevented the employee from seeking or accepting "employment with ... any Competitor" for one year post-termination.[60] The clause defined "Competitor" as meaning "any ... firm or body corporate which ... is engaged in ... any business or activity of the kind"[61] carried out by the claimant. First, the SGHC found that the claimant's customer connections and confidential information were protected by a confidentiality and non-solicitation clause respectively, and could not, therefore, be protected by the non-competition clause as well.[62] Going further in completeness, the court interpreted the words "business or activity" of the claimant as having a scope as wide as the entire cybersecurity and intelligence industry.[63] Based on this interpretation, the defendant would be prevented from working for "defensive" software companies that do not compete with the claimant.[64] The industrial scope of the

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52 [2019] 3 SLR 399 [*Powerdrive*].
53 *Ibid* at [9].
54 *Ibid* at [26].
55 *Ibid* at [40].
56 *Ibid* at [48]–[49].
57 *Ibid*.
58 See Part II.A.
59 [2019] 5 SLR 245 [*HT SRL*].
60 *Ibid* at [70].
61 *Ibid*.
62 *Ibid* at [75]–[77].
63 *Ibid* at [81].
64 *Ibid*.

clause, therefore, was far too broad to be reasonable as between the parties.[65] Finally, noting that the activity and geographical scope were also too wide,[66] the court held that the clause was an unreasonably wide prohibition in restraint of trade.[67]

The final two cases were decided recently and only a few months apart. First, in *Shopee v Lim*,[68] Shopee sought an interlocutory injunction to prevent a former employee from accepting employment with ByteDance, and to restrain him from soliciting Shopee's clients and employees.[69] The issues were decided, therefore, on the "serious question to be tried"[70] standard. The defendant was formerly a senior employee of Shopee, most recently serving as the Executive Director, Head of Operations for Shopee Brazil.[71] After leaving Shopee, the defendant's new role at ByteDance was "Leader for TikTok Shop Governance and Experience, Middle Platform".[72] Shopee alleged that the defendant's role in ByteDance was substantially similar to the roles he undertook in Shopee, as he continued to: (a) manage user experience, such as customer satisfaction; (b) manage the designing of policies relating to seller and listing management; (c) manage the publishing of external-facing policies of TikTok Shop to sellers and creators; (d) manage after-sale services such as return and refund; and (e) manage and hold responsibilities in respect of the Southeast Asia market (albeit allegedly to a lesser extent than the US and UK markets).[73] In response, the defendant averred that the scope of his work in ByteDance was different from that of his last role, because Shopee Brazil was geographically confined to Brazil, a jurisdiction in which TikTok Shop did not currently operate.[74]

The defendant's non-competition clause prevented him from seeking or accepting employment with a competitor of Shopee for one year post-termination, on the basis that he was "privy to confidential and sensitive information".[75] The SGHC found that the non-competition clause did not protect Shopee's confidential information or trade secret because that interest was already protected by a confidentiality clause.[76] To make matters worse, Shopee did not plead or point to any specific confidential information,[77] leaving the court to find that the non-competition clause

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65 *Ibid*.

66 *Ibid* at [82] and [83]. See also the case of *3D Networks Singapore Pte Ltd v Voon South Shiong and another* [2023] 4 SLR 396 wherein the SGHC found that "the prohibition on any employment or engagement which 'by the nature of the employment or engagement will be detrimental or may be perceived to be detrimental to the best interest of the Company' [went] well beyond what [was] necessary to protect the [claimant's] interest in maintaining its trade connection" (at [42]). Therefore, despite the fact that the one-year time restriction was reasonable, the clause overall was not reasonable as between the parties.

67 *Ibid* at [84].

68 *Shopee v Lim*, *supra* note 5.

69 *Ibid* at [2].

70 *Ibid* at [17], citing *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and *RGA Holdings International Inc v Loh Choon Phing Robin and another* [2017] 2 SLR 997.

71 *Shopee v Lim*, *supra* note 5 at [3].

72 *Ibid* at [7].

73 *Ibid* at [6].

74 *Ibid* at [7].

75 *Ibid* at [8].

76 *Ibid* at [58]–[59], citing *Man Financial*, *supra* note 1 at [92].

77 *Ibid* at [69].

did not protect a legitimate proprietary interest.[78] Going further, the SGHC noted that the non-competition clause would neither protect Shopee's trade connections, as this interest was already protected by the client non-solicitation restriction,[79] nor its interest in maintaining a stable and trained workforce as this interest was also already protected by an employee non-solicitation restriction.[80] Finally, the court noted in *obiter* that the geographical scope of the non-competition clause would have been too wide because it would effectively restrain its former employee from working for any competitor of Shopee who had been in Shopee's markets, even though these were markets which the defendant was not involved in or responsible for, and, therefore, had no *specific* information about.[81]

The non-competition clause was drafted quite differently in *MoneySmart v Artem*.[82] The claimant, MoneySmart, provided online financial product comparison services for consumers to review, compare and purchase financial products from banks or insurers.[83] In late 2022, MoneySmart launched an in-house insurance brand called 'Bubblegum' which offers direct-to-consumer digital insurance products for the Singapore market.[84] Prior to his departure, the defendant was employed by the claimant as the Head of Technology at MoneySmart's Bubblegum division.[85] During his employment with the claimant, the defendant led the Design, Product and Technology department for MoneySmart's Bubblegum division to create the Bubblegum platform and mobile application, and to ensure that this platform was functioning.[86] The defendant's employment contract contained a cascading non-competition clause which prevented the defendant from engaging with any business in "South-East Asia or any other country" where MoneySmart and its associated companies operated for a period of either one year, six months or three months, depending on which time period was found to be reasonable.[87]

Once again, the SGHC first established that the non-competition clause neither protected MoneySmart's confidential information and trade secrets, nor its interest in maintaining a stable and trained workforce.[88] As it did in *Shopee v Lim*, the court found that MoneySmart's confidential information and trade secrets were already protected by a confidentiality clause in the defendant's employment contract.[89] Furthermore, the SGHC distinguished *PH Hydraulics* and found that, unlike the marine winch industry, the digital insurance industry was not similarly "small and specialised".[90] Additionally, the defendant was not offered any training in the

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78 *Ibid* at [61] and [68].
79 *Ibid* at [64].
80 *Ibid* at [65].
81 *Ibid* at [71].
82 *Ibid*.
83 *Ibid* at [3].
84 *Ibid*.
85 *Ibid* at [4].
86 *Ibid* at [7].
87 *Ibid* at [10].
88 *Ibid* at [29].
89 *Ibid* at [11].
90 *Ibid* at [35], citing *PH Hydraulics*, *supra* note 20 at [64].

"specialised field" of the digital insurance industry, such that MoneySmart could argue that it invested much time and resources in his training.[91]

For completeness, the court also noted that the non-competition clause was too wide because there was, at best, a very *tenuous* connection between the restriction against engaging with any business which provides online financial product comparison services, and the work done by the defendant while employed by MoneySmart.[92] Affirming the principle laid down in *Buckman* that a reasonable non-compete clause would limit "the restriction to countries in which the [employee] had actual and significant customer contact",[93] the court noted that the non-competition clause was too wide as the defendant only had contact with the Singapore market, and was not involved in any other geographical market in Southeast Asia or Hong Kong.[94] Finally, the SGHC observed that the non-competition clause was drafted in a cascading manner, inviting the court to apply the doctrine of severance and arrive at the longest permissible restraint period.[95] Applying *Lek Gwee Noi*, the court found that cascading covenants leave "the vulnerable employee uncertain as to which cascading restriction binds him in law until the issue is actually determined by a court", and, therefore, held that the non-compete was unreasonable.[96]

2. *Decisions with Enforceable Non-Competition Clauses*

Over the years, the Singapore courts have upheld several non-competition clauses. As earlier mentioned, however, these decisions are less common. In some cases, the non-competition clause is only briefly mentioned. For example, in *Clearlab SG Pte Ltd v Ting Chong Chai and others*,[97] the SGHC found that the defendants had breached their non-competition clauses.[98] This necessarily implies that the non-competition clauses were reasonable and enforceable. However, the court omitted to explicitly apply the framework laid down in *Man Financial*, likely because the defendants were in breach of a plethora of other clauses contained in their employment contracts. Notable also is the fact that the SGCA has yet to uphold a non-competition clause, with positive decisions issued exclusively by the SGHC.

Beginning then with the oft-cited case of *PH Hydraulics*.[99] The claimant was a Singapore-incorporated company which manufactured hydraulic and electrical installations, and drilling rig equipment for the marine industry.[100] During his employment with the claimant, the defendant worked in the engineering department and was involved in the authorship of five general arrangement drawings of

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91 *Ibid* at [37].
92 *Ibid* at [45]–[46].
93 *Ibid* at [50], citing *Buckman*, *supra* note 25 at [24].
94 *Ibid* at [52].
95 *Ibid* at [56].
96 *Ibid*, citing *Lek Gwee Noi*, *supra* note 40 at [197].
97 [2015] 1 SLR 163 [*Clearlab*].
98 *Ibid* at [264].
99 *PH Hydraulics*, *supra* note 20.
100 *Ibid* at [3].

winches, which formed the basis of the claimant's breach of confidence claim.[101] The defendant's employment contract contained a non-competition clause which prevented him from engaging in "any activity or business which shall be in competition" with PH Hydraulics "within Singapore and Malaysia" for a "period of two (2) years following the resignation/termination of [his] employment."[102]

The SGHC found that the claimant had a legitimate interest in "maintaining employees well-versed and skilled in the [claimant's] system of work such that it [could] pursue its commercial activities successfully."[103] The court reasoned that since the claimant likely invested much time and resource into providing the second defendant with extensive specialised training in a relatively small and specialised marine winch industry, it deserved protection against its employees leaving for its competitors.[104] Next, the court found that the clause was reasonable. First, the court interpreted "the business of PH Hydraulics" as referring to the business of "designing and manufacturing marine hydraulic and electrical installations", which did not amount to a "blanket prohibition to work for the marine industry."[105] Second, in light of the facts that: (a) the claimant had a business presence in Singapore and Malaysia; (b) the marine winch industry only had a select group of potential customers; and (c) the second defendant could have sought employment in Indonesia and Thailand, the court found that the geographical delimitation of the non-competition clause was permissible.[106] Finally, the court found that the temporal restriction of two years was not unreasonable because the first defendant's (the new employer of the second defendant) initial employment contract with the second defendant also contained a two-year non-competition clause.[107]

The case of *Tan Kok Yong Steve v Itochu Singapore Pte Ltd*[108] concerned a claim by a former employee against his former employer for the severance package he was promised in return for his resignation from the company,[109] and a counter claim by the defendant-employer for an injunction to restrain the plaintiff-employee from engaging in any business which competes with the defendant.[110] During his employment with the defendant, the plaintiff was specifically assigned to handle the defendant's cement trade.[111] This role required him to handle the business leads and deals for Cement Products in Vietnam, the Philippines and Bangladesh, as the person-in-charge of those countries.[112]

The plaintiff's employment contract contained a non-competition clause which sought to prevent the plaintiff from being "employed ... with any company or business which competes with the Employer and/or any Affiliate in respect of Restricted

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[101] *Ibid* at [7].
[102] *Ibid* at [6].
[103] *Ibid* at [64].
[104] *Ibid*.
[105] *Ibid* at [67].
[106] *Ibid*.
[107] *Ibid*.
[108] [2018] SGHC 85 [*Tan Kok Yong Steve*].
[109] *Ibid* at [1].
[110] *Ibid* at [2].
[111] *Ibid* at [6].
[112] *Ibid* at [8].

Goods or Restricted Services within the Restricted Area."[113] The term "Restricted Goods" was defined as meaning "any product competitive with any product sold or supplied by the Employer and/or any Affiliate with which the Employee was concerned during the period of 12 months immediately preceding the date of termination of the Employment"[114], and the term "Restricted Area" was defined as meaning "the area (geographical or otherwise) constituting the market of the Employer and that of any Affiliate for the Restricted Goods and Restricted Services."[115]

Since the plaintiff was the "person-in-charge" for the defendant's business in Vietnam, Bangladesh and the Philippines, and his job was to build rapport and establish trade connections on behalf of the defendant, the court held that the defendant had a legitimate interest in protecting its trade connections by way of the non-competition clause.[116] Next, the court found that the activity scope of the clause was reasonable because it was not a "blanket ban" and only sought to prevent the plaintiff from engaging in the same area of business that he was involved in while he was employed by the defendant.[117] The court also found that the geographical scope was reasonable because the plaintiff had actual and significant customer contacts in Vietnam and the Philippines.[118] On this point, the court noted that while a nationwide, rather than city-specific, restriction was reasonable for Vietnam and the Philippines,[119] the same geographical restriction may not be reasonable for bigger countries such as China and the United States of America.[120] Finally, the court accepted the defendant's argument that a two-year restriction was necessary to allow the plaintiff's replacement to build up customer connections in the Cement Products industry without interference from the plaintiff.[121]

So far, the Singapore courts have only examined the reasonableness of non-competition clauses post-termination. The pre-termination reasonableness of a non-competition clause was first examined in *Solomon Alliance Management Pte Ltd v Pang Chee Kuan*.[122] The SGHC accepted that it would adopt an approach that preferred freedom of contract over freedom of trade when assessing the reasonableness of non-competition clauses which restrict trade during the life of the agreement.[123] The plaintiff in this case was a Singaporean company which promoted, marketed and sold asset-backed investment products, including land acquisition and joint-development projects.[124] The defendant was one of the founders of the plaintiff company, and his role was to market the plaintiff's products.[125] At some

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[113] *Ibid* at [5].

[114] *Ibid*; the term "Restricted Services" was similarly defined as "any services competitive with any of the services sold or supplied by the Employer and/or any Affiliate with which the Employee was concerned during the period of 12 months immediately preceding the date of termination of the Employment."

[115] *Tan Kok Yong Steve*, *supra* note 108 at [5].

[116] *Ibid* at [85]–[87].

[117] *Ibid* at [93].

[118] *Ibid* at [94] and [98].

[119] *Ibid* at [100].

[120] *Ibid* at [101].

[121] *Ibid* at [103].

[122] [2019] 4 SLR 577 [*Solomon Alliance*].

[123] *Ibid* at [102]–[103].

[124] *Ibid* at [3].

[125] *Ibid* at [4].

point in 2014, one of the plaintiff's other founders suspected the defendant of diverting business to other entities and engaged the services of a private investigation company.[126] After the investigation revealed that the defendant was representing a company known as Megatr8 Inc Pte Ltd,[127] the plaintiff commenced suit against the defendant, alleging that the defendant had breached the terms of their agreement by diverting business away from the plaintiff.[128]

One of the issues discussed by the court was whether the restraint of trade clauses in the contract as between the parties were enforceable.[129] The relevant non-competition clause provided that the defendant "shall not, either individually or in partnership or jointly or in conjunction with any person ... During the term of the [Contract] and for a period of one (1) year from the date of termination of the [Contract] for any reason compete with [the claimant] in respect of similar business anywhere in Asia".[130]

First, the SGHC found that the claimant had a legitimate interest in preventing its employees from marketing its products and using its confidential information on behalf of its competitors.[131] Furthermore, the clause was reasonable as between the parties because it only limited the defendant's activities to those in competition with the plaintiff,[132] and the clause was reasonable in the interests of the public because the plaintiff did not have a monopoly in the industry, and therefore, competitors could engage persons other than the defendant to sell similar products on their behalf.[133] Interestingly, the court found that although the geographical scope of the non-competition clause extended to Asia, the plaintiff's case was confined to the defendant's sale of products in Singapore.[134] The clause's broader geographical scope, therefore, was found to be irrelevant.[135]

Finally, the pre-termination reasonableness of a non-competition clause was once again examined in *Swift Maids Pte Ltd and another v Cheong Yi Qiang and others*.[136] Here, the SGHC upheld a non-competition clause which provided that the defendant would not, during his employment, "either jointly or alone together with or as agent for any reason, company or association of any nature whatsoever directly or indirectly ... Be in any way interested in any such business or activity whether as principal, agent, shareholder, or otherwise; or be associated or engaged in or any way concerned yourself in such activity."[137] The court construed the words "any such business or activity" as referring to the "business" or "activity" of "providing foreign domestic workers and related services".[138] On this basis, the SGHC held that the non-competition clause reasonably prevented the defendant from being

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[126] *Ibid* at [5].
[127] *Ibid*.
[128] *Ibid* at [6].
[129] *Ibid* at [42].
[130] *Ibid* at [99].
[131] *Ibid* at [105].
[132] *Ibid* at [108].
[133] *Ibid*.
[134] *Ibid* at [109].
[135] *Ibid*.
[136] [2023] SGHC 317 [*Swift Maids*].
[137] *Ibid* at [31].
[138] *Ibid* at [43] and [44].

"interested or engaged in, or associated or concerned with, the business or activity of providing foreign domestic workers and related services" during the term of his employment.[139]

C. *The Contours of Reasonableness*

Having traversed the case law, this section seeks to clarify the contours of a reasonable non-competition clause. Although there is "no clear formula that would lead to a fairly predictable result ... [some] guidelines as to application may ... be discerned from the case law itself."[140] As is the case in many areas of law, much depends on the particular factual matrix.[141] This section will identify guidelines based on the common factors that are considered when the courts evaluate reasonableness: (a) the temporal scope; (b) the geographical scope; and (c) the scope of restricted activity.

The temporal restriction of a non-competition clause only refers to the post-termination restriction against competition.[142] A non-competition clause that has an undefined temporal scope, and, therefore, operates for an indefinite period of time, will almost always be void and unenforceable.[143] When defining the temporal scope of a non-competition clause, employers should formulate a justification for imposing such a restriction instead of plucking "a figure from the air".[144] This is because employers bear the burden of proving the reasonableness of a non-competition clause at trial.[145] Citing the time it would take for the former employee's replacement to build up similar connections in the industry has proved to be a successful justification in the past.[146] It also appears that when assessing the reasonableness of a temporal restriction, the court will consider the nature of the employee's employment.[147] Where an employee on six-month probation (without a fixed term of employment) was subject to a two-year non-competition clause, the court found the restriction to be unreasonable.[148]

When it comes to the geographical scope of a non-competition clause, worldwide non-competition clauses (those without territorial limitations) are likely to be unreasonable.[149] In fact, the SGHC recently commented that although nationwide non-competition clauses for smaller countries may be reasonable, bans in bigger countries like China and the United States of America are likely unreasonable.[150] Reasonable geographical restrictions must also consider the specific information possessed by the employee. An employee who simply participated "in regularly

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[139] *Ibid* at [45].
[140] *Man Financial*, *supra* note 1 at [72], citing *Butterworths Common Law Series*, *supra* note 22 at [5.104]–[5.105].
[141] *Ibid* at [110].
[142] *Solomon Alliance*, *supra* note 122 at [110]; *Swift Maids*, *supra* note 136 at [45].
[143] *Smile Inc Dental* (CA), *supra* note 14 at [29]; *Sir W C Leng & Co Limited, supra* note 39 at 744.
[144] *CCL*, *supra* note 38 at [111].
[145] *Ibid* at [112].
[146] *Tan Kok Yong Steve*, *supra* note 108 at [103].
[147] *Powerdrive*, *supra* note 52 at [48].
[148] *Ibid*.
[149] *Hengxin Technology*, *supra* note 15 at [125]; *HT SRL*, *supra* note 59 at [83].
[150] *Tan Kok Yong Steve*, *supra* note 108 at [101].

held regional operations meetings" where "strategies and priorities for *all* markets" were shared, could not be restricted from seeking employment in *all* the markets in which the employer operated.[151]

Similarly, non-competition clauses which do not define the activities a former employee is prohibited from engaging in post-termination are likely to be unreasonable.[152] Non-competition clauses left undefined in this manner are likely to constitute a blanket ban on engaging in the industry of business of the employer, even if there is little connection with the former employee's role at the employer.[153] When defining the scope of restricted activity, therefore, employers should reference the employee's most recent role.[154] This necessarily requires some degree of tailoring each non-competition clause to the particular employee or class of employees. By avoiding standard form clauses in this way, employers are more likely to prove that the non-competition clause was carefully designed to protect their legitimate proprietary interests, rather than stifle competition.[155] Although non-competition clauses often prevent any form of competitive activity, including the ownership of shares, for example, the case law suggests that non-competition clauses should only restrict the seeking of employment.[156]

III. Doctrinal Uncertainty

At this juncture, we make two observations regarding the enforceability of non-competition clauses in Singapore. First, it is unclear whether an employer can only protect its interest in maintaining a stable and trained workforce via a non-solicitation clause. If so, there may be less room for a non-competition clause to operate in the future. If, however, an employer may protect this interest via a non-competition clause, the present state of the common law may create a perverse incentive for employers to omit less restrictive covenants in their employment contracts. Second, it is unclear whether the narrower scope of a broader restrictive covenant may be pleaded and enforced.

A. *It is Unclear Whether an Employer is Required to Protect its Interest in Maintaining a Stable and Trained Workforce Exclusively via a Non-Solicitation Clause*

In *Man Financial*, the SGCA identified *trade secrets* and *trade connections* as two of the main legitimate interests which merit protection by restraint of trade clauses in the employment context.[157] Having canvassed a range of legal authorities from

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[151] *Shopee v Lim*, *supra* note 5 at [71].
[152] *Hengxin Technology*, *supra* note 15 at [126].
[153] *PH Hydraulics*, *supra* note 20 at [67]; *Tan Kok Yong Steve, supra* note 108 at [93].
[154] *Powerdrive, supra* note 52 at [40].
[155] *Ibid* at [26].
[156] *HT SRL*, *supra* note 59 at [82].
[157] *Man Financial*, *supra* note 1 at [81], citing *Butterworths Common Law Series*, *supra* note 22 at [5.118].

England, Hong Kong, and Australia,[158] the SGCA also confirmed the proposition that "the maintenance of a stable, trained workforce is a legitimate proprietary interest that the employer is entitled to protect via a non-solicitation clause."[159] With respect, however, it is unclear whether the court meant that the employer is *required* to protect this interest *exclusively* via a non-solicitation clause, or if this interest may also be protected by other restrictive covenants, such as a non-competition clause.

The *PH Hydraulics* case appears to squarely affirm the latter interpretation. There, the SGHC found that "the interest of the plaintiff requiring protection by the non-competition clause was that of maintaining employees well-versed and skilled in the plaintiff's system of work such that it can pursue its commercial activities successfully", reasoning that the clause protected the employer against its employees leaving it for its competitors soon after receiving extensive specialised training.[160] The court also phrased this legitimate interest as that of "building up and maintaining a pool of trained skilled workers."[161] Despite the difference in wording, we suggest that this conception of a legitimate interest is akin to that of maintaining a stable, trained workforce, as explained by the court in *Man Financial*. If so, we see the court in *PH Hydraulics* enforcing a non-competition clause to protect an interest (*ie*, the maintenance of a stable, trained workforce) that could otherwise be protected by a non-solicitation clause.

If the latter interpretation represents the present state of common law, however, employers may have a perverse incentive to omit less restrictive covenants in their employment contracts in favour of non-competition clauses. Recall that at the first stage of the reasonableness inquiry, courts determine whether the restraint of trade clause in question protects a legitimate proprietary interest.[162] If, however, the legitimate proprietary interest is already covered by another clause in the employment contract, the employer will need to show that the clause in question covers a legitimate proprietary interest *over and above* that which is protected by the other clause.[163] A daring employer may, therefore, simply choose to omit less restrictive clauses (such as confidentiality clauses and non-solicitation clauses) in favour of the more restrictive non-competition clause.

This point is best illustrated by the case of *Shopee v Lim*. There, the SGHC refused to enforce the non-competition clause because Shopee's confidential information was protected by a confidentiality agreement,[164] its trade connections were protected by a client non-solicitation clause,[165] and its interest in the maintenance of a stable, trained workforce was protected by an employee non-solicitation clause.[166] This judgement may incentivise Shopee and other employers to draft employment contracts without confidentiality and non-solicitation clauses in order to better their

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158 *Ibid* at [94]–[120].
159 *Ibid* at [121].
160 *PH Hydraulics*, *supra* note 20 at [64], citing *Man Financial*, *supra* note 1 at [79].
161 *Ibid* at [65].
162 *Smile Inc Dental* (HC), *supra* note 14 at [67].
163 *Stratech Systems*, *supra* note 25 at [48]–[49], read with *Man Financial*, *supra* note 1 at [92].
164 *Shopee v Lim*, *supra* note 5 at [60].
165 *Ibid* at [64].
166 *Ibid* at [65].

chances of enforcing a non-competition clause. Indeed, in *CCL*, Justice Woo commented that:

> It seems illogical that an employer who does not have the benefit of a confidentiality provision in his employee's contract of employment has a better chance of establishing confidential information as a legitimate interest to protect under [a non-competition clause] than an employer who has sought to protect his confidential information by the use of dual provisions (*ie*, one specifically to preclude disclosure of such information post-employment and the other to restrict the employee from engaging in a competitive business for a certain duration and within a certain geographical scope).[167]

And yet, illogical as this consequence may seem, it is supported by the latter interpretation. In practice, commercial lawyers may be hesitant to advise the omission of confidentiality clauses and non-solicitation clauses from boilerplate employment contracts, risking the loss of specific protections to better their chances of enforcing a non-competition clause. In principle, however, the latter interpretation of *Man Financial* supports such an approach.

Instead, it is argued that the former interpretation represents, or at least should represent, the current state of the law. In *Man Financial*, the SGCA affirmed the following passage from the Australian decision of *Cactus Imaging Pty Limited v Glenn Peters* in confirming the employer's interest in maintaining a stable and trained workforce:

> But apart from protection against misuse of confidential information, does an employer have a protectable interest in staff connection – that is, in maintaining a stable trained workforce? The cases denying that there is any such legitimate interest emphasise that an employer does not own the workforce, as if employees were akin to stock-in-trade. ***That is self-evident, but nor does an employer own the customers, who are also not akin to stock-in-trade; yet a connection with customers is unquestionably amenable to protection by covenant. The employees, along with the suppliers and the customers, make up the three relations upon which the profitability of a business depends. The customers are not property, but their connection with the business adds value to the business and is recognised as deserving of protection in the proprietor's legitimate interest. Similarly, employees are not property, but, all else being equal, a business with a stable trained workforce will be more attractive to a purchaser and command a higher price than one with a workforce which is unstable, disruptive or poorly trained, just as a loyal and satisfied clientele makes a business more attractive and valuable. In my opinion, staff connection constitutes part of the intangible benefits, which may give a business value over and above the value of the assets employed in it, and thus comprises part of its goodwill. It is amenable to protection by a covenant in a manner similar to customer connection, even in the absence of protectable confidences***. [emphasis in original][168]

By affirming this passage, the SGCA seemed to draw a parallel between the maintenance of employees and the maintenance of clients and suppliers as "the three

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[167] *CCL*, *supra* note 38 at [92].

[168] *Cactus Imaging Pty Limited v Glenn Peters* [2006] NSWSC 717 at [55].

relations upon which the profitability of a business depends."[169] In this way, the maintenance of a stable and trained workforce may simply be a more specific articulation of the employer's interest in protecting its trade connections. If so, it is suggested that both interests should be protected by non-solicitation clauses, rather than non-competition clauses. This approach is aligned with case law, as courts have held that a non-competition clause has no bite where the employer's trade connections are already protected by a non-solicitation clause.[170] In this way, the *Man Financial* court may have held that trade connections with clients, suppliers and employees must be protected directly by client, supplier and employee non-solicitation clauses, respectively. This approach would avoid creating the aforementioned incentive for employers to omit such clauses in favour of a broader, more restrictive non-competition clause which purports to protect all three relations of profitability.

B. *It is Unclear Whether the Narrower Scope of a Broader Clause May Be Pleaded and Enforced*

In *MoneySmart v Artem*, Senior Judge Tan Siong Thye affirmed the proposition that a plaintiff-employer could not seek to enforce the narrower scope of a broader clause without reference to the doctrine of severance:

> I digress to first address the related question of whether the claimant can elect to enforce certain parts of the Non-Compete Clause which, when put together, are reasonable. While this approach reaches the same outcome, it does not engage the doctrine of severance. … This directly deals with the claimant's position that it seeks to enforce the Non-Compete Clause *only* in respect of Singapore and Hong Kong. It is plainly not open for the claimant to specify which countries in which it wishes to enforce the trade restriction within the much wider geographical scope [emphasis in original].[171]

In that case, therefore, MoneySmart could not seek to enforce the non-competition clause *only* in respect of Singapore and Hong Kong since the clause applied to "South-East Asia or any other country where MoneySmart (or associated companies) operates".[172]

Yet, in *Solomon Alliance*, in spite of the fact that the non-competition clause extended to "anywhere in Asia",[173] the SGHC accepted that Solomon Alliance's case was confined to the defendant-employee's sale of products in Singapore:

> In terms of the geographical scope, the Defendant argued that the scope of cl 11(b)(*i*) which extended to Asia, was too wide to be reasonable since he was Singaporean and had only worked in Singapore. However, the Plaintiff's case was confined to the Defendant's sale of products in Singapore on behalf of other entities. That cl 11 prohibited the Defendant from engaging in competing business in Asia, and not just Singapore, was of little relevance in the present case

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169 *Ibid* at [55].

170 See for example *Shopee v Lim*, *supra* note 5.

171 *MoneySmart v Artem*, *supra* note 7 at [60], citing R Chandran, *Employment Law in Singapore*, 6th ed (Singapore: LexisNexis, 2019) at [3.61].

172 *Ibid* at [10] and [60].

173 *Solomon Alliance, supra* note 122 at [52].

> given that the relevant events which the Plaintiff alleged as constituting breach were events that occurred in Singapore.[174]

Therefore, by confining its case to the defendant's sale of products in Singapore, Solomon Alliance was able to enforce a much narrower geographical scope of the non-competition clause.[175] With respect, we suggest that the approach taken by the *Solomon Alliance* court is inconsistent with that taken by the *MoneySmart* court, and that the approach taken in *MoneySmart* is preferred because it prevents employers from circumventing the doctrine of severance.[176]

To make good on this point, we must briefly outline the doctrine of severance in Singapore. There are two objectives underlying the doctrine of severance, which were neatly encapsulated by the SGCA in *National Aerated Water Co Pte Ltd v Monarch Co Inc*[177] as follows:

> The doctrine of severance may be invoked to serve two purposes. The first is to cut out altogether an objectionable promise from a contract leaving the rest of the contract valid and enforceable. Second is to cut down an objectionable promise as to its scope but not to cut it out of the contract altogether. An unreasonably wide restraint of trade clause would be a classical example of a case falling within the second category.[178]

In the later SGCA decision of *Man Financial*, the court cited *National Aerated Water* and elaborated on this second category of severance, clarifying that:

> … severance occurs, if at all, *within* the clause itself according to what is popularly known as the 'blue pencil test'. Put simply, in order to apply the doctrine of severance so as to save an otherwise (*prima facie*) offending clause, the court concerned must be able to run, as it were, a 'blue pencil' through the offending words in that clause *without altering the meaning of the provision and, of course, without rendering it senseless (whether in a grammatical sense or otherwise)*. In other words, the court will not rewrite the contract for the parties [emphasis in original].[179]

Finally, in *Ng Boon Ching v CLAAS Medical Centre Pte Ltd*,[180] the SGHC applied the three-fold test in *Sadler v Imperial Life Assurance Company of Canada Ltd*,[181] where it was decided that a contract which contains an unenforceable provision nevertheless remains effective after the removal or severance of the provision if: (a) the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains; (b) the remaining terms continue to be supported by adequate consideration; and (c) the removal of the unenforceable provision does not so change the character of the contract that it becomes "not the sort of contract that parties entered into at all".[182]

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[174] *Ibid* at [109].
[175] *Ibid* at [111].
[176] *MoneySmart v Artem*, *supra* note 7 at [60].
[177] [2000] 1 SLR(R) 74 [*National Aerated Water*].
[178] *Ibid* at [40].
[179] *Man Financial*, *supra* note 1 at [127].
[180] [2009] 3 SLR(R) 78 [*Ng Boon Ching*].
[181] [1988] IRLR 388 [*Sadler*].
[182] *Ng Boon Ching*, *supra* note 180 at [77].

While the SGHC's application of this test was overturned on appeal, the test itself appeared to be implicitly affirmed.[183] Interestingly, the SGCA in *CLAAS Medical Centre*, like the SGCA in *National Aerated Water*, cited the case of *Attwood v Lamont*[184] with approval. Thus, it would appear that the Singapore approach to severance mirrors the old English approach.

The current approach in England is as stated in the case of *Tillman v Egon Zehnder Ltd*,[185] overruling the approach in *Attwood*. So far, this approach has yet to be considered by the Singapore courts. Furthermore, although the Canadian approach, as stated in the case of *New Solutions Financial Corporation v Transport North American Express Inc*,[186] was considered in *Man Financial*, the court declined to express a concluded view on the issue.[187] It remains to be seen, therefore, whether the doctrine of severance in Singapore will evolve in harmony with the English or Canadian approaches. In any case, it lies beyond the scope of this article to go any further in evaluating these approaches.

Suffice to say, however, that the doctrine of severance is applied with caution in the Singapore context. For example, by applying the third limb of the *Sadler* test, courts are careful to ensure that the resulting clause continues to make contractual sense by embodying "the fundamental basis of the parties' contract including the principal consideration for the contract."[188] In this way, courts are careful not to rewrite the contract in order to save the offensive provision.[189] It is precisely this caution which is circumvented when adopting the *Solomon Alliance* pleading strategy.

Furthermore, courts are cautious to save unreasonable restraint of trade clauses because cascading non-competition clauses, which appear to be calculated to invite blue pencil severance, have been found to have an *in terrorem* effect on the reasonable employee.[190] In *Lek Gwee Noi*, for example, the SGHC found that the non-solicitation clause contained cascading covenants because its third limb simply went further in scope than the second limb by covering *all* customers of the defendant and not just customers of the defendant during the plaintiff's employment.[191] The court found that such a clause offended public policy by having an *in terrorem* effect on the reasonable employee, leaving them uncertain as to which cascading restriction binds them in law until the issue is actually determined by a court.[192] Likewise, in *MoneySmart v Artem*, the temporal scope of the non-competition clause was drafted

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183 *CLAAS Medical Centre*, *supra* note 23 at [70].

184 *Attwood v Lamont* [1920] 3 KB 571 [*Attwood*]. In this case, the court adopted the blue pencil test in finding that a contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining. Ultimately, however, because the court found that the non-competition clause was one covenant for the protection of the respondent's entire business, and not several covenants for the protection of his several businesses, the clause could not be saved by the doctrine of severance.

185 [2019] UKSC 32.

186 [2004] SCC 7.

187 *Man Financial*, *supra* note 1 at [131].

188 *Lek Gwee Noi*, *supra* note 40 at [147]–[148].

189 *Man Financial*, *supra* note 1 at [127]; *Lek Gwee Noi*, *supra* note 40 at [148].

190 *Lek Gwee Noi*, *supra* note 40 at [197]; *MoneySmart v Artem*, *supra* note 7 at [63].

191 *Lek Gwee Noi*, *supra* note 40 at [197].

192 *Ibid* at [197].

in a similar fashion.[193] Once again, the SGHC found that this drafting strategy was unreasonable because it gave the claimant multiple bites of the cherry in relation to determining the duration of the non-competition clause,[194] and to allow severance to save the clause would be "unfair and inequitable to the employee."[195]

With this context in mind, it becomes clear that the *Solomon Alliance* approach allows the employer to achieve the desired outcome of a cascading non-competition clause, without having to contend with the public policy reasons for refusing to apply the doctrine of severance to such clauses. This approach allows employers to influence the analysis of reasonableness by selectively alleging events of breach, leaving the vulnerable employee uncertain as to the scope of the non-competition clause until it is determined by a court. As with cascading clauses, this has an *in terrorem* effect on the reasonable employee. We suggest, therefore, that the approach in *MoneySmart v Artem* is preferred because it upholds the contractual expectations of the parties. It requires the employer to take care in drafting reasonably scoped restrictive covenants, and gives employees certainty that the reasonableness of these covenants will be evaluated based on their construction at the time they are entered into.

IV. Conclusion

In conclusion, we have sought to elucidate a set of guidelines for employers and employees regarding the scope and texture of a reasonable non-competition clause by canvassing the case law over the past two decades. We have also sought to highlight some of the uncertainty regarding the restraint of trade doctrine in the context of employment law in Singapore, and we hope to see a resolution on these questions in the near future. Ultimately, employers would be wise to err on the side of reasonableness when drafting non-competition clauses, and employees should be aware that the enforceability of a non-competition clause is ultimately decided by the courts, not by their employers.

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[193] *MoneySmart v Artem*, *supra* note 7 at [53].
[194] *Ibid* at [53], citing *Lek Gwee Noi*, *supra* note 40 at [197].
[195] *Ibid* at [63].