



**LEGAL SEMINAR FOR SMES: GETTING THE HOUSE IN ORDER AND
PRIMING YOUR BUSINESS FOR SUCCESS**

Presentation by Lionel Tan, Cindy Seah and Francis Chan

24 May 2018

RAJAH & TANN ASIA
LAWYERS
WHO
KNOW
ASIA



OVERVIEW OF
RAJAH & TANN | *Singapore*

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OVERVIEW OF RAJAH & TANN SINGAPORE



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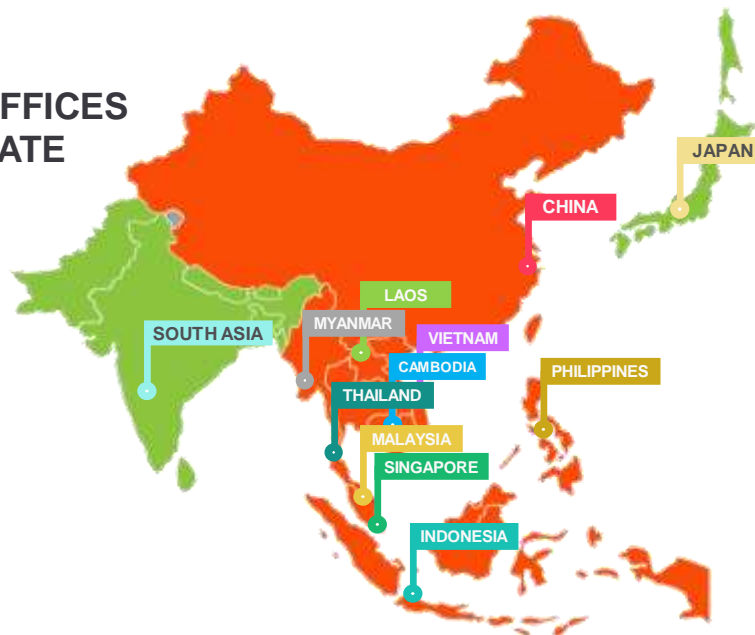
OVERVIEW OF RAJAH & TANN ASIA

OVERVIEW OF RAJAH & TANN ASIA



REGIONAL OFFICES AND ASSOCIATE FIRMS

- Cambodia
- China
- Indonesia
- Lao PDR
- Malaysia
- Myanmar
- Philippines
- Singapore
- Thailand
- Vietnam



REGIONAL DESKS

- Japan
- South Asia

TEAM PROFILE



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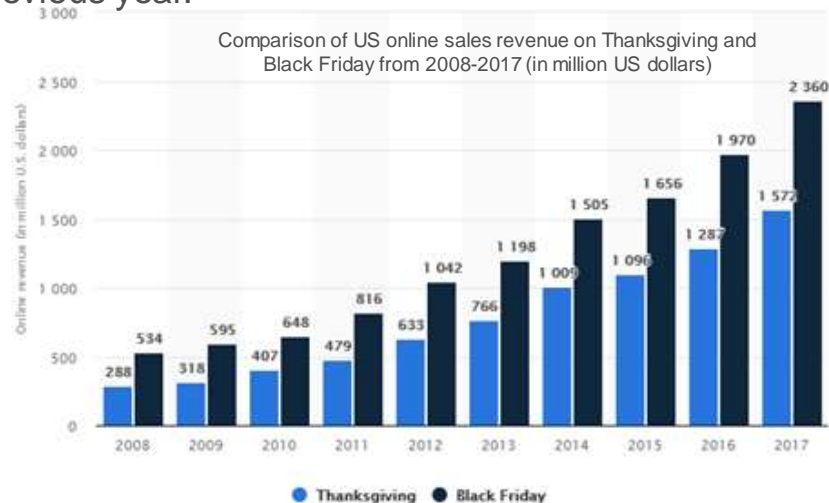
Practice Area: Technology, Media & Telecommunications

Lionel started out his career in law as a Deputy Public Prosecutor and concurrently held the appointment of Assistant Director of the Computer Information & Systems Department of the Attorney-General's Chambers in Singapore. Since joining private practice he has been involved in various high profile commercial and criminal litigation cases and has advised clients on a wide spectrum of commercial and criminal matters. He has a keen interest in the field of Information Technology law, with special emphasis on the developing area of litigation practice in the Information Technology arena. He has been involved in cases dealing with Internet defamation, Internet fraud, on-line security breaches, trade secrets and misappropriation of confidential information. He also advises clients on compliance measures in relation to the Personal Data Protection Act (PDPA) and is a member of the National Council of Social Services Workgroup for PDPA. He regularly advises clients on responding to investigations carried out the Personal Data Protection Commission and his background in litigation provides unique insights on the best strategies to be adopted. He advises clients on the area of persistent threats of cyber-security breaches and how best to take legal measures to mitigate against such risks and manage liabilities.



GROWTH OF ONLINE SALES

On **Black Friday 2017**, US online revenues amounted to **2.36 billion US dollars**, up from 1.97 billion US dollars in the previous year.



Source: <https://www.statista.com/statistics/266010/online-revenue-on-thanksgiving-and-black-friday/>

GLOBAL E-COMMERCE REVENUES

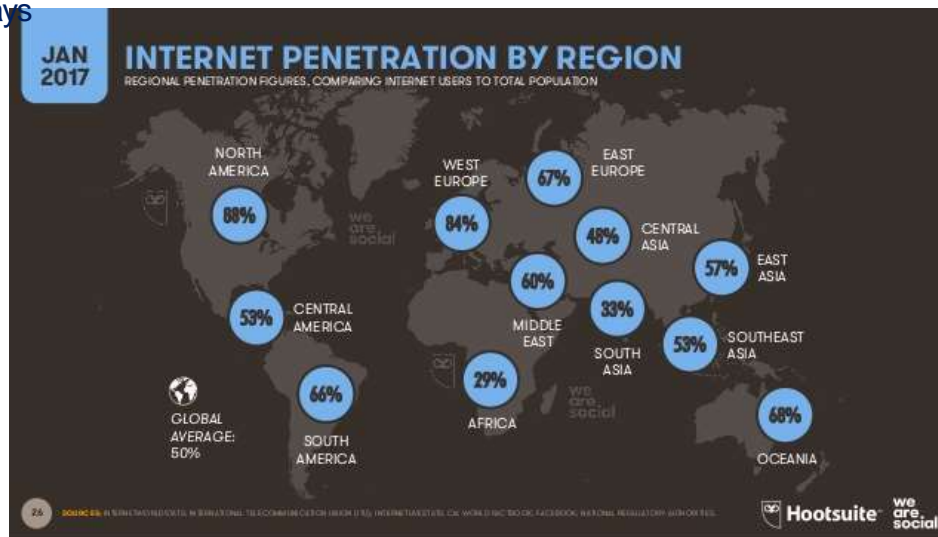


Source: <https://www.slideshare.net/wearesocialsg/digital-in-2017-southeast-asia>



GLOBAL INTERNET PENETRATION

- More than half the world now uses a smartphone
- Almost two-thirds of the world's population now has a mobile phone
- More than half of the world's web traffic now comes from mobile phones
- More than one in five of the world's population shopped online in the past 30 days



Source: <https://www.slideshare.net/wearesocialsg/digital-in-2017-global-overview>

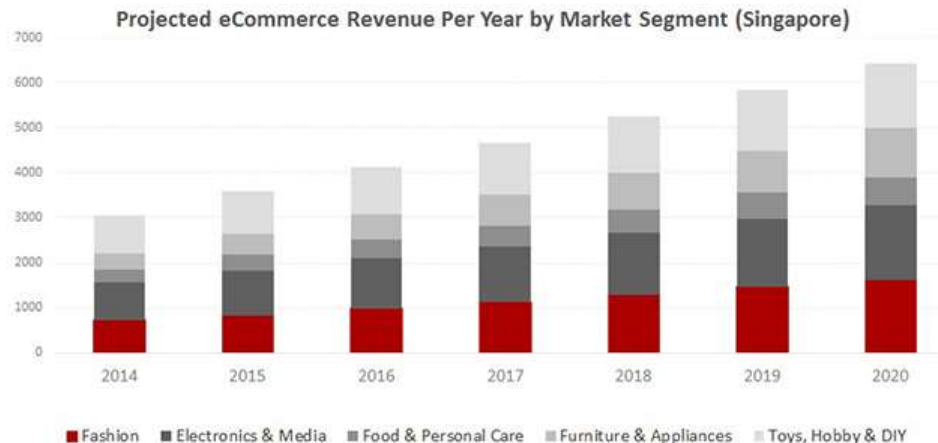


E-COMMERCE POTENTIAL IN SOUTHEAST ASIA



Source: <https://wearesocial.com/special-reports/digital-southeast-asia-2017>

BILLION DOLLAR INDUSTRY



Revenue in the e-commerce market in 2017: **US\$3.326 billion**

The mobile commerce market is expected to grow by **33 percent** in the next five years

Sources: <https://www.eshopworld.com/blog/articles/singapore-e-commerce-insights-market/>
<https://www.statista.com/outlook/243/124/e-commerce/singapore#>
<https://www.cio-asia.com/tech/industries/singapores-m-commerce-market-to-grow-by-33-percent-in-next-five-years/>

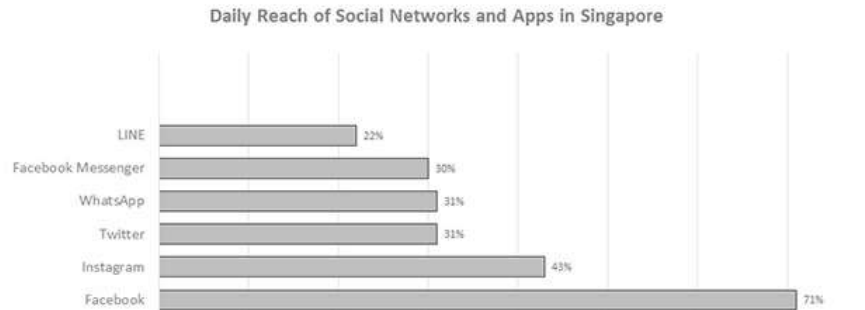


SOCIAL MEDIA USAGE IN SINGAPORE

80% of Singapore shoppers said that what they buy is ‘heavily influenced’ by social media.

96% of Singapore consumers use at least one social network.

Facebook and Whatsapp have the highest daily reach in Singapore



Source: <https://www.eshopworld.com/blog-articles/singapore-ecommerce-insights-market/>

OVERVIEW



(1) Preparatory Steps

- Acquiring licences
- Selecting / designing your platform
- Obtaining your domain name

(2) Running your business

- Website terms & conditions
- Content regulation

(3) Selected regulatory and legal issues

- Privacy and personal data
- Consumer protection
- Cyber security

OVERVIEW



(4) Marketing and Advertising

- Marketing – Spam Control Act, Social Media
- Advertising – Consumer Protection (Fair Trading) Act, SG Code of Advertising Practice

(5) Use of

- Trademark
- Copyright

(6) Other Issues

- Contracting Online
- Pricing Errors

• Infringement of third party rights



ACQUIRING THE NECESSARY LICENCES

Internet licence	Business licence
Automatic	Must be applied for
Class licence	Specific industry (e.g. F&B business would have to apply with NEA)
<ul style="list-style-type: none"> (i) IMDA's Class Licence (ii) Internet Code of Practice 	Specific rules depending on industry



ACQUIRING LICENCES – NEW OR DISRUPTIVE TECHNOLOGIES



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CROWDFUNDING

SELECTING YOUR PLATFORM



- Possible options:
 - 1) Bespoke / customised solutions
 - 2) Template / subscription solutions (e.g. shopify)
 - 3) E-marketplaces (e.g. Qoo10)

Bespoke	Template	E-marketplace
Unique	Certainty	Existing customer base
Tailored functionality	Speed / Ease	Limited functionality / differentiation
Security risk	Cost	Cost

SELECTING YOUR PLATFORM

- Does your business have the capability to develop / maintain the website / app?
 - If not, outsourcing the development may be necessary, albeit



Beware of standard terms



Negotiate for the long-term



Types of contractual provisions

DESIGNING YOUR PLATFORM



Types of contractual provisions

Contractual mechanics

- What must be delivered?
- When should it be delivered?

Commercial highlights

- What price is payable?
- Who owns the intellectual property?

Problem management

- What happens if something goes wrong?
- What remedies are available?

DESIGNING YOUR PLATFORM



- Consider using a checklist like the following:

Do you have:

- a written specification?
- delivery and acceptance arrangements?
- a timetable?
- an agreement on pricing and payment?
- an agreement on intellectual property rights issues?

Have you considered:

- having express warranties?
- limitations and exclusion of liabilities clauses?
- contractual remedies?
- a liquidated damages clause?
- change control provisions?
- provisions for termination?

....

Register your domain name

- Step 1: Identify the Top-Level Domain you want
 - Two types: Generic and Country-code

Generic TLDs	Country Code TLDs
.com .org .info	.com.sg .org.sg .sg

- Step 2: Find out who the accredited registrars are
- Step 3: Apply for domain name



Obtaining your domain name – Potential problems

- **Cybersquatters, typosquatters, and gripe sites**
 - *Cybersquatting*: registering a domain name with the intention to sell
 - *Typosquatting*: registering a domain name with a common misspelling to lure internet users
 - *Gripe sites*: websites criticising someone or something



2014 : Legal suit
against cybersquatter
who registered
“trumpmumbai.com,
trumpindia.com,
trumpbeijing.com,
trumpbudhabi.com

Cybersquatter
ordered to hand
over domain
names and pay
damages of
US\$32,000

Source : CNN

Source: www.trademarksandbrandsonline.com

LAWYERS
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In 2015, eBay succeeded in its suit for the successful transfer of more than a thousand web addresses that were registered in its name

- ebay000.com
- ebay001.net
- ebay002.com
- ebay002.net
- ebay003.com
- ebay003.net
- ebay005.net
- ebay006.com
- ebay006.net

.....

Obtaining your domain name – Potential problems

- Evicting cybersquatters, and shutting down typosquatters and gripe sites
 - Alternative Dispute Resolution (ADR)
 - Uniform Domain-Name Resolution Policy
 - Singapore Domain-Name Resolution Policy



E-CONTRACTING: WEBSITE T&CS

- “Dullest page on a website”
- No legal requirement to have T&Cs
- T&Cs differ for different businesses
- In dispute, court will review T&Cs to determine contractual terms between you and customer
- T&Cs should be drafted so that it can be upheld in court

E-CONTRACTING: WEBSITE T&CS

➤ T&Cs should have provisions addressing:

- Standards, rules and any other conditions that must be followed by users who access and use the website;
- User's rights, obligations and responsibilities;
- Personal data protection information, which are linked back to the website's privacy policy;
- Assumption of responsibility, risks and accountability borne by the user for the access and use of the website;
- Ownership and permissions relating to intellectual property rights;
- Disclaimer / Limitation of the website owner's liabilities;
- Representations and warranties by the user;
- Disclaimer of any representations and warranties by the website owner;
- Governing law; and
- Mode and place of dispute resolution.

E-CONTRACTING: WEBSITE T&CS



- It is also recommended that your business:
 - ❑ Ensures that the T&Cs are brought to the user's attention;
 - ❑ Prevent any access and use of the website until the user has indicated their assent to the T&Cs; and
 - ❑ Require users to scroll through the T&Cs in its entirety before allowing the users to give their assent to be bound.



E-CONTRACTING: WHAT ARE CUSTOMERS' REMEDIES?

- If product is defective or not delivered, customers only entitled to refund or replacement.
- Returns and refunds policy
- “Company not liable for any indirect, special, incidental, consequential, or punitive damages”
- “Liability towards customer capped at \$X”



E-CONTRACTING: SHOULD I PROVIDE ANY WARRANTIES?

- Sale of Goods Act implies warranties of ‘satisfactory quality’ and ‘fitness for a particular purpose’
- “Goods to be supplied on an ‘as is’ basis”
- “All warranties are disclaimed”

CONTENT REGULATION



- Recall:

Internet licence	Business licence
Automatic	Must be applied for
Class licence	Specific industry (e.g. F&B business would have to apply with NEA)
(i) IMDA's Class Licence (ii) Internet Code of Practice	Specific rules depending on industry



CONTENT REGULATION

- IMDA's Class Licence
 - Registration not required unless Internet Content Provider ("ICP") is a
 - i. Political Party;
 - ii. Engages in, or provides for the discussion of political or religious issues relating to Singapore; or
 - iii. In the business of providing news.
 - Requires ICPs to comply with Singapore laws and assist IMDA in the event of investigations.



CONTENT REGULATION

- Internet Code of Practice
 - ICPs must use their best efforts to ensure that “prohibited material” is not broadcasted via the Internet to Singapore users.
- Prohibited material could include those that:
 - depict nudity;
 - promote sexual violence or sexual activity involving coercion or non-consent;
 - depicts act of extreme violence or cruelty;
 - are against public order, public security or national harmony; or
 - incites ethnic, racial or religious hatred.

CONTENT REGULATION



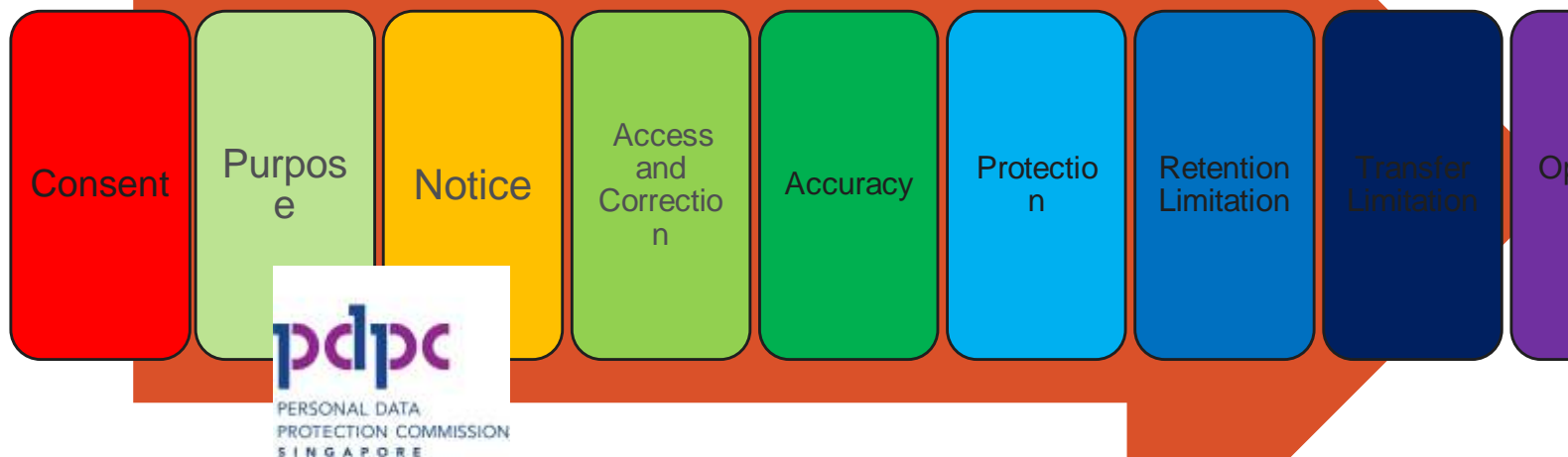
- MDA orders “The Real Singapore” to cease operations for contravention of the Internet Code of Practice (May 2015)
 - Broadcasted prohibited materials against public interest
 - Doctored articles to increase traffic
- Editors of TRS charged with sedition
 - Ai Takagi (who authored the articles) commenced 10 month jail term in April 2016
 - Yang Kaiheng sentenced to 8 months



PRIVACY AND PERSONAL DATA



Personal Data Protection Act Obligations



USER INFORMATION - PRIVACY



- Personal Data Protection Act
 - Businesses are required to make public information regarding its data protection policies and practices.
 - Encouraged to include these information on your websites.
- Such information includes:
 1. Data protection policies and practices;
 2. Business process for receiving and responding to personal data related complaints; and
 3. Contact details of the Data Protection Officer.

USER INFORMATION – ONLINE ACTIVITIES

Use of IP Addresses to track visitors and activities

- More data points associated, may be able to identify individual
- May constitute collecting personal data and consent needed

Use of Cookies

- Consent not needed if cookies do not collect personal data
- Configuring of browser settings may indicate consent
- Behaviour targeting based on collection and use of personal data, consent required

PDPC Guidelines on Selected Topics
– revised Sep 2014

PDPC ENFORCEMENT

- 20 April 2016: YESTUITION AGENCY had disclosed on its website the NRIC numbers and images of certain individuals who had registered to be tutors
- Personal data of approximately 30 tutors were disclosed
- YESTUITION did not obtain the consent of the 30 tutors to disclose their name, NRIC and pictures
- YESTUITION issued a warning for breach of its consent obligations under Section 13 of the PDPA.





PDPC ENFORCEMENT

- **NTUC Income** – A financial penalty of \$10,000 was imposed on NTUC Income for lapses in its print process which resulted in an unauthorised disclosure of personal data of 212 individuals. (3 May 2018)
- **ComGateway** – A financial penalty of \$10,000 was imposed on ComGateway for not protecting its webpage against URL manipulation, which resulted in unauthorised disclosure of its customers' personal data (29 Dec 2017)
- **GMM Technoworld** – A financial penalty of \$3,000 was imposed on GMM Technoworld for failing to implement proper and adequate security measures on its official website, resulting in an unauthorised public disclosure of approximately 190 of its customers' personal data (5 Oct 2016)

CYBER SECURITY

Spearphishing E-mail Purportedly Sent by Ministry of Law

From: Ng How Yue <NgHowYue@mLaw.gov.sg>
To: [REDACTED]
Date: 21/10/2015 10:42 AM
Subject: Please review and get back to me today

Actual email:
ng_how_yue@mLaw.gov.sg

Please check the pdf documents shared on the Dropbox site.

as regards the pending arbitration. Please try to make provision for the outlined items and get back to me.

["case=no-4ggfr5r6ykk-review-critical=view.pdf"](#)



Regards

Mr Ng How Yue
Permanent Secretary
Ministry of Law

The Treasury
100 High Street
#08-02, Singapore 179434
Tel: 1800-CALL-LAW (1800 2255 529)
Fax: (65) 6332 8842
NgHowYue@mLaw.gov.sg
www.mLaw.gov.sg

Link appears similar to Dropbox:
<http://sg.dropbox.login.viewdocs.csomalaysia.org>

CONSUMER PROTECTION



Consumer Protection (Fair Trading) Act;

Consumer Protection (Trade Descriptions and Safety Requirements) Act;

Consumer Protection (Consumer Goods Safety Requirements) Regulations;

Consumer Protection (Safety Requirements) Regulations;

The Unfair Contract Terms Act; and

The Sale of Goods Act

CONSUMER PROTECTION



➤ In summary:

Unfair trade practices

Misleading, false, or deceptive trade descriptions, labelling, and advertising

Implied and unfair contract terms

Product liability for defective goods

Product safety and recalls

CONSUMER PROTECTION - UNFAIR TRADE PRACTICES



- Some examples:
 - Using small print to conceal a material fact;
 - Misrepresenting the quality of goods or services;
 - Misrepresenting that goods are new or unused when they're not;
 - Exerting undue pressure on the consumer in a transaction.



CONSUMER PROTECTION - MISLEADING, FALSE, OR DECEPTIVE TRADE DESCRIPTIONS, LABELLING, AND ADVERTISING

- Essentially an “untruth” about goods made in any way: written, oral, advertisement, etc.

OFFICIAL LAUNCH

World's First... Your Home in Dolphin Habitat
16km from Sentosa, Singapore

Dolphin Villa

Where you play and sleep with the dolphins.

Priority Discount - Attractive Easy Payment Scheme - Attractively priced with guaranteed (over 1000 sq ft) 3 bedrooms

YOU ARE EXCLUSIVELY INVITED!
18th April 2015, 10am - 7pm
19th April 2015, 11am - 7pm

'7% Rent Guarantee Per Year!'
*Subject to terms and conditions

Where else can I find a Home where dolphins say "hello" to my children at my doorstep? It is absolutely thrilling.

If I were to spend \$1.5 million for a property in Singapore, there would have been nothing to rave about. But here, I get the privacy of a home on a Private Island where my family is absolutely thrilled to be living.

And I can invite my friends to enjoy the RARE luxury. What's more, it's just a 20-minute hop away from Singapore. It's like bringing the Maldives or Discovery Bay to my backyard to me... this is absolutely incredible!

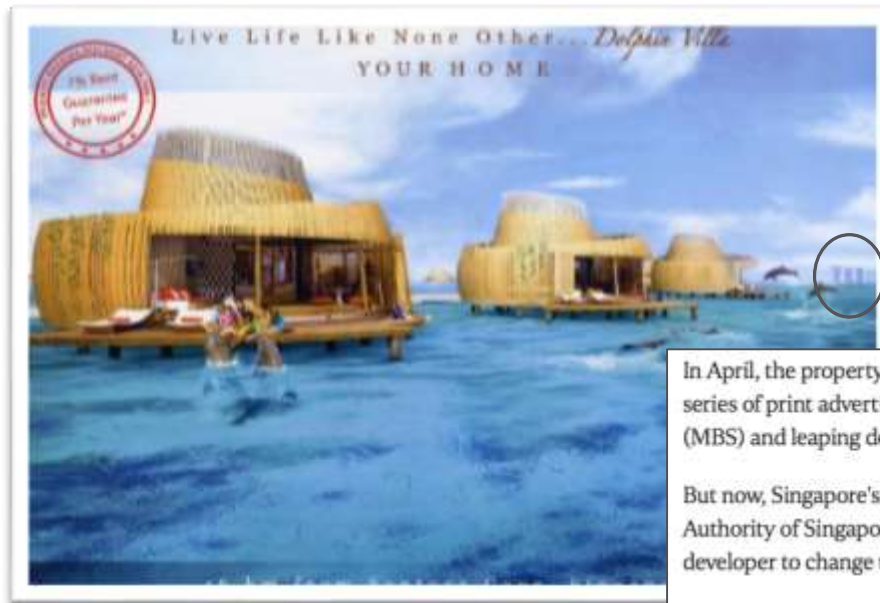
A view of Dolphin Villa

CALL NOW 9188 2098 8131 2000 8484 0022

SHOWROOM - 808 North Bridge Road, 16 Marina View, #11-11, 11 Cove Drive, Sentosa Cove, 1096632

CONSUMER PROTECTION

- MISLEADING, FALSE, OR DECEPTIVE TRADE DESCRIPTIONS, LABELLING, AND ADVERTISING



Source: *The Straits Times*

In April, the property developer behind a Batam villa project splashed a series of print advertisements promising views of Marina Bay Sands (MBS) and leaping dolphins at the residents' doorsteps.

But now, Singapore's advertising watchdog, the Advertising Standards Authority of Singapore (Asas), has objected to the ads, and asked the developer to change them.

It found three things unacceptable: claiming that landmarks such as Marina Bay Sands are visible from the villas, promising a guaranteed rental of 7 per cent a year and quoting an anonymous buyer on how wonderful the development is.

MARKETING – SPAM CONTROL ACT



- Senders of unsolicited marketing messages must comply with the following:
 - Contain “unsubscribe” option;
 - Sender must remove receivers’ contact details business days;
 - Message sent must not have false or misleading title; and
 - Title must be prefixed with <ADV>.
- Failure to do so could result in civil liability.

MARKETING – SOCIAL MEDIA



- Take note of advertising guidelines as well as the need to adopt honest and ethical practices



IDA issues stern warning to Telco for negative marketing practices against competitors – 18 May 2015

When using social media influencers, they need to declare any sponsorship or connection with the company.
(Advertising Standards Authority of Singapore – Social Media guidelines – July 2017)



ADVERTISING - CONSUMER PROTECTION (FAIR TRADING) ACT

- Businesses cannot mislead consumers or make false claims.
- Examples: Making representations -
 - that goods have sponsorship or approval that they don't.
 - that goods are new or unused when they're not.
 - that a price benefit or advantage exists when there aren't any.
 - that goods are available at a discounted price for a stated time if supplier knows that the discount will last for a longer period.



ADVERTISING - SG CODE OF ADVERTISING PRACTICE

- Regulated by the Advertising Standards Authority of Singapore (ASAS)
- Principles:
 - Legality
 - Decency
 - Honesty
 - Fear, superstition, violence
 - Truthful presentation
 - Safety



ADVERTISING - SG CODE OF ADVERTISING PRACTICE

- Principles:
 - Portrayal of persons
 - Children and young people
 - Social and family values
 - Non-denigration
 - Non-exploitation of goodwill or intellectual property
 - Non-imitation
 - Restricted use of National symbols



INTELLECTUAL PROPERTY

- Registrable
 - Trademarks (e.g. words, logos)
 - Domain Names
- Non-Registrable
 - Copyright (text, pictures, algorithm)
 - Business methods
 - Trade secrets/confidential information



TRADEMARK INFRINGEMENT



SPOT THE FAKE!



PROTECTING TRADEMARK



- Trademark is probably the most likely thing you'll want to protect, as having a clear trademark ensures that your store identity is protected, which can help form the basis for growing brand recognition.
- First-to-File Rule
- Registration - Application with IPOS – must include
 - The name and address of the applicant
 - A clear graphical representation of your trade mark
 - A list of goods and/or services in relation to which you wish to register your trade mark
 - A declaration of your use of or intention to use the mark
- Pay S\$341 per class if applying online via ip2.sg, or S\$374 per class via a paper application

ONGOING TRADEMARK DISPUTE

Is the name “Sentosa” a trademark that can be used only by the Sentosa Development Corporation (SDC), the statutory board that manages and promotes tourism activities on the island?

The statutory board is seeking a court order for the group - Vela Holding, Vela Operations Singapore, Vela Research Singapore and Vela Diagnostics - to stop using its "iconic" trademark. The group of companies is registered and headquartered in Singapore.

The Vela group argues that "Sentosa" is used as a place name and does not qualify as a trademark.





COPYRIGHT

- Protection of an author's expression of ideas in a tangible form; includes photographs, articles, stories, videos, songs, etc.
- Authors own exclusive right to works; if work was created in course of employment, employer owns the rights to the work unless otherwise agreed.
- No need for registration and has extra-territorial protection



Copyright
Tussle –
SPH and
Twelve
cupcakes



Licence fee
requested for
posting interview
article on their
Facebook pages



POSSIBLE ENFORCEMENT ACTIONS

- Negotiating with infringer (removal, damages, licensing)
- Sending lawyer's letter
- Commencing legal action in court (damages, injunction)
- Filing police report (fraud, trademark infringement)
- UDRP action for infringing domain names



INFRINGEMENT OF THIRD PARTY RIGHTS

- You may be in breach of third party rights too!
- When using others' pictures / sounds / music for your online platform, always make sure to seek permission (i.e. enter into a licensing agreement).
- Obtain indemnity from website developer
- Consequence of infringement:
 - Civil damages;
 - Possible criminal liability for both company and company's officers

CONTRACTING ONLINE



- No legal definition of “electronic contract” under Singapore Law.
- However, the Electronic Transactions Act (“ETA”) acknowledges electronic agreements as agreements that may be formed using technology such as “*electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities*”.
- ETA confirms that electronic agreements are valid.
- Remember that contracts generally do not need to be in writing.
- However, an “electronic record” will satisfy the formal requirement of a document needing to be “in writing”.
 - This means emails, documents in electronic form, other forms of communication (instant messaging, social media etc) can constitute an agreement, so long as the basic requirements of contract are satisfied.

CONTRACTING ONLINE



- Section 11 of the ETA: Offer and acceptances can be made online.
- Section 14 of the ETA: Advertisements proposing to conclude contracts addressed to the world at large are not offers capable of immediate acceptance, unless this is clearly communicated.
- Section 15: Contracts formed through automated message systems are not to be denied validity or enforceability just because no natural persons reviewed the action of the system.

PRICING ERRORS ONLINE



Chwee Kin Keong v Digilandmall.com [2004] 2 SLR(R) 594

- Plaintiffs placed orders on Internet for 1,606 Hewlett Packard laser printers on Defendant's website at S\$66 each
- Actual price was S\$3,854 as Defendant made mistake on website
- Total Paid : **S\$105,996** versus Market Value : **S\$6,189,524**
- Court Held : Although there were concluded contracts, the contracts were vitiated by unilateral mistake
- Price was so absurdly low, a reasonable person would have been suspicious

PRICING ERRORS ONLINE



- **SIA business class tickets sold at economy class prices due to computer glitch**

In December 2014, a computer error caused about 900 business class seats to be sold at economy class prices in Australia after these tickets were wrongly loaded onto the global booking system used by travel agents.

The price difference was in the thousands, at up to \$5,500 for some tickets

SIA initially demanded that the travel agents either cancel the sale and refund the amounts paid by the customers or collect the price difference from them

SIA eventually decided to honour the sale of the cheap business class tickets

PRICING ERRORS ONLINE



- **Customers riled after MBS declines to honour mispriced room rates**

In 2016, An error on the five-star hotel's website allowed customers to book rooms for just S\$62.70 a night.

An MBS spokesperson pointed out that the hotel's booking terms included a clause regarding incorrectly posted rates.

MBS had had contacted the affected guests to extend the lowest rate available for their stays as well as a S\$100 credit towards their final bill for their inconvenience.

CASE – *“As a matter of good business practice, we would encourage the hotel to work towards an amicable resolution to this matter”*

PRICING ERRORS ONLINE



- Who is liable for pricing errors online?
 - If the Court finds that consumers have actual knowledge that prices were set wrongly, contracts will be void.
 - BUT this finding is only made where consumers have actual knowledge of the mistake, something difficult to prove.
- Have contractual terms that may mitigate against such errors (See MBS situation)
- May need to balance reputational issues



QUESTIONS?

TEAM PROFILE

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*LLB (Hons), National University of Singapore
Advocate & Solicitor, Singapore
Solicitor, England & Wales (non-practising)*

Cindy is qualified in Singapore and England and Wales, and has practiced with a Magic Circle firm in London as well as an international law firm prior to joining Rajah & Tann Singapore. She started out in the corporate department of one of the Big Four law firms in Singapore before spending two years in London during which, she has worked on major cross-border investments, private and public mergers and acquisitions, and other corporate transactions. She therefore has rich experience in advising companies – whether it is handling major corporate transactions as an external counsel, or advising on and overseeing corporate, legal and regulatory affairs for businesses in Asia Pacific as an internal counsel.

Companies Act Updates

A photograph of three business professionals in an office setting. A man in a dark suit is seated on the left, looking at a laptop. A woman in a dark blazer is standing on the right, leaning over a desk and pointing at documents. Another person is partially visible in the center, also looking at the documents. The background shows office equipment like printers and monitors.

IMPROVING TRANSPARENCY OF OWNERSHIP & CONTROL

REGISTER OF CONTROLLERS



- Controller is an individual or legal entity with:
 - Significant Interest; or
 - > 25% of shares; or
 - shares with > 25% of voting power.
 - Significant Control
 - right to appoint/remove directors holding majority of votes;
 - > 25% of voting power; or
 - exercise/right to exercise significant influence or control.



REGISTER OF NOMINEE DIRECTORS

- “Nominee directors” refer to directors who are accustomed or under an obligation whether formal or informal to act in accordance with the directions, instructions or wishes of any other person.
- Nominee directors will have to disclose:
 - their nominee status; and
 - particulars of their nominators to their companies.



REDUCING REGULATORY BURDEN & IMPROVING EASE OF DOING BUSINESS

USE OF COMMON SEAL



- Previously – companies had to use common seal for deeds or share certificates, and affixation has to be in the presence of 2 directors, or a director and the secretary
- From 31 March 2017 – common seal will not be required, and such documents can be executed by:
 - 2 directors;
 - 1 director and the secretary; or
 - 1 director and a witness who attests the signature.



Employment Act Updates

EMPLOYMENT CLAIMS TRIBUNAL

EMPLOYMENT CLAIMS TRIBUNAL (“ECT”)



- The first port of call will be mediation with the Tripartite Alliance for Dispute Management, following which claims can be made in the ECT.
- ECT will:
 - take over the Labour Court’s function of hearing statutory salary-related disputes;
 - hear contractual salary-related claims from employees (including PMEs); and
 - hear claims from employers (for claims for salary in lieu of notice).
- Claims are capped at S\$20,000 (or S\$30,000 if dispute involves union member who proceeds via mediation).



TRIPARTITE MEDIATION

TRIPARTITE MEDIATION FRAMEWORK (“TMF”)



- TMF was formed in 2011 for:
 - employees earning a fixed monthly salary of up to S\$4,500, who are union members working in non-unionised companies; and
 - Disputes relating to salary arrears, breach of employment contracts and payment of retrenchment benefits.
- From 1 April 2017, TMF has been enhanced to:
 - benefit all PME who are union members in non-unionised companies; and
 - expand coverage to include claims related to statutory benefits and re-employment issues.

CHILD DEVELOPMENT CO-SAVINGS ACT

SHARED PARENTAL LEAVE



- Shared parental leave for fathers has been increased from 1 week to a maximum of 4 weeks
- Following conditions have to be met:
 - child must be a Singapore citizen;
 - mother must have been eligible for maternity leave;
 - child's mother was lawfully married to the child's natural father; and
 - child's mother must elect/consent to sharing the leave (and the child's mothers' leave will be reduced correspondingly).



ADOPTIVE MOTHERS



- Adoptive mother will be entitled to 12 weeks of adoption leave (increased from 4 weeks previously).
- Following conditions have to be met:
 - the adopted child is below the age of twelve (12) months;
 - (if child is not a Singapore citizen) a dependant's pass in respect of the child has been issued and either the adoptive father or mother is a Singapore citizen; and
 - female employee is not the natural mother of the child.



ADOPTIVE FATHERS



- Adoptive father will be entitled to 4 weeks of his wife's adoption leave (increased from no shared leave previously).
- Following conditions have to be met:
 - adoptive father has made a joint application with the child's adoptive mother to adopt the child;
 - the adoptive father is lawfully married to the adoptive mother; and
 - (if child is not a Singapore citizen) the adoptive father or mother is a Singapore citizen.



A photograph of three business professionals in an office setting. A man in a dark suit is seated on the left, looking at a laptop. A woman in a dark blazer is standing on the right, leaning over a desk and pointing at documents. Another person is partially visible in the center, also looking at the documents. The background shows office equipment like printers and monitors.

RETIREMENT AND RE-EMPLOYMENT ACT

RE-EMPLOYMENT OF OLDER EMPLOYEES

- The age which employers must offer re-employment to Singapore citizen/PR has been increased from 65 to 67.
- Employers are no longer allowed to reduce wages of employees who reach 60 years old (previously reduction up to 10% was permitted).
- Re-employment obligations may be transferred to another employer if:
 - employee consents to transfer; and
 - new employer agrees to take over all re-employment obligations.



RE-EMPLOYMENT OF OLDER EMPLOYEES

- Recommended maximum Employment Assistance Payment amount is increased from S\$10,000 to S\$13,000



RE-EMPLOYMENT OF OLDER EMPLOYEES



Summary of Changes

Policy	Before 1 Jul 2017	After 1 Jul 2017
Re-employment Age Ceiling	65 years old	67 years old
Legal Wage Reduction	Employers allowed to reduce the wages of employees who reach 60 years old	Employers no longer allowed to reduce the wages of employees who reach 60 years old
Re-employment Obligations	Employers cannot transfer re-employment obligations	If an employer is unable to offer a suitable position to the employee, the employer may transfer his re-employment obligations to another employer, subject to certain conditions being met
Employment Assistance Payment	Maximum EAP of S\$10,000	Maximum EAP of S\$10,000



TRIPARTITE STANDARDS

TRIPARTITE STANDARDS – TERM CONTRACT EMPLOYEES



- Continuous Service: Cumulative periods (duration > 14 days and renewed within 1 month from end of previous contract) to be treated as continuous service
- Paid Leave Benefits: Statutory benefits (e.g. annual leave, sick leave, maternity/paternity leave) to be awarded to term contract employees
- Notice Period: Cumulative length of service to be used to calculate the notice period as follows –
 - < 26 weeks – 1 day
 - At least 26 weeks but < 2 years – 1 week
 - At least 2 years but < 5 years – 2 weeks
 - At least 5 years – 4 weeks

TRIPARTITE STANDARDS – FLEXIBLE WORK ARRANGEMENTS (“FWA”)



- Employers to inform employees of the types of FWA, process to request for FWA and expectations on responsible use of FWA.
- Outcomes of applications for FWA to be documented and communicated to employees.
- If FWA is not granted, supervisors should discuss suitable alternatives with employees.
- Supervisors trained to evaluate applications for FWA based on suitability (considering both needs of job and employee).
- Supervisors to set work expectations, manage and appraise employees on FWAs.
- Employer to appoint a member of the senior management to champion FWAs.

TRIPARTITE STANDARDS – GRIEVANCE HANDLING



- Employers to implement a grievance handling procedure (“**Procedure**”) to allow employees to raise grievances and for employer to conduct investigations and respond to the affected employees.
- Employers to communicate clearly the Procedure to the employees and document it by company circular or memo.
- Procedure to specify appropriate authority to hear appeal and provide reasonable timeline.
- Employee to be given the right to bring his/her unresolved grievances to the next level.
- Employers required to train their supervisors to manage employee feedback and work with union (if company is unionised).

TRIPARTITE STANDARDS – RECRUITMENT PRACTICES



- Job Advertisements: State selection criteria related to the qualifications, skills, knowledge and experience required for the job, and where specific attributes are required, the reasons for requirements should also be clearly stated.
- Job Application Forms: Ask for information relevant for assessment of applicant's suitability for the job, and should not ask for age, IC number, date of birth, gender, race, religion, marital status etc unless required to assess applicant's suitability for the job.
- Job Interviews: A set of relevant and objective criteria should be used consistency to shortlist and interview candidates in a fair and unbiased manner. Proper records of interviews, assessments procedures, test and job offers should be kept for 1 year. Unsuccessful applicants should be informed of outcome of interview.

TRIPARTITE STANDARDS – CONTRACTING WITH SELF-EMPLOYED PERSONS



- Following key terms should be discussed with self-employed persons:
 - Names of contracting parties;
 - Parties' obligations (nature of services/types of products);
 - When payment (amount for each service/product) is due;
 - Terms of variation should be clear in how either party may vary or terminate agreement; and
 - Resolving dispute by way of mediation.
- Agreed terms (incorporating the above) should be set out clearly and properly documented before any products or services are delivered.

TRIPARTITE STANDARDS – UNPAID LEAVE



- Unpaid leave may include:
 - 4 weeks of unpaid leave per annum may be offered to employees if their child is below the age of 2 and has medical conditions; or
 - 2 weeks of unpaid leave per annum to care for immediate family members who are hospitalised.
- Employers should inform their employees of the type of unpaid leave, process to request for unpaid leave and expectations for use of unpaid leave.
- Employers to also notify employees on outcome of unpaid leave requests timely, and if unpaid leave not granted, to explain to employees the reasons and discuss alternative means of support.

A photograph of three business professionals in an office setting. A man in a dark suit is seated on the left, looking at a laptop. A woman in a dark blazer is standing on the right, leaning over a desk and pointing at documents. Another person is partially visible in the center, also looking at the documents. The background shows office equipment like a printer and computer monitors.

PROPOSED EMPLOYMENT ACT AMENDMENTS

PROPOSED EMPLOYMENT ACT AMENDMENTS

- Minister of Manpower announced that the Employment Act will be reviewed.
- Key proposed changes include:
 - removal of S\$4,500 salary threshold, providing PMEs with statutory protections;
 - (in relation to Part IV of the Employment Act) raising salary threshold for non-workmen from S\$2,500 to S\$2,600 to afford more non-workmen with statutory protections; and
 - allowing ECT to hear both salary-related and wrongful dismissal claims.





QUESTIONS?

TEAM PROFILE



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Francis routinely advises clients in respect of employer obligations under the CPF Act, Employment Act and Employment of Foreign Manpower Act and all relevant subsidiary legislation and guidelines, and represents clients in disputes with the CPF Board, Ministry of Manpower and TAFEP. Francis frequently acts and advises in contentious matters for clients (both employee and employer) in prosecuting and defending against claims arising from breach of employment obligations in the Singapore Courts (Magistrate, District and High Court) including claims arising from breach of restrictive covenants, confidentiality obligations and fiduciary duties.

Francis has also successfully acted as lead counsel and successfully defended employers in personal injury claims brought against them by their former employees for non-fatal and fatal accidents and has independently represented clients in the High Court in respect of employment related personal injury claims.

Apart from his litigation and advisory practice, Francis is also an employer law trainer and has conducted training sessions for officers, decision makers and key stakeholders from the Ministry of Manpower, Tripartite Alliance for Dispute Management and employers in various aspects of employment law.

AGENDA



1. Partnership / Shareholder agreements
2. Non-competition obligations
3. Misuse of confidential information / Breach of Confidence
4. Independent contractors vs employees

PARTNERSHIP / SHAREHOLDER AGREEMENTS



Common problems

- Measuring / rewarding financial vs “sweat” contributions to business
- Decision making: strategic direction, monetary limits, hire-fire etc / deadlock provisions
- Exit considerations / Buy-out / valuation methods
- Continuing obligations: non-compete, non-solicitation, confidentiality, ownership of IP etc

PARTNERSHIP / SHAREHOLDER AGREEMENTS



Where there are no partnership / shareholder agreements

- Companies – usually, default terms of model Constitution from ACRA or corporate secretary. Generic and may not sufficiently protect parties or give effect to the intentions of parties. E.g. transfer of shares (no ROFR), quorum for meetings etc
- Partnerships – default provisions in the Partnership Act will apply e.g. equal profit and loss sharing notwithstanding actual capital contribution etc
- Dispute develops - Court decides. Out of your hands.

NON-COMPETE CLAUSES



Runs counter to public policy:

“Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into.” – Lord Atkinson in *Herbert Morris, Ltd v Saxelby* [1916]

NON-COMPETE CLAUSES



The legal test is clear in Singapore:

1. Is there a legitimate proprietary interest to be protected

2. Is the restriction reasonable?
 - As between the parties
 - In the interests of the public

NON-COMPETE CLAUSES



Reasonableness:

- Duration of operation: the longer it is, the more likely it is to be deemed void
- Jurisdiction – the more places the restrictions are extended to, the more likely it is to be deemed void. Highly dependent on the nature of the industry and the scope of the company's operations
- Scope of restraint– Similarly, depends on the level of seniority and expertise of the employee as well as the nature of the industry

NON-COMPETE CLAUSES



Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart [2011] SGHC 266; [2012] SGCA 39

- Smile Inc commenced proceedings against Dr. Lui, a former employee. Smile Inc alleged that Dr. Lui was in breach of express and implied contractual duties to Smile Inc in setting up a competing business and soliciting Smile Inc's patients.
- Smile Inc's case was dismissed at the High Court.
- On appeal, the Court of Appeal dismissed Smile Inc's appeal.

NON-COMPETE CLAUSES



Learning Points from the High Court Judgement in respect of non-compete clauses:

- Smile Inc's "3-KM Radial Clause" was held to be unreasonable because it included every other current and new clinics not yet even set up - [92,96]
- The unlimited duration of the restriction was also deemed to be unreasonable – [101]

These points were all upheld on appeal against Smile Inc.

NON-COMPETE CLAUSES



- The Courts will only enforce non-compete clauses if they are reasonable.
- What is “reasonable” is a highly fact-sensitive exercise.
- In general, the shorter and more clearly defined in scope the restriction, the better chance it will have of surviving judicial scrutiny.

MISUSE OF CONFIDENTIAL INFORMATION



What is Confidential Information?

- Is information confidential just because the employer deems it to be confidential?
- Does marking something as “confidential” confer on it properties of confidentiality?
- Is information confidential if others have access to it?

MISUSE OF CONFIDENTIAL INFORMATION



Some definitions:

- “information that is important to the business or company and is not known to the public” - IPOS
- “any confidential business information which provides an enterprise a competitive edge may be considered a trade secret” - WIPO

MISUSE OF CONFIDENTIAL INFORMATION



Commonly accepted categories of confidential information:

- Business plans: marketing, pricing strategies
- Client lists, data and information
- Technical R&D, research
- Generally, information not readily available in the public domain

MISUSE OF CONFIDENTIAL INFORMATION



- Establish clear guidelines as to what is confidential information and how such confidential information is to be dealt with within the company
- Employees should be made to execute a well-defined confidentiality / non-disclosure agreement
- If a breach occurs, act quickly – time is of the essence. Delays in response will impact quantum of damages.

INDEPENDENT CONTRACTORS VS EMPLOYEES



Basic differences:

- Statutory labour laws do not apply to independent contractors e.g. CPF Act, Employment Act
- For employees, employer may be in breach for not adhering to the terms of the relevant legislation e.g. not paying CPF (offence under CPF Act), not giving minimum number of days of sick leave (offence under Employment Act)
- Independent contractors generally do not owe any duties to the hirer apart from the contractually stipulated ones. However, employees owe not just the duties stated in their employment contract but also implied duties of confidence, good faith and fidelity.

INDEPENDENT CONTRACTORS VS EMPLOYEES



- Substance over form approach – the Courts will examine in detail the arrangements between employer and the worker to determine the relationship. E.g. even if the contract expressly states “Independent Contractor Agreement”, the contractor may still be held to be an employee.
- Key element is the extent of control that the hirer exercises over the worker, as well as the intention of parties in entering into the working relationship.

INDEPENDENT CONTRACTORS VS EMPLOYEES



- Ensure that the engagement contract is worded carefully and properly reflects the intention of parties.
- Ensure that the actual conduct of the parties is consistent with the terms of the contract.
- Climate of heightened enforcement and increased prosecutions by CPF, IRAS

DISCLAIMER



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Questions?

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