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Contents

In June 2021's edition, we look at how the Personal Data Protection Act guides us to deal with data breaches; we consider non-solicitation clauses, a mainstay of employment contracts; we consider issues in leasing retail premises; and we look at how the courts will deal with conflicting contractual clauses.

I. Dealing with Data Breaches

Sherman Ng, Attorney-at-law

1. Introduction

Cyber-attacks have become increasingly prevalent in recent years, with many reported instances of hackers exploiting security weaknesses of organisations and holding their data hostage, demanding millions of dollars in payment in exchange for the release of such data. Such data often includes the personal data of individuals, which introduces an additional problem for the organisation that has fallen victim to the cyber-attack – having to deal with the data breach in compliance with personal data protection laws.

The Personal Data Protection Act (No. 26 of 2012) (the "**PDPA**") is the foremost data protection legislation in Singapore that governs the collection, use and disclosure of individuals' personal data by organisations, and imposes obligations on organisations in respect of (amongst other things) the protection of personal data (which includes preparing for a data breach), the assessment of data

breaches, and the notification of certain types of data breaches. This article will focus on these 3 main obligations, and explore some of the practical ways in which these obligations may be met.

2. Preparing for Data Breaches

Under the PDPA, an organisation must *"protect personal data in its possession or under its control by making reasonable security arrangements to prevent: (a) unauthorised access, collection, use, disclosure, copying, modification or disposal, or similar risks; and (b) the loss of any storage medium or device on which personal data is stored"*. The PDPA does not set out the specific measures that organisations should take when making "*reasonable security arrangements*". However, the Advisory Guidelines on Key Concepts in the Personal Data Protection Act ("**Advisory Guidelines**") issued by the Personal Data Protection Commission (the "**PDPC**", the regulatory authority responsible for data protection matters in Singapore) provides some guidance as to what constitutes "*reasonable security arrangements*". Generally speaking, an organisation should:

(i) design and organise its security arrangements to fit the nature of the personal data held by the organisation and the possible harm that might result from a security breach;

(ii) identify reliable and well-trained personnel responsible for ensuring information security;

(iii) implement robust policies and procedures for ensuring appropriate levels of security for personal data of varying levels of sensitivity; and

(iv) be prepared and able to respond to information security breaches promptly and effectively.

As can be seen from items (i) to (iv) above, making "*reasonable security arrangements*" also involves preparing for data breaches. General examples of reasonable security arrangements include (but are not limited to) conducting training sessions for employees in relation to the handling of personal data, data breaches, and IT security threats; storing confidential documents in secure / locked cabinets and systems; restricting access to confidential documents on a need-to-know basis; encrypting and implementing access controls in respect of personal data; updating IT security measures regularly; and ensuring that any IT service providers engaged are capable of providing the requisite standard of IT security.

Having said that, it has been acknowledged by the PDPC that there is no "one size fits all" solution. The PDPC has recommended that organisations undertake a risk assessment exercise to ascertain the adequacy of their security arrangements, having regard to factors such as the size of the organisation, the amount and type of personal data the organisation holds, as well as whether the personal data will be received or disclosed to third parties. Different organisations have their own specific data protection needs, and it is crucial that the security arrangements be tailored to meet these needs.

The PDPC's Guide on Managing and Notifying Data Breaches Under the PDPA ("**Data Breach Guide**")

also helpfully sets out what organisations should do to prepare for and prevent data breaches. This includes monitoring IT systems through regular oversight and the use of monitoring tools (such as real-time intrusion detection software), as well as subscribing to information sources such as SingCERT (Singapore Computer Emergency Response Team of the Cyber Security Agency of Singapore ("**CSA**")) alerts and advisories on the latest security issues and trends. This can help organisations be aware of and detect possible IT risks and threats. It is also recommended that organisations have in place a data breach management plan (that sets out the roles, responsibilities, and steps involved in managing a data breach), to enable a swift response to data breaches.

3. Obligation to Assess Data Breaches

Generally speaking, if an organisation has reason to believe that a data breach affecting personal data in its possession or under its control has occurred, it must conduct an assessment of whether the data breach is a notifiable data breach in a "*reasonable and expeditious*" manner. If the organisation is a data intermediary[1], and has reason to believe that a data breach has occurred in relation to personal data that it is processing on behalf of and for the purposes of another organisation, it must notify that other organisation of the breach (whereupon that other organisation will have to conduct an assessment of whether the data breach is a notifiable data breach). In this regard, Section 26B of the PDPA provides that a data breach is notifiable if it: (a) results in, or is likely to result in, significant harm[2] to an affected individual; or (b) is, or is likely to be, of a significant scale.[3]

It is noted that any unreasonable delay in assessing a data breach will constitute a breach of the data breach notification obligation (explored below), allowing the PDPC to take enforcement action. As such, it is crucial that any suspected data breach be taken seriously and escalated to the persons within the organisation who are responsible for dealing with data breaches. It is also important that the assessment begins as soon as there are credible grounds to believe that a data breach has occurred.

In making the assessment, an organisation should ideally document the facts and all the steps taken in assessing the data breach, as such records will be necessary to demonstrate that it has taken "*reasonable and expeditious*" steps to assess whether the data breach is notifiable. This includes (but is not limited to) how and when the data breach occurred, the type(s) of personal data involved, and the data breach management and remediation measures in response thereto.

An organisation has at most 30 days to carry out the aforesaid assessment, and if it is unable to do so within that period, it will need to provide the PDPC with an explanation for the time taken to carry out the assessment. Notwithstanding this 30-day deadline, it is worth bearing in mind that an organisation must always take "*reasonable and expeditious*" steps to assess whether a data breach is notifiable.

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[1] "data intermediary" means an organisation which processes personal data on behalf of another organisation but does not include an employee of that other organisation.

[2] Briefly, whether the harm is significant will depend a variety of factors, in particular, the type of personal data that has been compromised.

[3] A data breach that affects 500 or more individuals will be regarded as a significant data breach.

Simply meeting the aforesaid 30-day deadline may not mean that an organisation has taken "*reasonable and expeditious*" steps. In fact, depending on the circumstances, this can be quite the opposite - it is not recommended to take 30 days to assess a data breach if there is no valid reason for taking this long. In this regard, the aforementioned data breach management plan would no doubt be helpful in ensuring that the organisation acts quickly (and at the very least, meets this 30-day deadline) in the event of a data breach, as responsible persons within the organisation would have already been adequately instructed on what to do, saving considerable time.

4. Data Breach Notification Obligation

If, pursuant to the aforesaid assessment of the data breach, the organisation determines that the data breach is notifiable, it must notify the PDPC as soon as is practicable, but in any case no later than 3 calendar days after the day the organisation makes that assessment. It is noted that organisations may also choose to voluntarily notify the PDPC even if they assess that the data breach is not a mandatorily notifiable one under the PDPA. As mentioned in the Data Breach Guide, voluntary notifications may potentially be considered as a mitigating factor when the PDPC considers the appropriate enforcement action against the organisation for a breach of the PDPA.

Where notification to the PDPC is assessed to be required, the organisation must also notify affected individuals in any manner that is reasonable in the circumstances, as soon as practicable (at the same time or after notifying the PDPC). It is noted that there may be circumstances where the organisation may be exempted from the obligation to notify affected individuals of the data breach. This includes situations where the organisation has taken timely remedial actions that renders it unlikely that the data breach will result in significant harm to the individuals, or where the organisation has been specifically instructed by law enforcement agencies or the PDPC not to notify the affected individuals. As such, when notifying the PDPC of the data breach, it is good practice to seek the guidance of the PDPC before notifying the affected individuals.

If applicable, organisations should also consider alerting the CSA (in the case of any cybersecurity incident) and the Singapore Police Force (in the case of any suspected criminal activity), or any other sectoral regulator or regulatory authority of a data breach under other written laws.

5. Conclusion

As alluded to above, some organisations may be further subject to other laws which impose obligations additional to those under the PDPA, such as the Cybersecurity Act (No. 9 of 2018) of Singapore, which requires (amongst other things) certain organisations to report cybersecurity incidents to the relevant authorities. Other organisations may also be required to meet additional data breach notification requirements (in addition to the baseline requirements that apply generally to all organisations under the PDPA), whether under other written laws, or under requirements imposed by their sectoral regulator (e.g. requirements imposed by the Monetary Authority of Singapore for organisations in the finance sector, etc.).

Organisations may wish to obtain legal advice if they are not already certain of all of their data breach (and cybersecurity) obligations under law. If your organisation or business requires such advice, or a discussion on how it can better meet these obligations, please do not hesitate to reach out to us and we would be happy to arrange the same.

II. Prudential Assurance Co Singapore

Leon Ryan, Attorney-at-law

Companies often include non-solicitation clauses in the employment contracts of their workers. Typically, these clauses attempt to prohibit workers (during their employment period) from enticing other workers to leave the company and potentially joining a competitor. Sometimes such clauses are also worded to apply to a period of time after the worker has left the company (e.g. no solicitation for a period of 24 months after leaving the company).

Companies are sometimes uncertain on whether such clauses can be enforced. The recent case of *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter and another* [2021] SGHC 109 provides a useful overview of the topic. While the case specifically involved insurance agents, who are independent contractors and not employees, the guiding principles provided by the court also offer some guidance on the interpretation and enforceability of non-solicitation clauses which are intended to be binding on employees.

The case involved an insurance agent (Peter Tan) who terminated his agency contracts with Prudential Assurance Co Singapore (Pte) Ltd ("**PACS**") sometime in July 2016. At around the same time, over 200 agents who had been working under Mr. Tan also terminated their agency contracts. Mr. Tan and most of the other agents subsequently started working with PACS' competitor, Aviva.

While the case involved a wide range of legal claims, on the specific issue of non-solicitation clauses, the following practical learning points can be noted:

(1) Companies should ensure that non-solicitation clauses are properly incorporated into their employment contracts. It is common for companies to issue rules and regulations to its employees (even though such rules are not found in the employment contract), and it is important to note that such rules and regulations are not necessarily automatically binding on the employee.

(2) PACS attempted to impose a non-solicitation clause on to Mr. Tan by way of an "Agency Instruction", which was a document separate from Mr. Tan's agency contracts. However, because (among other reasons) Mr. Tan's agency contracts required that all amendments must be in writing and signed by both parties, the non-solicitation clause was not properly incorporated into the agency contracts and hence not binding, and unenforceable.

(3) In order for a non-solicitation clause to be valid, it must (i) protect "legitimate proprietary interest"; and (ii) be reasonable in light of the interest of the parties and the interest of the public.

(4) In terms of protecting a "legitimate proprietary interest", the court recognized that the need to maintain a stable and trained workforce will generally be considered a legitimate proprietary interest which can be protected via a non-solicitation clause. This is useful guidance - so long as non-solicitation clauses genuinely seek to maintain a stable and trained workforce, it will generally fulfil the requirement of protecting a "legitimate proprietary interest".

(5) In terms of whether a clause is reasonable, some factors to consider are whether the application of the clause is too wide (e.g. are there good reasons for the clause to apply to all employees regardless of seniority?); and whether the applicable period for the clause is too long (e.g. is there good reason for a non-solicitation period to apply even after the worker has left the company?).

Of course, an assessment of what is "reasonable" will depend heavily on the specific circumstances of the employment, which includes the nature and scope of the job. Generally speaking, non-solicitation clauses which are limited in scope, and/or which specifically apply to "high value" groups of workers, are more likely to be considered as reasonable. Companies should thus always tailor their non-solicitation clauses to the specific needs of their organisations to ensure that such non-solicitation clause is properly and appropriately drafted and incorporated into the agreement between the contracting parties, be it employee or independent contractor.

III. Code of Conduct for Leasing of Retail Premises in Singapore

Henry Tan, Attorney-at-law

1. Introduction

A Code of Conduct for Leasing of Retail Premises in Singapore (the "**CoC**") has been developed by the Fair Tenancy Pro Tem Committee (the "**Committee**"). The Committee, established with the support of the Singapore Business Federation, comprises representatives from landlord and tenant communities, members of government, and relevant experts of industry and academia.

2. Qualifying Retail Premises

The CoC, which came into effect on 1 June 2021, aims to provide landlords and tenants of Qualifying Retail Premises ("**QRPs**")[4] with (i) guidance toward a fair and balanced position in lease negotiations

4 QRPs are defined as premises (a) held under lease agreements entered into on or after 1 June 2021 for tenures of at least one year and (b) permitted to be used by the Urban Redevelopment Authority ("**URA**") and other authorities for certain purposes, including usage as food and beverage, shop, medical, pet shop, commercial sports and recreation, and entertainment establishments. For this purpose, the CoC defines lease agreements as including "sub-lease agreements, licence agreements, agreements for lease and accepted letters of offer between landlords/licensors and

and (ii) a framework for compliance and accessible dispute resolution. The Fair Tenancy Industry Committee ("**FTIC**") was established on 3 May 2021 to be custodian of the CoC and to provide guidance to landlords and tenants of QRPs to achieve fair and balanced negotiations.

3. Structure of the CoC

The CoC contains four parts: (A) Conduct and Spirit of Negotiations, (B) Leasing Principles for Key Tenancy Terms, (C) Data Transparency and (D) Dispute Resolution & Enforcement of Code of Conduct.

(1) Part A - Conduct and Spirit of Negotiations

Part A of the CoC sets forth the overarching guiding principles of the CoC that apply to lease negotiations between landlords and tenants of QRPs. Under these principles, landlords and tenants are required to adopt a consensual and good faith approach to negotiations, The principles recognise the symbiotic relationship between landlords and tenants and their shared interest in creating collaborative ecosystems with long term benefits, while acknowledging their respective rights to have regard to their own commercial self-interest in negotiations so long as they do not act in bad faith[5].

(2) Part B - Leasing Principles for Key Tenancy Terms

Part B of the CoC discusses the leasing principles for 11 key tenancy terms ("**Leasing Principles**") identified by the Committee, as briefly summarised below:

(i) Exclusivity

As a general rule, exclusivity clauses (e.g., preventing or restricting tenants from opening branches or franchises within a certain radius of the relevant QRP), must be excluded from lease agreements, unless otherwise agreed between the parties on an exceptional basis (in which case a joint declaration from the parties to the FTIC is required.

(ii) Costs of Preparing Lease Agreement and Third Party Costs

Landlords and tenants must abide by the following general principles in respect of all costs incurred or to be incurred in connection with the lease of QRPs: (a) transparency, (b) legitimacy and justifiability and (c) non-profiteering. The CoC also provides details on the allocation of fees and costs between landlords and tenants in respect of integration of point-of-sale systems, lease agreement preparation, tenant-initiated requests, and third party costs[6].

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tenants/licensees under written agreements."

5 Such as providing misleading or incomplete information intentionally or by negligence.

6 Including sales audit fees, public liability insurance coverage and electricity charges.

(iii) Advertising and Promotion Charge and Service Charge

Gross rent typically consists of base rent, service charge and advertising and promotion (A&P) charge. Landlords are entitled to adjust service and A&P charges during the lease term if the overall gross rent do not rise after such adjustments.

(iv) Pre-termination by Landlord due to Landlord's Redevelopment Works

A Landlord is only entitled to pre-terminate a lease if it intends to carry out substantial redevelopment, asset enhancement or reconfiguration works to the relevant building or part of the building ("**redevelopment works**") and require vacant possession to do so. A Landlord wishing to terminate a lease for redevelopment works must give no less than 6 months' prior written notice to the tenant unless the time period given to the landlord to comply with relevant laws and regulations is of such duration that the landlord is unable to give the requisite 6 months' prior written notice, in which case a termination notice should be promptly provided without undue delay. A landlord that pre-terminates a lease is required to compensate the tenant for such pre-termination, if certain conditions are met. The CoC provides a formula for the calculation of such compensation.

A landlord that has obtained written permission from the URA for asset enhancement initiative ("**AEI**") work must inform a tenant of such proposed AEI works before the relevant lease agreement is signed. Failure to do so would entitle the tenant to compensation from the landlord (in addition to any other compensation claimable from the landlord pursuant to any pre-termination by the landlord by reason of proposed redevelopment works) if the lease is pre-terminated by the landlord for reason of redevelopment works. If the landlord and tenant cannot reach agreement on the amount of additional compensation, either party may escalate the matter to the Singapore Mediation Centre ("**SMC**").

(v) Sales Performance

As a general rule, sales performance clauses (e.g., provisions that allow landlords to pre-terminate leases if specified sales targets are unmet by tenants) must be excluded from lease agreements, unless otherwise agreed between the parties on an exceptional basis (in which case a joint declaration from the parties to the FTIC is required).

(vi) Material Adverse Change

Landlords and tenants are encouraged to re-negotiate lease agreements in cases where tenants are prevented, obstructed or hindered from performing their typical business activities at the leased premises due to events beyond their control.

(vii) Pre-Termination by Tenants

The right of a tenant to pre-terminate a lease (if any) due to exceptional conditions must be set forth in the lease agreement. The CoC provides for two exceptional conditions, (a) where the business principal of the goods and/or services from which the tenant has obtained the rights to sell the goods and/or provide the services being retailed at the premises is insolvent or (b) where the tenant loses its distributorship or franchise rights to sell the goods and/or provide the services and such loss is not attributable to the tenant's non-performance or breach of the distributorship or franchise agreement.

A tenant must give no less than 6 months' prior notice or pay 6 months' gross rent in lieu thereof to the landlord if the tenant wishes to terminate a lease by reason of the occurrence of either of the aforementioned exceptional conditions. Tenants may also shorten such 6 months' notice period by paying an amount equivalent to the gross rent for the unfulfilled notice period, capped at 6 months' gross rent. A compensation sum equivalent to the security deposit amount is payable by the tenant to the landlord for any pre-termination of lease by the tenant in the event of either of the aforementioned exceptional conditions.

(viii) Security Deposit

The security deposit for QRPs with floor areas of up to 5,000 square feet and lease terms of up to 3 years must not exceed an amount equal to 3 months' gross rent. Landlords and tenants may mutually agree to alternative security deposit amounts for such QRPs (in which case a joint declaration by the parties to the FTIC is required).

(ix) Floor Area Alterations

For each new letting, landlords must provide a certificate from the registered surveyor confirming the surveyed area of the premises ("**Surveyor Certificate**") before handover, unless the parties agree to a later date.

If the surveyed floor area is different from the floor area originally specified in the lease agreement, and if certain conditions are met, adjustments to gross rent and security deposits (and all other amounts payable in the lease agreement that are affected by the floor area of the premises) may apply. The CoC provides details on how such adjustments are determined.

(x) Building Maintenance

Landlords are responsible for all losses or damages suffered by tenants resulting from landlords' gross negligence or willful default in maintaining buildings where leased premises are located.

(xi) Rental Structure

As a general rule, rental formulae must be based on a single rental computation throughout the lease term (that is, rent must not be structured on an "either/or, whichever is higher" basis), unless otherwise agreed between the parties on an exceptional basis (in which case a joint declaration from the parties to the FTIC is required).

(3) Part C - Data Transparency

Part C of the CoC sets forth guidelines to allow for more data transparency. Under such guidelines, landlords who collect sales data from tenants as part of variable rent structures based on tenants' gross sales or gross turnover, must share sales data metrics by trade category (i.e., total monthly sales and total floor area) on a one-on-one basis before the signing of the lease agreement. For existing tenants, landlords must share such sales data on a bi-annual basis.

(4) Part D - Dispute Resolution & Enforcement of Code of Conduct

Part D of the CoC contains a checklist that landlords must complete and provide to tenants when sending the first draft of the lease agreement to tenants. The completed checklist must indicate those Leasing Principles that are inapplicable or that deviate from the CoC. Non-compliance by landlords or tenants with Part B and/or C of the CoC during lease negotiations may be referred to the FTIC, which has the discretion to name and shame the non-complying party. Non-compliance with the lease agreement by landlords or tenants with Part B and/or Part C of the CoC after the lease agreement has been signed may be escalated to the SMC by either party within 14 days of the signing.

IV. Specific versus General Contractual Clauses: Two Decisions of the Singapore Court of Appeal

Akshay Kothari, Attorney-at-law

1. Introduction

In many industries, commercial parties buy and sell goods via multiple separate transactions, often at regular periodic intervals. For example, a supplier of marine fuel would sell a certain quantity of fuel to a buyer every month. Parties may not enter into a distinct sale and purchase agreement for each transaction – doing so would be expensive and cumbersome. Instead, the seller might issue invoices or purchase orders which contain standardised terms and conditions that govern each transaction (each such term is referred to as an "**Invoice/PO Term**").

Additionally, all such sales transactions might be governed by a 'master' contract that contains terms and conditions that apply to all such transactions. On occasion, parties may also enter into other stand-

alone agreements that are similarly meant to govern all such transactions (e.g. parties may enter into a set-off agreement which is intended to apply to all transactions between them. Such a set-off agreement is different from a 'master' contract in that the set-off agreement is intended to apply to one aspect of all the parties' transactions, whereas a 'master' contract is meant to apply to many aspects (if not all aspects) of all transactions between the parties (a term of such 'master' contract is referred to as a "**Master Term**").

An issue that might arise is: what happens when an Invoice/PO Term conflicts with a Master Term? This issue arose and was addressed in two recent Court of Appeal ("**CA**") cases: *CIMB Bank Bhd v. World Fuel Services (Singapore) Pte Ltd and another appeal* [2021] 1 SLR 1217 ("***CIMB v WFS***") and *Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd v CIMB Bank Bhd* [2021] SGCA 56 ("***Italmatic v CIMB***").

A related issue is: which terms are meant to apply to all transactions, and which are meant to apply only to certain transactions? Although this may seem obvious at first blush, the cases show that the answer to this question is not always as clear as it may seem. This is illustrated by contrasting *CIMB v WFS* and *Italmatic v CIMB* on one hand, to another CA decision, *Sintalow Hardware Pte Ltd v OSK Engineering Pte Ltd* [2017] 2 SLR 372 ("***Sintalow***"), on the other.

2. Facts of the Cases

Both cases were related, in that they involved the set-off of amounts owed by various parties to Panoil Petroleum Pte Ltd ("**Panoil**"), a bunker fuel supplier. On 20 Aug 2014 and 1 Jul 2015, respectively, World Fuel Services (Singapore) Pte Ltd ("**World Fuel**") and Italmatic Tyre and Retreading Equipment (Asia) Pte Ltd ("**Italmatic**"), respectively, entered into set-off agreements with Panoil. The set-off agreements provided for mutual set-off of certain sums owed. However, each transaction was subject to a term in certain sales confirmations issued by Panoil that included a clause 8.2 that purported to preclude the right of set-off. The issue that the CA identified was whether the set-off agreement or clause 8.2 prevailed.

In CIMB v WFS:

- The CA held that the key issue was ascertaining the contractual intention of the parties i.e. whether they had intended the set-off agreement to apply to the transactions that were subject to clause 8.2.

- The CA referred to its earlier decision, *Sintalow*, in which it laid down some general principles for instances of conflicting contractual clauses, particularly, that where the order of precedence amongst contracts is not expressly agreed, that the specific document prevails over the general.

- The CA held that the set-off agreement evidenced that the parties had focused solely on the issue of set-off and had intended for the right of set-off to apply to their transactions, whereas clause 8.2 was part of a set of generalised terms. Furthermore, the generalised terms (of which clause 8.2 was one) had been unilaterally issued by Panoil, whereas the set-off agreement was specifically agreed to and signed by both parties. Therefore, the set-off agreement

superseded clause 8.2, following the CA's earlier statement of the principle that the specific prevails over the standard form document.

In *Italmatic v CIMB*, the CA held that, notwithstanding clause 8.2, the set-off agreement was effective in giving Italmatic a right to set off the amounts it owed to Panoil. The CA referred to and applied the same reasoning as it used in *CIMB v WFS*.

These decisions provide some guidance for commercial parties as to the manner in which contracts should be drafted:

- If parties want to enter into a 'master contract' that they intend to govern all transactions between them moving forward, they should do their best to ensure that the terms and conditions on any purchase order do not conflict with the terms of the master contract.

- In any case, a master contract should also provide for how to deal with inconsistencies – this was referred to as a "*hierarchy of precedence*" in *Sintalow*.

- A term in an invoice or purchase order is not always the term that applies to only certain transactions, and a term of a stand-alone contract is not always a term that applies to all transactions. In *Sintalow,* the parties had signed a stand-alone letter containing general terms and conditions, which the CA held merely prescribed general terms and conditions for all the transactions in that factual matrix. However, the terms that were specific to each particular transactions were the terms and conditions stated on product quotations, which superseded the general terms in the stand-alone letter. However, in *CIMB v WFS* and *Italmatic v CIMB*, it was the other way around, in that the stand-alone set-off agreements were held to be specifically applicable to the issue of set-off, whereas the terms and conditions stated on the sales confirmations were the more general terms. The takeaway is: it is the substance of the agreements that matters, not the form. Whether a term is general or specific depends on the facts of the case and the drafting of the relevant documents, and not the name of the agreement in which it appears. Therefore, precise and clear drafting is necessary to ensure that terms apply in the manner that the parties intend. To illustrate, let's consider a common arrangement amongst parties that transact on a regular basis (e.g. monthly shipments of goods). These parties could enter into a 'master contract' that expressly states that its terms apply to all transactions between the parties – this would be the Master Terms. A set-off clause could be one of them. However, the 'master' contract could state that any terms contained in the purchase order, i.e. a PO/Invoice Term, would supersede the terms of the 'master' contract, to the extent of inconsistency. Thereafter, if the parties wish to deviate from the terms of the 'master contract', they can do so by making express provision in the purchase order (or equivalent document)

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