ANDERSON MŌRI & TOMOTSUNE

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In light of Singapore's progress in vaccinating its people against COVD-19, July's edition begins with a look at how employers can make rules pertaining to such vaccination. It also examined the SGX Regco's powers and whistleblowing policy. It then goes on to examine the implied term of mutual trust and confidence in employment contracts in the context of employee investigations. Finally, it concludes with an article on some 'grey areas' in the statutory provisions on amalgamations.

## I. Advisory on COVID-19 vaccination in employment settings

Hannah Tay, Attorney-at-law

On 2 July 2021, the tripartite partners (Ministry of Manpower, Singapore National Employers Federation and National Trades Union Congress) issued an advisory on COVID-19 vaccination in employment settings ("**Advisory**"). A summary of the key points raised in the Advisory is set out below.

### 1. General Policy

(1) In general, while vaccination is strongly encouraged, employers should not make COVID-19 vaccination mandatory. However, employers should encourage and faciliate medically eligible employees to get vaccinated by granting paid time-off to employees for COVID-19 vaccination

and facilitating public education programmes on vaccine safety and efficacy for their employees.

(2) Employees who decline to be vaccinated should not be penalised such as having their employment terminated on the ground of declining vaccination.

(3) Employers are allowed to also ask employees for their vaccination status for business purposes e.g. business continuity planning.

**2. Exceptions for High Risk Employment Settings**

(1) Where an employee's employment setting exposes the employee to a higher risk of COVID-19 infection compared to the general employment setting, employers may require COVID-19 vaccination as a company policy for these higher risk employment settings. Employers may also impose this vaccination requirement upfront at the point of recruitment or advertisement for new hires into these higher risk employment settings. This policy must be clearly communicated to the employees.

(2) High risk settings would include settings where:

- the work environment exposes employees to significantly higher risk of COVID-19 exposure than in general community (e.g. healthcare and aircrew employees);
- there is a communal living environment (e.g. employees living in dormitories); and
- the work environment or nature of work does not allow for Safe Management Measures to be effective or practicable due to the removal of masks or high density workplaces (e.g. professional athletes engaged in sports).

(3) Employers who choose to adopt a company policy of requiring COVID-19 vaccination for higher risk employment settings, should:

(i) Provide affected employees with additional paid sick leave (beyond contractual or statutory requirement) to support their recovery from any immediate adverse medical complications arising from vaccination.

(ii) Exempt (from the vaccination requirement) employees who belong to groups identified by the Ministry of Health as not suitable to receive the COVID-19 vaccine or are not scheduled for vaccination yet. These employees may be redeployed to reduce the risk of infection at the workplace, but should employees decline the redeployment offer, employers should not impose cost recovery measures (as described out below).

(4) It is important to note that even with a company policy requiring COVID-19 vaccination, employers are not permitted to terminate or threaten to terminate the service of an employee on the ground of declining vaccination.

(5) However, employers may, in consultation with the unions (if applicable) adopt the following measures for employees that decline vaccination:

(i) Redeploy such an employee to another job with lower risk of COVID-19 infection that is commensurate with the employee's experience and skills, as per existing redeployment policies. If there are no existing redeployment policies within the organisation, the terms and conditions for redeployment should be mutually agreed between employers and employees.

(ii) Recover COVID-19 related costs (e.g. COVID-19 testing costs or costs of SHN accommodation) incurred by the employer from employees (who declined vaccination) that are over and above the costs incurred for vaccinated employees in similar employment settings. These costs can be recovered either through salary deductions or requiring the employee to pay the relevant service provider directly.

(iii) Adopt a differentiated leave policy for vaccinated employees versus employees who decline vaccination such as putting the latter on no-pay leave for the duration of any SHN served.

(6) In addition to the measures above, the union and the employer may mutually agree on other measures to be taken for employees who decline vaccination.

(7) Employers should also make reasonable efforts to find out why the employees had declined vaccination and attempt to address their concerns. This would include communicating to the employees:

- reassurance to the employees that they will not be penalised or have their employment terminated because they decline COVID-19 vaccination;
- the reasons why vaccination is required for employees in jobs or employment settings that would expose the employees to a higher risk of COVID -19 infection;
- the measures taken by employers for employees who decline vaccination (e.g. redeployment, cost recovery, leave arrangements while serving Stay Home Notice); and
- information on any forms of assistance offered to individuals who suffer from adverse complications due to the vaccination requirement.

**3. Safe Management Measures**

Finally, even where employees have been vaccinated, Safe Management Measures must still be observed at the workplaces, such as mask-wearing and where required, donning of Personal Protective Equipment.

# II. Expansion of SGX Regco's Powers and Introduction of Mandatory Whistleblowing Policy

Sherman Ng, Attorney-at-law

## 1. Introduction

The Singapore Exchange Regulation ("**SGX RegCo**") has announced that it will be expanding its powers and the existing whistleblowing framework following the public consultation on "Enhancements to Enforcement and Whistleblowing Frameworks" issued on 6 August 2020 (the "**Consultation**").[1]

## 2. Expanded Enforcement Powers

Generally speaking, where SGX Regco is of the view that a breach of the Listing Manual has occurred, it may choose to either take enforcement action directly, or bring the matter before the Listings Disciplinary Committee. While taking enforcement action directly allows the SGX Regco to address breaches of the Listing Rules expeditiously, the range of enforcement actions available are mainly restricted to more private actions[2] that are not disclosed to the public (as opposed to the more public sanctions available to the Listings Disciplinary Committee). Furthermore, the sanctions and/or conditions associated with direct enforcement are typically less severe than those arising from disciplinary proceedings. These sanctions which are currently only available to the Listings Disciplinary Committee include (amongst other things) the power to issue a public reprimand, and to issue an order for the denial of facilities of the market.[3]

With the expansion of SGX Regco's enforcement powers, SGX Regco will, with effect from 1 August 2021, also be able to:

(i) issue public reprimands;
(ii) require an issuer to comply with specific conditions on the activities undertaken by it;
(iii) prohibit issuers from accessing market facilities for a specific period and/or until fulfilment of specified conditions;
(iv) bar issuers from appointing or reappointing a director or an executive officer for up to three (3) years (as a director or executive director, or both); and
(v) force a director or an executive officer of an issuer listed on the Exchange[4] to resign.

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[1] In the Consultation, feedback was sought on proposed changes to the SGX Listing Rules (Mainboard) and SGX Listing Rules (Catalist) (collectively, the "**Listing Rules**") relating to SGX Regco's enforcement framework, its proposal to introduce a mandatory whistleblowing regime, and other matters.

[2] Such as issuing a private warning, requiring an issuer to undertake an independent review of internal controls and processes, requiring an issuer to implement an effective education or compliance programme, and so on.

[3] Paragraph 4.5.2 of the Enforcement Handbook of Singapore Exchange Securities Trading Limited ("**Enforcement Handbook**").

[4] Singapore Exchange Securities Trading Limited (the "**Exchange**").

The actions in items (i) and (ii) above are non-appealable, while the actions in items (iii) to (v) are appealable before the independent Listing Appeals Committee, with the appeals proceedings under the Listings Rules to apply. SGX RegCo will also provide for a stay of execution of the appealable sanctions where an appeal is lodged.

SGX Regco has commented that it considers these expanded powers as striking an appropriate balance between achieving expeditious public enforcement outcomes, while addressing concerns with regard to safeguards and oversight.[5] It was also noted by SGX Regco (citing one of the respondents to the Consultation) that aggrieved parties may seek a judicial review through the Singapore courts if they hold the view that SGX RegCo has acted in a manner that is illegal, irrational, or there is procedural impropriety in the enforcement of SGX RegCo's powers.[6]

The Enforcement Handbook issued by SGX RegCo will also be updated to provide (amongst other things) guidance on SGX RegCo's use of its new expanded enforcement powers, relevant considerations in the exercise of such powers (and examples of their application), as well as the relevant sentencing principles and guidance.

### 3. Enhanced Administrative Powers and Approval of Appointments (and Re-appointments)

SGX Regco will, from 1 August 2021, be empowered to object to appointments and re-appointments of individual directors or executive officers in any issuer for up to three (3) years, where the director or executive officer has contravened, or is being investigated or is the subject of proceedings for contraventions of, any relevant laws, regulations, and rules (including those of any professional or regulatory bodies) relating to fraud, dishonesty, the securities or futures industry, corruption or breaches of fiduciary duties, whether in Singapore or elsewhere.

SGX Regco's view is that proposed range of offences triggering this enhanced power are serious enough to cast doubt on the individual's suitability to serve on the boards or management teams of listed companies, and it is necessary for SGX RegCo to have the discretion to take action pre-emptively where the involvement of such individuals on the boards or management teams may be prejudicial to a listed company.[7]

Along a similar vein, SGX Regco will require an issuer under investigation by the authorities to seek the approval of SGX Regco before directors can be appointed or re-appointed to its board, and the Listing Rules will also be amended to clarify SGX Regco's expectations when a listed issuer or its director or executive officer is subject to investigation(s) by the authorities.

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[5] Paragraph 1.13 of SGX Regco's Responses to Comments on Consultation Paper "Enhancements to Enforcement and Whistleblowing Frameworks", dated 24 June 2021 (the "**Responses**").

[6] Paragraph 1.15 of the Responses.

[7] Paragraphs 3.6 and 3.7 of the Responses.

### 4. Mandatory Whistleblowing Policy

Last but not least, SGX RegCo will require all issuers to establish and maintain a whistleblowing policy with effect from 1 January 2022, setting out the procedures for a whistleblower to make a report on any misconduct or wrongdoing related to the issuer or its officers.

Due to confidentiality concerns and SGX Regco's recognition that issuers should have the flexibility to implement a tailored whistleblowing framework that works for them, SGX Regco has decided that the Listing Rules will not prescribe the required details of the whistleblowing policy, but has commented that issuers should adopt certain best practices, namely:

(i) designate an independent function to investigate whistleblowing reports;
(ii) ensure that the whistleblower's identity is kept confidential;
(iii) disclose its commitment to ensure protection of the whistleblower against detrimental or unfair treatment, and
(iv) have the Audit Committee be responsible for oversight and monitoring of whistleblowing.

Issuers will also be required to disclose in their annual reports that the whistleblowing policy is in place for financial years commencing from 1 January 2021, as well as an explanation of how they have complied with the best practices set out at items (i) to (iv) above.

## III. Mutual Trust and Confidence in Employment Relationships

Fan Kin Ning, Advocate & Solicitor

### 1. Introduction

In an employment relationship, it is accepted that there is an implied term of mutual trust and confidence. This implied term provides that an employer shall not, *without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*.[8] This implied term covers a broad scope and part of this broad obligation goes to anything that affects the continuation of the employment relationship.[9]

The recent High Court decision in *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 ("**Dong Wei**") specifically considered this implied term of mutual trust and confidence in the context of employee investigations and suspensions.

Dong Wei serves to remind employers of the need to be careful when conducting investigations into employees accused of breaching their terms of employment. An employer's want of care could breach

[8] *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 ("**Dong Wei**") at [32]
[9] Dong Wei at [43]

this implied term of mutual trust and confidence and open the employer to an actionable claim even if the employee's employment was not subsequently terminated.

## 2. Case Background

In Dong Wei, the plaintiff was employed by the first defendant, Shell Eastern Trading (Pte) Ltd ("**Shell**"). Shell had commenced investigations against the plaintiff on allegations of conflicts of interest. The plaintiff was suspended on full pay whilst investigations were ongoing. Notwithstanding that the results of the investigation were inconclusive, Shell thereafter terminated the employment of the plaintiff by way of notice.

Following the termination, a news source reached out to Shell on the investigation, but Shell declined to comment. An article was published on the investigation with certain inaccuracies but did not identify the plaintiff.

The plaintiff thereafter commenced proceedings against Shell for, inter alia, breaches of the implied term of mutual trust and confidence.

## 3. Findings

This article shall focus on the application of the implied term of mutual trust and confidence in the Court's decision on three key aspects of the employer's conduct in an employment relationship – investigations and suspensions, safeguarding the reputation of the employee, and termination.

### (1) Investigations and Suspensions

The Court held that a minimum content of fairness is required of the employer when suspending or investigating allegations against an employee.[10]

A minimum standard would mean that the manner and procedures of the investigations should not amount to a "hatchet job" where the outcome is pre-ordained against the employee.[11] The employee should be told clearly of the allegations against him and be allowed to clarify his position.[12] An employer should be careful not to carry out a perfunctory investigation simply to justify a termination.

It is common for employers to suspend an employee pending investigations but suspending an employee as a "knee-jerk" reaction to unclear allegations of dubious credibility may fall short of the minimum standard.[13]

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[10] Dong Wei at [56]

[11] Ibid.

[12] Ibid.

[13] Ibid.

However, the Court was mindful of the need to strike a balance between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited, and thus some leeway be given to the employer to act upon practical considerations to avoid imposing on the employer obligations that may be onerous and unduly constrain the employers' aforesaid interest.[14] In light of this, the Court refused to import all the obligations of natural justice or due process obligations such as informing the employee of the investigation outcome or investigating or suspending in a particular way as part of an employer's obligations.[15]

(2) Safeguarding the Reputation of the Employee

The Court found that is no duty on the employer to combat misinformation relating to the employee or to take reasonable care to protect employees from economic and reputational harm.[16]

(3) Termination

The Court held that the implied term must not undermine express provisions agreed between the parties.[17] As an example, the implied term of mutual trust and confidence would not apply where an employer exercised his contractual right to terminate an employee by notice without cause.[18] The Court was doubtful as to whether the employer's exercise of its express right to terminate with notice should be qualified by an "overriding obligation of trust and confidence" but ultimately left the issue to be decided in another case as this point was not raised in submissions.[19]

In general, when deciding on whether there has been a breach of the implied term of mutual trust and confidence, the question is whether the employer's conduct is objectively likely to destroy or seriously damage the relationship of trust and confidence required for the employment relationship to function.[20]

## 4. Postface

Notwithstanding the findings of the Court in Dong Wei as illustrated above, employers should also have regard to the Employment Act and the Tripartite Guidelines on Wrongful Dismissal (the "**Tripartite Guidelines**").

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[14] Dong Wei at [58]
[15] Dong Wei at [57]
[16] Dong Wei at [112]
[17] Dong Wei at [126]
[18] Dong Wei at [127]-[128]
[19] Dong Wei at [129]
[20] Dong Wei at [44]

In particular, Section 14 of the Employment Act provides that the employer must conduct due inquiry before dismissing an employee on the grounds of misconduct without notice or suspending the employee for one week without salary. A suspension lasting for more than a week requires the Commissioner for Labour's approval.

Further, under the same Section 14, an employee may lodge a claim for dismissal without just cause or excuse with the Employment Claims Tribunal (the "**ECT**") seeking reinstatement or compensation. In such claims, the ECT will refer to the Tripartite Guidelines as their main point of reference.

It remains to be seen how the implied term of mutual trust and confidence is interpreted in line with the Employment Act and since Dong Wei is pending appeal, more clarifications on the implied term by the Courts may be expected.

## IV. Uncertainties in Amalgamations under the Companies Act

Akshay Kothari, Attorney-at-law

### 1. Introduction: Amalgamation in a nutshell

One of the methods for two or more companies to merge is by an amalgamation under sections 215A to 215K of the Companies Act. In an amalgamation, all the assets, liabilities, rights, privileges and obligations of one or more companies (collectively, the "**amalgamating companies**" and each an "**amalgamating company**") vest in the surviving company ("**amalgamated company**") and the amalgamating companies merge and continue as the amalgamated company from the effective date of the amalgamation.

Some important points to bear in mind are, firstly, that the process is statutory, and therefore, the vesting of the assets, liabilities, rights, privileges and obligations in the amalgamated company is effected by **process of law**. This means that there is no need for separate contracts to effect transfers, novations or assignments, although it is good practice for the companies to enter into an amalgamation agreement to record the general terms of the amalgamation proposal (a document that is required under the applicable law).

This article will briefly discuss a few 'grey areas' pertaining to amalgamations. In this article, all references to sections shall be to sections of the Companies Act (Chapter 50) of Singapore.

### 2. Is there a need to classify shareholders?

Section 215C(1) provides that, in addition to requiring the approval of at least 75% of the shareholders present and voting at a general meeting, an amalgamation proposal must be approved "by any other person, where any provision in the amalgamation proposal would, if contained in any amendment to the

constitution of an amalgamating company or otherwise proposed in relation to that company, require the approval of that person." ("**215C(1)(b) Requirement**")

Take an example in which the constitution of a company contains a clause that states that the rights of a particular class of shareholders can only be altered if approved by 80% of the shareholders' present and voting in a general meeting. By virtue of the 215C(1)(b) Requirement, an amalgamation proposal that proposes to alter class rights would also require the same 80% approval.

The uncertainty arises in the second limb of the 215C(1)(b) Requirement, i.e. "…or otherwise proposed in relation to that company" ("**2nd Limb**"). Singapore's courts have not had the opportunity to determine the content of this requirement.

One commentator has suggested that a literal reading of the 2nd Limb requires that any and all consents, which would have been required if a different form of structuring the transaction had been used, would be required if an amalgamation proposal would have the same effect. Therefore, in the context of modifying the rights of a particular class of shareholders (and where the relevant constitution does not specify any requirements to do so), their rights could therefore be modified by amending the constitution by way of a special resolution (75% majority). However, if a scheme of arrangement is used to effect the same modification, it would be necessary to hold a separate class meeting to obtain the consent of the shareholders of that class. Under the literal reading of the 2nd Limb, the same requirement for the consent of the shareholders of that class would be needed in relation to an amalgamation proposal that had the same effect.

However, there has been academic opinion that there is no requirement for the approval of different classes of shareholders to be obtained separately just because these different classes have different interests.

For practical purposes, the question is: what should a company that is involved in an amalgamation do? The answer to this question will depend on the circumstances of each particular amalgamation, i.e. the constitution of the relevant companies, the existence of different classes of shareholders, and the attitude of the shareholders to the prospect of amalgamation.

### 3. The effect of anti-assignment clauses, pre-emptive rights and other restrictions on transfers of rights and obligations

Take, for example, two companies that seek to amalgamate. The amalgamating company is a party to a contract with a third party that contains an anti-assignment clause. The amalgamating company is also a party to a contract with a third party in which it is provided that if the amalgamating company wishes to dispose of its interest in its assets, the third party would have a pre-emptive right to acquire such assets. The question is: when they amalgamate, will the anti-assignment clause be breached? Will the pre-emptive right be triggered?

The Companies Act states that the effect of an amalgamation is, among other things, that the property, rights and privileges, liabilities and obligations of the amalgamating company shall be **transferred to and vest in** the amalgamated company. Unfortunately, the wording of the relevant statutory provisions of the Companies Act and other statutes in Singapore characterizes the mode by which the property, rights and privileges, liabilities and obligations of the amalgamating company vest in the amalgamated company as a transfer and vesting. As such, a problem arises in relation to the aforementioned anti-assignment clause, as it means that the contract containing it would not be effectively assigned to the amalgamated company unless the third party consented.

The equivalent law on amalgamations in New Zealand (from which Singapore took its provisions on amalgamations) and Canada makes it clear that, for these jurisdictions, this issue does not arise. In Canada, there is no transfer of property, rights and privileges, liabilities and obligations. Instead, these are deemed to be owned by the amalgamated company due to a fusion between the amalgamating companies. On a similar vein, in New Zealand, the law is that the amalgamated company succeeds to the assets and liabilities of the amalgamating company as a result of the continuance of all parties to the amalgamation, and not as a result of a transfer or disposition. There have been academic calls for Singapore law to expressly adopt the position taken in New Zealand and Canada, as it would give better effect to the intention of the amalgamation provisions, i.e. to provide for a more efficient and effective statutory form of merger.

However, until this issue is resolved, the question remains: what should parties do when faced with a situation in which an anti-assignment or pre-emption clause threatens to interfere with an amalgamation? The most prudent approach would be to obtain the consent or waiver of the third parties. This process would involve a careful examination of each contract entered into and the determination of whether any of these contain such clauses. Careful due diligence is necessary.

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