Protecting Low-Wage Foreign Workers in Singapore from Bait-and-Switch Contracts

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

In their home countries, many migrant workers incur significant expense and debt in coming to Singapore. Some do so after being told they will be paid a certain salary (the "bait") only to find that once they arrive in Singapore, they receive a much lower amount (the "switch"). This paper discusses the legal remedies available in Singapore to seek redress for low-wage migrant workers who migrate on the promise of a higher salary.

As a starting point, the employment of foreign workers is regulated by the Employment of Foreign Manpower Act ("EFMA"),[1] which requires employers to apply to the Singapore government for Work Permits for low-wage foreign workers before they can come to Singapore. In the Work Permit Application, the employer must certify the details of the migrant worker's employment, including salary, length of contract, and type of work. The employer must also have secured the worker's consent to these terms. If the government approves the Work Permit Application, it will issue the employer an In-Principal Approval ("IPA"), which contains these same employment details. The employer must give the worker a copy before he or she leaves for Singapore. Upon arrival, however, some workers are forced by their employers to sign new, lower-wage contracts, or are simply paid less than promised to them in their home countries and as stated in the Work Permit Application and IPA.

This paper discusses the legal and equitable claims that such workers can make to secure the higher salary originally promised, and the evidentiary value of the Work Permit Application and the IPA in attempting to do so. We submit that the Work Permit Application and the resulting IPA constitute documentary evidence of an enforceable home-country contract between the employer and the worker, which the worker should be able to rely upon should a salary dispute arise. The IPA is detailed in this manner to ensure that workers "come [to Singapore] with their eyes fully open as to what they have agreed to and what the employer [has] agreed to."[2] The worker may use these documents to establish the existence and

[1] Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed Sing) [*EFMA*].
[2] *Parliamentary Debates Singapore: Official Report* (4 February 2013) vol 90 (Tan Chuan-Jin, Acting Minister for Manpower).

terms of an earlier, higher-wage contract which, if breached, can form the basis of a legal action to recover unpaid wages.

The IPA is significant in other respects as well. The governing EFMA Regulations[3] require employers to pay the worker *no less than* the post-deductions salary reflected on the IPA, unless there is a legally enforceable, subsequent written agreement to reduce this amount submitted to the Ministry of Manpower ("MOM"). Under the regulations, any attempt by an employer to reduce the salary of a low-wage migrant worker without a legally enforceable written agreement or without notice to MOM is unlawful and void. To be legally enforceable, any such lower-wage agreement must be supported by valid consideration, an element of contract formation that is often lacking in instances where a worker accepts less pay for the same work.

Wage reductions must also be carefully scrutinized under the doctrines of both duress and unconscionability. While there is generally "a disparity in bargaining power between [an] employer . . . and [its] employee,[4] this disparity is even greater between low-wage migrant workers and their employers, an observation often made by the Singapore courts.[5] As the Chief Justice explained in a case involving the abuse of a foreign domestic worker, these workers "are in an inherently unequal position of subordination in relation to their employers."[6] Consequently, wage reductions in many instances will be void for lack of consideration or may be set aside by virtue of the duress and unconscionability doctrines, enabling the worker to seek enforcement of the earlier, higher-wage contract evidenced by the Work Permit Application and the IPA.

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[3] Employment of Foreign Manpower (Work Passes) Regulations 2012 (S 569/2012 Sing), Fourth Schedule, Part II, Paragraph 5A and Part IV, Paragraph 6A [*EFMA Regulations*].

[4] *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR 663, [2007] SGCA 53 at [48].

[5] *Janardana Jayasankarr v Public Prosecutor* [2016] SGHC 161, [2016] 4 SLR 1288 at [4] [*Janardana*]; *Lee Chiang Theng v Public Prosecutor* [2011] SGHC 252, [2012] 1 SLR 751 at [34] [*Lee Chiang Theng*].

[6] *Janardana* at [3].

INTRODUCTION

Front-line organisations in Singapore and Indonesia have reported that many of the low-wage foreign workers they assist will take up employment in Singapore with the expectation of a certain salary, only to be paid a much lower amount after arrival. Burdened with debt and without any viable alternative employment, these workers often feel they have no choice but to accept the lower salary, even if they may be legally entitled to what they were promised before leaving home. This paper analyses the legal theories under which claims for the higher salary can be still made and provides some practical tips for overcoming the evidential and doctrinal obstacles to such claims.

THE BAIT-AND-SWITCH

Imagine that you are a pro bono lawyer and meet Sami, a migrant worker from Bangladesh:

> *Sami explains to you that he arrived in Singapore about six months ago to work in the construction sector (he speaks but does not read English). He previously worked in Bangladesh in the construction sector, earning the equivalent of $100 SGD per month, and before that, completed only primary school. His wife and ageing parents also work, and he has school age children that he would like to see complete secondary school without having to work to support the family.*
>
> *He explains that about eight months ago, he was approached by a man who said he represented a Singapore construction company called Constructo. The man told Sami that Constructo would pay Sami $2,000 SGD per month for full-time work for two years. This man also explained that Sami would have to pay the equivalent of $7,500 SGD for placement and administrative fees associated with the job, which Sami could take out as a loan. While $7,500 SGD was far more than Sami had ever seen at one time and more than he earned in four years of work in Bangladesh, he also knew that if he could work for two years at this salary, he could pay off the debt and still have significant income to support his family. While he did not want to leave his family, he knew their future depended on his ability to earn money in Singapore and so he agreed.*

When Sami arrived in Singapore, he was met by another man who took him to the Constructo site. At the site, he was given a contract to sign that stated he would be paid $750 SGD per month. He objected, but was told that this was the "going" rate and that if he did not want to work for this amount, he could return to Bangladesh. Knowing he was now thousands of dollars in debt, he did not feel he had a choice. He signed the document and started working. He worked for Constructo for six months and then came to talk to you.

How would you advise Sami?

What happened to Sami is a commonly reported occurrence among migrant workers who seek help from local aid organisations in Singapore. These workers incur significant expense and debt to move to Singapore with the understanding that they will be paid a certain salary (the "bait") only to find that the actual salary they are paid is much lower (the "switch"). In a 2012 study by the Humanitarian Organisation for Migration Economics ("HOME"), a non-governmental organisation ("NGO") in Singapore, 62% of the 151 foreign domestic workers they interviewed reported having agreed to contract terms in their home country, only to arrive in Singapore and be presented with new, less favourable terms.[7] In 2013, another Singapore NGO, Transient Workers Count Too ("TWC2"), reported the case of 15 construction workers who were paid approximately 35% of the amount they understood they would be paid before they left Bangladesh.[8]

These wage reductions occur against the backdrop of migrant workers incurring significant placement fees to secure their jobs in Singapore. In 2012, TWC2 reported that migrant construction workers paid, on average, $7,256 in recruitment costs.[9] In 2016, after

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[7] "The Invisible Help, Trafficking into Domestic Servitude in Singapore" *HOME* (2012), available at http://www.home.org.sg/wp-content/uploads/2015/06/The-invisible-help.pdf (last visited 16 December 2016).

[8] "How Low Can A Salary Go?" *TWC2* (24 December 2013), available at http://twc2.org.sg/2013/12/24/woolim-part-1-how-low-can-a-salary-go/ (last visited 16 December 2016).

[9] "Worse Off For Working? Kickbacks, Intermediary Fees and Migrant Construction Workers in Singapore" *TWC2* (12 August 2012), available at http://twc2.org.sg/wp-content/uploads/2012/08/Worse-off-for-working_initial-report_v2.pdf (last accessed 14 February 2017).

conducting a mini-survey, TWC2 found that the average recruitment costs among interviewees had risen to $15,555 for first-time jobs.[10] For domestic workers, TWC2 recently reported on fees in the range of $2,000-$3,000.[11] As one Bangladeshi construction worker put it: "In Bangladesh, [we are] very poor, everybody coming [to Singapore] must sell land, cow, something."[12]

Contract substitution such as that faced by Sami is explicitly prohibited in some countries,[13] and while there is no express prohibition under Singapore law,[14] the EFMA and several common law and equitable doctrines protect Sami from arbitrary and coerced salary reductions. In this paper, we will provide you (as Sami's counsel) with arguments for how to challenge salary reductions under these doctrines. If successfully applied, these doctrines should enable Sami to enforce the salary that he was originally promised or to secure the equivalent in damages.

We will also briefly consider two variations of Sami's story: one where the worker's home-country promise is less than the actual salary he receives in Singapore and one where the worker's home-country promise is not reflected in the IPA.

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[10] "Pilot Survey: Agent Fees" *TWC2* (December 2016), available at http://twc2.org.sg/wp-content/uploads/2016/12/pilot_survey_agent_fees_2016.pdf (last accessed 14 February 2017).

[11] "The Price of a Job" *TWC2* (19 October 2016), available at http://twc2.org.sg/wp-content/uploads/2016/10/the_price_of_a_job_2016.pdf.

[12] Liz Neisloss, "Debts and dreams: Singapore's migrant workers" *CNN* (7 October 2011), available at http://edition.cnn.com/2011/10/07/business/singapore-migrants/ (last visited 22 February 2017).

[13] Contract substitution is explicitly prohibited in the Philippines and Sri Lanka. See *Philippines Overseas Employment Administration, Substitution of Employment Contracts* [Mem. Circ. No. 4, Section 2009]. See also Sri Lanka Bureau of Foreign Employment, *Code of Ethical Conduct for Licensed Foreign Employment Agencies/Licensees* (November 2013), at Chapter 5, para vii, available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-colombo/documents/publication/wcms_233369.pdf (last visited 16 December 2016).

[14] Although not directly addressing contract substitution, Section 3(1)(c) of the Prevention of Human Trafficking Act 2014 (No. 45 of 2014, Sing) stipulates that "[a]ny person who recruits, transports, transfers, harbours or receives an individual (other than a child) by means of . . . fraud or deception . . . for the purpose of the exploitation . . . of the individual shall be guilty of an offence."

I. PART ONE: PROVING THE HIGHER-WAGE, HOME-COUNTRY CONTRACT

Section Summary

- A contract is formed when both parties have agreed to the material terms, whether orally or in writing (or both), even if the details are not completely made out.
- The salary amount indicated in the Work Permit Application or IPA is evidence of an enforceable agreement made between the employer and the worker. Failure to honour the terms of that agreement amounts to breach of the contract, and the party in breach is liable for damages.
- The Employment of Foreign Manpower Act mandates that employers pay workers no less than the amount set out in the IPA, unless the amount was properly and subsequently modified.

To help Sami, you (as Sami's counsel) will first need to establish that Constructo entered into a legally binding agreement to pay Sami the higher salary (i.e. $2,000 per month). According to Sami's statement, this promise was not part of a written agreement and was made in Bangladesh.

You are not concerned *per se* that the promise was oral, because you know oral contracts can be enforced under common law.[15] You

[15] Parties to a contract may write down the terms of their agreement, they may forego a written contract entirely, or they may agree to some of the terms orally and others in writing. When a court is confronted with a contract that is not reduced to writing, it will apply an objective test to determine whether an agreement has been reached between the parties. See *Low Kin Kok (alias Low Kong Song Song) v Lee Chiow Seng* [2014] SGHC 208 at [41]-[43]. A contract may also be formed by conduct alone. See *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] SGHC 182, [2004] 4 SLR(R) 258 at [48]-[49] [*Midlink*]. Section 2(1) of the Employment Act (Cap 91, 2009 Rev Ed Sing) [*EA*] similarly adopts a definition of a "contract of service" that incorporates all the different ways in which a contract of service can be formed, i.e. "any agreement, whether in writing or oral, express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee." Employers may use agents to negotiate employments contracts on their

are also not concerned that the contract was made in Bangladesh, as the Singapore courts will enforce foreign contracts that are to be performed in Singapore.[16] You are similarly not concerned that this oral agreement may have lacked some of the details of Sami's employment for Constructo, as contracts may be formed (and enforced) once the parties reach agreement on material terms, with non-material terms to be confirmed at a later time.[17]

Your key concern, however, is proof: how can you prove that Constructo agreed to pay Sami $2,000 per month in exchange for his work? You have Sami's oral evidence that he was promised this amount and agreed to travel to work in Singapore based on the promise, but what other evidence is there?

There are two pieces of important documentary evidence that exist in every case of a low-wage foreign worker: The Work Permit Application and the IPA. Integral to the system for importing foreign labour, the Work Permit Application and the IPA are signed by the employer or its representative and contain the material terms of employment (notably, the agreed salary). Both documents are evidence of an employment contract entered between the employer and worker, as discussed in further detail below.

A. The Work Permit Application and the IPA Are Evidence of a Migrant Worker's Employment Contract

1. The Work Permit Application Process Under EFMA

Employers may not bring foreign workers to Singapore without the approval of MOM, and the process is highly regulated.[18]

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behalf, even if the employer remains an undisclosed principal. See *Family Food Court v Seah Boon Lock* [2008] SGCA 31, [2008] 4 SLR 272 at [29].

[16] See Rule 1(d), Order 11 of the Rules of Court (Cap 322, R5, 2014 Rev Ed). The two basic concepts that underlie the determination of jurisdiction in cross-border disputes are: (1) there must be a legal connection between the case or the defendant and Singapore for jurisdiction to exist; and (2) Singapore should be the most appropriate forum for the dispute, taking into account the degree of connection that might exist between the case and other countries. See Yeo Tiong Min, *The Conflict of Laws* (updated 30 April 2015), at [6.2.1], available at http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-6 (last visited 15 February 2017).

[17] *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] SGHC 147, [2001] 2 SLR(R) 285 at [28].

[18] Section 5(1) of the EFMA provides that the employment of a foreign employee is

The EFMA is the main piece of legislation regulating foreign labour and has as one of its main purposes "to protect the well-being of foreign workers"[19] and to "stem the worst abuses against [them]."[20] This is particularly so for those who are unskilled and therefore especially vulnerable.[21]

An employer who wishes to hire a foreign worker must apply for and secure a work pass for that worker from MOM.[22] The work pass available for workers earning less than $2,200 per month is the Work Permit, which is the subject of this paper. The Work Permit is further divided into two subcategories, one for foreign domestic workers ("FDW") and one for foreign non-domestic workers ("Non-FDW").[23] Each subcategory has its own application, referred to here as the "FDW Application"[24] and the "Non-FDW Application."[25]

Both Applications require the employer to include, among other things:

1) Employer details;[26]
2) Worker details;[27]

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permitted only where the foreign employee has a valid work pass.

[19] *Minichit Bunhom v Jazali bin Kastari and another* [2016] SGHC 271 at [18].

[20] *Parliamentary Debates Singapore: Official Report* (11 September 2012) vol 89 (Tan Chuan-Jin, Acting Minister for Manpower).

[21] *Lee Chiang Theng* at [34].

[22] *EFMA*, Section 5(1). The employer can do so directly, or through a registered agent.

[23] *EFMA Regulations*, Regulation 4. The minimum monthly salary requirement for S Pass and Employment Pass holders are, respectively, $2,200 and $3,600. See "Work passes and permits" Ministry of Manpower Singapore, available at http://www.mom.gov.sg/passes-and-permits (last visited 8 February 2017). There is no minimum salary requirement for Work Permit holders.

[24] The FDW Application Form, revised 28 September 2016, is Tab A in the Appendix. The Appendix is available upon request from Justice Without Borders, info@forjusticewithoutborders.org.

[25] One (2011) Non-FDW Application Form is Tab B of the Appendix and one (undated) Form is Tab C.

[26] The FDW Application requires the name and address of the employer, who must be an individual. Appendix Tab A at 5. The Non-FDW Application requires the name and address of the employer, which must be a registered company with the Accounting and Corporate Regulatory Authority. See "Work permit for foreign worker" Ministry of Manpower Singapore, available at http://www.mom.gov.sg/faq/work-permit-for-foreign-worker/can-a-company-not-registered-in-singapore-apply-for-work-permits-for-foreigners-to-work-here (last visited 14 December 2016).

[27] Both Applications require the worker's full name, passport number and highest

3) Type of work;[28]
4) Length of contract;[29]
5) **Monthly salary;**[30]
6) Agency fees;[31] and
7) The written consent of the worker.[32]

The FDW Application further requires employers to indicate the number of agreed rest days per month.[33]

2. The Work Permit Application and the IPA Specify the Salary and Other Conditions of Employment and Are Evidence of a Home-Country Contract

Upon approval, MOM will issue an IPA to the employer, which provides that it has approved the Work Permit Application "in principle." There are two parts to the IPA: one part for the employer and the other for the worker. The worker's part contains the key employment terms that the employer provided in the Application (employer details, salary terms, length of contract, etc.).[34] The employer must translate the worker's part of the IPA into the worker's native language[35] and convey it to the worker before he or

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education attainment. See Appendix Tab A at 4 and Appendix Tab B at 6.

[28] The Non-FDW Application requires the employer to indicate the proposed occupation and main duties of the worker. See Appendix Tab B at 7. The FDW Application is used solely for the category of domestic work.

[29] The Work Permits for FDWs and Non-FDWs are valid for two years, subject to renewal. See "Work passes and permits" Ministry of Manpower Singapore, available at http://www.mom.gov.sg/passes-and-permits (last visited 16 December 2016).

[30] See Appendix Tab A at 4; Appendix Tab B at 7; Appendix Tab C at 1.

[31] See Appendix Tab A at 4; Appendix Tab C at 3.

[32] MOM mandates that employers completing either Application must obtain the written consent of the worker prior to submission. See "Why must I get a foreigner's written consent before applying for work pass for them?" Ministry of Manpower Singapore, available at http://www.mom.gov.sg/faq/work-pass-general/why-must-i-get-a-foreigners-written-consent-before-applying-for-a-work-pass-for-them (last visited 16 December 2016). The employer need not submit the written consent with the Applications, but in the FDW Application, the employer is required to declare that written consent has been obtained. Appendix Tab A at 9. Similarly, in one version of the Non-FDW Application, the worker must sign the Application. Appendix Tab C at 3.

[33] Appendix Tab A at 4.

[34] Appendix Tab E at 2; Tab G at 2.

[35] See the Non-FDW IPA at Appendix Tab D at 2. A recent version of the FDW IPA is prepared in both English and the worker's native language. See Appendix Tab F

she leaves his or her home country.[36] The worker is then allowed to enter Singapore with the IPA. The purpose of these documents and the details they contain is to ensure that workers "come in [to Singapore] with their eyes fully open as to what they have agreed to and what the employers have agreed to"[37] and to "ensure that foreign workers are kept informed on their salary components prior to entering Singapore."[38]

The Work Permit Application and the IPA contain critical evidence of the terms of employment between a foreign worker and his employer, as agreed to prior to the worker's migration to Singapore. These include terms for type of work, length of contract and salary. Standing alone, these documents should be sufficient to prove the existence of a legally enforceable contract that was formed before the worker's migration.[39]

The salary term in the IPA has even greater significance. As explained below, the IPA salary term is the amount that the employer *must* pay the foreign worker, absent subsequent modification in compliance with the regulations.

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at 4-8. The requirement that employers convey the IPA to workers in the workers' native language was emphasized by Mr Tan Chuan-Jin, then the Minister for Manpower, as an example of a pre-employment condition to keep foreign workers "informed of their actual employment terms and reduce their reliance on unscrupulous middlemen." *Parliamentary Debates Singapore: Official Report* (11 September 2012) vol 89 (Tan Chuan-Jin, Acting Minster of Manpower).

[36] See *EFMA Regulations*, First Schedule, Part II, Section 1 (for FDWs) and Part IV, Section 1 (for Non-FDWs).

[37] *Parliamentary Debates Singapore: Official Report* (4 February 2013) vol 90 (Tan Chuan-Jin, Acting Minister for Manpower).

[38] Oral answer by Mr Tan Chuan-Jin, Minister of State for National Development and Manpower, to Parliamentary Question on salary payment to Work Permit holders, Ministry of Manpower Singapore, 2012, available at http://www.mom.gov.sg/newsroom/Pages/PQRepliesDetails.aspx?listid=22#sthash.QDLVV2Hp.dpuf (last visited 15 December 2016).

[39] Any attempt to argue that the IPA violates the parol evidence rule is a red herring. The parol evidence rule, set out in Section 94 of the Evidence Act (Cap 97, 1997 Rev Ed Sing), regulates pre-agreement evidence in the face of a written agreement. See *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and Another and Another Appeal* [2013] SGCA 43, [2013] 4 SLR 193 at [40]. The IPA is post-agreement evidence.

Practice Tip 1: Obtaining the IPA, Work Permit Application, and the Client's Written Consent for the Application

If your client does not have these documents, you can attempt to obtain copies from one or more of these entities.

1. Client's Employer

Your client's employer submitted the Work Permit Application and received the IPA from MOM and may have copies. The employer should also have a copy of the written consent required by MOM. You or your client can request them and, if applicable, may be entitled to them pursuant to Section 21(1) of the *Personal Data Protection Act 2012* (No. 26 of 2012, Sing) ["PDPA"].

2. Client's Singapore Employment Agency

You or your client can request all "personal data" about your client, including the Work Permit Application and the IPA, pursuant to Section 21(1) of the PDPA.

3. MOM

MOM received the Work Permit Application and generated the IPA and so may have copies. You or your client can request these documents from: Controls Compliance and Levy Department, Work Pass Division, Ministry of Manpower, 18 Havelock Road #03-01, Singapore 059764.

4. Client's Home Country Embassy in Singapore

5. Client's Home Country Employment Agency

6. Client's Home Country Government Office Regulating Migrant Workers

3. Absent Valid Modification, the EFMA Mandates That Employers Pay the IPA Amount

As explained above, the IPA is critical because it provides evidence of a higher-wage, home-country contract. It is also critical because, as per the EFMA Regulations, it contains a salary term that the employer *must* pay the foreign worker, absent valid subsequent modification. The EFMA Regulations provide that the employer *shall* pay the foreign employee *not less than*:

> a. the amount declared as the fixed monthly salary in the work pass application submitted to the Controller in relation to the foreign employee, or

b. if the amount of fixed monthly salary is at any time subsequently revised in accordance with [another regulatory provision], the last revised amount.[40]

In other words, the employer *must* pay no less than the salary declared in the Work Permit Application and reflected on the IPA,[41] unless the parties subsequently modified the salary in compliance with the EFMA Regulations.

In addition to the plain language of this regulation, subsequent Ministerial comments indicate that the IPA is meant to accurately reflect a foreign worker's salary while working in Singapore. In 2013, Mr Tan Chuan-Jin, then the Minister for Manpower, explained that the purpose of the IPA and the details it contains are to ensure that workers "come in with their eyes fully open as *to what they have agreed to and what the employers have agreed to.*"[42]

Returning to Sami's case, assume that you can secure a copy of Sami's IPA and that it contains a salary term of $2,000 per month. At this point, you have what you need to file a breach of contract claim on Sami's behalf in a Singapore court.[43] You can argue that Constructo contractually agreed to pay Sami $2,000 per month in exchange for Sami's agreement to come to Singapore and work for Constructo for two years, as evidenced by the IPA, which in turn reflects the information Constructo submitted to MOM in Sami's Work Permit Application. For every month that Sami worked, he is due the difference between $2,000 and the sum Constructo actually paid him.

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[40] *EFMA Regulations*, Fourth Schedule, Part I, Section 7 and Part III, Section 4.
[41] An employer who violates this provision may also be subject to penalties under *EFMA*, Section 25(2).
[42] *Parliamentary Debates Singapore: Official Report* (4 February 2013) vol 90 (Tan Chuan-Jin, Acting Minister for Manpower) [emphasis added].
[43] For general information on the procedural and substantive requirements for breach of contract actions, see Justice Without Borders, *A Practitioner's Manual for Migrant Workers: Pursuing Civil Claims in Singapore and From Abroad,* 2nd Ed (2016), Chapter 2 at [2.64].

II. PART TWO: CONTRACT MODIFICATIONS THAT REDUCE A WORKER'S SALARY MAY NOT BE ENFORCEABLE

Section Summary

- Unless the written agreement with a lower-salary term complies with the requirements set out in the EFMA, it will be unenforceable by virtue of statutory illegality.

- Any agreement that reduces a worker's salary must contain valid consideration, must not be formed under conditions of duress, and must not be unconscionable.

Part I of this paper explained that the IPA is evidence of a foreign worker's home-country contract and that, absent modification, Singapore law requires workers to be paid the salary amount in the IPA. Front-line NGOs report, however, that it is not uncommon for foreign workers they encounter to be presented with new documents to sign upon their arrival in Singapore. These documents may reflect a new salary that is lower than the salary that the employer and worker originally agreed, and which is declared in the Work Permit Application and reflected on the IPA.

The question then is whether the new documents *validly* modify the previous contract for a higher salary.

As explained below, the EFMA limits salary reduction agreements in two ways: It requires that (a) any salary reduction must be the subject of a "prior written agreement" between the parties, and (b) the employer must notify MOM prior to reducing the worker's salary pursuant to this agreement. While determining whether the second requirement has been met is straightforward, determining whether the first requirement is met requires more detailed analysis. Is the lower-wage agreement a valid contract? Is it voidable for some reason? If the answer is yes, then it likely does not satisfy EFMA's requirement of a "prior written agreement."

We thus also discuss in this section three ways that the later, lower-salary contract may be rendered void or voidable: (1) a lack of valid consideration (void), (2) duress (voidable), and (3) unconscionability (voidable). Where any one of these doctrines is

successfully proven, lower-wage salary modifications that foreign workers are forced to sign upon arrival in Singapore are void or voidable and do not satisfy the requirements of the EFMA. This leaves in place the earlier, higher-salary contract reflected in the IPA, which can then be enforced via a breach of contract action.

A. The EFMA Restricts Salary Reduction Modifications

1. The EFMA Requires Salary Reductions to Be Agreed in Writing and Notified to the Controller

The starting point for our analysis is again the EFMA Regulations, which provide restrictions on how and when an employer may reduce salary in an employment agreement:

> (1) The employer *shall not* —
>
> (a) *Reduce* the foreign employee's *basic monthly salary*[44] or *fixed monthly allowances*[45] *to* an amount *less than that declared* as such *in the work pass application* submitted to the Controller in relation to the foreign employee; or
>
> (b) *Increase* the amount of *fixed monthly deductions* to *more than that declared as such in the work pass application* submitted to the Controller in relation to the foreign employee,
>
> *except with the foreign employee's prior written agreement.*
>
> (2) Before implementing such reduction or increase, as the case may be, the employer *shall inform the Controller* *in writing* of the proposed reduction or increase, as the case may be.[46]

Thus, an employer cannot simply start paying a lower salary. It must have an agreement with the foreign worker, and any such agreement varying the terms of the original agreement must be *in writing*. In addition, the employer must notify the Controller of the agreement before the employer implements the reduction in salary.

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[44] See *EFMA Regulations*, Fourth Schedule, Part II, Paragraph 5B, and Part IV, Paragraph 6B for the definition of "basic monthly salary."
[45] See *EFMA Regulations*, Fourth Schedule, Part II, Paragraph 5B, and Part IV, Paragraph 6B for the definition of "fixed monthly salary."
[46] *EFMA Regulations*, Fourth Schedule, Part II, Paragraph 5A and Part IV, Paragraph 6A [emphasis added]. Note that the effect of increasing the amount of fixed monthly deductions is akin to reducing salary.

Failure to comply with these requirements renders the new, lower-salary unenforceable by virtue of statutory illegality.[47]

As a result, with the lower-salary contract voided, the earlier-in-time contract with the higher salary reflected in the IPA remains operative and can be enforced for all work performed.

2. The Contours of EFMA's "Prior Written Agreement" Requirement

In Sami's case, he signed a document once he arrived in Singapore that provided for the payment of $750 per month for his employment at Constructo ("Reduction Modification"). Constructo will likely present the Reduction Modification and argue that it supersedes the earlier contract and salary amount reflected in the IPA.

But is Constructo in compliance with the EFMA Regulations? What did the drafters mean when they specified that a salary reduction must be accompanied by "the foreign employee's prior written agreement"? Will any document amending the terms of the original agreement and bearing the worker's signature suffice?

No. The "*prior written agreement"* required under the EFMA Regulations before a foreign employee's monthly salary can be reduced must be a *valid agreement (contract)*. It would be quite remarkable for the drafters of the EFMA Regulations to require the formality of writing and notice to MOM before an employer can reduce a worker's salary, but not to also require that the written agreement be a valid agreement.

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[47] *Ting Siew May v Boon Lay Choo* [2014] SGCA 28, [2014] 3 SLR 609 at [103]-[107]. The SGCA in *Ting Siew May* laid down a two-stage test to determine whether a contract is prohibited under statutory illegality: (1) whether there has been a contravention of the statutory provisions (or subsidiary legislation) concerned; and (2) whether the statutory provision (or subsidiary legislation) concerned was intended to prohibit not only the conduct but also the contract. The failure of the employer to comply with the EFMA Regulations will satisfy stage 1. Stage 2 involves a purposive interpretation of the statutory provision to determine whether it prohibits not only the conduct but also the contract, such that the contract is void and unenforceable. In this case, any reduction to the employee's monthly salary without a prior written agreement would likely be unenforceable, since the provisions are worded to protect vulnerable employees from unscrupulous employers. A lower-salary term would contravene the statute and thus it can be said that the EFMA was intended to prohibit the conduct *and the contract*.

This interpretation is also supported by reference to other provisions of the EFMA Regulations. The regulations applicable to S-Pass and Employment Pass holders (higher-wage foreign workers) include salary reduction provisions but do not require reductions to be the subject of written agreements.[48] This suggests that the EFMA's requirement for the amendment to be captured in writing was included to protect Work Permit holders – the lowest-earning and most vulnerable class of foreign employees – from exploitation.

Any subsequent agreement that reduces the salary of low-wage foreign workers should properly attract detailed scrutiny for its compliance with the law.

Practice Tip 2: For Salary Reduction Modifications, Check for Compliance with EFMA Regulations

Where there has been a subsequent reduction in the worker's salary as stated on his IPA, it is important to determine whether:

(a) there is a *written* agreement between the parties; and

(b) the employer has informed the Controller in writing of the proposed reduction.

The absence of either of these conditions violates the EFMA.

In assessing whether the employer has informed the Controller in writing, counsel can request this information from the employer or MOM at Foreign Manpower Management Division, MOM Services Centre, 1500 Bendemeer Road, Singapore 339946.

B. To Satisfy EFMA, Employers Must Provide Valid Consideration for a Lower-Wage Contract

Section Summary

- For an agreement to be legally binding, it must be supported by valid consideration.

[48] *Compare EFMA Regulations*, Fourth Schedule, Part II, Paragraph 5A and Part IV, Paragraph 6A (addressing salary reductions of Work Permit holders) *with* Fifth Schedule, Part II, Paragraph 12-13A (addressing salary reductions of S-Pass holders) *and* Sixth Schedule, Part II, Paragraph 2-3A (addressing salary reductions of Employment Pass holders).

If there is no valid consideration or if the consideration is illusory, the contract is void and unenforceable.

- When an employer argues that the underlying consideration is its forbearance on the right to terminate the worker, consider carefully whether the employer actually had such a right and whether the right was constrained in some way under the applicable laws, the parties' contract, or the implied duty of mutual trust and confidence.

- When forbearance from termination lacks any specifics, it may be possible to argue that the forbearance was not meaningful.

1. The Consideration Requirement

For an agreement to be legally binding in Singapore, it must be supported by valid consideration.[49] Consideration may consist of a right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.[50] In the absence of such consideration, the agreement is void and unenforceable.

Sami's home-country contract with Constructo appears to have been supported by valid consideration, as it involved an agreement to

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[49] *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] SGCA 3, [2009] 2 SLR(R) 332 at [64]-[67] [*Gay Choon*]; *Sea-Land Services, Inc. v Cheong* [1994] SGCA 103, [1994] 3 SLR(R) 250 at [7] [*Sea-Land*]; *Brader Daniel John and others v Commerzbank AG* [2013] SGHC 284, [2014] 2 SLR 81 at [69] [*Commerzbank*]. The Court of Appeal in *Gay Choon* at [113]-[115] provided an extensive discussion of whether the doctrine of consideration remained workable, particularly in the context of contract modifications, and noted that the doctrines of unconscionability, economic duress, and undue influence may be better suited for resolving disputes involving contract modifications. Nonetheless, the court concluded the discussion by stating that "maintenance of the status quo (viz, the availability of both (a somewhat dilute) doctrine of consideration as well as the alternative doctrines canvassed above) may well be the most practical solution inasmuch as it will afford the courts a range of legal options to achieve a just and fair result in the case concerned." *Gay Choon* at [118].

[50] *Gay Choon* at [67] (citing *Currie v Misa* [1874] LR 10 Exch 153 at [162]).

work for Constructo in Singapore for two years in exchange for a monthly salary of $2,000 (i.e. Sami received a benefit in the form of his salary in exchange for a responsibility in the form of his labour). However, upon Sami's arrival in Singapore, he signed another agreement, the Reduction Modification, stipulating that he would *perform the same job*, but for $750 per month. As such, the issue is whether Constructo provided Sami with valid consideration for the Reduction Modification.

It is an established rule that the promise to perform a pre-existing contractual duty owed to the other party cannot be good consideration, as the promisee derives no additional benefit in law.[51] This general rule calls into question the validity of a modified employment contract where there is a change in the salary term, but no change in the employment duties. Nonetheless, Singapore courts have held that an *employee's forbearance from resigning*, at least in some circumstances, is valid consideration for contracts promising *more pay for the same job*.[52] We can assume, therefore, that employers in Constructo's circumstances will argue that an *employer's forbearance from terminating* can support contracts promising *less pay for the same job*. The Singapore Court of Appeal has not yet had cause to consider this specific circumstance.[53] The Court has pointed out, however, that the English courts have historically held that contract modifications to pay less than the full amount promised are generally not supported by consideration.[54]

Even if we assume that the Singapore courts would, in theory, endorse an employer's forbearance from termination as valid consideration for a lower-salary contract, there are two additional requirements: the forbearing party must have actually had a legal right capable of forbearance, and the agreement to forbear must be meaningful and not illusory, as discussed below. Applied to the

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[51] *Sea-Land* at [8].
[52] *Commerzbank* at [70].
[53] Compare *Euro-Asia Realty Pte Ltd v Mayfair Investment Pte Ltd* [2001] SGDC 352 at [7]-[10], where the court held that a promise to pay less on a pre-existing contractual obligation lacked consideration, *with Asia Polyurethane Mfg Pte Ltd v Woon Sow Liong* [1990] SGHC 25, [1990] SLR 407 at [15], where the court noted, without citation or discussion, that the employer's forbearance from terminating the employee was valid consideration for a modified contract that restricted the employee's post-employment business dealings (i.e. a restraint of trade agreement).
[54] *Gay Choon* at [97], [102]-[103] (citing *Re Selectmove Ltd* [1995] 1 WLR 474 at [480]).

Reduction Modification, the questions are thus whether Constructo had a legal right to terminate Sami and whether Constructo's agreement not to terminate Sami was meaningful.

2. The Limits on Termination Forbearance as Valid Consideration

Constructo will likely argue that it provided valid consideration for the Reduction Modification when it did not terminate Sami's contract and send him back to Bangladesh. This raises a few critical questions. Did Constructo actually have a right to terminate Sami in the first place and, if it did, was that right *constrained* or *conditioned* in any way?

If Sami had an employment contract that provided only for a "just cause" dismissal, Constructo would not be able to terminate him without a reason as it threatened. However, in Singapore, most foreign workers (in fact, most workers) operate under "at-will" contracts where their employment can be terminated without cause. Notwithstanding this, terminations must still comply with the terms of the worker's employment contract, contract law principles, the EFMA, and, where applicable, the Employment Act ("EA").[55] These constraints are discussed below.

Prior Notice. An employer may be required, under the relevant statutes or an employment contract, to give notice prior to termination. For example, the EA provides that workers (including construction workers like Sami) must be given prior notice (from one day to four weeks, depending on length of service) of termination or pay in lieu of notice.[56] Viewing Constructo's threat to terminate Sami on the spot if he refused to agree to the lower salary through this lens, then, highlights that Constructo did not have a legal right to do so without payment in lieu of notice. Without an unfettered legal right to terminate as it threatened, Constructo will have difficulty arguing that its forbearance constitutes valid consideration. While

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[55] The Employment Act, Section 2(1), covers both local and foreign employees working under a contract of service, but generally does not cover FDWs (unless MOM exercises the discretion it is granted under the Employment Act).

[56] Section 10 of the Employment Act addresses the notice period requirement for employees covered under the Act (generally excluding FDWs). The EFMA specifies that FDWs be given "reasonable" notice before being [terminated and] repatriated. *EFMA Regulations*, Fourth Schedule, Part II, Paragraph 12 and Part IV, Paragraph 13.

savvier employers may be aware of these requirements and frame any threat to terminate to satisfy notice requirements, it is important when representing clients like Sami to review the applicable law and facts surrounding the signing of a lower-wage contract to assess the possibility of this type of argument.

Implied Duty of Mutual Trust and Confidence. Implied into all employment contracts, including the one between Sami and Constructo, is a duty of mutual trust and confidence ("MTAC").[57] The Singapore Court of Appeal has held that an employer will be in breach of this implied duty when his or her conduct is (1) without reasonable and proper cause, and (2) calculated and likely to destroy or seriously damage the relationship of confidence and trust.[58] Underpinning the duty is the fact that "a contract of employment is a special kind of agreement with special attributes. [It is] not a commercial contract. It involves a continuing relationship of trust and confidence between employer and the employee."[59] Although fairly "extreme behaviour" is required before courts will find a breach of this duty,[60] "[a] breach of the implied term of mutual trust and confidence by the employer would constitute a breach of a fundamental term of the contract of employment[.]"[61]

In Sami's case, it is arguable that Constructo would have breached the implied duty of MTAC if it had actually terminated Sami's employment because Sami refused to agree to a lower salary for the same work upon his arrival in Singapore. Constructo either did know, or should have known, that foreign workers in Sami's position would have incurred massive debt in order to come to Singapore to work, and to fire Sami upon arrival because he wanted to keep the salary he was promised would certainly "destroy or seriously damage the relationship of confidence and trust" between employer and employee.

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[57] *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] SGCA 43, [2014] 4 SLR 357 at [24] (citing *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at [45]) [*Wee Kim*]; *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] SGHC 32, [2013] 2 SLR 577 at [59] [*Cheah Peng Hock*]; *Commerzbank* at [110]-[113].

[58] *Wee Kim* at [24]; *Cheah Peng Hock* at [57]; *Commerzbank* at [110].

[59] *Cheah Peng Hock* at [41] (quoting *Aldabe Fermin v Standard Chartered Bank* [2010] SGHC 119, [2010] 3 SLR 722 at [54]).

[60] *Commerzbank* at [114].

[61] *Wee Kim* at [24].

Thus, because actual termination would have been a breach of the contract, Constructo cannot then claim that its forbearance from doing such an unlawful act constitutes valid consideration for the Reduction Modification.[62] Indeed, in the analogous context of contracts with *express* clauses that allow employers to unilaterally reduce an employee's salary or exercise discretion in providing a bonus, courts have interpreted the implied duty of MTAC to constrain the exercise of the employer's discretion.[63] The duty will be breached if an employer exercises its discretion to reduce an employee's wages unreasonably, arbitrarily or capriciously.[64] The burden is on the employer to attest to the extenuating circumstances (e.g. a downturn in business prospects) which allegedly led to the decision to impose a wage cut or decline to provide a bonus.[65]

In other words, it will be a breach of the implied duty of MTAC to reduce salary without adequate justification. No lower standard of "reasonableness" should apply under the duty of MTAC in Sami's case. This is especially so when Constructo does not even have an express right to lower Sami's salary, but is trying to achieve the same result through an express or implied threat to terminate Sami's employment.

In summary, the implied duty of MTAC acts as a constraint on Constructo's right to terminate Sami's employment.

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[62] It should be noted that courts in England have held that the implied duty of MTAC does not apply to the termination of an employee. However, this is not the law in Singapore. The Singapore High Court noted that the restriction on the implied duty in the United Kingdom was "necessarily dependent on the existence of a statutory right not to be unfairly dismissed." *Chan Miu Yin v Philip Morris Singapore Pte Ltd* [2011] SGHC 161 at [43] [*Chan*]. In the absence of an equivalent statutory right in Singapore law, the High Court refused to apply the English precedents to strike a claim for breach of the implied duty in a termination case. *Chan* at [44]-[45]; see also *Latham Scott v Credit Suisse First Boston* [2000] SGCA 26, [2000] 2 SLR(R) 30 at [42]-[53] (where the Court of Appeal considered whether an employee had been dismissed in bad faith); *Chan* at [48] (suggesting that *Latham* was an application of the modern implied duty of MTAC).

[63] *Commerzbank* at [114]-[119]; *Dresdner Kleinwort Ltd v Attrill* [2013] EWCA Civ 394 at [135]-[138] [*Attrill*]; *Bateman v Asda Stores Ltd* [2010] IRLR 370 at [14] [*Bateman*].

[64] *Commerzbank* at [114]-[119]; *Attrill* at [135]-[138]; *Bateman* at [14].

[65] *Commerzbank* at [114]-[119] (scrutinizing the employer's asserted reasons for not paying the workers a promised bonus); *Attrill* at [135]-[138]; *Bateman* at [12]-[14].

Meaningful Forbearance. When considering Constructo's forbearance argument, one will also want to consider whether Constructo's 'agreement' to forbear from terminating Sami provided a meaningful benefit to Sami or whether it was illusory. In this context, the Singapore Court of Appeal's decision in *Sea-Land Services, Inc v Cheong*[66] is particularly helpful.

In *Sea-Land*, the court had to consider whether an employer's promise to pay additional salary was enforceable.[67] The employer notified the employee that he would be terminated in 30 days and offered a severance package.[68] The employee continued to work for 30 days, but did not receive the original severance amount (the employer claimed the amount had been a mistake).[69] The employee argued that, *inter alia*, he had had the right to resign immediately, but had agreed to forbear on that right and instead continue to work for 30 days.[70] As such, he argued that he had provided valid consideration for the full severance pay.[71] The court disagreed. It saw no additional or special benefit conferred by the employee on the employer in working for the additional 30 days. In other words, the employee's forbearance from resigning was scrutinized by the court and found insufficient to enforce the higher-salary agreement.

Applying the *Sea-Land* rationale to Sami's circumstances, it is hard to see how Constructo's forbearance was, in fact, meaningful or conferred any additional or special benefit on Sami beyond what he had in the original contract (i.e. "at-will" employment). For example, Constructo did not specify for how long it would forbear from terminating Sami in exchange for the reduced-salary agreement. *Without a definite term of forbearance, how beneficial or meaningful was this agreement to Sami?* If the threat of termination remained present every day that Sami worked, it is probably fair to say that Sami did not secure a real benefit from Constructo's agreement to forbear from termination. In similar contexts, where a promise to forbear specifies no definite time frame, courts will look for the promisor to actually forbear for a 'reasonable' time.[72] What satisfies

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[66] [1994] SGCA 103, [1994] 3 SLR(R) 250.
[67] *Sea-Land* at [5].
[68] *Sea-Land* at [3].
[69] *Sea-Land* at [4].
[70] *Sea-Land* at [11].
[71] *Sea-Land* at [11].
[72] *Fullerton v Provincial Bank of Ireland* [1903] AC 309 at 313, citing *Oldershaw v*

a reasonable time is inferred from the surrounding circumstances, taking into account the context of the express or implied request for forbearance.[73]

Furthermore, did Constructo really intend to terminate Sami? Perhaps, but doing so would have meant that Constructo would have had to send Sami back to Bangladesh and then start a new process for bringing on a new employee in Sami's stead. This may have caused work delays, which may have led to other negative consequences for Constructo that Constructo may have wanted to avoid. The specific circumstances underlying any threatened termination are worth exploring because, under the case law, if the party with the legal right never intended to exercise it, forbearance may not be found.[74]

Practice Tip 3: Review the Contract, the EA, and the EFMA for Termination Conditions

- Review your client's **employment contract** to see if there are any express conditions on termination. These may help establish the failure of consideration underlying a lower-salary agreement.
- The **EFMA, EA, and EFMA Regulations** also prescribe specific requirements with which employers must comply before terminating a foreign employee.
- Consider the **implied duty of mutual trust and confidence** as a potential constraint on express rights to terminate or reduce salary.

In summary, while Constructo's forbearance from terminating Sami may be viewed at first glance as valid consideration, a closer

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King (1857) 2 H & N 517 [*Fullerton*]. See also *Payne v Wilson* (1827) 7 B. & C. 423 [1827], 108 ER 781 at 782.

[73] *Fullerton* at 313. Courts have held that "forbearance to sue, *even for a short time*, may, in appropriate circumstances, be consideration for a promise." *Malayan Banking Bhd v Lauw Wisanggeni* [2003] SGHC 208, [2003] 4 SLR(R) 287 at [11] (citing *Alliance Bank Ltd v Broom* (1864) 2 Dr & Sm 289) [emphasis added]. It is unlikely, however, that courts would endorse forbearance from termination for an hour or a day.

[74] *Miles v New Zealand Alford Estate Co* [1886] 32 Ch D 266 at 291. *Miles* has been referred to and followed in *Real Estate Consortium Pte Ltd v East Coast Properties Pte Ltd* [2010] SGHC 373, [2011] 2 SLR 758 at [51]; and *Shunmugam Jayakumar v Jeyaretnam Joshua Benjamin* [1996] SGHC 158, [1996] 2 SLR(R) 658 at [51], although this specific point of law has not been applied in local courts. See also *Cook v Wright* [1861] B. & S. 559 at 569, 121 ER 822 at 826.

review is critical. If the forbearance is not meaningful, it may not be valid under the doctrine established in *Sea-Land*. Without valid consideration, the Reduction Modification imposed by Constructo is unenforceable, and Constructo remains liable for the original salary it promised.

C. To Satisfy EFMA, a Lower-Wage Agreement Must Not Be the Result of Duress or Unconscionability

Section Summary

- The doctrines of duress and unconscionability largely overlap, and both doctrines render a contract voidable in favour of the exploited party.
- Duress is primarily concerned with the exertion of an illegitimate pressure that induces the weaker party's consent.
- The emphasis in unconscionability is on the inequality of bargaining power between the parties which has been used to exploit the weaker party and bring about an oppressive bargain.

The Reduction Modification also may be challenged under the equitable doctrines of duress and unconscionability. Pleading duress will likely be met with greater success in local courts, given that it has been recognised and formally applied as part of Singapore law.[75] The status of unconscionability as a vitiating factor, at least at the Court of Appeal level, remains more tentative.[76] While neither of these doctrines are easy to establish, the dynamic of exploitation and coercion often found between employers and foreign workers in situations like Sami's gives Sami and others a reasonable basis for pursuing claims under these doctrines.[77]

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[75] *Third World Development Ltd and Another v Atang Latief and Another* [1990] 1 SLR(R) 96, [1990] SGCA 2 at [17] [*Third World*].

[76] *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and Another (Orion Oil Limited and Another, Interveners)* [2011] 2 SLR 232, [2010] SGHC 270 at [66] [*E C Investment*].

[77] When considering the validity of later-in-time lower-wage agreements, you may also want to consider other doctrines that vitiate consent, such as undue influence,

1. The Reduction Modification May Have Been Procured by Duress

In cases where illegitimate pressure is exerted on the worker so that he or she is bereft of any alternative but to relent to the employer's terms, the resulting contract is voidable on grounds of duress. In Sami's case, the illegitimate pressure is an example of "economic duress."[78] There are two judicially recognised elements required to prove economic duress: (1) the pressure exerted by the wrongdoer must have been illegitimate; and (2) such pressure must have amounted to a compulsion of the will of the victim such that his given consent resulted from a lack of choice.[79] While courts do not vitiate contracts lightly, these elements may be met in cases where an employer threatens to terminate a vulnerable migrant worker's employment and repatriate him unless the worker agrees to a salary reduction.[80]

Illegitimate Pressure. The first element is whether the pressure (the "threat") exerted on the employee was "illegitimate." In Sami's case, the threat was Constructo's statement that it would terminate Sami's contract and send him back to Bangladesh if he refused to sign an agreement that provided a lower salary for the same job.

At the outset, it should be noted that a *threat to commit an unlawful* act will most likely be considered illegitimate pressure *per se*.[81] However, even *a threat to commit a lawful* act can amount to

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see *Pek Nam Kee and Another v Peh Lam Kong and Another* [1994] SGHC 163, [1994] 2 SLR(R) 750 at [117]-[120] [*Pek Nam Kee*], or, if there is evidence of a physical threat, physical duress, see *Barton v Armstrong* [1976] AC 104 at 118H-119B. Additionally, you may want to consider whether the terms of a subsequent, lower-wage agreement violate other Singapore statutes, such as the recent Prevention of Human Trafficking Act 2014.

[78] *Third World* at [17]. See generally *Gay Choon* at [113] (explaining that the doctrine of duress (and the doctrines of undue influence and unconscionability) supplement and inform contract disputes where one of the parties may not have received sufficient consideration).

[79] *Third World* at [17]; *Tam Tak Chuen v Khairul bin Abdul Rahman and Others* [2008] SGHC 242, [2009] 2 SLR 240 at [22] [*Tam Tak Chuen*].

[80] *Tam Tak Chuen* is particularly helpful. In that case, the High Court set aside a contract on grounds of duress in a case involving a lawful threat between two former business partners and overall much less egregious circumstances than those Sami faced.

[81] *Sharon Global Solutions Pte Ltd v LG (International) Singapore Pte Ltd* [2001] SGHC 139, [2001] 2 SLR(R) 233 at [31] [*Sharon Global*].

illegitimate pressure under certain circumstances, such as where the threat is an abuse of legal process, where the demand is not made *bona fide*, where the demand is unreasonable, and where the threat is considered unconscionable in light of the circumstances.[82]

In considering a third category of threats, *threats to breach a contract*, there is a focus on whether the "threat" was merely a true statement that one party can no longer perform the contract due to serious and unexpected difficulties or whether the "threat" was a "deliberate exploitation" of the weaker party's position with the aim of gaining some advantage.[83] More generally, courts consider all relevant circumstances when considering duress claims, including the state of mind of the parties,[84] and have held that the duress doctrine should not be unjustifiably constrained.[85] Nonetheless, the courts are careful to distinguish high-pressure commercial bargaining, which is legitimate, from unfair exploitation, which is not.[86]

The factors that support a finding of illegitimate pressure in cases like Sami's are manifold. To start, there is no evidence that Constructo was faced with "serious and unexpected difficulties" that would make paying Sami the amount he was originally promised a "considerable hardship."[87] Instead, all the evidence points to Constructo seeking a "deliberate exploitation" of Sami's position with the aim of gaining some advantage.

Moreover, Constructo pressured Sami to take less pay for the same job knowing full well that he had no realistic practical alternative but to submit to the Reduction Modification. Sami, like all Work Permit holders (FDWs and Non-FDWs) can work *only* for the employer and in the occupation specified in the Work Permit.[88]

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[82] *Tam Tak Chuen at* [50]; *E C Investment* at [48].
[83] *Sharon Global* at [32]; *Tjong Very Sumito and others v Chan Sing En and others* [2012] 3 SLR 953, [2012] SGHC 125 at [249]-[251].
[84] *Sharon Global* at [32].
[85] *E C Investment* at [51].
[86] *Third World* at [17]; *E C Investment* at [52].
[87] *Sharon Global* at [32].
[88] This requirement applies to both FDWs and Non-FDWs. The relevant sections are *EFMA Regulations*, Fourth Schedule, Part II, Section 9, and Part IV, Section 12, respectively. See also "Work Permit Conditions" Ministry of Manpower, available at http://www.mom.gov.sg/passes-and-permits/work-permit-for-foreign-worker/sector-specific-rules/work-permit-conditions (last visited 15 December 2016).

Thus, the consequences to Sami of refusing to agree to a salary reduction would be termination of his contract and repatriation to Bangladesh without a job or any salary. Perhaps even more severe, Constructo is aware (or should be aware) of the pressure on Sami of returning to Bangladesh with $7,500 in unpaid debt, an amount that Sami has no chance to pay off with a Bangladesh salary.

Constructo is also aware (or should be aware) of Sami's general poverty, his limited formal education, his inability to read English, and his lack of knowledge of his rights and possible avenues of redress. Sami is likely to have little knowledge of contract law or his employment rights as opposed to Constructo, who may have secured legal advice. Together, these factors can make a strong case for showing illegitimate pressure that leaves Sami and the workers like him with no realistic alternative but to accept a unilateral salary reduction.

Absence of Choice. Once it has been proven that illegitimate pressure was exerted, the burden of proof shifts to the defendant to *disprove* the causal link between its illegitimate pressure and the plaintiff's execution of the contract.[89] The relevant factors to consider in determining causation include (1) whether the coerced victim protested; (2) whether the victim had alternative courses open to him or her at the time of the alleged coercion; (3) whether the victim was independently advised; and (4) whether after entering the contract the victim took steps to avoid it (when the circumstances of duress no longer exist).[90]

The factors enumerated above favour Sami. Sami protested but was ultimately unable to resist the lower-wage modification for fear of being prematurely dismissed and deported to Bangladesh with crippling debt.[91] As explained above, by law Sami could not refuse the lower salary and find another job in Singapore. The placement fee of $7,500, which Sami must repay regardless of whether his employment has been terminated, also leaves him with little option but to attempt to earn back this sunk cost by all means available. In fact, this inequality is exacerbated by the structural

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[89] *E C Investment* at [48]; *Tam Tak Chuen* at [62].
[90] *Third World* at [17]; *E C Investment* at [44]; *Tam Tak Chuen* at [62].
[91] Amelia Chew & Isaac Tay, "Broken Promises" *HealthServe* (4 January 2016), available at http://www.healthserve.org.sg/stories/2016/1/4/broken-promises (last visited 15 December 2016).

conditions of the construction industry where the supply for cheap unskilled labour outstrips demand.[92] Since Sami is a readily replaceable labour commodity, he has significantly weaker bargaining power when resisting the salary reduction. His only other "choice," to return to Bangladesh without a job or any pay and $7,500 in unpaid debt, can hardly be said to be a reasonable alternative for Sami or others in his situation.

As to the third factor, Sami did not have access to timely legal advice prior to his acceptance of the salary cut (and even if he had, the cost may have been prohibitive), and thus he was also not independently advised. The fourth factor, whether the worker took steps to avoid the contract upon entering it, is not relevant when the circumstances of duress persist. In Sami's case and many other cases involving migrant workers, who are at risk throughout the duration of their employment of having their contracts terminated and being repatriated, it will be fairly straightforward to show that the circumstances of duress persisted throughout the employment contract and thus that there was no way for the worker to avoid the contract.[93]

Bearing in mind that the test for causation is flexible,[94] even if one of the factors is not present, the other factors should be developed and presented. For example, there will be workers who, unlike Sami, do not verbally protest a wage reduction and remain silent. Although their cases may be more difficult, the reasons why they did not protest (e.g. fear of termination and its severe consequences, unfamiliar surroundings, unequal bargaining position) should be explored and presented.

Where duress is successfully pleaded, the contract is rendered voidable,[95] subject to any bars on rescission.[96] Sami will be able to

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[92] "Statement on Labour Market Developments" Ministry of Manpower Newsroom (15 September 2015), available at http://www.mom.gov.sg/newsroom/mom-statements/2015/15-sep-statement-on-labour-market-developments (last visited 15 December 2016).

[93] A 2015 survey involving 801 South Asian workers in Singapore reveals that at least 64% of workers with salary or injury claims have been threatened with deportation by their employers. See "Deportation threats among causes of distress in migrant workers: Survey" *Channel News Asia* (4 November 2015), online: http://www.channelnewsasia.com/news/singapore/deportation-threats-among/2237642.html.

[94] *E C Investment* at [52].

[95] Lee Pey Woan, Pearlie Koh & Tham Chee Ho, *The Law of Contract* (updated 30

rescind the contract for a salary of $750 per month. A contract that has been rescinded under these equitable doctrines is treated as if it never existed. As a result, Sami's higher-wage contract, as evidenced by the Work Permit Application and documented on the IPA, can be enforced for the entire duration.[97]

2. The Reduction Modification May Be Unconscionable

The doctrine of unconscionability, although applied sparingly,[98] exists to vitiate contracts that have been secured via the exploitation of vastly unequal bargaining power between parties.[99] The Singapore courts generally recite the unconscionability doctrine as permitting courts to set aside a contract "where [the] transaction is entered into by a poor and ignorant man at a considerable undervalue, such person not having had independent advice[.]"[100] It is also generally required that the stronger party act in a morally reprehensible (or unconscionable) manner in exploiting his bargaining power to bring about the oppressive bargain.[101] In light of

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April 2015), at [8.11.9], available at http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-8 (last visited 22 February 2017).

[96] "The right to rescind will . . . be lost if: (a) the induced party has affirmed the contract; (b) innocent third parties have acquired (for value) rights in the subject matter of the contract; (c) it is no longer possible to restore the parties to their respective prior positions; and (d) (except in the case of fraud) an inordinate period of time has lapsed. It should also be noted that the court may, pursuant to s 2(2) of the Misrepresentation Act (Cap 390, 1994 Rev Ed), award damages in substitution for the right to rescind." Lee Pey Woan, Pearlie Koh & Tham Chee Ho, *The Law of Contract* (updated 30 April 2015), at [8.10.5], available at http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-8 (last visited 22 February 2017).

[97] HG Beale, *Chitty on Contracts: General Principles*, vol 1, 32nd Ed (London, UK: Sweet & Maxwell, 2008) at [8-054].

[98] The Court of Appeal in *Chua Chian Ya v Music & Movements (S) Pte Ltd* [2009] SGCA 54, [2010] 1 SLR 607 at [24] has noted local case law endorsing a "narrower equitable jurisdiction proscribing specific (and improvident) bargains" though it did not deal directly with the question of "whether there is or ought to be a broader doctrine of unconscionability" which it considered to be "in a state of flux."

[99] *Gay Choon* at [113], explaining that the doctrine of unconscionability (and economic duress and undue influence) may be more clearly suited than the consideration doctrine to situations where there has been possible "extortion."

[100] *Fong Whye Koon v Chan Ah Thong* [1996] 1 SLR(R), [1996] SGHC 68 at [8] (citing *In re Fry; Whittet v Bush* [1889] 40 Ch D 312 at 322) [*Fong Whye Koon*]; *Pek Nam Kee* at [131]; *Lim Geok Hian v Lim Guan Chin* [1993] 3 SLR(R) 183, [1993] SGHC 233 at [47].

[101] *Boustany v Pigott* [1993] 42 WIR 175 at 303.

the foregoing elements, the Reduction Modification that Sami was forced to sign possesses all the indicia of an unconscionable contract.

Sami was forced to accept a vastly reduced salary of $750 despite previously agreeing to work in Singapore for a salary of $2,000. With an incurred placement fee of $7,500, Sami would have to work without pay for ten months, as opposed to his expected three and a half months, to repay this substantial debt. Taking into account (1) the absolute quantum of the salary reduction (a reduction of approximately 60%, a considerable undervalue), and (2) the coercive circumstances in which Constructo forced the disadvantageous terms upon Sami (i.e. accept the reduced wage or have your employment terminated), the Reduction Modification can be characterised as overreaching and oppressive.

Additionally, Constructo and Sami have vastly unequal bargaining power. Case law suggests that the unequal bargaining power of the victim in relation to the stronger party can be evidenced by way of a "serious disadvantage" on the victim's part.[102] A serious disadvantage can be the victim's poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, and the lack of assistance or explanation where assistance or explanation is necessary.[103]

Sami is indeed placed at a serious disadvantage due to his poverty, his limited formal education, and his inability to read English. Further, he has limited bargaining power relative to his employer because of the restrictions in the EFMA on finding alternative employment in Singapore, as discussed above. This is especially problematic for Sami, and for the many foreign workers who arrive in Singapore with significant debts from placement fees paid to employment agencies and recruiters. The debt leaves workers vulnerable to coercive 'take-it-or-get-deported' tactics on the part of employers.[104] When an employer uses a worker's financial predicament against him or her by threatening deportation, its conduct is likely to be characterised as exploitative and unconscionable.

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[102] *Fong Whye Koon* at [7].
[103] *Fong Whye Koon* at [7].
[104] See "Workers Asked To Choose Between Pay Cut Or Repatriation" *TWC2* (19 November 2011), available at http://twc2.org.sg/2011/11/19/workers-asked-to-choose-between-pay-cut-or-repatriation (last visited 15 December 2016).

Sami is also likely to have little knowledge of contract law or his employment rights as opposed to his employer, who may have secured legal advice. This *asymmetry of knowledge* causes him to be acutely vulnerable to exploitation. Collectively, these factors entrench the employer's leverage over Sami, and place the latter in a position of heightened vulnerability and manifest disadvantage, a state of affairs recognized by Singapore courts.[105]

Where the agreement is unconscionable, it is voidable and may be set aside,[106] subject to any bars on rescission.[107] Upon rescission of the Reduction Modification, the parties are restored to the positions they were in as if there had been no such modification, and Sami's original home-country contract (with the higher salary) can then be enforced.[108]

III. PART THREE: WAGE REDUCTION IN OTHER FORMS: CONSIDER CHEN AND SITI

While Sami's circumstances appear to be the most common amongst the reported patterns of bait and switch, there are several other wage reduction scenarios that have been reported among groups that support migrant workers in Singapore. As to these workers, the following discussion is not meant to be comprehensive; it is meant to flag several issues for further consideration and development.

First, there are some workers who initially earn *more than* the amount shown in the Work Permit Application and IPA associated with their employment, only to have their wages reduced at a later time. In one case reported by HealthServe, a worker who was earning a monthly salary of $1,900 had an IPA that showed a monthly wage of just $580. While workers welcome receiving a higher wage, in most cases this higher wage is only temporary. After being paid the higher wage for a period of time, these workers commonly face a period of partial or non-payment. They then seek to recover the higher salary for the work performed. Current practice shows, however, that in this instance, the employer will point to the

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[105] *Janardana* at [4]; *Lee Chiang Theng* at [34].
[106] See note 95.
[107] See note 96.
[108] See note 97.

wage amount in the IPA and avoid any subsequent contract with a salary increase.

Consider these facts: *Chen is a Chinese national who came to Singapore to work as a construction worker under an IPA, obtained by his employer Buildco, that contained a monthly salary of $580. After Chen arrived in Singapore, he began working for Buildco and was paid once a month for six months at a rate of $1,900 (minus some salary deductions not relevant here). He worked for the seventh month, but when he received his pay in the eighth month, it was only $580. He protested but Buildco told him that the previous salary amounts were discretionary bonuses and were never meant to be a permanent salary increase. He then comes to consult with you.*

While the IPA is the central piece of documentary evidence in Sami's case, it does not tell the whole story in Chen's case. To help Chen, you will have to establish that Buildco and Chen entered into a subsequent contract that increased Chen's salary from $580 to $1,900 per month. As with Sami's home-country contract with Constructo, Chen's Work Permit Application and IPA are excellent evidence of Chen's home-country contract with Buildco. And, as with Sami's case, the key analysis for determining how much Chen must be paid for his work will involve assessing whether there is a valid Singapore-based contract that supersedes the home-country contract. For Sami, the assessment results in invalidation of the Singapore-based contract. But what about Chen?

The starting point for helping Chen is to attempt to prove that a later-in-time contract exists. Just as with proving any contract, you will need to look at offer, acceptance, consideration and intention to create legal relations.[109] Of relevance here, offer and acceptance can arise through the parties' course of conduct.[110] It is also worth noting that in salary increase situations, where the offer of increased pay is

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[109] *Commerzbank* at [62]-[106]. If you have a client like Chen, review *Commerzbank* with great care, particularly when seeking to establish that Chen provided Buildco valid consideration. In *Commerzbank*, the employee's continued employment conferred on the bank a "meaningful" benefit in the form of employee stability and the ability to continue operating as a going concern during a period of economic uncertainty. This constituted valid consideration.

[110] *Midlink* at [53].

likely unilateral, no acceptance needs to be communicated by the employee to the employer.[111]

Here, Buildco paid Chen an increased salary on a consistent basis, over the course of six months. This could support an argument that Buildco offered, and Chen accepted, the higher-salary amount for the work performed. In practice, evidence of the parties' course of conduct will come in the form of evidence of the higher pay over a period of time (e.g. payslips, paychecks, bank statements, etc.). Any evidence of actual discussions between Buildco and Chen regarding the circumstances of the salary increase, including the intended duration of the increase (e.g. permanent vs. temporary) or an expressed understanding by even one of the parties, would be helpful here. For Chen, your ability to help him will depend on the specific facts.

You may also encounter a worker, Siti, who, like Sami, was promised more in her home country than she received in Singapore, but whose IPA does not reflect the higher promise. Siti's case may be a harder case than Sami's, as you will need to prove the prior home-country contract without the benefit of the IPA and the EFMA's salary reduction constraints. You should still investigate what evidence you can muster on the home-country contract and consider whether the subsequent agreement was void or voidable for all of the reasons set forth above (i.e. lack of consideration, duress, and unconscionability). You may also want to investigate whether Siti provided consent, in writing, to her employer prior to the employer's submission of Siti's Work Permit Application to MOM, as is required.[112] If her employer submitted an Application without securing this consent, the employment details therein, including salary, may be subject to challenge.

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[111] *Commerzbank* at [66]-[67].

[112] See note 32.

Practice Tip 4: A Word About Damages: Two Standalone Claims To Consider

Part II of this paper provides three doctrines for attempting to set aside a second, lower-wage agreement for the same work. If successful, your client will be able to secure the amount he or she was originally promised. Your client may also be entitled to *damages* under several theories for relief worth considering:

- *Fraudulent or negligent misrepresentation*. Employers who convey one salary amount to workers in order to induce them to incur debt and travel to another country may be liable for misrepresentation, a claim that, if proven, entitles the worker to damages. See *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2002] SGCA 35, [2003] 3 SLR(R) 307 at [20] and [21].

- *Breach of the implied duty of mutual trust and confidence*. Employers who threaten workers with termination in order to induce them to accept a lower wage for the same work may have breached the implied duty of mutual trust and confidence that, if proven, entitles the worker to damages. See *Wee Kim* at [24]; *Cheah Peng Hock* at [57]; *Commerzbank* at [110]. See also *Semana Bachicha v Poon Shiu Man* [2000] 2 HKLRD 833, cited favourably in *Wee Kim* at [27], and awarding damages for breach of the implied duty in a case brought by a foreign domestic worker against her employer.

CONCLUSION

Unfortunately, the "*bait-and-switch"* tactic has been reported by many organisations that support migrant workers in Singapore. Unscrupulous employers lure foreign employees to Singapore with the promise of a higher salary, enticing them to incur significant debt before migrating to Singapore, only to force them into accepting a lower salary upon their arrival. In a 2014 report, Bangladeshi workers under the same employer were found to have been paid a salary amounting to $286 per month for a year, even though their basic monthly salaries were clearly stipulated on their respective IPAs as $800.[113]

In response to this problem, this paper discussed the possible arguments that may be made to enable a foreign employee like Sami to receive the salary that he or she was promised. The EFMA is clear in its prohibition of an employer's unilateral reduction of a foreign employee's monthly salary. Without the employee's genuine consent,

[113] "How Low Can a Salary Go?" *TWC2* (24 December 2013), available at http://twc2.org.sg/2013/12/24/woolim-part-1-how-low-can-a-salary-go/ (last visited 15 December 2016).

no such reduction may be made. Such a statutorily entrenched protection for Work Permit holders must be construed in light of the unique vulnerability of foreign workers, and take into account this vulnerability when analysing the contractual arrangements between the employer and employee.

The paper concludes with several alternate bait-and-switch scenarios that lawyers and front-line caseworkers may encounter. These scenarios are included to spur additional investigation and highlight that exploitation around salaries can take different forms.

Ultimately, the Singapore legal system contains doctrines that upon which to pursue illegal bait-and-switch tactics. Their use in the migrant worker context may be novel, but should benefit from the employment and contract cases developed in other sectors. Future legal action is necessary to explore the exact contours of these doctrines in our context and chart out additional strategies to help aggrieved workers more effectively pursue valid claims.