

## Trademark Rules Update: Non-Use Period Extended to Five Years Before Potential Deletion



In July 2024, the Indonesian Constitutional Court handed down a decision<sup>1</sup> that extended the non-use period of trademarks from three years to five years. Non-use period of a trademark is when a registered trademark is not used in business related to the goods or services listed in the registration from its last use or registration date. Currently, it is governed by Article 74 of Law No. 20 of 2016 on Trademark and Geographical Indication (“**Trademark Law**”).

The petitioner, a micro, small, and medium enterprise (“**MSME**”) entrepreneur in the technology sector, challenged Article 74 of the Trademark Law, arguing that it does not allow a sufficient non-use period for MSMEs to recover from force majeure events, such as the pandemic and economic crises.

In our view, the Court’s decision reflects Indonesia’s unique economic condition, where MSMEs plays an important role. The extension allows time for MSMEs to revive their business after facing force majeure conditions and other challenges which may affect their ability to use their trademarks. Furthermore, this additional time could protect MSMEs’ trademarks from being sued for trademark deletion as their business are recovering.

<sup>1</sup> Constitutional Court Decision No. 144/PUU-XXI/2023.

## Client Update: Indonesia

### 20 August 2024

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### Background

Article 74 of the Trademark Law allows third party with an interest to file a lawsuit for trademark deletion with the Commercial Court if a trademark has not been used for three consecutive years (from the registration date or last use date) in connection with the trade of the goods and/or services listed in the registration. Exceptions to the non-use principle, such as import bans, temporary permit prohibition for the distribution of goods using the trademark, decisions by authorised parties, or other similar prohibitions under government regulations, cannot be considered valid grounds for claiming non-use.

As briefly mentioned above, the petitioner is an Indonesian individual MSME engaged in the field of technology. The petitioner asked the Constitutional Court to declare Article 74 of the Trademark Law as unconstitutional against Articles 28H(4), 28D(1), and 33(4) of the Indonesian Constitution and legally non-binding. The petitioner argued that the three years non-use period under Article 74 of the Trademark Law is harmful to MSMEs. A pandemic, economic crisis, increasing raw material prices, and other force majeure conditions could easily impact the business operation of MSMEs, resulting in the potential deletion of the MSME's trademark from the trademark register maintained by the Directorate General of Intellectual Property at the Ministry of Law and Human Rights.

### The Court's Consideration

The Court ruled in favour of the petitioner based on the considerations that Article 19 Annex IC of the Trade-Related Aspects of Intellectual Property Rights Agreement ("TRIPS Agreement") states that trademark registrations can only be cancelled after an **uninterrupted non-use period of at least three years**, unless there are valid reasons to justify the non-use. This means that the TRIPS Agreement gives countries the freedom to determine the non-use period as long as it adheres to the minimum period. Hence, some countries like Singapore and England have already implemented a non-use period of five years. Furthermore, Law No. 20 of 2016 on MSMEs stipulated that a trademark is not a mere brand identity. Rather, it is a tool to increase the competitiveness of MSMEs. Therefore, the non-use period should be adjusted to suit the need of MSMEs in Indonesia.

### Implications of the Extended Non-Use Period

The Court mentioned that the extension of the non-use period aims to provide trademark owners, especially MSMEs entrepreneurs, a more realistic timeframe to recover from adverse economic conditions and to continue using their trademarks. The Constitutional Court emphasised that the extension does not undermine the advancement of technology where trademarks owners can utilise online platforms to avoid having their trademarks be classified as non-use. Hence, the determination of non-use period should be based on an accountable, clear, transparent, and measurable data of trademark use, i.e. from registration date or last use date.

Under Article 74(2) of the Trademark Law, one reason why the non-use period may be found to be invalid is if there is a government regulation that establishes prohibition, e.g. import ban or temporary prohibition for the distribution of the goods under the trademark. Specifically, towards Article 74(2) of

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the Trademark Law, the Court also ruled that force majeure conditions can be one of the factors that caused a trademark owner to not be able to use their trademarks or run their business operations. Hence, in its verdict, the Court stated that the scope of “other similar prohibition” must include “force majeure as established by a government regulation”. This is now an inseparable part of Article 74(2) of the Trademark Law.

While the Trademark Law now acknowledges the concept of force majeure, it is important to note that the Indonesian Civil Code itself does not explicitly define force majeure. Based on Articles 1244 and 1245 of the Civil Code, force majeure can be implied as pressing and unforeseen circumstances which cannot be accounted for under these Articles. Moreover, although the revised Article 74(2) of the Trademark Law recognises force majeure, its application is limited because it only applies when the government has formally established or announced the force majeure. This limitation could be disadvantageous to MSMEs, as they might struggle to have their challenges (such as high inflation, economic crisis, or extreme rises in material prices) recognised under this narrow definition, potentially leaving them vulnerable during unforeseen events.

## Next Step Forward

While the Court’s ruling represents a significant development for Indonesian trademark regime and its implications, its effectiveness is yet to be seen. In our view, in order to be truly effective, the government should establish clear criteria for what constitutes force majeure conditions.

Nonetheless, the extension of the non-use period from three years to five years and the inclusion of force majeure as one the exceptions for non-use provide greater protection for trademark owners, like MSMEs, that are more vulnerable to unstable economic conditions. These changes aim to align with the broader objectives of the Trademark Law in creating a fair and competitive business environment in Indonesia.

In the end, business owners should register their trademarks even if their products are not market-ready yet. The extended five-year non-use period provides a valuable window to optimise product development without risking the loss of trademark rights.

If you have any queries on the above, please feel free to contact our team members below who will be happy to assist.

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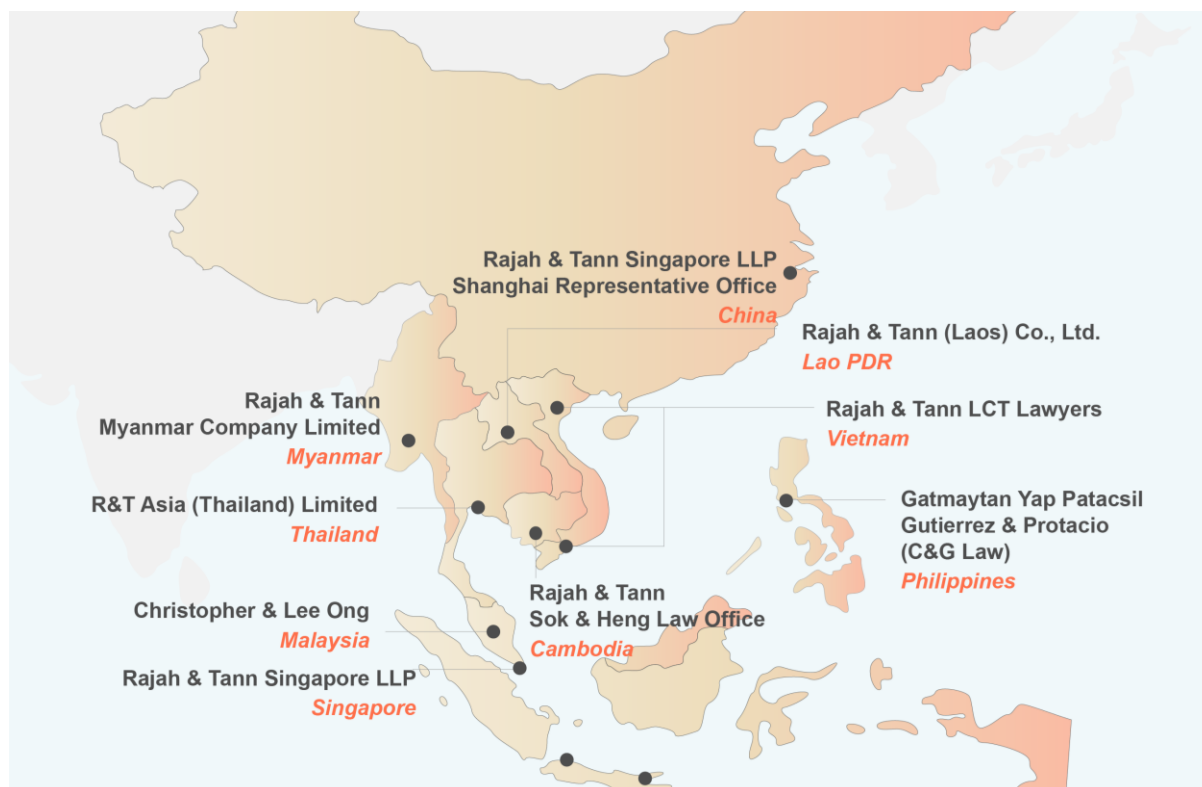
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## Client Update: Indonesia

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