THAILAND*

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I. RESTRICTIVE COVENANTS: LAWS AND TYPES OF RESTRICTIONS

A. Governing Legislation

In approaching restrictive covenants, Thai law attempts to balance the interests of employees against legitimate business interests. This is within the context of providing an environment that is conducive to economic growth and encourages foreign investment. As compared with other jurisdictions, Thailand's policy on restrictive covenants is much more favourable to employers than employees. As a general matter, a consistent approach to restric-

tive covenants is taken within every industry. However, restrictive covenants are more difficult to enforce, within the context of applicable law, for certain categories of employees.

Employees working in Thailand for most private entities are covered by the Labour Protection Act (the LPA). This law is the primary source of labour regulation in Thailand. It sets out rules and regulations relating to employment in general, as well as work safety, wages, overtime, employee welfare, severance pay, etc. The Unfair Contract Terms Act, enacted in 1997 in response to the Asian financial crisis, gives courts the authority to modify the effect of contractual terms they consider unfair. These laws, combined with a number of court decisions thereon, provide the basis for legal regulation of noncompetition and nonsolicitation covenants.

A contract of employment is a reciprocal agreement. As a general matter, much of the Thai law of contract stems from the "freedom of contract" principle. However, in accordance with the Thai Civil and Commercial Code (the CCC), in order to be enforceable, terms in contracts must be neither expressly prohibited by law nor impossible to implement. Further, terms that are contrary to public order or good morals are void. Thai courts are empowered to make determinations as to whether particular terms are contrary to public order or good morals, on a case-by-case basis.

There are also acts that provide for the protection of trade secrets, patents, and copyrights in the context of an employment relationship: the Trade Secrets Act (the TSA), the Patent Act, the Copyright Act, and the Penal Code.

1. Applicable Treaty or Convention

Thailand is neither a party to any treaty on the matter of restrictive covenants in employment relationships, nor has any such regulation been applied through the ASEAN framework.

2. Applicable Statutes or Rules

In addition to their basis in contract, restrictive covenants are governed by a number of different national laws. These include the CCC, the LPA, the Penal Code, the Unfair Contract Terms Act, the TSA, the Patent Act, and the Copyright Act. They all apply

nationally, and there are no regional laws on these matters. Also, foreign law can be applied to the extent that it and its applicability are proven to the court, and to the extent that the chosen foreign law is not contrary to public order or good morals. However, the applicability of Thai labour law cannot be avoided by opting for a foreign law.

Depending on the specifics of the claim, an action concerning a restrictive covenant could be brought in a general court or in a specialized court. Given that restrictive covenants are related to employment, actions concerning restrictive covenants are often brought in the Labour Court, a specialized court of first instance. Thailand's Labour Court consists of the Central Labour Court and six regional Labour Courts. In addition, the Central Intellectual Property and International Trade Court has jurisdiction over, inter alia, matters involving intellectual property.

As a general matter, employees are not subject to different treatment with respect to considerations relating to restrictive covenants by the court based on their level, position, or tenure. The court may, however, consider the relative bargaining power and ability to carry on one's occupation, both of which are factors that may correlate with differing positions or levels of employees.

The presence or absence of a union and collective bargaining agreement does not have an impact on the ruling on and the enforcement of restrictive covenants. However, terms of relevance to these issues may be included in collective bargaining agreements and, to the extent they are applicable, the court may consider them.

There are no industry-specific statutes or rules that govern restrictive covenants.

B. Type and Scope of Restriction

1. Noncompetition

Noncompetes are governed primarily by the Unfair Contract Terms Act and Section 14/1 of the LPA. In addition, given their contractual basis, the CCC is relevant. As a general matter, noncompetes are enforceable in Thailand, subject to some restrictions. They are neither favoured nor disfavoured, but are enforceable to the extent that they are reasonable. The public policy considerations behind this approach are an attempt to balance the interests

of companies against the interests of workers, so as to provide for economic growth and prosperity for the country, both of which are important for national security and social cohesion.

The Unfair Contract Terms Act stipulates that contract terms that are not void but cause the person whose right or freedom has been restricted to shoulder more of a burden than a reasonable person could have anticipated under normal circumstances shall only be enforceable insofar as they are fair and reasonable in the circumstances.[1] Courts are to consider the geographic scope of the area specified and the period of restriction of rights or freedoms, as well as the ability and opportunity of the employee to carry on his or her occupation or otherwise engage in business, as well as all legitimate advantages and disadvantages of the contracting parties.

In determining to what extent terms are enforceable as fair and reasonable, courts are to take all circumstances into account, including good faith, bargaining power, economic status knowledge and understanding, adeptness, anticipation, guidelines previously observed, other alternatives, and all advantages and disadvantages of the contracting parties according to actual conditions; ordinary usage applicable to such kind of contract; time and place of performance or making the contract; and whether one party is made to bear a much heavier burden than the other.[2]

Although the statute does not draw a distinction between enforceability during employment and post-employment, the reality is that most such disputes arise after an employment relationship terminates. For an employment agreement that contains a noncompete, a court would consider it within the same framework already described, regardless of whether it was to have effect during or after the employment relationship, or both.

Several Supreme Court judgments have held that a restriction period of 24 months after employment ended, with nonspecific geographic restrictions, prohibiting an employee from directly or indirectly working, carrying out, or engaging in businesses in competition with the former employer, are fair and reasonable, and thus enforceable. In one case, the Supreme Court even held that

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[1] Unfair Contract Terms Act §5.

[2] *Id.* §10.

a similar restriction—though valid for a period of five years and applicable to a specific geographic area including Thailand, Vietnam, Cambodia, Laos, and Myanmar—was also fair and reasonable, and thus enforceable.

The statute does not require employers to give additional consideration or other benefits to an employee or former employee during a noncompete period. However, it is possible that terms providing for such an arrangement may be included in an employee's employment agreement, or that a departing employee may negotiate such an arrangement with his employer. In either case, the employer's obligation to pay would be enforceable.

Typically, the reason for ending an employment relationship has no impact on enforcement of noncompetes. However, it is possible to draft a noncompete clause in such a way that it would have effect only in certain conditions, e.g. termination for cause, but not in the case of termination without cause or resignation.

Being a professional does not automatically confer an exemption from enforcement of noncompetes. However, with respect to a doctor or lawyer, one can see that a noncompete, depending on its scope, could easily have the effect of eliminating all opportunities to practise one's occupation. Thus, a court would consider this within the context of the factors described above, with the likely result of modifying the term or not enforcing it.

2. Nonsolicitation of Clients and Customers

As a general matter, provisions regarding nonsolicitation of clients and customers are governed by the same legal regime as provisions regarding noncompetes discussed in 1. above. In this regard, the Unfair Contract Terms Act specifically refers to the right or freedom in pursuing an occupation or carrying out a juristic act related to trading or a professional business operation.

There is no statutory distinction between prior clients of the employee and clients of the employer. However, employees who bring with them large or significant client bases will often ensure that provisions making it clear that their clients "belong" to them are included in their employment agreements. Likewise, employers often seek to include similar provisions in agreements they negotiate.

3. Nonsolicitation of Employees

As a general matter, nonsolicitation of employees is governed by the same legal regime as noncompetes discussed in 1. above. In this regard, the Unfair Contract Terms Act specifically refers to the right or freedom in pursuing an occupation or carrying out a juristic act related to trading or a professional business operation.

The statute does not prescribe specific look-back periods, though it is possible that a nonsolicitation provision could be drafted in a way that would provide for the employee to be forbidden from approaching the employees with whom he or she had contact within a certain period of time prior to the end of the employment relationship. With respect to such a clause, the same analysis would apply.

The statute provides for nonsolicitation provisions to be applied equally to all employees, subject to the same analysis described above. There is no specific rule that addresses the enforceability of provisions that would prohibit executives or directors hiring employees of their former employers. Likewise the statute does not prevent the application of such provisions to lower-ranking employees, such as administrative assistants.

4. Confidentiality and Trade Secrets

Disclosure of an employer's confidential information is addressed in the Penal Code, which sets out the criminal penalties. Section 323 of the Penal Code provides protection of all secrets, regardless of their nature. However, the effect of this provision is limited to competent officials, medical practitioners, pharmacists, druggists, midwives, nursing attendants, priests, advocates, lawyers, or auditors, or assistants of such professions, who acquire such secrets by reason of their professional functions.

Section 324 of the Penal Code protects secrets on industry, discoveries, or scientific inventions. Moreover, the penalties for violating either of these sections are minimal compared with the penalties for violations under the Trade Secrets Act. Offenders under either Sections 323 or 324 of the Penal Code would only be subject to imprisonment of up to six months and/or a fine not exceeding Baht 1,000.

The TSA, which came into force on July 22, 2002, contains stronger provisions to guard against unauthorized disclosure of trade secrets.

The term "trade secrets" means trade information not yet publicly known or not yet accessible by persons who are normally connected with the information, the commercial values of which derive from its secrecy and from the fact that the controller of the trade secrets has taken appropriate measures to maintain the secrecy. "Trade information" means any medium that conveys the meaning of a statement, facts, or other information irrespective of its method and forms. It shall also include formulas, patterns, compilations or assembled works, programs, methods, techniques, or processes.

The TSA authorizes the court to award injunctive relief, actual damages, disgorgement of profits (or an appropriate substitute therefor), and punitive damages in the case of acts conducted willfully or maliciously. The law also prescribes criminal penalties for various violations under the TSA, including maximum fines of Baht 20,000-Baht 2,000,000 and maximum imprisonment from one month to ten years, depending on the particular offense.

Besides the protection mentioned above, some protection is also provided under the Computer-Related Crime Act 2007 (the 2007 Act). Sections 5 through 16 of the 2007 Act set out a variety of offenses related to computers, software, and data, which range from unauthorized access to intentional damage. Depending on the offense, the maximum imprisonment ranges from 6 months to 20 years, and the maximum fine ranges from Baht 10,000 to Baht 300,000. Importantly, this 2007 Act purports to have extraterritorial effect, as it specifically mentions its applicability to Thai citizens outside Thailand, and to non-Thai citizens who injure Thai citizens.

a. Misappropriation, Theft, and Misuse

The infringement of trade secrets includes the disclosure, use or deprivation of use, of trade secrets without the consent of the owner in a manner contrary to honest trade practices. Acts contrary to honest trade practices include breach of contract, infringe-

ment or inducement to infringe confidentiality, bribery, coercion, fraud, theft, receipt of stolen property, and espionage through electronics or other means. To constitute infringement, the infringer must be aware or have reasonable cause to be aware that such act is contrary to honest trade practices.

Under Section 7 of the TSA, the following is not considered infringement:

- disclosure or use of trade secrets by a person who has obtained the trade secrets through a transaction without knowing or having reasonable cause to know that the other party to the transaction obtained the trade secrets through the infringement thereof;
- disclosure or use of trade secrets by state agencies responsible for their maintenance in the following circumstances:
  - when it is necessary for the protection of public health or safety; or
  - when it is necessary for the benefit of other public interests with no commercial purpose, so long as the state agency responsible for the maintenance of trade secrets, or other state agency or person concerned, which/who has access to the trade secrets, has taken reasonable steps for their protection from use in unfair trading activities;
- independent discovery, *i.e.* discovery of a trade secret belonging to others by the researcher's own method of invention, or development through his/her own expertise; or
- reverse engineering, *i.e.* discovery of a trade secret belonging to others by means of evaluation and analysis of a widely-known product with the intention to discover the method by which such product is invented, manufactured, or developed, provided that the product was obtained in good faith by the person who conducted the evaluation and analysis, except if the person who conducted reverse engineering expressly agreed otherwise with the owner of trade secrets or seller of the product.

b. Doctrine of Inevitable Disclosure[3]

There is no legal doctrine corresponding to "inevitable disclosure". Therefore, subject to the measures taken by the owner of the proprietary interest, a highly skilled employee is not automatically barred from taking up employment with a competitor, even if the employee would inevitably disclose the protected information. For this reason, restrictive covenants are often used to clearly enumerate the agreed restrictions.

c. Employer Monitoring and Employee Privacy Rights

As a general matter, Thai law seeks to balance the rights of employer and employee. While there are no specific laws that prevent or regulate monitoring employees at work, there are general provisions of law that provide employees some level of privacy protection.

Office computers and email systems are generally considered the employer's assets, and employers generally have the right to search or monitor office computer data and emails. However, pursuant to the Computer-Related Crime Act 2007, if an employer accesses an employee's personal computer system or data installed with access prevention measures, the employer may be subject to criminal penalties.[4] It is always prudent for employers to obtain the employee's consent to access computers during the hiring process.

Greater privacy would be afforded for an employee's personally owned computer or data source. For example, Section 74 of the Telecommunications Business Operation Act stipulates that

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[3]The doctrine of inevitable disclosure, recognized in some jurisdictions, allows former employers to argue that the court should grant an injunction preventing a former employee from working for a competing employer because that former employee possesses knowledge, confidential information or trade secrets learned at the prior employer that will inevitably be disclosed to the new employer, whether intentionally or inadvertently. See in BRIAN MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY, Finding List of Additional Topics, Additional Topic 53.A.1 (6th ed. 2008).

[4]Computer-Related Crime Act 2007 §§5 & 7.

any person who commits an act of illegal interception, utilization, or disclosure of messages, information, or any other data by means of telecommunications shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding Baht 400,000, or both. Given this provision, it would be advisable to seek an employee's consent to such monitoring. Union employees are not treated differently in regard to privacy rights, though collective bargaining agreements could, in theory, contain provisions that might be relevant to this issue.

To the extent that any right to privacy actually exists in a way that would make violations actionable, there are provisions under the CCC and the Penal Code that could form the basis for such an action. For example, Section 420 of the CCC stipulates that a person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property, or any right of another person is said to have committed a wrongful act (tort) and is bound to make compensation therefor. In addition, there is also the risk of defamation charges, if such information were disclosed.

II. Existence of a Duty Outside of an Express Covenant

A. Duty of Loyalty (During and Post Employment)

While not specifically named a duty of loyalty, Section 583 of the CCC, which applies throughout the country, provides that an employee who wilfully disobeys or habitually neglects the lawful commands of his or her employer or absents himself or herself from services is guilty of gross misconduct; and if the employee otherwise acts in a manner incompatible with the due and faithful discharge of his or her duty, he or she may be dismissed by the employer without notice or compensation. Therefore, if the employee violates the duty of loyalty, the employer may terminate the employee for cause. Logically, these obligations are limited to the period of employment.

No other consideration is required for this duty to be binding on the employee. This obligation is applicable to all employees, and does not differentiate on the basis of the level of an employee or whether or not an employee is a union member. Section 119 of the Labour Protection Act adopts a similar approach, allowing the employer to immediately terminate an employee without payment of severance, in response to a variety of employee conduct and other circumstances, one of which is intentionally causing damage to the employer.

The remedy for a breach of duty of loyalty is termination of the employee's employment. If there are associated matters for which the employer could claim for damages, an action could be brought in court. These matters might include actual damages the employee had caused to the employer, salary advances that had not been repaid, etc.

The default period of prescription is 10 years. However, a 2-year period of prescription applies to some claims arising out of an employment relationship, including employees' claims for wages or other remuneration, disbursements, and employers' claims for advances made thereon.

If an employee disagrees with the termination, the employee could claim against the employer for unfair dismissal, or raise other issues such as insufficient notice or dismissal for an invalid reason. However, if the employer has suffered actual damages, the employer could claim against the employee for such damages. Depending on what the claim is, it could be brought in a general court or in the Labour Court.

B. Fiduciary Duty (During and Post Employment)

Under the CCC and the Public Limited Companies Act, directors and officers of a company owe special duties of loyalty to the company. An employee does not acquire an implied fiduciary duty by virtue of an employment relationship. For this reason, an employer may provide for such a duty in an employment agreement.

III. LEAVE AND NOTICE REQUIREMENTS

A. Rules on Garden or Similar Leave (and Breach by Employer)[5]

1. Notice Requirements

The CCC and the LPA contain specific provisions regarding notice of termination. In cases of termination for cause, no notice needs to be given.[6]

Employment under a fixed term employment agreement ceases at the end of the term set out under the agreement.[7] Therefore, a fixed term contract will normally expire at the end of the agreed period without need to give advance notice of termination.

When an employment agreement does not contain a fixed term of employment, the employee is entitled to advance notice of termination without cause.[8] The timing of giving advance notice is important. Such notice may be given at or before a payday, in order for the termination to take effect as of the following payday, i.e., at least one payment cycle in advance of the effective date of

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[5]Garden leave is a term that refers to an employer requiring an employee who has given notice or has been terminated to depart the workplace while continuing to pay the employee during the applicable notice period. In some countries and industries the practice also may involve the use of lengthier notice periods than customary or specified by law, if permissible. The continuation of the employment relationship during a period of garden leave means that the employee remains bound by the employment contract and the duties thereunder. The employer's intent is to minimize the amount of up-to-date and/or important information that the employee might bring to a competitor by excluding the employee from the workplace during the notice period while at the same time forestalling the employee from working for another competitor during the notice period, which in many countries would constitute a violation of the employee's duty of loyalty. Garden leave also has the benefit to employers of preventing the employee from being an unproductive or disruptive presence in the workplace. It can also prevent access by the employee to the employer's confidential information and clients during the period of leave. *See* BRIAN MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY, Finding List of Additional Topics, Additional Topic 52.41.1 (6th ed. 2008); M. SCOTT MCDONALD & JACQUELINE JOHNSON LICHTY, DRAFTING AND ENFORCING COVENANTS NOT TO COMPETE 373–83 (2009).

[6]CCC §583.

[7]Labour Protection Act §17.

[8]Labour Protection Act §17; CCC §582.

termination. In other words, to meet the requirement, there must be one complete payment cycle between the date of the notice and the date of the termination for the termination to take effect. Thus, in considering when to give notice, an employer should take the employee's payday into account. For example, if the employee's payday is on the 27th of each month, and the employer intends to terminate the employment of the employee with effect on June 30, the employer should give notice to the employee on or before May 27. However, if a longer notice period was agreed in the employment agreement or provided in the work rules and regulations, the employer would be obligated to meet the longer notice requirement. However, the law provides that notice of more than three months is not necessary.[9]

The employee is expected to work during the notice period, but the employer can choose to dismiss the employee immediately by paying wages in lieu of notice.[10]

The obligation to give notice is not a mutual obligation of the employer and the employee. Different notice periods may be agreed in an employment agreement, so long as they meet or exceed the employer's minimum obligations under law. In theory, a collective bargaining agreement could contain terms regarding notice. In that situation, it would be necessary to consider all relevant terms, including those in the collective bargaining agreement, the employment agreement, work rules, and the law, and then proceed according to the terms that deliver the greatest benefit to the employee.

Apart from those obligations stipulated in a valid contract, work rules, or applicable law, there are no other specific duties or obligations for an employee to perform or observe during the notice period. However, any valid restrictive covenants in employment agreements must be observed, in accordance with their terms and within the legal framework described herein. Moreover, even if the employment agreement does not contain confidentiality obligations, the parties would still be bound by those stipulated under law, as described above.

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[9]Labour Protection Act §17; CCC §582.

[10]Labour Protection Act §17.

If an employer wishes to seek enforcement against the employee, the employer may bring suit in court.

The Ministry of Labour may enforce an employer's obligations to give proper notice of termination or to pay wages in lieu thereof. An employee may also seek to enforce his or her right to notice by claiming against the employer for actual damages, in the Labour Court. The same approach applies in the union context. Moreover, penalties including imprisonment and fines may be imposed for violations of the Labour Protection Act.

2. Garden Leave

There are no rules specific to garden leave. However, an employment agreement or other source of employment terms may provide that an employee will be placed on such leave for a period of time prior to actual termination. In addition, a departing employee may negotiate such an arrangement with his or her employer. The actual details of these arrangements vary quite widely, and often with the nature of the employee's position. A senior employee may save face if he or she continues to come into the office, from time to time, during the period of garden leave. In other acrimonious situations, it may be preferable for the employee not to come to the office, and to make that clear in the relevant termination paperwork. If the employer and employee agree on terms to this effect, breach of such agreement would be actionable. It is also possible to place employees on leave for the purposes of an investigation. In such a situation, the employer need only pay the employee at the rate of 50 percent of normal wages, and such leave can last up to seven days. Following the conclusion of the investigation, if the employee is cleared of any wrongdoing, the employee must be paid the other 50 percent.

B. Rules on Compensation

As explained above, there is no statutory provision for garden leave, though such arrangement can be made in a contract and the parties can agree on the appropriate conditions, e.g., observing restrictive covenants during that period of leave. Further, the terms of compensation may also be negotiated, e.g., only wages or also including benefits and provident fund contributions.

However, as also noted above, where employment is terminated without cause, there is a required period of advance notice. In that situation, an employer is entitled to pay an employee wages in lieu of notice, and dismiss him or her immediately. As a general matter, courts have held that "wages" include all fixed periodic payments that an employee receives, however they are characterized. The law requires that these wages be paid, regardless of whether the employee observes particular additional conditions in a termination or resignation agreement. However, some other payment could be included in such an agreement, to which additional conditions could be attached.

C. Rules on Equity Forfeiture and Other Clawback Provisions, Breach by Employee, and Employee Choice Doctrine[11]

The law does not provide specifically as to whether an employee's equity in a provident fund or stock options continues to vest, during the notice period or in a garden leave situation. Whether it does would be a matter of the employer's policy, as well as the rules of the provider of the benefits. Put simply, it is not a statutory right, and vesting depends on the plan or scheme, and on whether the employee remains on the payroll.

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[11]In the United States, New York's common law "employee choice" doctrine allows employers to argue that a forfeiture-for-competition clause should not be scrutinized by the courts. The doctrine posits that an employee who voluntarily terminated his or her employment and who received nonvested deferred compensation conditioned on not competing with the employer that conferred such benefits, has the choice either of a) preserving those benefits by refraining from competition or of b) automatically forfeiting the compensation by engaging in such competition. According to this doctrine, the employee's decision to compete constitutes an automatic waiver of the right to the compensation without the necessity for judicial review as to reasonableness or other limits on enforceability. BRIAN MALSBERGER, COVENANTS NOT TO COMPETE: A STATE BY STATE SURVEY, "New York," questions 3 and 8 (6th ed. 2008); M. SCOTT MCDONALD & JAQUELINE JOHNSON LICHTY, DRAFTING AND ENFORCING COVENANTS NOT TO COMPETE 328, 329 (2009). This kind of clause should be distinguished from a clawback clause, which specifies that the employee must return to the employer financial benefits such as stock options that were granted subject to employee compliance with a noncompete agreement. M. SCOTT MCDONALD & JAQUELINE JOHNSON LICHTY, DRAFTING AND ENFORCING COVENANTS NOT TO COMPETE, 345–56 (2009).

While in theory it would be possible for continued vesting or delivery of contributions or shares to be conditioned on an employee observing a restrictive covenant, and addressed in a termination or resignation agreement, the reality is that this would be difficult to execute with respect to rank-and-file employees, given the applicable terms of benefits, such as provident funds. Moreover, the Labour Protection Act restricts deductions that an employer may make from an employee's wages, defined above. In this regard, an employer should not make any deductions from an employee's wages in respect of work performed or otherwise, unless such deductions are specifically authorized by law. It will also be necessary to give consideration to the terms under which compensation is provided.

IV. Litigating Restrictive Covenants

A. Procedural Issues in Litigation

1. Jurisdiction (Power of the Forum to Adjudicate a Case)

The Trade Secrets Act 2000 (the TSA), discussed under I.B.4. above, governs the jurisdiction and enforcement procedures of covenants preventing the disclosure of trade secrets. Other than that, there are no statutes providing for unique jurisdiction and enforcement procedures for certain types of restrictive covenants.

Depending on the nature of the dispute, an action relating to enforcement of restrictive covenants and protection of trade secrets can be brought in the Labour Court, the Intellectual Property & International Trade Court (IP&IT Court), or the Civil Courts.

- The Labour Court has jurisdiction to adjudicate disputes concerning the rights or duties under an employment agreement or an employment relationship, such as disputes that involve unfair employment terms and conditions, noncompete clauses and other restrictive covenants, and compensation under Thai law.[12] The Labour Court follows specific

[12]TSA §14.

procedural rules under the Act Establishing Labour Court and Labour Procedure, but otherwise follows the Civil Procedure Code. Payment of fees and costs[13] is exempted if a complaint is filed with the Labour Court. A complaint can be made either verbally or in writing.[14] The Labour Court also has the power to summon witnesses and take evidence as it deems appropriate.[15] The Labour Court has the authority to render judgment or issue orders against other employers and employees who have mutual interests in the cause of the case.[16]

- The IP&IT Court maintains jurisdiction over disputes involving the intellectual property rights of litigants such as trade secrets.[17] Suits between a former employer and new employer or prospective employer over trade secrets would fall within the jurisdiction of the IP&IT Court. The IP&IT Court may appoint experts to give opinions for its consideration. In this case, the court must notify the parties, who are entitled to call their own experts for the purpose of giving opinions that are contradictory or additional to those of the court-appointed experts.[18]
- The Civil Court has jurisdiction where a specialized court such as the Labour Court or the IP&IT Court does not, due to the nature of the claim. Examples might include a company's claim against a contractor for disclosure of confidential information. Rules governing the jurisdiction of the Civil Court are set out under the Civil Procedure Code.

Litigation is commenced when the plaintiff files a complaint pleading the facts and allegations constituting the basis of the claim.

After the complaint is filed with the payment of the court filing fee, the case will proceed in the following manner:

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[13] Act Establishing Labour Court and Labour Procedure §27.

[14] *Id.* §35.

[15] *Id.* §45.

[16] *Id.* §53.

[17] Act for the Establishment of and Procedure for Intellectual Property and International Trade Court §5(9).

[18] *Id.* §31.

- *Summons and service of process.* After an action is filed in a written complaint and accepted by the court, the plaintiff petitions the court to issue a summons which will be served by a court officer on the defendant together with a copy of the complaint. If, without reasonable cause, the plaintiff fails to initiate service of the summons within the prescribed time period, the court may consider that the plaintiff has abandoned his or her action, in which event the court filing fee will not be recoverable.
- *Answer.* Within 15 days after receiving proper service of the summons and the complaint, the defendant must file an answer that clearly admits or denies the plaintiff's allegations, either in whole or in part, and states the basis of the denials (if any). Extensions of the filing deadline are common.
- *Pre-trial hearing.* After the pleadings have been filed, the court will fix a date for an initial hearing to settle the issues in dispute and the burden of proof with respect to each issue (the "settlement of issues") and to schedule the trial. Each party has the right to challenge the issues or evidence by verbal statement or by filing an application within seven days from the settlement of issues.

2. *Choice of Forum (Arbitration vs. Court and Which Court)*

Thai courts are not bound by a choice of forum clause under a contract. However, a similar effect can be accomplished by including an arbitration clause in a contract. Thailand is a party to the New York Convention and, as a general matter, Thai courts will enforce arbitration provisions in contracts, so long as one of the parties raises the issue. In this regard, the parties could agree to arbitration in a certain foreign country, and the Thai courts would enforce it, unless the agreement to arbitrate is void, inoperative, or impossible to perform.

Foreign judgments and court orders are not enforceable in Thailand, so a party must keep this in mind when considering bringing an action in a non-Thai jurisdiction (see IV.K. below). If a party nevertheless wishes to file suit in another jurisdiction, the venue will depend on the laws of that jurisdiction. In Thailand,

lawsuits generally must be filed (i) in the jurisdiction where one of the parties is domiciled, (ii) in the jurisdiction where the cause of action arose, or (iii) in the jurisdiction where the assets are located, depending on the circumstances.[19]

A noncompete or nonsolicitation agreement can include a choice of forum clause; however, unless the clause stipulates that any dispute shall be settled by arbitration it is unlikely that a Thai court will concede jurisdiction to a foreign court solely on this basis. If Thai courts have jurisdiction under the law, and if one of the parties files a complaint with the proper Thai court, it is unlikely the court will dismiss the claim unless the agreement includes a binding arbitration clause, or one of the parties convinces the court to dismiss the claim on grounds of *forum non conveniens*.[20]

3. Venue (Geographical Location)[21]

See discussion in 2. above.

4. Choice of Law

The Act on Conflict of Laws provides that the parties to a contract can agree on the governing law of the contract, so long as the chosen foreign law is not contrary to the public order or good morals of Thailand.[22] Since the Labour Protection Act, the Labour Relations Act, and the Unfair Contract Terms Act implement matters of fundamental public policy, the parties to a restrictive covenant can elect to apply foreign law but only insofar as such law does not contradict these Thai statutes.

If an agreement does not specify the governing law, and if the parties are of different nationalities, the agreement is governed by the law of the place where the agreement was made. An agreement is deemed to be made in the place where the notice of acceptance reaches the offeror, and if such place cannot be ascertained, then

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[19]Civil Procedure Code §§4, 4*bis* & 4*ter*.
[20]*Id.* §6.
[21]The choice of location of a branch of a court within a country.
[22]Act on Conflict of Laws §5.

the agreement must be governed by the law of the place where the contract is to be performed.[23]

See also IV.A.5. Conflicts of Law below.

5. Conflicts of Law

It is difficult for parties to apply foreign law to restrictive covenants and other policy-related aspects of their employment relationships in Thailand with any level of certainty because doing so could be considered contrary to public order and good morals under the Act on Conflict of Laws. See also 2., 3., and 4. above.

6. Necessary Parties

The governing law is the Civil Procedure Code. Under the Civil Procedure Code, any person whose rights or duties under the civil law have been affected can be a plaintiff,[24] and any person who has been sued by the plaintiff can be a defendant subject to the rules on jurisdiction. Any third party can become a party by his or her own motion if he or she has legal interests in the outcome of a case, or by being summoned to appear in the case on the application of any party.[25]

A prospective or new employer could be added as co-defendant if the former employer has sufficient grounds to claim interference with contract. Primary considerations are (i) the additional time and cost involved, and (ii) the new employer's additional capacity to pay a judgment debt. See also V. below.

7. Statute of Limitations

The statute of limitations on a civil claim for breaching a restrictive covenant is generally 10 years from the date of the breach. For civil claims under the TSA, the statute of limitations is 3 years from the date the infringement is discovered (up to 10 years from the date of infringement). For criminal actions under the TSA and the Penal Code, the statute of limitations depends on the sanctions

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[23]*Id.* §13.
[24]Civil Procedure Code §55.
[25]*Id.* §57.

available for the precise infringement, and ranges from 90 days to 15 years.

B. Pre-litigation and Privacy Issues

As a practical matter, in considering whether to sue for breach of restrictive covenants, the plaintiff should take into account, among other things, the prescription period, the evidentiary burden, the possibility of preliminary injunctions pending judgment on the merits, the ability of the opposing party to pay damages (if sought), legal expenses, and the impact on the employer's workforce.

Thai civil procedure does not provide for pre-trial discovery, so each party is responsible for assembling its own evidence without much assistance from the court. Employers should implement internal procedures to safeguard trade secrets and other confidential information, including mechanisms to monitor the flow of information.

If an employee is suspected of wrongful activity, the employer should retain a computer forensics expert to recover all data from the employee's hard drive for evaluation. The investigation should be overseen by legal counsel in order to ensure that the results are admissible and unimpeachable as evidence in court proceedings.

Office computers and email systems are generally considered the employer's assets, and employers generally have the right to search or monitor office computer data and emails. However, pursuant to the Act Governing Commission of Offences Relating to Computer, if an employer accesses an employee's personal computer system or data protected with access prevention measures, the employer may be subject to criminal penalties.[26] It is always prudent for employers to obtain employees' consent to access computers during the hiring process.

To the extent that an employer needs to question other employees and/or third parties, the employer should try to avoid disclosing accusations or other potentially harmful information about the employee, so as to minimize the risk of being sued under Thailand's onerous defamation laws, which are both civil and criminal.

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[26] Act Governing Commission of Offences Relating to Computer §§5 & 7.

C. Declaratory Relief Actions; Counterclaims

1. Declaratory Relief Actions

There is no mechanism under Thai law for employers or employees to request declaratory relief regarding restrictive covenants or trade secrets.[27]

2. Counterclaims

Counterclaims are optional under the Civil Procedure Code.[28] The defendant may make a counterclaim in his or her answer if the counterclaim concerns only the parties currently involved in the suit, and if it arises from the same matter that forms the basis of the original suit. In the alternative, a defendant may file a counterclaim as a separate suit. Moreover, if the counterclaim relates to other matters having no connection with the original suit, the court would typically order the defendant to initiate a separate claim.

Whether a party is considering a complaint or a counterclaim, it should take into account, among other things, the prescription period, the evidentiary burden, the possibility of preliminary injunctions pending judgment on the merits, the ability of the opposing party to pay damages (if sought), and legal expenses.

D. Temporary or Preliminary Relief

1. Temporary Restraining Orders (TROs)[29]

Temporary relief, including injunctions, restraining orders, and attachment, is possible at any time before judgment is entered.

A party seeking temporary relief must file a petition with the court specifying the type of relief sought and the grounds for the request. The court will issue a restraining order if it is convinced that the petitioner's underlying case is strong on the merits, and

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[27]Dika Court Decision No. 1727/2551 (Siribordi Jongwiboolsup).

[28]Civil Procedure Code §177.

[29]A temporary restraining order is the term used in the United States and a number of other common law jurisdictions for an emergency *ex parte* injunction that the plaintiff obtains for a limited period to prevent irreparable harm, pending a hearing with the defendant represented.

that the opposing party (i) intends to move, transfer, or waste property in order to obstruct the execution of a judgment, or (ii) intends to continue the wrongful act or other conduct that is the subject of the dispute, and (iii) the petitioner will thereby suffer trouble or injury.[30] If the court is sufficiently convinced of the urgency, it can grant temporary relief on an emergency *ex parte* basis. Thereafter the opposing party can object and petition the court for a subsequent hearing. If the court believes that giving the opposing party an opportunity to object before issuing an order will not cause injury to the petitioner, the court will schedule a hearing for the parties to present their arguments and evidence before it orders temporary relief.[31]

If a party wilfully disobeys a judgment or court order (including a restraining order or injunction), the opposing party can petition the court to order arrest and detention of the wrongful party. The court will grant the petition if it is convinced by the parties' evidence that the wrongful party could have complied with the judgment or order if it was acting in good faith, and that there is no other way open to the petitioner to secure execution.[32] Each detention must not exceed six months.[33]

Restraining orders and other temporary relief are generally difficult to obtain in Thailand, because the courts usually require very strong evidence of an imminent threat. Once issued, temporary relief normally remains in effect until the court issues a final judgment on the merits, and if the judgment is in favour of the petitioner, until the judgment is executed.[34] Nonetheless, the opposing party can petition to have temporary relief withdrawn or amended at any time, if the circumstances on which relief was ordered have changed.[35]

See also IV.C. above.

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[30]Civil Procedure Code §§254, 255, 266 & 267.
[31]*Id.* §256.
[32]*Id.* §297.
[33]*Id.* §300.
[34]*Id.* §260.
[35]*Id.* §§261 & 262.

2. Preliminary Injunctions

The grounds and procedures for obtaining and enforcing preliminary injunctions are the same as those that govern TROs discussed in 1. above.

E. Litigation Discovery

There are no rules for conducting discovery of documents, since pre-trial discovery is not practiced in Thailand. The only exception is that a party may request that the court subpoena known identifiable documents.

The court can order appointment of a forensic expert when it thinks fit or upon the application of any party. Although the appointment of a forensic expert is at the discretion of the court, either party may challenge the appointment.[36]

There is no specific time frame for a hearing on the merits of a case.

For information on the Hague Evidence Convention, see Appendix B.

F. Other Pre-Trial Matters

Thai courts normally schedule one or more pre-trial negotiation sessions where all parties appear in court to discuss settlement. The recommended pre-trial approach does not normally vary depending on whether the attorney concerned represents the employer or represents the employee.

G. Burden of Proof

Generally, the procedural rules of the Labour Court, the Civil Courts, and the IP&IT Court[37] are set out under the Civil Procedure Code, which stipulates that a party who alleges any fact in support of his or her complaint or answer has the burden of proof

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[36] *Id.* §129.

[37] See discussion in IV.A.2. above.

for such fact, except for any fact that is generally known, indisputable, or admitted by the opposing party.[38]

If there is a presumption in law that is favourable to a party, such party is only required to prove the conditions that entitle him or her to avail himself or herself of the presumption.[39] The burden of proof is the same at every stage of the proceedings.

H. Final Remedies

1. Monetary and Injunctive Relief

There are four types of final remedies available: (i) the payment of a sum of money (monetary damages), (ii) delivery of property, (iii) specific performance, and (iv) restraint from performing an act (injunction).

The remedy or remedies awarded depend on the circumstances of each case. Monetary damages are generally preferred by the court if they will be sufficient to fully ameliorate a party's loss. Permanent injunctions are often issued to prevent the continuing infringement or disclosure of trade secrets.

2. "Blue Pencil" Modifications[40]

Pursuant to the Labour Protection Act[41] and the Unfair Contract Terms Act,[42] a court is empowered to order that terms which excessively restrict the right or freedom of an employee in profess-

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[38]Act Establishing Labour Court and Labour Procedure §31, and Civil Procedure Code §84.

[39]Civil Procedure Code §84/1.

[40]"Blue pencilling," also referred to as "severing," refers to the authority recognized in courts in some countries to delete unenforceable parts of a restrictive covenant rather than finding the covenant unenforceable in its totality. Such authority can also extend to "notional severance" (as opposed to actual severance), which involves interpreting the scope of the requirement so as to reduce its effect to one that would be in accord with law, as opposed to severing the offending language by the "blue pencil" mechanism. It does not involve writing missing words into the covenant. See question 4 in BRIAN MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (6th ed. 2008). Some restrictive covenants may contain provisions expressly authorizing blue pencilling/severance of provisions found contrary to law as a means of preserving the nonoffending provisions of the restrictive covenant concerned.

[41]Labour Protection Act §14/1.

[42]Unfair Contract Terms Act §§4 & 5.

ing an occupation are only enforceable insofar as they are fair and reasonable under the circumstances, and do not cause the employee to bear an unforeseeable burden.

See also I.B.1. above.

I. Enforcement of Domestic Rulings

Pursuant to the Civil Procedure Code,[43] the court generally has the power to issue writs of execution to enforce its judgments and decide on matters relating thereto. When the court issues a judgment, it will also issue an order instructing the judgment debtor to pay the judgment, deliver certain property, perform a certain act, and/or stop performing a certain act.

If the judgment debtor does not comply within the time specified by the court, the judgment creditor may apply *ex parte* for a writ of execution.[44]

For the execution of judgment against the debtor's property, an executing officer normally accompanies the creditor or his or her agent to the place of the debtor, and the officer will attach the debtor's property, which will either be removed to a safe warehouse or left in place under seal. Notice of attachment is then sent to the debtor and a subsequent public auction is advertised. Both litigants and all other concerned parties are notified.

Where a writ orders the performance or restraint from performing any act, the court must expressly specify in the writ that the judgment debtor will be subject to attachment of property, arrest, or detention if the debtor fails to comply with the writ within the prescribed period of time.[45]

J. Appeal

Generally a party may appeal against a temporary injunction within one month from the date of pronouncement (15 days for Labour Court orders).[46] No appeal may be lodged against most

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[43]Civil Procedure Code §§271 & 275.

[44]*Id.* §275.

[45]*Id.* §273.

[46]*Id.* §228(2); Act Establishing Labour Courts and Labour Procedure §54.

other preliminary rulings during the trial. If a party objects to such preliminary orders, the court must write down the objection in a memorandum, and the objecting party is entitled to appeal against the order within one month from the date of the judgment or order disposing of the case[47] (15 days in the Labour Court).

Either party may appeal a final ruling on the merits to the intermediate Courts of Appeal or the Dika (Supreme) Court, as appropriate. As a general rule, unless subject to a specific court order, no new evidence may be introduced after the trial in the lower court has been completed. Appeals from judgments rendered by the IP&IT Court and the Labour Court are made directly to the Dika Court. The ruling given by the Dika Court is final.

Appeals by right must be filed within one month of the judgment being entered (15 days for Labour Court judgments), although extensions may be granted upon petition provided there is a reasonable basis. Filing an appeal will not in itself stay the execution of a judgment or an injunction issued by the court of first instance. A separate motion for stay must be filed with or after the appeal.

Each level of appeal can take up to two years or longer. Before filing an appeal, a party should consider the value of the amount claimed, which must exceed Baht 50,000 for an appeal to the Court of Appeals on questions of fact, and Baht 200,000 for an appeal to the Dika Court on questions of fact.

K. Enforcement of Foreign Judgments

Foreign judgments are not enforceable by the Thai courts. Thailand is not a party to any treaty or convention on the recognition and enforcement of foreign judgments. As such, a judgment creditor must bring suit *de novo* in a competent Thai court in order to obtain satisfaction. When doing so, the foreign judgment creditor can submit the foreign judgment as evidence. The Dika Court has ruled that a foreign judgment must be a final dispositive order in order to be admissible and a foreign default judgment cannot be considered final unless the procedural rules of the rendering forum provided that it could not be revoked at any time.

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[47]Civil Procedure Code §226.

V. INTERFERENCE WITH CONTRACTUAL RELATIONSHIP

The CCC provides that "a person who, wilfully or negligently, unlawfully injures the life, body, health, liberty, property *or any right* of another person, is said to commit a wrongful act and is bound to make compensation therefor."[48] Consequently, if the former employer can establish that the new employer knew that an employee was bound by an enforceable noncompete provision, the former employer could sue the new employer who hires that employee for committing a wrongful act. This would be a fairly novel application of the law, but Thailand's Supreme Court has awarded damages in at least one case against a third party who intentionally interfered with and caused the breach of a contract between two other parties.

A prospective employer or departing employee is not likely to prevail in an action for interference with contract against a former employer unless the latter's conduct was egregious. The reason is that valid, fair, and reasonable noncompete clauses and other restrictive covenants are not unlawful, and they are only unenforceable to the extent that they might be invalid, unfair, or unreasonable.

[48]Civil and Commercial Code §420 (emphasis added).