

THE ENFORCEABILITY OF NON-COMPETITION CLAUSES IN THAILAND

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The essence of a contract is the fulfilment of each party's obligations to perform under the specified terms and conditions to accomplish the contract's objective. A contract of employment is also a reciprocal agreement—the employer must fulfil its obligations to the employee and the employee must perform its duties for the employer. Failure by one party to perform the duties as agreed will result in the other party having the right to make a claim for compensation for such breach. General provisions contained in a contract of employment (such as scope of work, payment terms, employee duties, benefits, annual leave, and so forth) are common in all jurisdictions. However, details for each contract of employment will vary depending upon the seniority of the position. This is particularly true for higher-level positions involving trade secrets and confidential information, for which specific terms to protect the employer's interest are commonly included. Such protection will generally take the form of a non-competition clause.

Legal Standing of Non-Competition Clauses

In Thailand, any employee working for any local entity will be protected under the Thai Labor Protection Act, which stipulates provisions relating to wages, overtime, employee welfare, employment of labour in general, severance pay, etc. However, this statute does not contain a provision addressing the concept of non-competition provisions. A non-competition provision may be deemed as a type of restrictive covenant which prohibits an employee from performing any work in addition to the work so assigned by the employer during the period of employment and which prohibits an employee who no longer works for the employer from working with any competitors for a specific period of limitation.

Performance of work outside of the scope of work as agreed, particularly working with another person or entity without the prior consent of the existing employer, would be considered a violation of the contract of employment, for which the employer will have the right to terminate employment accordingly. However, in a situation where an employee no longer works for an employer, the issue of whether or not the non-competition clause will be enforced after cessation of employment is subject to the interpretation of the enforceability of such clause.

Employers customarily attempt to protect against leakage of trade secrets and confidential information that an employee was privy to in the course of employment. Multinational companies often put a great deal of effort into training staff, which requires both time and money. Given this investment in training, the employer therefore needs some sort of protection to ensure that those employees who have been trained will not immediately leave the organisation to work with competitors after completion of their training courses.

A typical non-competition clause is as follows: “The Employee agrees that during the continuance of employment with the Employer and for a period of [?] after cessation of employment, he/she will not directly or indirectly, without the prior written consent of the Employer, engage in any trade or business which is carried out within the area of [?] and wholly or partly in competition with the Employer.”

In order to determine the enforceability of this type of post-termination non-competition clause, the Thai Courts initially take into consideration three central factors: (i) whether the employer has a proprietary interest it is entitled to protect; (ii) whether such non-competition clause is contrary to public interest; and (iii) whether the terms of such clause are reasonable.

Proprietary Interest

As mentioned above, protection of trade secrets from being leaked to competitors is the key element for most employers, who must show that such trade secrets must be protected for their legitimate interests. For contracts of employment, it is apparent that in the employer-employee relationship, the employer is the party who requires the protection of its proprietary interests. It is also common to have a provision under which the employee acknowledges that any and all intellectual property invented, devised, or developed by the employee during the term of employment will be owned by the employer. It is legitimate for the employer to prevent the potential disclosure of trade secrets and confidential information by preventing a former employee from utilising the employer’s proprietary interest.

Previous Thai Supreme Court decisions have held that for common trade business, competition among traders is unavoidable. As a result, each owner of the proprietary interest, particularly of information relating to trade secrets, has the right to implement appropriate measures to prevent the leakage of such trade secrets. When protecting against a former employee disclosing such trade secrets to any competitors of the employer, the plaintiff (the owner of the proprietary interest) will have to prove that the purpose of protection of such trade secrets is to maintain the stability of the organisation and that failure to do so may cause damage to the organisation, which may affect the remaining employees’ stability.

Public Interest and Public Order

Under the Thai Civil and Commercial Code, to determine whether an act is contrary to public interest, Thai courts apply Section 150, which states that, “An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals.” Accordingly, as a non-competition clause is intended to protect the legitimate interests of an employer, the objective of such a clause is not prohibited by law.

Another issue is whether such clause is contrary to the public order or good morals of Thailand. Since there is no specific definition of “public order or good morals”, based on previous Supreme Court decisions, it can be interpreted as any act which impacts national interests, restricts freedom, etc. Thai courts will determine the facts on a case-by-case basis; but in general, if such agreement is deemed a reciprocal contract in which each party has the right to protect its own interests, such agreement will not be void. In addition, Thai courts have also ruled that an employer can enter into an agreement with an employee prohibiting the employee from working with any of the employer’s competitors once the employee no longer works for such employer, as long as such agreement will not prohibit freedom of occupation entirely.

Reasonableness

Section 5 of the Unfair Contract Terms Act B.E. 2540 (A.D. 1997) states: “The terms restricting the right or freedom in professing an occupation or an execution of a juristic act related to the trading or professional business operation which are not void, but being the terms that cause the person whose right or freedom has been restricted to shoulder excessive burden than a reasonable person could have anticipated under normal circumstance, shall be enforceable in so far as they are fair and reasonable in such circumstance only ... Consideration shall be based on the scope of the area and the period of restriction of right or freedom, including the ability and opportunity to profess such occupation ...”

This provision grants the Thai courts authority to rule on the reasonableness of the restrictions of a non-competition clause. Under Section 5, the criteria of such reasonableness are the geographic area and the period of limitation of occupational freedom.

In terms of geographic area, it is likely that the size of the area is the key point in determining reasonableness, regardless of density of population. Prior to the enactment of the Unfair Contract Terms Act, the Thai courts ruled that a provision prohibiting an employee (defendant) from engaging in work in competition with the business of the employer (plaintiff) within Bangkok and for a perimeter of 2.4 kilometres around Bangkok was enforceable. After 1997, the Thai Supreme Court ruled that a provision prohibiting an employee from working with competitors of the employer in Thailand, Vietnam, Cambodia, Laos, and Myanmar was enforceable.

However, these examples are not automatically treated as precedents, as the Thai courts have the right to decide each case based on its own merits. The Thai courts take into consideration various factors to determine the reasonableness of a geographic area restriction clause. To protect trade secrets and trade connections, the employer may have to prove the actual extent of its operation to determine whether a former employee can have influence over the employer’s trade connections. The size of the employer may sometimes be a factor when specifying the size of the area. But the bottom line is not to restrict an area more than necessary to protect the interests of the employer, taking into consideration that freedom of occupation is protected under the Thai Constitution. In some cases, an

agreement that actually names competitors within a defined area may convince the courts to rule in favour of the employer.

Reasonableness in relation to period of limitation is another key factor. Any non-competition clause without a specified period of limitation would be unenforceable as it would undeniably create too much of a burden for the employee. By virtue of Section 5 of the Unfair Contract Terms Act, the Thai courts have the authority to consider the reasonableness of such constraint. Court decisions have held that a clause restricting an employee from working for any competitors of the employer within six months from the date of cessation of employment is enforceable. Some Supreme Court rulings have determined that a two-year period of limitation was reasonable. Based on such previous Supreme Court decisions, a period of two years or less will likely be acceptable to the Thai courts, which will weigh the length of period of limitation against the necessity to protect the employer's trade secrets.

In addition to the above criteria used to determine the reasonableness of a non-competition clause, the Thai courts also consider whether such trade secrets are precise, and not simply general skills that may be learned by employees through normal business operations. Therefore, it must be apparent that the purpose of the non-competition clause is strictly to protect trade secrets, which must not be general work skills. For the courts' determination of the reasonableness of the period and geographic area of restriction, any such non-competition provision must protect the lawful interests of the employer while the employee's position must involve the employer's lawful interests, such as trade secrets.

Conclusion

Non-competition clauses are widely used in all jurisdictions as a mechanism for employers to protect their proprietary interest and prevent former employees from disclosing proprietary information to their competitors. Based on previous Supreme Court decisions, the Thai courts are fully aware of this. As a result, decisions tend not to rule non-competition clauses to be automatically invalid, but rather determine the reasonableness of such restriction, carefully and fairly, for both employer and employee. This will continue to be the norm until another, more suitable protection mechanism arises.

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