

NON-COMPETITION CONTRACT ENFORCEMENT

by Noppramart Thammateeradaycho, Sasirusm (Roll) B. Chunhakasikarn
and Tiziana Sucharitkul



Left: Noppramart Thammateeradaycho, Litigator
Right: Sasirusm (Roll) B. Chunhakasikarn, Attorney
Bottom: Tiziana Sucharitkul, Co-Managing Partner & Director
Dispute Resolution Department

Non-competition clauses are often inserted in employment contracts by employers for many reasons. But perhaps the main reason is to ensure that should the employee leave employment, the employer's trade secrets, confidential customer information, confidential business know-how and other confidential matters with which the employee had contact remain protected and cannot be used by such employee in a manner detrimental to the employer. Some employers also insert non-competition clauses in employment agreements to deter employees from leaving for the competition. Many employers invest a substantial amount of time and money in training staff and do not want to see such investment benefit their competitors to whom employees may seek to migrate.

As we see more and more employers seeking to protect their business interests by inserting non-competition clauses in employment contracts, we must ask how much protection such clauses really offer employers. Furthermore, are such clauses enforceable in Thailand, and if so, to what extent?

Generally speaking, employment agreements between employer and employee are based on the general legal principle of freedom of contract. Both contractual parties are free to bind themselves to any condition as long as the contract is not otherwise prohibited by law. However, in today's labor market, employers have the upper hand and most employees are in the unfortunate position of having to accept employment on the terms of the employer and having to sign employment contracts, as drafted unilaterally by the employer, most of which contain non-competition clauses.

However, to counterbalance employers' positions and to ensure that employees' rights are adequately protected, employees can seek protection under Thailand's Unfair Contract

Terms Act of 1997. Such Act allows the Thai Courts to review terms relating to the restraint of trade in the professional field in eight types of contracts, including employment contracts.

Under Section 5 of the Act, the Court has the authority to review terms of employment contracts and determine whether such terms place unnecessary burden on the employee or unfairly restrict the employee's professional freedom. As such, the Court has the ability to assess whether non-competition clauses are fair and reasonable to the employee.

In evaluating whether a non-competition clause is fair and reasonable to the employee, Section 5, paragraph 2 of the Unfair Contract Terms Act stipulates that the following factors be taken into consideration:

- Geographic area to which the clause limits the employee's future employment.
- Duration of time during which the employee is prohibited from working in a similar field.
- Competence and opportunity of the employee to seek or work in other careers.
- Advantages and disadvantages caused by the non-competition clause to both employer and employee.

Thai case precedent indicates that where the employee is in a position to obtain sensitive information, the non-competition clause is upheld as enforceable. For example, in Supreme Court (Dika) case 1275/2543, a logistics company filed a lawsuit against a former employee, claiming that such employee breached the non-competition clause by accepting employment with another logistics firm only one year after leaving the company.

The non-competition clause prohibited the employee, who was the regional branch manager, from working with any of the employer's competitors in the logistics business or

from holding shares in any such companies in Thailand, Vietnam, Cambodia, Laos and Burma for a period of five years after leaving the employer.

The Court granted judgment in favor of the employer, ruling that the non-competition clause was fair and, therefore, enforceable. The Court reasoned that although the clause prohibited the employee from working in the logistics field, it did not prohibit the employee from working in other fields. As for the geographical limitation placed on the employee, i.e. prohibiting him from working in five countries in the Indochina region, the Court ruled that this was not unfairly restrictive. The Court also opined that the five-year time period during which the employee was prohibited from working with any of the employer's competitors was a time frame mutually agreed by both parties. Furthermore, as the time frame was limited, it did not limit the employee's earning opportunity indefinitely. Consequently, the Court ruled that the clause was not contrary to public order or good morals, and was enforceable. The employee was ordered to pay a fine to the employer.

We can see from such precedent and similar others that non-competition clauses tend to be upheld by Thai Courts where it is viewed that the employee had access to sensitive information, the restrictions imposed have limitations, and the employee is not unduly burdened by the restrictions. However, where such conditions do not exist, it remains unclear how the Courts will rule. ♦