

A regional guide to 'restrictive covenants'

Asia



Introduction

There are few areas of employment law which differ as significantly between countries as the laws relating to post-termination restrictions. The increasing trend for key employees to have international responsibilities, be globally mobile, and for post-termination restrictions to apply across many different jurisdictions is a challenge. In reality when enforcement issues arise the decisions taken in the early stages of action may determine the outcome weeks or months later.

This is why the Guide to Restrictive Covenants was created, serving over 14 key countries. Within are discussions on non-compete covenants, non-solicitation covenants and non-solicitation of employees’ clauses, issues relating to employee benefits, pension, stock plans and more...

An essential publication for anyone involved in employment law, it has been compiled by lawyers from a major international law firm, as well as partner companies based in other jurisdictions.



Thailand



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A. OVERVIEW:

Restrictive covenants are governed primarily by the Civil and Commercial Code, the Unfair Contract Terms Act, and Section 14/1 of the Labour Protection Act.

Pursuant to Section 150 of the Civil and Commercial Code, an act is void if its object is expressly prohibited by law, is impossible, or is contrary to public order or good morals. It is possible that particular restrictive covenants could be held invalid on the basis that they are illegal or contrary to public order or good morals. For restrictive covenants which are not void, the Unfair Contract Terms Act and the Labour Protection Act potentially apply.

The Unfair Contract Terms Act stipulates that contract terms which are not void, but which cause a 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. Courts are to consider the geographic scope of the area specified and the period of restriction of right or freedom, 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.



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In determining to what extent particular 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.

In some circumstances, the Trade Competition Act may also be relevant. Under the Trade Competition Act, certain contractual provisions can be held void on the basis that they are anticompetitive.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The court has the authority to consider whether non-competes are valid, taking into account the factors outlined in section a above. Generally, to be enforceable, a non-compete should have a defined geographic scope and a defined period of time which does not extend beyond two years after termination of employment.

iii. Is it necessary to pay an employee during the period of the covenant?

The law does not require payment to a former employee during a non-compete period. Even though this is not required by statute, some practitioners take the position that payment in respect of a non-compete functions to make it more enforceable.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The court has the authority to consider whether such restrictions are valid, taking into account the factors outlined in section a above. It should be noted that we more frequently see clauses providing for non-solicitation of customers/clients, rather than clauses prohibiting all contact.

iii. Is it necessary to pay an employee during the period of the covenant?

The law does not require payment to a former employee during a period of no-contact or non-solicitation of customers/clients.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes.



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i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The court has the authority to consider whether such restrictions are valid, taking into account the factors outlined in section a above.

iii. Is it necessary to pay an employee during the period of the covenant?

The law does not require payment to an employee/former employee in respect of a period of non-solicitation/restriction on hiring of such person's colleagues/former colleagues.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Other frequently included restrictive covenants concern intellectual property and protection of employers' confidential information. Enforceability of such provisions is also subject to other laws beyond those outlined here.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

This issue typically arises in the larger context of considering the extent to which an employment agreement can provide for the applicability of foreign 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. On the basis that the Labour Protection Act, the Labour Relations Act and the Unfair Contract Terms Act implement matters which are arguably fundamental public policy, the position would be that the parties could agree to apply foreign law, but only insofar as such foreign law does not run contrary to the above laws.

i. Can an employer impose a dispute resolution method on the employee?

Thai courts are not bound by contractual provisions on choice of forum. With respect to arbitration provisions, however, 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 and so long as the agreement to arbitrate is not void, inoperative, or impossible to perform under the Arbitration Act or the Civil and Commercial Code, or other laws. In this regard, there remains some question as to the validity of arbitration clauses in employment agreements.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Final remedies include payment of monetary damages, delivery of property, specific performance, and/or restraint from performance of a particular act. The specific award would depend on the circumstances of each case, but courts typically prefer to award monetary damages. However, permanent injunctions are sometimes issued to prevent infringement or unauthorized disclosure of an employer's trade secrets.

Temporary relief (which can include injunctions, restraining orders, and attachment) is typically difficult to obtain as the courts usually require very strong evidence of an imminent threat to justify such relief.



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H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

In principle, restrictive covenants can be contained in any document which constitutes part of an employee's employment agreement. In this regard, the same principles of enforcement as outlined in section g above would be applicable, regardless of whether the relevant restrictive covenants are contained in an employee's 'main' employment agreement, or in a separate document signed by both parties.

Questions commonly arise, however, with regard to what enforcement actions the employer might have beyond those remedies described in section g above. In the event of breach of a restrictive covenant, it would generally not be lawful for the employer to deny payment of any benefits to which an employee is entitled by statute (e.g. statutory severance, payment for unused annual leave, etc.). As for provident funds, these are handled by a separate fund manager, and it would generally be beyond the ability of an employer to deny payment to an employee, if the employee is lawfully entitled to payment in accordance with the applicable provident fund regulations.

With respect to employment benefits which are not required by statute, such as those under performance bonus plans and employee share schemes, it would be possible to write the applicable terms such that entitlement would be lost if an employee breached particular restrictive covenants. Were the matter to proceed to litigation, however, the employee may challenge the validity of the restrictive covenant(s) (see factors in a above), as well as the forfeiture provisions.

ii. Which covenants are typically imposed?

It is unusual for restrictive covenants to be written into performance bonus plans and employee share schemes.

iii. What sanctions are/can be imposed by the employer for non-compliance?

Performance bonus plans and employee share schemes could be written to provide for an employee to lose entitlement to certain benefits, but as noted above, an employee may challenge the validity of the restrictive covenant(s) (see factors in section a above), as well as the forfeiture provisions.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

The law does not impose specific limits on what could be forfeited under performance bonus plans or employee share schemes. However, the relevant restrictive covenant(s) and/or forfeiture provisions may be subject to challenge.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Pursuant to the Civil and Commercial Code, a restrictive covenant could be void on the basis that it is illegal or contrary to public order or good morals, in which case it would simply not be enforceable; depending on the agreement in which it exists, this may or may not invalidate the entire agreement. With respect to restrictive covenants which are not void, courts are empowered, pursuant to the Labour Protection Act and the Unfair Contract Terms Act, to order that terms which excessively restrict the right or freedom of an employee in professing an occupation, shall only be enforceable insofar as they are fair and reasonable in the circumstances, and do not cause the employee to bear an unforeseeable burden.