



Non-compete clauses in employment agreements in Thailand

Written by Dr Andreas Respondek from Respondek & Fan Ltd

Many employers put substantial resources into training people and giving them valuable work experience which they don't want to see being exploited by their competitors. Therefore employers often have concerns about their employees competing with them after they leave the company. To make sure that confidential knowledge that is gained during the term of employment is protected, employers use non-competition clauses as a mechanism for employers to protect their proprietary interests and prevent former employees from disclosing proprietary information to their competitors.

As a general rule, non-compete clauses in employment contracts are acceptable in Thailand. Thai courts base their evaluations whether non-compete clauses are valid usually on Sec. 150 of the Thai Civil and Commercial Code (also Sec. 1168 for directors), the *Thai Unfair Contract Terms Act* and the *Thai Labour Protection Act*.

To determine whether non-compete clauses are permissible, Thai courts are considering the following three factors:

Does the employer have a proprietary interest that is entitled to protection?

The first question Thai courts will ask is whether 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 interests. What the employer will have to prove is that the purpose of protection is to maintain the stability of the organization and that failure to do so may cause damage to the employer's organisation, which may affect the remaining employees.

Is the use of the non-compete clause contrary to the public interest and good morals?

Under the Thai Civil and Commercial Code, to determine whether an act is contrary to public interest, Thai courts apply Section 150 Thai Civil and Commercial Code, 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."

The Thai Civil Court lacks a definition of "public order and good morals", so presumably this means a violation of the national interests. Whether or not this is the case will be determined by the Thai courts on a case-by-case basis.

Are the conditions spelt out under the non-compete clause "reasonable"?

Under reference to Section 5 of the Thai Unfair Contract Terms Act B.E. 2540, the Thai courts examine the "reasonableness" of the non-compete clause. Section 5 of the Unfair Contract Terms Act B.E.2540 reads as follows:

"The terms restricting the right or freedom in professing an occupation or an execution of a juristic act related to the business, trading or professional operation which are not void, but being the terms that cause the person whose right or freedom has been restricted to bear more burden than that could have been anticipated under normal circumstances, shall only be enforceable to the extent that they are fair and reasonable according to such circumstances."

In determining whether the terms under paragraph one cause the person, whose right or freedom has been restricted, to bear more burden than that could have been anticipated, consideration shall be taken to the scope of the area and the period of restriction of right or freedom, including whose ability and opportunity to profess occupation or to execute juristic act in other form or with other person, as well as all legitimate advantages and disadvantages of the contracting parties."



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. To determine the reasonableness under Section 5, the Thai courts regularly examine all relevant circumstances of the employer's situation and the relationship with the restrictions, i.e. the geographic area of the applied restrictions and the period of limitation of occupational freedom. 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's business may sometimes be a factor when specifying the size of the non-compete area.

It is also important to note that the restrictions contained in the non-compete clause may not restrict the activities of the employee more than necessary, especially they may not undermine an employee's ability to earn a living, taking into consideration that the freedom of occupation is protected under the Thai Constitution. The more restrictive the non-competition clause is, the less likely it is to be upheld by the courts.

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Dr. Andreas Respondek

Partner, Bangkok

Respondek & Fan Ltd

E: respondek@rlegal.com