Recent Developments in the Enforcement of Non-Competition Provisions in Thailand

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A non-competition clause[1] is an important contractual provision which employers in many sectors use to protect their legitimate commercial interests in the event an employee, usually at an executive or managerial level, leaves their company. A common style of non-competition clause seeks to prevent a departing employee from entering into work or trade in competition with the employer in a certain geographical area for a certain period of time.

In Thailand, non-competition clauses will generally be upheld as valid provided they are fair and reasonable in the circumstances in accordance with section 5 of the Unfair Contract Terms Act B.E. 2540 (1997) (**Unfair Contract Terms Act**) and section 14/1 of the Labour Protection Act B.E. 2541 as amended (**Labour Protection Act**). However, there are some common issues which often arise when an employer seeks to enforce a non-competition clause against a former employee in Thailand.

In this article, we take a look at these common issues, and consider a recent legislative development that may assist employers in enforcing non-competition clauses. We also consider some recent cases where the new procedure was used effectively.

Reasonableness and the Court's discretion

Section 5 of the Unfair Contract Terms Act and section 14/1 of the Labour Protection Act grants the Court the discretion to determine the fairness and reasonableness of the restrictions in a non-competition clause including the scope of the geographical restriction and the period of restriction of the right or freedom. The Court has the discretion to adjust the restrictions imposed by a non-competition provision as it deems appropriate.

Quantum issues

Traditionally, in cases where the Thai Labour Court has accepted the validity of non-competition provisions, the Court has awarded actual damages in the form of compensation (or liquidated damages if there was a relevant contractual provision) as the remedy for the former employee's breach. Assuming the employer is able to measure and prove the quantum of the loss or damage it has suffered, actual damages might be seen as an adequate remedy. However, in practice, it is often difficult for an employer to gather the relevant documentary evidence to prove its financial and economic loss. Accordingly, an employer may find itself in a situation where it is successful in having the validity of the non-competition provision upheld, only to be awarded a small amount of compensation, due to lack of evidence.

Employers seeking to avoid future quantum issues should consider including a liquidated damages provision in the non-competition clause at the contract drafting stage, where the amount of liquidated damages represents a pre-estimate of the loss that the employer is likely to suffer upon a breach of the non-competition clause. Essentially, if the departing employee breaches the non-competition clause, a certain amount of damages will be payable. This strategy enables the employer and the employee to understand the risks and benefits of the non-competition clause prior to entering into the employment agreement.

[1] Commonly referred to as a "non-compete clause" in other jurisdictions.

However, employers should be aware that although the Thai Labour Court has upheld liquidated damages provisions in many previous decisions, it is also not uncommon for the Court to adjust the quantum of damages awarded, as the Court has the discretion to do so as it deems appropriate.

New procedural powers of the Court

Until recently, in breach of non-competition clause cases, the Thai Labour Court did not go as far as to order defendants to honour their contractual promises and discontinue working with the new employer during the relevant restraint period. As discussed earlier, the remedy in such cases would often be an award of actual or liquidated damages. However, with the promulgation of section 359 of the Civil Procedure Code (**CPC**) in September 2018, the landscape appears to have changed.

Section 359 of the CPC has granted additional authority to the Court to order the arrest and detention of a defendant who does not comply with a Court judgment ordering the defendant to refrain from committing any certain action. In an interesting development confirmed in the judgments discussed below, section 359 of the CPC also applies to employment cases heard by the Thai Labour Court.

Recent decisions

With the Court's new procedural power in section 359 of the CPC, the Thai Labour Court has now expanded the remedies available to employers in breach of non-competition cases to hand down a judgment which prohibits an employee from continuing working with a new employer during the applicable restraint period in breach of a non-competition provision.

In each of the following cases: 1696/2560, 1098/2561, 1112/2561, and 1389/2561, the Court of Appeal for Specialized Cases (**Court of Appeal**) upheld the judgment of the Central Labour Court ordering the employee to discontinue working with the new employer in breach of the non-competition clause during the restraint period. In three of the four judgments (1098/2561, 1112/2561, and 1389/2561) liquidated damages (as adjusted by the Court) were awarded to the employer in addition to the order that the defendant discontinue working with the competitor during the restraint period.

Interestingly, as the defendants in each case failed to comply with the respective judgments of the Court of Appeal and the enforcement orders issued by the Central Labour Court, the plaintiff filed a petition to the Central Labour Court referring to each defendant's non-compliance, and sought an order to arrest and detain each defendant under section 359 of the CPC until the relevant judgments had been fully complied with.

In case 1389/2561, the former employee failed to attend the hearing set down by the Central Labour Court. Consequently, the employer was successful in its petition to have an arrest warrant issued under section 359 of the CPC against the former employee who failed to comply with the judgment and enforcement order.

In the other three cases, the former employees attended their respective hearings and agreed to follow the Court's judgment. It appears that in those cases, the submitting of a petition requesting the Court to issue an arrest warrant under section 359 of the CPC was sufficient to deter the defendants from breaching the respective orders.

Conclusion

These four cases represent a new era in enforcing non-competition provisions in Thailand, enabling employers to obtain remedies that align with the intention and purpose of the non-competition provisions drafted in their employment contracts. Importantly, the Court of Appeal has confirmed that a judgment which orders an employee to discontinue working with a new employer in breach of a non-competition provision is a judgment which can be enforced by Section 359 of the CPC.

Siam Premier represented the employer in each of the four judgments referred to above. We have extensive experience in assisting local and multinational clients enforce non-competition clauses and protect their legitimate commercial interests in Thailand.

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