TMI EYES

TMI Associates (Thailand) Co., Ltd.

TMI EYES No. 2: Is a Non-Competition Clause in an Employment Agreement Lawful and Enforceable?

Readers may be aware of a recent labor case in which an employer filed a claim for THB 15,000,000 in compensation against their former employee after such employee joined a direct competitor, thereby resulting in an alleged breach of the employment agreement's non-competition clause. In this edition of TMI's Eyes, we will provide legal analysis with reference to the provisions of Thai laws in considering the lawfulness and enforceability of adding a non-competition clause to an employment agreement.

Relevant Laws

We would like to first point out that consideration of the above legal question should be based on the following laws and provisions.

1. Section 40 of the Thai Constitutional Law B.E. 2560 (2017) provides that persons shall have the freedom to perform their occupations.
2. Section 14/1 of the Labor Protection Act B.E. 2541 (1998) provides that, where an employment agreement or rule exploits the employee, the Court has the power to determine that such agreement or rule is enforceable only to the extent that it is fair and reasonable.
3. Section 5 of the Unfair Contract Terms Act B.E. 2540 (1997) provides that, where employment terms restrict a person's right or liberty to engage in an occupation and impose a greater burden onto such person than would be reasonably expected, such terms will be enforceable only insofar as they are fair and reasonable in that particular case. In making this determination, consideration will be given to territorial boundaries and the duration for which the right or liberty is restricted, including the abilities and opportunities of such employee.
4. Section 150 of the Civil and Commercial Code (CCC) provides that an act is void if its purpose is expressly prohibited by law, impossible to carry out, or contrary to public order or good morals.

Non-Competition Clauses

The practice in which employers subject their employees to employment terms that include non-competition clauses and non-disclosure agreements is increasing. Terms often stipulate a period in which employees agree not to engage in a similar area of business or work for a competitor that engages in the same or similar business as the employer, and often impose penalties or damages on former employees who breach such clauses. The important question here is whether or not those terms and agreements are lawful, and, if so, to what extent they are legally enforceable. We discuss those questions further below.

1. Is a non-competition clause/agreement lawful?

First and foremost, we would like to point out that the Supreme Court has ruled in several cases that a non-competition clause is not unlawful and is indeed legally enforceable, often providing the rationale that it is fair for the employer to protect its interests; provided, however, that such non-competition clause only restricts employees from engaging/working in areas that compete with the employer, and provides clear differentiation between competing and non-competing businesses or companies. The Court has expressed the view that non-competition clauses do not create an obligation for employees to perform specific acts, nor do they entirely prohibit employees from engaging in all types of business/work for all companies. Rather, they simply prohibit employees from working in a certain area of business/occupation for a certain period of time.

2. How long can the non-competition period be and what geographical area can be covered?

When examining most cases, the Court considers how relevant and important the employee is to the business and operations of the employer, the areas of business engaged in and how competitive the industry is, and the types of information, knowledge, trade secrets, etc. disclosed to the employee or their customer database, etc. From past decisions, we have seen that the Court generally permits non-competition periods that last from 6 months to 5 years. Further, the non-competition agreement can cover a greater geographical area in which competition exists (e.g. Thailand and the surrounding Southeast Asian territories).

3. Are the predetermined penalties or damages enforceable?

A non-competition clause/agreement typically imposes a "predetermined amount of damages" or "actual damages," but readers should note that, in practice, the Court will treat "predetermined damages" as a "penalty." As such, the Court will adjust the predetermined amount into a penalty that reflects the damage the employer has incurred from the employee's breach of the non-competition clause. Conversely, in cases where the agreement allows employers to claim actual damages, employers must be able to prove the damages and losses they have suffered.

The above refers to the findings in Supreme Court Rulings such as: 1275/2543; 8570-8572/2552; 2169/2557; 2879/2557; and 3597/2561.

Author's Note: Creation of Non-Competition Clauses/Agreements

Based on the above analysis, readers should now understand that non-competition clauses/agreements are not unlawful and are therefore legally enforceable to the extent that it is fair and reasonable to do so and doing so will not impose a greater burden on the employee than is reasonably expected. Therefore, employers and employees should consider the following issues when discussing employment terms that involve non-competition clauses:

1. Stating the roles and duties of the employee, including whether they take on important roles that may impact the business of the company;
2. Setting forth what defines and constitutes competitive businesses and competing companies in the industry as clearly and reasonably as possible;
3. Determining a reasonable non-competition period that considers the business of the employer and the importance, involvement, and degree of confidentiality of the information that is disclosed in the course of business to the employer's employees and customers; and

4. Deciding on a predetermined amount of damages/penalties and actual damages, and the rationale for reflecting the provable losses and damages.

Lastly, it is important to note that employment relationships are always delicate. While it is fair for employers to protect their business interests, employees must also have the freedom to undertake their occupation, so it is imperative for employers and employees to find a balance between their respective interests and to agree upon non-competition clauses with reasonable and fair terms.

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