

Singapore V. Vietnam's Laws on Non-Compete Agreements in Employment Relationships

Asia Newsletter

November 6, 2023

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1. Introduction

This newsletter provides a glimpse of key differences between Singapore and Vietnamese laws on non-compete agreements in employment relationships. A “non-compete agreement” or “non-compete clause” (hereinafter referred to as an “**NCA**”) is an agreement or provision contained in an agreement designed to prevent employees (particularly senior employees) from working for competitors of the employer, starting a similar professional enterprise, or trading in competition against the employer. Given globalization’s ever-increasing number of cross-border transactions, it is useful to understand the similarities and differences between Singapore and Vietnam’s laws concerning this important issue..

2. Summary and Key Takeaways

Despite their common use, neither Singapore or Vietnam law clearly define NCA; each country has a distinct approach to determining NCA validity. In particular, while Singapore law, being a common law jurisdiction, has specific tests to ascertain NCA significance based on applicable legal doctrines, Vietnam law, having characteristics of a civil law system, mainly relies on civil and labor law principles to determine NCA validity. Precedent also is used in Vietnam to determine NCA validity and enforceability; however, given the nature of the legal system, its application is limited in some aspects.

3. Details

(1) NCA Definition

Singapore

There are no statutes or official guidelines governing Singapore NCA. Accordingly, there is no clear NCA definition in Singapore. Instead, Singapore adopts the common law “restraint of trade” doctrine with respect to NCA validity and enforceability.

NCA fall within the broader category of restrictive covenants, which also include clauses on non-solicitation of former employer’s customers or suppliers with a view to obtaining business, non-poaching of former employees,

and non-dealing with former employer's customers or clients. Restrictive covenants are commonly found in employment contracts where one party (i.e. the employee) agrees with another party (i.e. the employer) to restrict the employee's liberty to carry on trade with non-parties in certain manners. In Singapore, common NCA restrictions include the following:

- (a) restriction of an employee's ability to do business with other parties during and after the employee's employment; or
- (b) prevention of an employee from seeking employment or engaging in a specific type of business in specific geographical areas for a specified period.

Vietnam

Similar to Singapore law, Vietnam law does not derive its NCA definition from a pure labor law perspective. The statutory terminology in closest connection to the NCA concept is "agreement in restraint of competition," which is stipulated in the Law on Competition 2018 as an agreement made by and between the parties in any form, which causes or may cause anti-competitive effects; however, does not apply to agreements in the labor sector.

Despite the law's silence, to decrease the risk of employees leaking confidential information to competitors, especially with respect to senior employees who may have access to enterprise's important confidential information, such as business secrets, know-how, strategies, and other information related to customers, employers in Vietnam often apply NCA, together with non-disclosure agreements, in the form of an agreement between the employer and employee that restricts the employee from working for competitors or engaging in a specific type of business in specific geographical areas during the employment period or for a specified term after the termination of employment with the employer. Specific criteria to determine the competitors, restricted business, restricted geographical areas and restricted term vary in practice subject to agreement amongst relevant parties and the need of employer.

(2) NCA Validity and Enforceability

Singapore

The Singapore Court of Appeal in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 held that restrictive covenants (including NCA) are generally unenforceable under the restraint of trade doctrine unless it can be shown that they are reasonable in their protection of a legitimate proprietary interest. This rule takes into account two separate public policy considerations: first, the public policy underlying the restraint of trade doctrine (freedom to trade), and second, the public policy in favour of upholding genuine settlement or compromise agreements (freedom to contract).

The restraint of trade doctrine seeks to vindicate the legal right to freedom of trade while balancing the countervailing doctrine of freedom to contract. It remains the law, however, that covenants that fall afoul of the restraint of trade doctrine will (subject to certain conditions) be rendered unenforceable. To that extent, the doctrine endorses (with the requisite balance) the public policy which legally negates attempts to unreasonably proscribe freedom of trade.

The Singapore High Court in *Smile Inc Dental Surgeons v Lui Andrew Stewart* [2011] SGHC 266 reiterated that



a bare covenant not to compete will not be upheld unless there is a reasonable legitimate interest to be protected. In other words, a restraint of trade provision (i.e. an NCA) is generally unenforceable unless the person relying on such provision (i.e. the employer) can prove that such a provision is necessary to protect its legitimate proprietary interest and that such a provision is reasonable. In this regard, the High Court held that the test was three-fold and all three limbs had to be satisfied, namely:

1. *Is there a legitimate proprietary interest to be protected?*

In employment contexts, Singapore Courts generally adopt a relatively strict approach towards covenants in restraint of trade (as opposed to sale of business) for two reasons: first, unlike contracts of employment, the purchaser in a sale of business in whose favour the covenant is made is buying something tangible, which includes the element of goodwill which would necessarily be depreciated if no restrictive covenant were permitted. An employer, on the other hand, would not be deprived of that for which they were paid pursuant to the contract of employment (the employee's services) when the employee leaves the employer, although (as shall be seen) there are other legitimate proprietary interests that may merit protection even within this context. Second, there is likely to be greater equality of bargaining power in the case of the sale of a business compared to an employment contract situation.

More specifically, Singapore Courts have identified two legitimate proprietary interests as meriting protection in the employment context, namely (a) trade secrets and (b) trade connection.

In the case of protection of confidential information, trade secrets, or trade connections, the party seeking to enforce a relevant restrictive covenant (including an NCA) will have to demonstrate that the restrictive covenant in question covers a legitimate proprietary interest over and above the protection of such confidential information, trade secret, or trade connection. In other words, Singapore Courts will unlikely uphold a restrictive covenant if there are other provisions in the employment contract that adequately safeguard the legitimate proprietary interest that the employer is seeking to protect.

2. *Is the restrictive covenant reasonable in reference to the interests of the parties?*

The first part of the twin tests of reasonableness enunciated by Lord Macnaghten in the seminal House of Lords decision of *Thorsten Nordenfelt (Pauper) v The Maxim Nordenfelt Guns and Ammunition Company, Limited* [1894] AC 535 is to determine if the restrictive covenant (including NCA) is reasonable with reference to the interests of the parties involved. In determining whether a restrictive covenant is reasonable, the specific facts and circumstances of each case and the precise scope and application of the restrictive covenant will be taken into account. Singapore Courts will consider what was reasonable at the time of contracting rather than the time that the restrictive covenant is sought to be enforced. In particular, it is clear that Singapore Courts will primarily consider the following factors in determining whether a restrictive covenant is reasonable:

- (a) time (i.e. period of the restriction);
- (b) area (i.e. geographical scope of the restriction); and
- (c) the scope of activities being restrained.

All three factors must be deemed by a Singapore Court to be reasonable for it to uphold a restrictive covenant (including an NCA). As highlighted above, Singapore Courts generally take a more stringent approach to restrictive covenants where they are imposed in an employment context.

Singapore Courts will consider the specific circumstances of each case in determining whether the temporal, geographical, and activity restrictions are reasonable. For example, Singapore Courts may consider the specific role of the employee, whether the goodwill of the business is attached to the employee, how long it would take for employer to replace the employee and rebuild the connections and/or the goodwill held by/attached to the employee.

3. *Is the restrictive covenant reasonable in reference to the interests of the public?*

The second part of the twin tests of reasonableness is to determine if the restrictive covenant is reasonable with reference to the interests of the public. A key public policy consideration in the employment context as set out in *Herbert Morris, Ltd v Saxelby* [1916] 1 AC 688 (at 701) and cited in *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] SGHC 64 at [36] and *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] SGCA 39 at [21], is that it is in the public interest for employees to be free to move towards jobs in which they can most effectively use their skills and restricting that freedom distorts the labour market and diminishes its ability to move employees to where they will do the most good.

Vietnam

Unlike Singapore law, Vietnam law mainly relies on civil and labor law principles to determine NCA validity. However, due to lack of a clear legal framework, the validity of NCAs has been subject to various debates amongst legislators and experts, and also interpreted inconsistently by dispute settlement bodies throughout the years. However, the recently released precedent by the Vietnam Supreme People's Court, namely Precedent No. 69/2023/AL ("**Precedent 69**") that shall be applied as from 01 November 2023 had provided additional certainty and it appears that the controversy will soon come to an end to some extent. In particular:

Before Precedent 69, two trendy views, albeit contradictory, have been utilized to settle NCA disputes, including:

One, an NCA concluded by and between the employee and employer, together with all other agreements amongst the parties on implementing an employment relationship, form integral parts of the labor contract, therefore, an NCA must observe the laws on labor and employment. Given that, a fundamental right of an employee under the laws on labor and employment is to freely choose a job and employment with any employer, an NCA is invalid as its provisions restrict or impair such right of employee.

This view is supported by the People's Court of Ho Chi Minh City in its appeal judgment No. 420/2019/LD-PT dated 15 May 2019 by rejecting recognition of an NCA, finding that the NCA was invalid since it violated Article 35.1 of the Vietnam Constitution, Articles 5.1(a) and 10.1 of the Labor Code, and Article 4.1 of the Law on Employment that provide for freedom of choice of work. The People's Court of Thanh Hoa Province followed the same route with the People's Court of Ho Chi Minh City by rejecting the validity of an NCA under its Judgment No. 03/2023/LD-PT dated 10 January 2023.

Two, an NCA, if separately concluded by the employee and employer beside a labor contract, is a civil



agreement that is entered into by and between the parties on a free and voluntary basis, and is therefore independent of the labor contract that gives right to the labor relationship between an employer and an employee. Being a civil agreement amongst the parties, restrictive provisions under an NCA are permissible and recognized as freedom in concluding an agreement or contract, a fundamental principle of civil law. This view is supported by the People's Court of Duc Hoa District, Long An Province in its Judgment No. 09/2010/LD-ST dated 10 December 2010, where it accepted a provision prohibiting an employee from working directly or indirectly for a competitor after the employee had left the company in accordance with the NCA concluded by and between the relevant parties. The Court found that the NCA was a civil transaction that is not regulated by the Labor Code. In considering relevant provisions of the applicable Civil Code, the Court argued that (i) the NCA was a completely voluntary agreement between the parties, and that the employer could not force the employee to sign the agreement if the latter was not so inclined, and (ii) it was appropriate for the employer to require the employee to comply with the NCA since the employer could suffer damage if the employee worked for a rival company of the employer and disclosed business secrets.

The Vietnam International Arbitration Center went with this same opinion under its arbitral award No. 75/17 HCM dated 19 February 2018, which was later upheld by the People's Court of Ho Chi Minh City under Judgment No. 755/2018/QD-PQTT dated 12 June 2018. In such case, the Court found that the employee was a person with full capacity to act according to the provisions of the law, and was not forced, deceived, or imposed on her will to accept a non-disclosure agreement with the employer, which contained an NCA separately concluded from the labor agreement; hence, the NCA was legally valid and the employee was then required to pay compensation to the employer due to her breach of the non-disclosure agreement.

Now, after a long and complex studying procedure, Judgment No. 755/2018/QD-PQTT of the People's Court of Ho Chi Minh City has been selected as one of the precedents of Vietnam, i.e., Precedent 69. Such "official" precedents are defined by law as arguments and rulings in legally effective judgments or decisions of the courts selected by the Council of Justices of the Supreme People's Court and published by the Chief Justice of the Supreme People's Court in order for other courts to study and apply when deciding later cases. In this regard, Precedent 69 supports the argument that NCA are independent from labor contracts and, therefore, for the first time, the second view above also has been reinforced by law.

With the issuance of Precedent 69, in the near future, Vietnamese courts are expected to have a more relaxed view of NCA validity. However, it should be noted that in Vietnam, a precedent is only considered applicable in cases having similar legal situation and background to those of the precedent. Accordingly, the validity of an NCA included in a labor contract may still be questionable because, in Precedent 69, the NCA was concluded separately from the labor contract.

(3) Commercial and Practical Tips

Singapore

As restrictive covenants (including NCA) are generally void for restraint of trade, unless it can be shown that they are reasonable in their protection of a legitimate proprietary interest, interpretation plays a major role in determining the enforceability of such provisions.

It is advisable for employers to seek professional legal advice in drafting clear and precise NCA to mitigate any



risks of such provisions being held unenforceable by the Singapore Courts due to any ambiguity, uncertainty, or unreasonableness. Employers should be clear in terms of the legitimate proprietary interests that they seek to protect and ensure that the prohibitions set out in the NCA are reasonable with reference to the interests of the parties involved and the public.

In respect of the factors that Singapore Courts will consider in determining NCA reasonableness:

- (a) With regards to time period, the Singapore Courts have previously upheld time restrictions of between six months to two years – however, this is determined based on the facts of each case and should not be construed as a blanket reasonable period;
- (b) With regards to geographical restrictions, the Singapore Courts unlikely will deem an unlimited geographical scope to be reasonable. Accordingly, the geographical scope should be limited to jurisdictions which the employer has actual (rather than intended) business operations and to those jurisdictions in which the relevant employee had managed or had been involved in for the business of the employer; and
- (c) With regards to activity scope, it generally should be limited to activities in which the relevant person was involved with the employer's business and not beyond.

In addition to the foregoing, one method for an employer to try and protect a legitimate business interest is through the provision of additional consideration to the employee for accepting such NCA. This can be done by way of a side agreement signed off by the employer and employee which provides for additional and separate consideration for the employee for the effective duration of NCA period. This would support further the argument that the NCA is reasonable and increase the likelihood that Singapore Courts would uphold it on the basis of freedom to contract vis-à-vis freedom to trade.

Vietnam

As noted, Precedent 69 was promulgated to serve as a ground to settle NCA disputes that have the same or similar legal situations and background. That being said, dispute settlement bodies may choose not to apply the same view under Precedent 69 as long as they have appropriate reasons. Therefore, to mitigate the uncertainty in enforcement of NCA in Vietnam to the extent possible, legal practitioners should take the following practical tips into consideration:

One, an NCA should be completely independent of the labor contract, even though, in fact, they are executed between the same contracting parties. The independence of an NCA gives room for the parties to argue before the dispute settlement body that the NCA in question has full validity, instead of having the validity challenged by the authorities due to its non-compliance with restrictions provided by the laws on labor and employment.

Two, the employee should have a chance to review and revise an NCA, to an acceptable extent, which shall conform with a crucial argument under Precedent 69, i.e., an employee must be “a person with full capacity to act according to the provisions of law, and not forced, deceived, or imposed on her will to accept to sign a non-disclosure agreement with the employer.” To do so, the employer's draft NCA should give room for the employee to comment on the draft before signing.

(4) Possible developments of laws

Singapore

In a written statement to Singapore's parliament, the Ministry of Manpower of Singapore stated that it is currently working with its tripartite partners to develop a set of guidelines "to shape norms and provide employers with further guidance" on including NCA in employment contracts. Although such guidelines are not meant to be legal binding on companies in Singapore, the Singapore Courts would likely take into account such guidelines when considering the reasonableness of restrictive covenants in the future. It remains to be seen what guidelines may be issued by the Singapore authorities in respect of NCA but it is clear that the legal principle in Singapore that restrictive covenants (including NCA) are unenforceable unless reasonable, will continue to apply.

Vietnam

Apart from Precedent 69, there are no further movements by the Vietnam authorities to promulgate official guidance or regulations on the matter at this time. Therefore, it appears that authorities likely will rely on Precedent 69 to open their view to accept the validity of NCA in the future. However, despite the reinforcement offered by Precedent 69, some aspects of the validity and enforcement of NCAs remains uncertain and should be resolved by the legislators.

Should you wish to obtain further details on the laws on restrictive covenants in Singapore and Vietnam, please feel free to contact us.

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