

Phuoc & Associates Legal Newsletter - Sept 2019



Part 1 - Concerned issues

CONFUSION SURROUNDING THE COMMITMENT NOT TO WORK FOR COMPETITORS

*Lawyer Lac Duy & Lawyer Nguyen
Huu Phuoc¹*

Recently, during occasions to provide consultation for clients, as well as in participating at conferences or forums on labour law and human resources management, the matter that appears to be of most concern is whether the agreement between employer and employee regarding the commitment not to work for competitors (known as Non-Competition Agreement) (“NCA”) after the employee terminates the labour contract is recognized by the law of Vietnam.

The question may appear very

obvious, but to answer and explain it satisfactorily is not simple. The major reason arises out of the lack of relevant legislation and regulations. Meanwhile, through the interpretation and application of available regulations and legal principles, there are indications that point to the Vietnam judiciary no longer always taking the side of employees, often known as the weaker party in the labour relationship with the employer.

From the “Reversal” award

Those interested in NCA of the labour relationship, can hardly ignore the judgment of the Ho Chi Minh City People’s Court in mid-2018 which recognized the validity of the Vietnam International Arbitration Centre’s award, and stood for the employer.

Accordingly, the arbitration tribunal approved the request of the employer, declared that the former employee was



Ms. Lac Duy is Partner of Phuoc & Associates. She is also serving as a visiting lecturer at the Judicial Academy and a keynote speaker at many legal seminars.

¹ Phuoc & Associates

under an obligation to pay the damages specified in the agreement – equivalent to three-month salary of the employee for the violation of the commitment not to work for the competitor of the employer within 12 months after labour contract termination.

The arbitration award shall be final and also be recognized by the competent court which attracted numerous legal experts expressing their views.

Whilst this field of law is becoming increasingly commonplace, the regulation of the laws of Vietnam regarding this field is still in their early days. Hence, the judgment or award shall be delivered upon the inner belief of the judges (there may be the subjective consideration of the arbitrator or the judge). Indeed, this is such a confusing state of affairs for parties. No one could be assured that if the dispute is resolved by another arbitration tribunal, another judge or another local court or the court of the higher level, what the judgment or award shall be. Most people “see eye to eye” on the opinion that this commitment only means to “beautify” for the NCA, because in the event of going to court over a dispute, it is believed that the court shall consider this agreement as having violated the right to work, and freely choose the types of professions and workplaces of the employee protected by the laws of Vietnam.²

This point of view has been unofficially acknowledged by the Labour Court of the Supreme People’s Court for many years. In the Panel Report in regard to the Trial of Labour Cases in 2006, this

State agency affirmed that the “Non-Competition Agreement (consisting of the commitment not to work for the competitors) constrains the employee’s freedom from working and choosing the workplace.”

For this reason, to assess the impact of the recognition of the agreement regarding not working for the competitors of the Ho Chi Minh City People’s Court, a legal expert affirmed that this important precedent shall change the whole perception of employees when entering into the agreement with the employer.

Employees and their authorised representatives must now be conscious that in case there is no legal basis, if a dispute arises, they cannot be confident of being protected/favoured. In the opposite direction, it is clear that the anti-competitive clause is no longer just a deterrent. In the event of a dispute, the person with competent jurisdiction can consider this precedent as a reference in order to deliver the judgment in favour of the employer.

After the judgment, the employer made an attempt to “accomplish/reinforce” the NCA

Having reviewed the NCAs which were newly drafted or supplemented, it is noticeable that the “investment” of employers in accomplishing the content and the coherence of these documents has increased significantly.

Notwithstanding, it seems employers are “encouraged” by the Judgment. Instead of perfecting trade secrets, technology secrets as well as building the system to protect such secrets effectively but not to get a bad reputation regarding deterring the former employee from applying for new employment in a term of time, a variety of NCAs are only constituted to make the employer easily win if there is a dispute with a former employee. Accordingly, the scope of restrictions for employees in the agreement

has been extended maximum, which certainly comprise the content directly relating to the commitment not to work for competitors.

For instance, the definition of competitors, in lieu of listing the specific name of each enterprise, the description of the competitors are given (through the business registration code at the present and in the future, consisting of direct and indirect competitors); in lieu of imposing the restraint only on the competitors running the businesses in the operational locality of employers, the scope of restrictions is also extended throughout the country.

For an employee violation, the amount of damages (fixed) is substantial. As far as the author is concerned, in a NCA, the damages for this violation can reach up to a few years of an employee’s salary regardless of whether the violation causes damage to the employer.

The employees terminating the labour contract worry that “what is written binds the writer”

One can say that at the moment, it is during the recruitment and establishment of the labour relationship that is the most appropriate time for an employer to request employee to sign documents, including a NCA. It is not difficult to see the fact that as a new employee, you need to prove your integrity when your assigned work is related to trade secrets, technology secrets of employer, and the employee has no alternative but to sign unconditionally the NCA, which comprises of the term of not working for any competitor of the employer.

² Article 35 of the Constitution, Article 49 of The Civil Law Code, Article 5 of the Labour Code and Article 9 of the Law on Employment

Until the moment of terminating the employment or having already terminated the employment, and receiving the warning from the employer in regard to complying with the signed NCA, i.e. not working for competitors of the employer, all of a sudden it shall come to mind a list of enterprises that the employee will not be able to work for in the coming years and the penalty for breaking such commitment.

It will be more serious for the employees in some particular professions such as petroleum or insurance sectors, in which the number of enterprises can be counted on the fingers of one hand.

If an employee fails to comply with his/her commitments as signed with an employer since he/she has entered into the labour contract and decides to counter with the former employer while such employer has no sign of giving up the cases due to be likely to create a bad precedent, the employee shall only hope that the inner belief of different arbitrators or judges could potentially resolving the case in his/her favour such as they used to be.

In need of “action” by competent authorities

Back to the question mentioned at the beginning of this article, through the above analysis, it can be seen that the most practical and concise response is that the NCA, according to which the employee is not allowed to work for the employer’s competitor, has not been officially recognized by the laws of Vietnam.

Although there was an award of arbitrators and recognition of the Court at the provincial level of Vietnam, which recognized the validity of this NCA as a precedent, these awards are just individual decisions in some particular cases. As with any other valid awards, the validity of those awards could be only used as a source of reference for other similar disputes handled and settled by other arbitrators and courts, but could not be used as precedent for all courts in Vietnam when settling this matter.

Not to mention that the originating award was a controversial decision, as above.

Although the commitment not to work for competitors prescribed in the NCA is not officially recognized by the laws of Vietnam, in fact, it must be admitted that the NCA has become quite familiar/common, especially for enterprises in which success in business depends significantly on the confidentiality of information and protection of trade secrets. The fact that employees enter into this agreement has been currently performed by the enterprise and employees by themselves. Notwithstanding, until now, there is no surety that if a dispute occurs, which side the judicial council shall favour.

Hence, in the view of the authors, the “action” of competent authorities, in particular the Supreme People’s Court, is crucial in order to deal with the difficulties regarding this kind of agreement.

Nevertheless, the authors’ opinion is that the interpretation of the competent authorities whether leading to recognition or denial of the non-competition agreement, or in the form of a compromise solution (such as half recognition, stipulation of the conditions and limitation of the agreement) should be based on the consideration of the practical situation at present. NCAs, though “deemed” to be based on the spirit of parties being free to enter into agreements, the content of such NCA mostly protects the benefits of employers and binds and limits the lawful rights of employees, including the right to work and freely choose the type of work.

Part 2 - Remarkable Regulations

1. NEW REGULATIONS ON COLLECTION RATES FOR CHARGES ON ENTERPRISES AS OF 20 SEPTEMBER 2019

As of 05 August 2019, the Ministry of Finance issued Circular No. 47/2019/TT-BTC regulating collection rates, regime of collection, remittance, management and use of fees for providing information about enterprises, charges for enterprise registration (“Circular 47”).

Accordingly, Circular 47 features some key points as mention below:

Change in the collection rates for charges regarding new issuance, reissuance, and amendments to Enterprise Registration Certificate

Accordingly, the collection rates of charges regarding new issuance, reissuance and amendments to Enterprise Registration Certificate have been reduced to 50,000 Vietnam dong per application. The current collection rate is 100,000 Vietnam dong per application in accordance with Circular No. 130/2017/TT-BTC.

Change in the fees for providing information on an enterprise

Fees for providing information on an enterprise, specifically fee for Declaration of contents of enterprise registration from the effective date is 100,000 Vietnam dong per declaration. The current collection rate is 300,000 Vietnam dong per declaration.

Circular 47 shall take effect from 20 September 2019. Simultaneously, Circular 47 will abolish the legal validity of Circular 215/2016/TT-BTC dated 10 November 2016 of the



Ministry of Finance, prescribing the collection rates, regime of collection, remittance, management, use of fee for providing enterprise information, charge for enterprise registration and Circular 130/2017/TT-BTC dated 04 December 2017 supplementing, amending of a number of articles of Circular 215/2016/TT-BTC dated 10 November 2016 of the Ministry of Finance.

2. PROVIDING GUIDELINES ON HANDLING BAD DEBTS WHEN CALCULATING CORPORATE INCOME TAX

As of 08 August 2019, the Ministry of Finance issued Circular 48/2019/TT-BTC guiding on the appropriating and handling of provisions for devaluation of stocks, losses of investments, bad debts and warranty on products, goods, services, construction works at enterprises (“Circular 48”) with some key points regarding handling bad debts in calculation of corporate income tax, as follows:

Purpose of provision for bad debts

Provisions for bad debt in this Circular shall be accounted into deductible expenses when determining income subject to corporate income tax in the annual reporting period in order to offset possible losses in the subsequent years reporting period; ensuring that enterprises reflect the value of debts which are not higher than the value of receivables is not higher than the recoverable value at the time for preparing annual financial statements.

Conditions of provision for bad debts



Accordingly, to be considered as the subject of an application on the provision for bad debts, such debts including those overdue and debts which are not yet due but are likely not to recover on time, and ensure the following conditions:

- There must be original vouchers proving the amount of money that the debtor has not paid, including the following documents:
 - One of these original vouchers: Economic contracts, loan agreements, debt commitments;
 - The memorandum of liquidation of the contract (if any);
 - Liability reconciliation; in the absence of liability reconciliation, there must be a written request for debt reconciliation or a written past due reminder letter (with postmark or confirmation of the post-office service);
 - Liabilities lists; and
 - Other relevant vouchers (if any).
- There are sufficient grounds to determine the debts are difficult to recover.
 - The debts are overdue more than 6 months; the enterprise has sent the liability reconciliation or reminded the debtor to pay but still has not recovered the debts;
 - The debts are not due for payment yet but the enterprise collects evidence as it will be likely unrecoverable on time;
 - Particularly for debts purchased by debt trading enterprise (registered business sectors and activities regarding the debt

trading in accordance with the law), the overdue time shall be counted from the date of transfer of creditors' rights among the parties (on the basis of the minutes or notice of handing over the creditors' rights) or according to the latest commitment (if any) between the debtors' enterprises and the debt trading enterprises.

Dossier for appropriation of provision for bad debts

Accordingly, when handling the debts which are unlikely to be recovered, an enterprise shall prepare the following documents:

- Minutes of the Debt Settlement Council of the enterprise;
- The detailed list of debts is grounds for accounting. Accounting records, vouchers, and documents debts not yet recovered by the time of handling debts are being accounted for in an enterprise's accounting records; and
- Dossiers, documents regarding provision for debts which are not likely to be recovered. Circular 48 shall take effect as of 10 October 2019.

3. NEW REGULATIONS PROVIDING LEGAL ASSISTANCE FOR SMALL AND MEDIUM-SIZED ENTERPRISES

As of 24 June 2019, the Government issue Decree 55/2019/ND-CP on legal assistance for small and medium-sized enterprises ("**Decree 55**").

Activities in the legal assistance for small and medium sized enterprises

Small and medium-sized enterprises can obtain legal assistance in the following activities:

- The activities regarding providing domestic, foreign and international legal information, legal risk warning and policy of sector, field, local relevant to the small and medium-sized enterprises (if any);
- Activities regarding improvement of legal knowledge for small and medium-sized enterprises, for persons rendering legal advice for small and medium-sized enterprises, and for the legal consultant network; or
- Activities regarding rendering legal advice, including talks, legal obstacle responses for enterprises and other legal consulting activities in accordance with the law and based on the demands of small and medium-sized enterprises and resources of state agencies.

Time limit for implementing the legal assistance program for small and medium-sized enterprises

Accordingly, the maximum duration of a legal assistance program for small and medium sized enterprises is 05 years from the date on which it is approved.

The level of legal assistance cost for small and medium-sized enterprises

After submitting the dossier for request of legal assistance cost pursuant to regulations of Decree 55, in the event that the competent authority approves, the level of legal assistance cost is stipulated as follows:

- A micro-enterprise shall be provided with assistance of 100% of service fees but not exceed VND 03 million per year;
- A small-sized enterprise shall be provided with assistance of a maximum 30% of service fees but not exceed VND 05 million per year;
- A medium-sized enterprise shall be provided with assistance of a maximum 10% of service fees but not exceed VND 10 million per year.

Decree 55 comes into force as of 16 August 2019.

4. PROVIDING GUIDELINES ON ARTICLE 216 OF THE CRIMINAL CODE REGARDING EVADING PAYMENT OF SOCIAL INSURANCE, HEALTH INSURANCE, UNEMPLOYMENT INSURANCE FOR EMPLOYEES

As of 15 August 2019, Decree 05/2019/NQ-HĐTP providing guidelines on Article 214 regarding social insurance and unemployment insurance fraud, Article 215 regarding health insurance fraud and Article 216 regarding evading payment of social insurance, health insurance, unemployment insurance for employees of the Criminal Code ("**Decree 05**") is issued by Judicial Council of the Supreme People's Court. In particular, a number of provisions guiding the application of Article 216 Criminal Code should be noted. Specifically, as follows:

The crime committed before 0 hour 00 minute as of 01 January 2018 shall not be prosecuted



Correspondingly, evading payment of social insurance, health insurance, unemployment insurance for workers as prescribed in Article 216 of the Criminal Code who have not faced criminal prosecution in case this conduct was carried out before 01 January 2018. Depending on each specific case, it will be stipulated as follows:

- Firstly, in case the administrative violation has not been handled and the limitation period for handling administrative violations has not yet expired, the competent agency shall consider handling the administrative violations;
- Secondly, in cases having handled the administrative violations which individuals, organizations intentionally evade or delay fulfilling the obligation, the limitation period of execution of the decision on handling administrative violations shall be defined pursuant to Article 74.2 of the Law on handling administrative violations; and
- Thirdly, in cases of causing damage to the employees, social insurance agencies or other organizations or individuals, the aggrieved party may claim for non-contractual damage compensation against the violator pursuant to the provisions of the Civil Procedure Law.

Simultaneously, handling the administration of the above mentioned conduct is not considered as the legal grounds for criminal prosecution as prescribed in Article 216 of the Criminal Code.

Decree 05 shall take effect from 01 September 2019.

Part 3 - Monthly Legal Update

No	DOCUMENT TITTLE	ISSUANCE DATE	EFFECTIVE DATE
THE GOVERNMENT			
1.	Decree 68/2019/NĐ-CP of the Government on management of work construction investment expenses	14/08/2019	01/10/2019
2.	Decree 69/2019/NĐ-CP of the Government on usage of public property to make the payment of investors when carrying out construction projects in the form of build-transfer contracts	15/08/2019	01/10/2019
3.	Decree 70/2019/NĐ-CP on performance the duty of joining People's Police	23/08/2019	10/10/2019
JUDICIAL COUNCIL OF THE SUPREME PEOPLE'S COURT			
1.	Resolution 05/2019/NQ-HĐTP providing guidelines on Article 214 regarding social insurance and unemployment insurance fraud, Article 215 regarding Health insurance fraud and Article 216 regarding Evading payment of social insurance, health insurance, unemployment insurance for employees of the Criminal Code	15/08/2019	01/09/2019
STATE BANK OF VIETNAM			
1.	Circular 11/2019/TT-NHNN regulating on special control over credit institutions	02/08/2019	01/10/2019
2.	Circular 12/2019/TT-NHNN regulating on titles, rank codes, professional standards and methods of calculating salary for civil servants in the banking sector	19/08/2019	01/01/2020
3.	Circular 13/2019/TT-NHNN amending the Circular regulating on licensing and organizations, operations of credit institutions and bank branches	21/08/2019	05/10/2019
MINISTRY OF LABOUR, WAR INVALIDS AND SOCIAL AFFAIRS			
1.	Circular 12/2019/TT-BLĐTBXH providing guidelines on salary transfer job regarding the titles of officials working in careers education	12/08/2019	26/09/2019
MINISTRY OF FINANCE			
1.	Circular 47/2019/TT-BTC stipulating the collection rates, regime of collection, remittance, management and use of fees for providing information about enterprises, charges for enterprise registration	05/08/2019	20/09/2019

2.	Circular 48/2019/TT-BTC guiding on the appropriating and handling of provisions of devaluation of stocks, losses of investments, bad debts and warranty on products, goods, services, construction works at enterprises	08/08/2019	10/10/2019
3.	Circular 49/2019/TT-BTC providing guidelines on the management and use of State budget funding to support the development of human resources for small and medium enterprises	08/08/2019	23/09/2019
MINISTRY OF INFORMATION AND COMMUNICATIONS			
1.	Circular 07/2019/TT-BTTTT on National Technical Regulation regarding quality of telephone service on fixed land telecommunication network	16/08/2019	01/03/2020
2.	Circular 08/2019/TT-BTTTT on National Technical Regulation regarding quality of accessing service on fixed land broadband network	16/08/2019	01/03/2020
MINISTRY OF NATURAL RESOURCES AND ENVIRONMENT			
1.	Circular 13/2019/TT-BTNMT regulating on economic - technical norms for land statistics, land inventory and establishment of current land use map	07/08/2019	23/09/2019
2.	Circular 14/2019/TT-BTNMT on issuing the economic - technical norms for direct measurement in establishment of topographic maps with the ratio 1:500, 1:1.000 and national topographic maps with the ratio 1:2.000, 1:5.000	16/08/2019	01/10/2019
MINISTRY OF CONSTRUCTION			
1.	Circular 04/2019/TT-BXD amending Circular 26/2016/TT-BXD providing guidelines on quality control and maintenance of construction works	16/08/2019	01/10/2019
MINISTRY OF CULTURE, SPORTS AND TOURISM			
2.	Circular 06/2019/TT-BVHTTDL of the Ministry of Culture, Sports and Tourism prescribing the issuance of Regulations on organization and operation of Evaluation Council regarding the content of exhibition	01/08/2019	25/09/2019
MINISTRY OF HEALTH			
1.	Circular 21/2019/TT-BYT providing guidelines on the pilot model regarding family medical activities	21/08/2019	15/10/2019

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Phuoc & Associates International Law Firm

Head office

70 Quoc Huong Street,
Thao Dien Ward, District
2, Ho Chi Minh City.

T: +84 28 3622 3522

E: info@phuoc-associates.com

Da Nang office

629 Dien Bien Phu Street,
Thanh Khe District,
Danang City.

T: +84 28 3622 3522

E: info@phuoc-associates.com

Ha Noi office

Room 909, 55 Office, Sky
City Tower A, 88 Lang Ha
Street, Lang Ha Ward,
Dong Da District, Hanoi

T: +84 28 3622 3522

E: info@phuoc-associates.com

www.phuoc-associates.com
www.chiaseluatlaodong.com