

Bird & Bird

Talent Wars

The success of a business depends on its people. While employee attrition is unavoidable, what can businesses legitimately do to protect their interests when key employees leave? Despite their reputation, restrictive covenants retain their value and remain a useful form of business protection. We have prepared this Asia-Pacific guide on restrictive covenants to help you deploy and draft them better.

July 2024



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Introduction

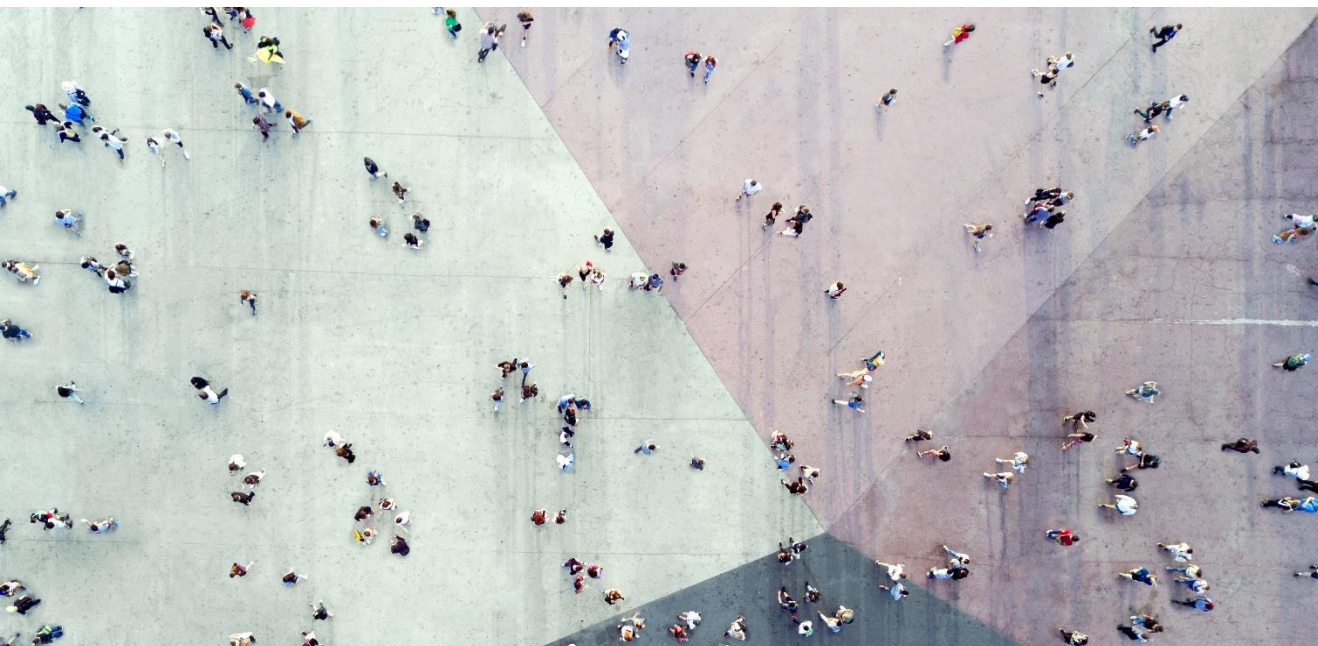
All organisations want to protect their business relationships, confidential information, and trade secrets. This is traditionally and still commonly done through the incorporation of restrictive covenants into employment contracts.

Across common law jurisdictions in Asia-Pacific (e.g. Singapore, Malaysia, Hong Kong, Australia, and India), there is a general reluctance by the Courts to enforce restrictive covenants. Civil law jurisdictions (such as China, Indonesia, Thailand, Vietnam, Philippines, UAE, and Taiwan) adopt a more permissive stance. However, all jurisdictions will assess the reasonableness of the restrictive covenants, often applying highly similar factors (necessity, duration, geographical scope, scope of restricted activity).

Our lawyers across Asia-Pacific continue to see restrictive covenants being commonly used to protect employers from departing employee risks. The position and trends in Asia-Pacific remain unaffected by recent U.S legal developments.

As employment lawyers, we are often asked if there are better ways to protect employers from departing employee risks. We recommend using restrictive covenants in combination with other strategies (e.g. financial disincentives, notice periods or payment) to achieve business goals.

In this guide, we provide you with a broad overview of restrictive covenants in various Asia Pacific jurisdictions - from Australia to Thailand - and hope you will find this useful in planning and formulating human resource and business protection strategies for your organisation.



Australia

Are non-compete clauses legal/enforceable in your jurisdiction or are they prohibited?

The starting presumption is that restraint of trade clauses are unenforceable, as they are considered to be contrary to public policy. However, at common law, restraint of trade clauses can be enforceable where:

- an employer has a "legitimate protectable interest"; and
- the restraint of trade clause goes no further than the protection of that legitimate interest.

What is the applicable legal test?

For a post-employment restraint to be enforceable, it must go no further than is necessary to protect the legitimate business interests of the employer.

All of the surrounding circumstances, including the employee's influence and relationship with customers, as well as access to confidential information and trade secrets and the extent of the employee's area of responsibility, will be relevant towards a determination of reasonableness and enforceability of a restraint area and period.

What are some of the factors which a Court would consider in the context of enforcing non-competes?

An Australian Court would primarily consider:

- the operation of the restraint having regard to the applicable principles of contractual construction;
- the interests of the employer that are being sought to be protected; and
- whether the effect of the restraint of trade is reasonable having regard to the legitimate interest of the employer being protected balanced against the interests of the employee and the public interest.

Can non-competes be applied to non-employees e.g. independent contractors, vendors?

Yes, but the above context in relation to enforceability of non-competes would need to be taken into consideration.

Are payments during the non-compete period mandatory?

No.

Will the Courts in your jurisdiction grant an order preventing an employee from working outside of your jurisdiction?

Yes, subject to the above test and considerations.

Is there a requirement for the governing law of the non-compete clause to be the law of your jurisdiction?

There is no strict requirement, however, the enforceability will be subject to the jurisdiction in which the applicable non-compete intends to operate.

Does the Federal Trade Commission's ban on non-competes affect a U.S headquartered company's ability to enforce non-competes in your country?

No, provided the relevant contract and restraints contain an Australian governing law provision.

Can long garden leave be used as an alternative to non-competes?

Yes, provided a contract allowed for garden leave.

Are non-disclosure agreements, training repayment agreement provisions, or non-solicitation agreements permissible?

Both non-disclosure and non-solicitation agreements are permissible, though a non-solicitation agreement is subject to the same considerations as set out above for non-competes.

Training repayment agreements may be permissible, depending on their specific terms and conditions, and subject to consideration of the repayment / deduction provisions set out in the *Fair Work Act 2009* (Cth).



China

Are non-compete clauses legal/enforceable in your jurisdiction or are they prohibited?

Non-compete clauses are legal and enforceable in China, but they are subject to certain restrictions and conditions as outlined in the PRC Labour Contract Law and related regulations.

What is the applicable legal test?

Non-compete clauses are applicable only to the following categories of employee:

- senior management,
- senior technicians, and
- other employees who are subject to confidentiality obligations.

The maximum permissible duration of a post-termination non-compete obligation is 2 years following the termination of employment.

Restricted activities are limited to those involving work for a competing employer or involving the establishment of a competing business that produces or operates with the same type of products or engages in the same type of business as the former employer.

What are some of the factors which a Court would consider in the context of enforcing non-competes?

A Chinese labour arbitration commission or Chinese court would primarily consider whether the employee falls within the category of employees to whom post-termination non-compete obligations apply, as well as the duration of the restraint, the geographical scope and the scope of restricted activity.

Can non-competes be applied to non-employees e.g. independent contractors, vendors?

Yes.

Are payments during the non-compete period mandatory?

Yes, an employer is required to provide compensation to employees during the post-termination non-compete period.

Will the Courts in your jurisdiction grant an order preventing an employee from working outside of your jurisdiction?

Generally, yes, as long as the relevant non-compete agreement is upheld and enforced by the court.

Is there a requirement for the governing law of the non-compete clause to be the law of your jurisdiction?

Yes, if the non-compete clause applies to an employment situation.

Does the Federal Trade Commission's ban on non-competes affect a U.S. headquartered company's ability to enforce non-competes in your country?

No.

Can long garden leave be used as an alternative to non-competes?

Yes, subject to the contractual arrangement between the parties.

Are non-disclosure agreements, training repayment agreement provisions, or non-solicitation agreements permissible?

Yes. Non-disclosure agreements, training repayment agreement provisions and non-solicitation agreements are permissible in China.



Hong Kong

Are non-compete clauses legal/enforceable in your jurisdiction or are they prohibited?

Non-compete clauses are prima facie unenforceable because they are regarded as being in restraint of trade and contrary to the public interest. To enforce a non-compete covenant, the employer must prove that it is no wider than is reasonably necessary to protect its legitimate business interests.

What is the applicable legal test?

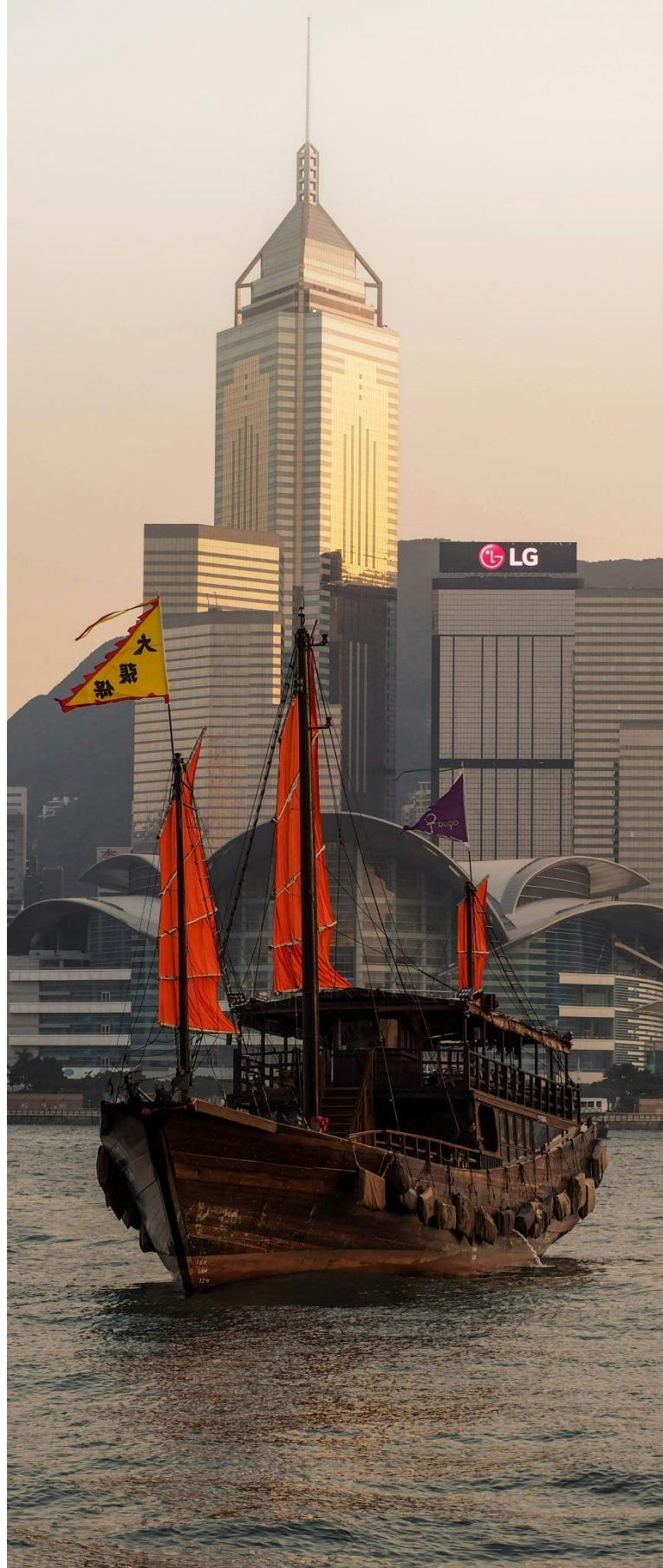
An employer has the burden of proving the reasonableness of non-compete clauses, not only through the submission of evidence, but also by reference to the language of the covenant, which must be drafted very clearly and must be tailored to ensure that its scope is no wider than is necessary to protect its legitimate business interests.

What are some of the factors which a Court would consider in the context of enforcing non-competes?

A Hong Kong Court would primarily consider the seniority and responsibilities of the employee, the type of confidential information to which the employee has had access, the geographical scope and duration of the restriction, the scope of activities prohibited by the restriction and the backstop period covered by the provision. The more onerous the restriction, the more difficult it will be to prove that the provision is necessary to protect a legitimate business interest.

Can non-competes be applied to non-employees e.g. independent contractors, vendors?

Yes. The same principles generally apply, but the reasonableness of the restriction may vary depending on whether the contracting party is an individual or a corporate entity.



Are payments during the non-compete period mandatory?

No.

Will the Courts in your jurisdiction grant an order preventing an employee from working outside of your jurisdiction?

Yes, if Hong Kong Courts are satisfied that a non-compete clause which prevents an employee from working outside of Hong Kong is reasonably necessary to protect the employer/enforcing party's legitimate business interests.

Is there a requirement for the governing law of the non-compete clause to be the law of your jurisdiction?

No.

Does the Federal Trade Commission's ban on non-competes affect a U.S headquartered company's ability to enforce non-competes in your country?

Not necessarily.

Can long garden leave be used as an alternative to non-competes?

Yes. However, the ability of an employer to keep an employee from joining a competitor through a garden leave clause is limited by the employee's statutory right to buy out his/her notice period by making a payment in lieu of notice.

Are non-disclosure agreements, training repayment agreement provisions, or non-solicitation agreements permissible?

Yes. Non-disclosure agreements, training repayment agreement provisions, and non-solicitation agreements are permissible.

However, if a non-solicitation clause operates as a restraint of trade, the enforcing party will be required to prove that it is no wider than is reasonably necessary to protect its legitimate business interests.

India

Are non-compete clauses legal/enforceable in your jurisdiction or are they prohibited?

Post-termination non-compete clauses have been deemed unenforceable in India as they are considered a restraint of the employee's freedom to trade. However, non-compete restrictions during the term of employment are enforceable.

What is the applicable legal test?

Generally, under Indian contract law, any agreement attempting to restrain a person from exercising a lawful profession, trade or business of any kind, is void, except in cases where such restraint is related to the sale of the goodwill of a business.

What are some of the factors which a Court would consider in the context of enforcing non-competes?

While post-term non-compete restrictions that are related solely to employment are unenforceable regardless of scope, duration or geography, non-competes are permissible in certain instances, such as a transfer of a business or the sales of shares along with associated goodwill.

When determining the enforceability of non-compete restrictions related to goodwill, courts will take into account both the nature of the business as well as the reasonableness of the restrictions (in terms of scope of business, time and geography).

In cases where non-competes have been upheld in relation to goodwill, courts typically examine whether the transaction contemplates (a) the transfer of a controlling position in the company, and (b) the transfer of a controlling interest with its associated goodwill as well as the reasonableness of the non-compete restrictions.

Can non-competes be applied to non-employees e.g. independent contractors, vendors?

While there is no prohibition on including non-compete restrictions, it is unlikely that courts may uphold such restrictions. Please refer to the above response.

Are payments during the non-compete period mandatory?

No.

Will the Courts in your jurisdiction grant an order preventing an employee from working outside of your jurisdiction?

No. Please refer to the above response.

Is there a requirement for the governing law of the non-compete clause to be the law of your jurisdiction?

No. However, Indian Courts will not apply the law of a jurisdiction that is contrary to Indian law or public policy.

Does the Federal Trade Commission's ban on non-competes affect a U.S. headquartered company's ability to enforce non-competes in your country?

Please refer to our response above. Post-term non-compete restrictions in relation to employment have been struck down by courts and are unenforceable.

Can long garden leave be used as an alternative to non-competes?

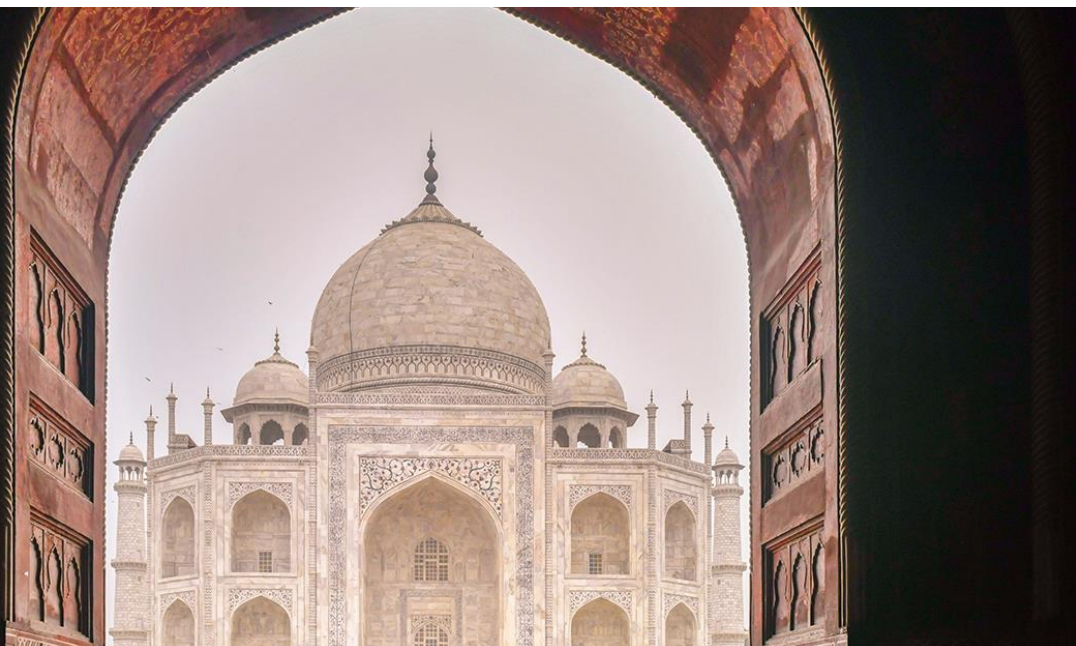
Yes. However, the employee would still be in employment during the term of the garden leave. Further, the garden leave period cannot be longer than the notice period prescribed under the employee's employment agreement.

Are non-disclosure agreements, training repayment agreement provisions, or non-solicitation agreements permissible?

Yes. Non-disclosure agreements are permissible in India.

With respect to training repayment agreement provisions, please note that such agreements are only enforceable in courts under specific circumstances, particularly when the employer can demonstrate that the employee has received training at the company's expense (all expenses need to be quantified and proved typically with receipts and similar documents) and that such training was specifically provided in addition to the standard training that is provided to employees to perform their job. Further, courts typically would only permit recovery of amounts incurred by the employer upon procuring training for the employee(s).

Lastly, post-termination non-solicitation restrictions have been enforced by courts in certain cases. However, courts typically only award damages and do not pass protective orders restricting employees/customers from moving to the soliciting party. Regardless of their enforceability, such clauses are typically included as deterrents.



Indonesia

Are non-compete clauses legal/enforceable in your jurisdiction or are they prohibited?

A non-compete clause is generally recognised in Indonesian jurisdiction. However, its validity and enforceability could be challenged as it potentially infringes on an employee's rights under the Indonesian Manpower Law and Indonesian Human Rights Law.

What is the applicable legal test?

There is no applicable legal test for a non-compete clause.

However, in general, a non-compete clause must be agreed upon by the parties (employer and employee) consciously, without coercion, and by taking into account the normal and formal requirements of an agreement as regulated under the Indonesian Civil Code. These non-compete requirements must be explicitly stated (i.e the prohibition to work in a competitor of the same industry).

What are some of the factors which a Court would consider in the context of enforcing non-competes?

The Panel of Judges of the Indonesian District Court would be considering several factors including fairness, specific time, position and activity scope as well as damages suffered. Usually, a non-compete clause is included to protect the employer's trade secrets which are regulated in the Indonesian Trade Secrets Law.

Can non-competes be applied to non-employees e.g. independent contractors, vendors?

No. It is generally prohibited based on the Indonesian Anti-Monopoly and Unfair Business Competition Law.

Are payments during the non-compete period mandatory?

No.

Will the Courts in your jurisdiction grant an order preventing an employee from working outside of your jurisdiction?

No.

Is there a requirement for the governing law of the non-compete clause to be the law of your jurisdiction?

No.

However, it is usually preferred for the governing law to be under Indonesian law in order for the employer to be able to enforce the provision directly to the employee.

The Panel of Judges of the Indonesian Court are not required to follow and do not have the authority to examine a governing law outside their jurisdiction.

Does the Federal Trade Commission's ban on non-competes affect a U.S headquartered company's ability to enforce non-competes in your country?

No. However, the Panel of Judges of the Indonesian Court can consider the FTC's ban as one of the legal facts of the case, if it is properly presented as evidence by either the plaintiff or defendant.

Can long garden leave be used as an alternative to non-competes?

Yes, it is possible. However, during the garden leave, employers are required to pay the salaries of their employees until their employment relationships are legally terminated.

Are non-disclosure agreements, training repayment agreement provisions, or non-solicitation agreements permissible?

Yes. Non-disclosure agreements, training repayment agreement provisions, and non-solicitation agreements are permissible and allowed by the Indonesian Civil Code. They are generally enforceable as long as we subject them to a private agreement (governed under the Indonesian Civil Code) and not under the Indonesian Manpower Law.



Japan

Are non-compete clauses legal/enforceable in your jurisdiction or are they prohibited?

Non-compete clauses can be enforceable as long as they are reasonable (the criteria is described below).

What is the applicable legal test?

A non-compete clause must be considered reasonable in light of all of the circumstances to be considered valid.

What are some of the factors which a Court would consider in the context of enforcing non-competes?

A Japanese Court would consider (i) genuine business need and interests which need to be protected by the non-compete clause (e.g. seniority of the role, access to confidential information, etc.), (ii) the scope of the restraint (duration, geographic scope, scope of duties), and (iii) whether any compensation is paid during the non-compete period.

Can non-competes be applied to non-employees e.g. independent contractors, vendors?

Yes, a non-compete clause can be applied to non-employees, but it is subject to a criteria which is similar to the criteria described above.

Are payments during the non-compete period mandatory?

No, but whether reasonable compensation is provided is one of the factors used to determine the validity of non-compete clauses, as described above.

Will the Courts in your jurisdiction grant an order preventing an employee from working outside of your jurisdiction?

Theoretically speaking yes, but generally a non-compete geographical scope which extends beyond a country border is likely to be considered too broad, though other factors would also be considered.

Is there a requirement for the governing law of the non-compete clause to be the law of your jurisdiction?

No.

Does the Federal Trade Commission's ban on non-competes affect a U.S. headquartered company's ability to enforce non-competes in your country?

No. However, a Japanese Court may exclude the U.S. from the geographical scope of an injunctive order, since the injunctive order will not be enforceable in the U.S.

Can long garden leave be used as an alternative to non-competes?

Yes. However, departing employees have a statutory right to terminate their employment earlier.

Are non-disclosure agreements, training repayment agreement provisions, or non-solicitation agreements permissible?

Yes. Non-disclosure agreements and non-solicitation agreements are permissible and common in Japan (non-solicitation agreements are subject to the same criteria described above). Training repayment agreement provisions are also permissible, but depending on its terms, such clauses could be found by Japanese Court to be contrary to Japanese labour law.



Malaysia

Are non-compete clauses legal/enforceable in your jurisdiction or are they prohibited?

Post-termination non-compete clauses are a form of restraint of trade and are void and unenforceable under s. 28 of the Contracts Act 1950.

What is the applicable legal test?

Non-compete clauses during the currency of the contract (i.e.: during employment) are enforceable.

Post-termination non-compete clauses are void and not subject to the 'reasonableness test' (even where expressly limited).

There are only three exceptions under s. 28 of the Contracts Act 1950 where non-compete clauses are enforceable:

- (1) Agreement not to carry on business of which goodwill is sold;
- (2) Agreement between partners prior to dissolution; and
- (3) Agreement between partners during continuance of partnership.

The above exceptions do not apply in employment relationships.

What are some of the factors which a Court would consider in the context of enforcing non-competes?

Post-termination non-compete clauses are automatically void and unenforceable by operation of law.



Can non-competes be applied to non-employees e.g. independent contractors, vendors?

Yes, but the non-compete clauses will only be valid and enforceable during the currency of the contract (e.g.: if it takes the form of an exclusivity clause).

Are payments during the non-compete period mandatory?

No.

Does the Federal Trade Commission's ban on non-competes affect a U.S. headquartered company's ability to enforce non-competes in your country?

No. Post-termination non-compete clauses are already void and unenforceable in Malaysia.

Can long garden leave be used as an alternative to non-competes?

Yes. However, departing employees can reject garden leave as they have a statutory right to terminate their employment earlier by paying salary in lieu of notice.

Are non-disclosure agreements, training repayment agreement provisions, or non-solicitation agreements permissible?

Yes. non-disclosure agreements, training repayment agreement provisions and non-solicitation agreements are permissible and common in Malaysia. The duties of confidentiality and non-solicitation survive even after employment ceases.

Philippines

Are non-compete clauses legal/enforceable in your jurisdiction or are they prohibited?

Non-compete clauses are allowed in the Philippines and are not necessarily void, as established in Philippine courts, as there are exceptions against the prohibition on contracts in restraint of trade. However, the same must be reasonable as to time, trade and place, in accordance with prevailing legal tests.

What is the applicable legal test?

Philippine courts consider the following: **(a)** if the covenant protects a legitimate business interest of the employer; **(b)** if covenant creates an undue burden on the employee; **(c)** if covenant injures public welfare; **(d)** if the limitations on time and place are reasonable; and **(e)** if it violates public policy. (Rivera vs Solidbank)

What are some of the factors which a Court would consider in the context of enforcing non-competes?

Philippine Courts have considered a number of factors in determining reasonableness, such as Employee's Right to earn a living, Clarity of what areas he isn't allowed to work in, how long the Non-Compete lasts, and if it's immoral or contradicts public policy.

Can non-competes be applied to non-employees e.g. independent contractors, vendors?

Yes, but they must satisfy the same test as mentioned.

Are payments during the non-compete period mandatory?

No. No rule or law set requires this.

Will the Courts in your jurisdiction grant an order preventing an employee from working outside of your jurisdiction?

Yes, trial courts generally may grant an Order of relief for damages and injunctive relief on the basis of the reasonableness test.

Is there a requirement for the governing law of the non-compete clause to be the law of your jurisdiction?

No. Philippine Courts will uphold a contract of the basis of a foreign law if the foreign law governs the contract, and it is proven what it says. But the terms of the Contract cannot be contrary to our local law, morals, good customs, public order, or public policy.

Does the Federal Trade Commission's ban on non-competes affect a U.S. headquartered company's ability to enforce non-competes in your country?

No. Philippine courts may assume jurisdiction if it chooses to do so, provided, that it is one to which the parties may conveniently resort to, in a position to make an intelligent decision as to the law and the facts and that it has or is likely to have power to enforce its decision.

Philippine courts generally do not have jurisdiction to prevent the employee from working outside its jurisdiction.

Can long garden leave be used as an alternative to non-competes?

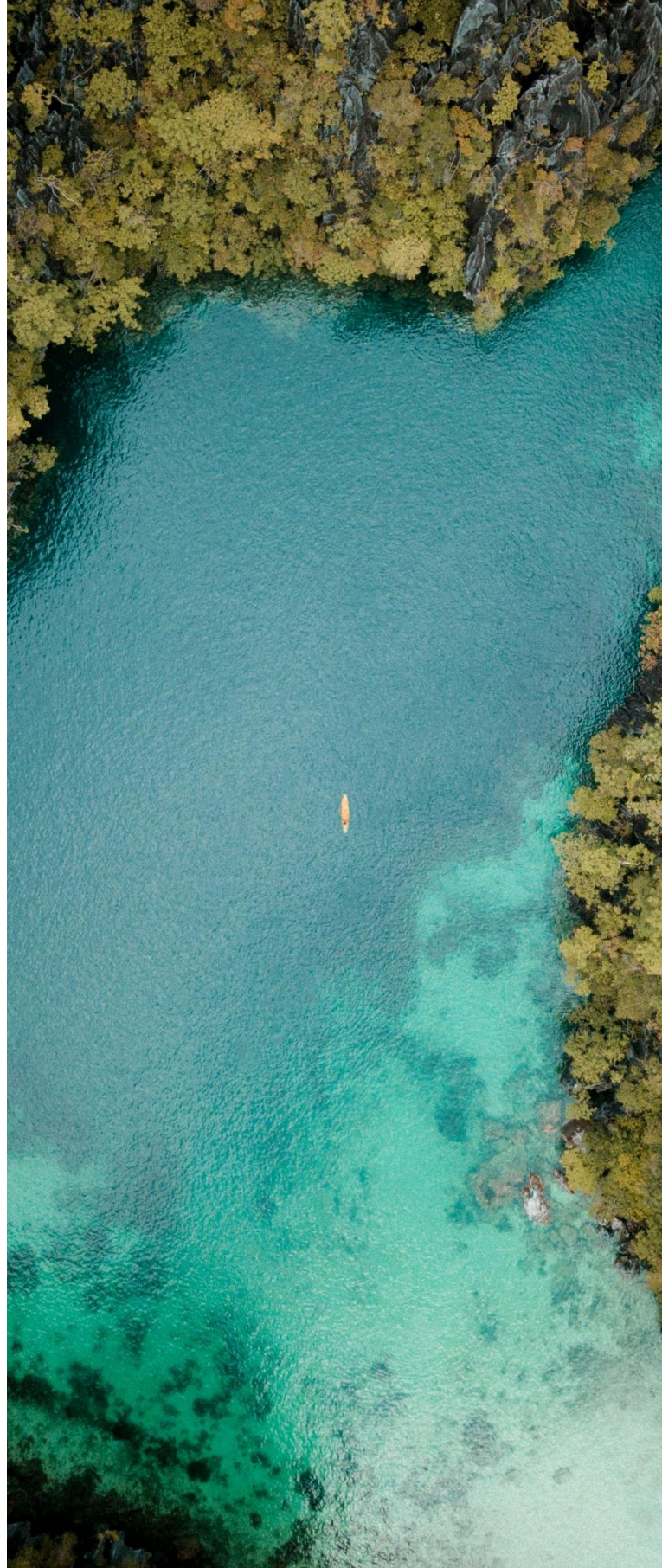
Yes, garden leave provisions are permitted in the Philippines. There is no prohibition under our labour laws against a garden leave clause in an employment contract.

Are non-disclosure agreements, training repayment agreement provisions, or non-solicitation agreements permissible?

Non-Disclosure Agreements are allowed provided they aren't contrary to law, public order, public morals, or public policy.

Training Repayment Agreements are also permitted. This is justified under Article 22 of the New Civil Code, which prohibits unjust enrichment.

Non-Solicitation agreements are subjected to the same test of Reasonableness of Non-Compete Clauses.



Singapore

Are non-compete clauses legal/enforceable in your jurisdiction or are they prohibited?

Non-compete clauses are not banned outright but are generally difficult to enforce. All covenants in restraint of trade are prima facie void due to public policy. It is for the enforcing party to justify the non-compete clause.

What is the applicable legal test?

The enforcing party must show necessity and reasonableness. The non-compete clause must be necessary to protect the enforcing party's legitimate business interests and must be no wider than necessary in terms of geographical scope, duration, and activity scope to protect these interests ("Legitimate Interests Test").

What are some of the factors which a Court would consider in the context of enforcing non-competes?

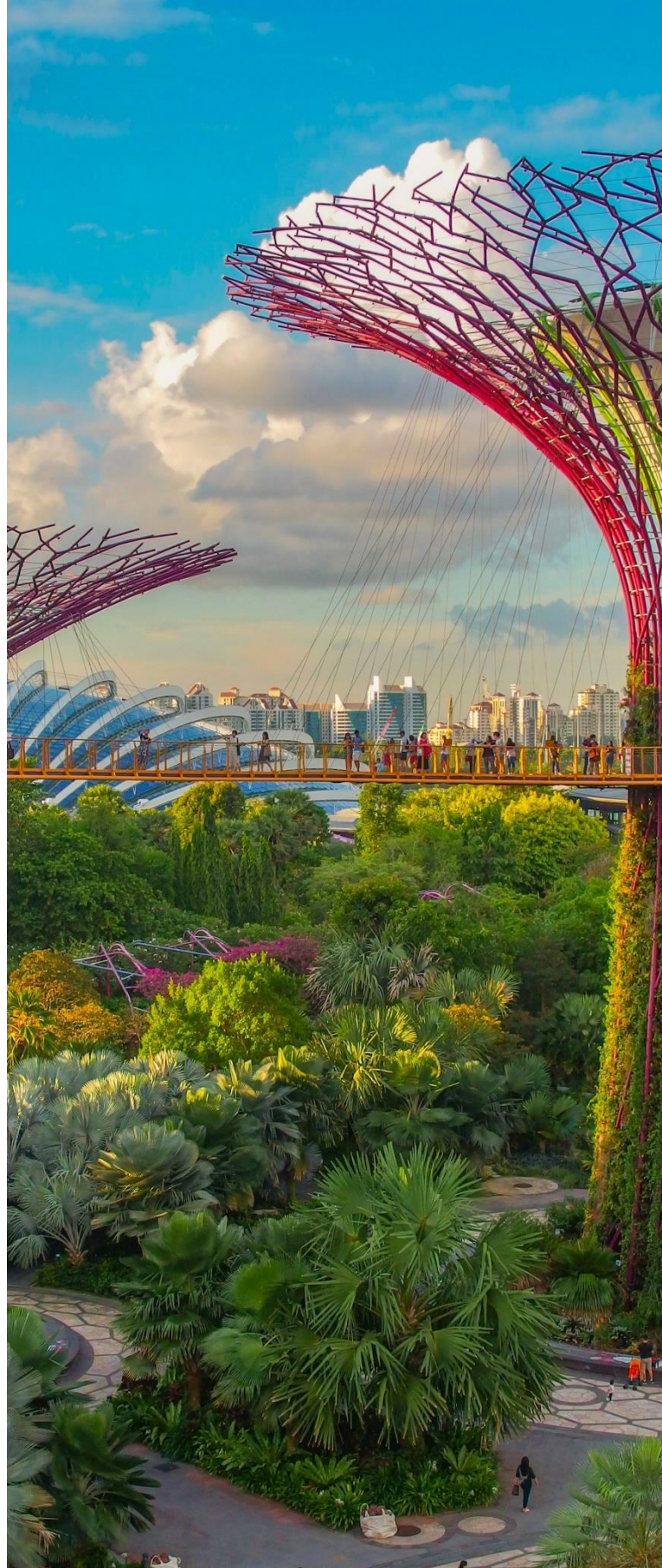
A Singapore Court would primarily consider geographical scope, duration and activity scope. The more onerous the restraint of trade clause, the more difficult it will be to prove that it is intended to serve a legitimate business interest.

Can non-competes be applied to non-employees e.g. independent contractors, vendors?

Yes, although the enforcing party will have to satisfy the same Legitimate Interests Test.

Are payments during the non-compete period mandatory?

No.



Will the Courts in your jurisdiction grant an order preventing an employee from working outside of your jurisdiction?

Generally, yes as long as the Legitimate Interests Test is satisfied.

Is there a requirement for the governing law of the non-compete clause to be the law of your jurisdiction?

No. However, Singapore Courts will not apply the law of a jurisdiction that is contrary to Singapore public policy.

Does the Federal Trade Commission's ban on non-competes affect a U.S. headquartered company's ability to enforce non-competes in your country?

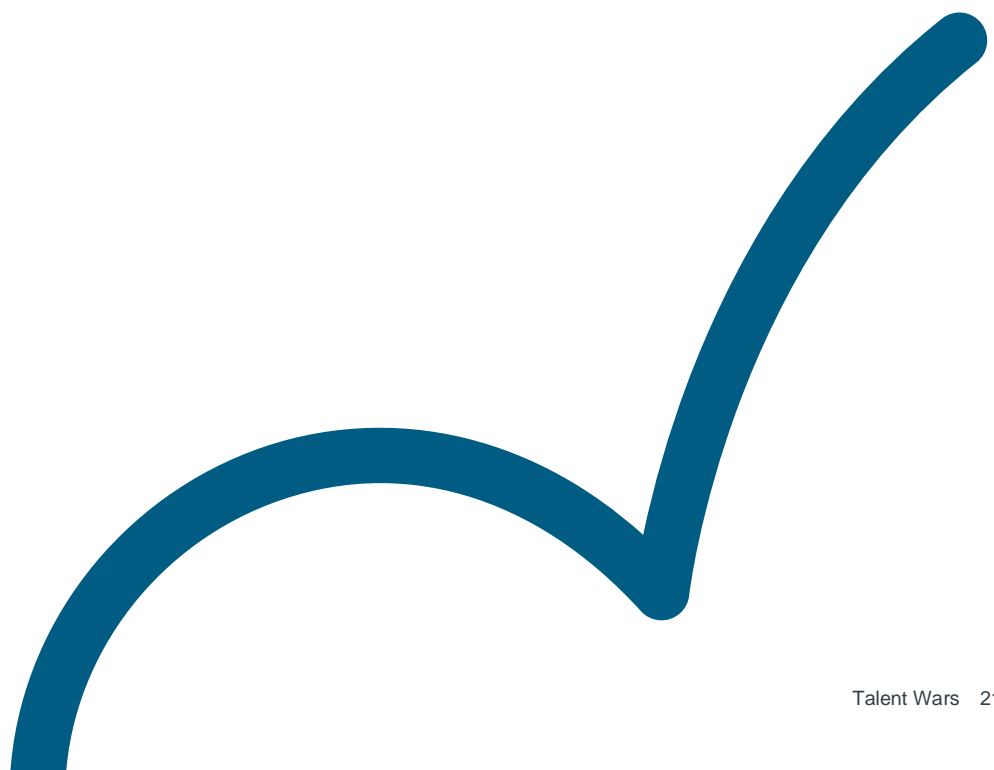
No. However, a Singapore Court may exclude the U.S. from the geographical scope of an injunctive order, since the injunctive order will not be enforceable in the U.S, and Singapore Courts do not grant useless remedies.

Can long garden leave be used as an alternative to non-competes?

Yes. However, departing employees have a statutory right to terminate their employment earlier by paying salary in lieu of notice.

Are non-disclosure agreements, training repayment agreement provisions, or non-solicitation agreements permissible?

Yes. Non-disclosure agreements and training repayment agreement provisions are permissible and common in Singapore. Non-solicitation agreements are subject to the same Legitimate Interests Test; forfeiture of incentives clauses could be considered a restraint of trade, depending on how they are worded and structured.



Taiwan

Are non-compete clauses legal/enforceable in your jurisdiction or are they prohibited?

Post-employment non-compete clauses are legal in Taiwan. They are also enforceable depending on whether the content and the forms of these clauses comply with relevant Taiwanese law.

What is the applicable legal test?

The non-compete clause must follow the below tests:

- (1) There are legitimate business interests/ trade secrets to protect.
- (2) The employee's role and position should involve access to these legitimate interests.
- (3) The activity scope, duration and geographical area must not exceed reasonable limits.
- (4) Compensation should be given.
- (5) The non-compete clause should be in written form and should be executed with wet signature / company chops.

What are some of the factors which a Court would consider in the context of enforcing non-competes?

A Taiwanese court would first consider formality issues as outlined in 2. (5) above. In terms of substantive issues, the court primarily considers that:

- (1) the non-compete duration may not exceed two years.
- (2) the geographical region must be limited to the geographical region in which the employer does business. If the employer does business globally, the region must be reasonably limited to the region in which the employee works or practices their profession.
- (3) the compensation, which not less than 50% of the employee's average monthly salary is legally required. For the non-compete to be legally valid and effective, the compensation amount should also be able to maintain the employee's living needs during the non-compete period and enough to compensate the employee for the losses incurred due to complying with the non-compete clauses.

Can non-competes be applied to non-employees e.g. independent contractors, vendors?

Yes. The non-compete clause should satisfy the same legal tests.

Are payments during the non-compete period mandatory?

Yes. A payment of not less than 50% of the employee's average monthly salary is legally required. For the non-compete to be legally valid and effective, the compensation amount should also be able to maintain the employee's living needs during the non-compete period and enough to compensate the employee for the losses incurred due to complying with the non-compete clauses.

Will the Courts in your jurisdiction grant an order preventing an employee from working outside of your jurisdiction?

Yes.

Is there a requirement for the governing law of the non-compete clause to be the law of your jurisdiction?

No. However, for employees regulated under Taiwan's Labor Standards Act (i.e., performing work in Taiwan, hired by entities registered in Taiwan), any non-compete clauses that violate the Act will be deemed invalid by the courts even if they are not governed by Taiwan laws.

Does the Federal Trade Commission's ban on non-competes affect a U.S. headquartered company's ability to enforce non-competes in your country?

We assume this refers to a non-compete clause made between a U.S. company's Taiwan subsidiary/ branch and its employees. Assuming this, if the parties agree that the non-compete clause will be enforceable outside of the United States, the company's ability to enforce the non-compete clause in Taiwan will not be affected.

Can long garden leave be used as an alternative to non-competes?

Yes, as long as the employee agrees to the terms and conditions of the long garden leave.

Are non-disclosure agreements, training repayment agreement provisions, or non-solicitation agreements permissible?

Non-disclosure agreements and non-solicitation agreements are permissible. The permissibility of training repayment agreements will depend on whether the company (1) provides professional technical training - which goes beyond general pre-employment or personnel training or training content that merely familiarizes workers with products, business processes - and cover the costs of such training, and (2) provides reasonable compensation.



Thailand

Are non-compete clauses legal/enforceable in your jurisdiction or are they prohibited?

A non-compete clause is valid and enforceable to the extent that it is not contrary to the public order or good morals of Thailand and that the Thai Court finds it fair and reasonable.

What is the applicable legal test?

In determining whether the non-compete clause is fair and reasonable; the Thai Court will consider several factors. Essentially whether (1) it results in unreasonable exploitation of the employee by the employer; (2) it totally eliminates the employee's opportunity and means to make a living; and (3) the restricted period and the geographical scope.

What are some of the factors which a Court would consider in the context of enforcing non-competes?

In order to determine the enforceability of the non-compete clause, the Thai Court would primarily consider the non-compete activities, the geographical scope, the restricted period, and whether the employer has a proprietary interest which it is entitled to protect.

Can non-competes be applied to non-employees e.g. independent contractors, vendors?

Yes, to the extent that the non-compete clause is not contrary to the public policy or good morals of Thailand and that the Thai Court finds it fair and reasonable after applying the legal tests mentioned in No. 2 above.

Are payments during the non-compete period mandatory?

No.

Will the Courts in your jurisdiction grant an order preventing an employee from working outside of your jurisdiction?

Yes, if the legal test mentioned in No. 2 above are satisfied.

Is there a requirement for the governing law of the non-compete clause to be the law of your jurisdiction?

No. However, the Thai Court will recognize and apply the foreign laws only to the extent that such laws are not contrary to the public order or the good morals of Thailand.

Does the Federal Trade Commission's ban on non-competes affect a U.S. headquartered company's ability to enforce non-competes in your country?

No. However, the Thai Court may exclude the U.S. from the geographical scope of an injunctive order if the employee can prove to the Thai Court that its injunctive order will not be enforceable by the U.S. Courts.

Can long garden leave be used as an alternative to non-competes?

Yes. However, Thai law does not have a concept of the "garden leave". The employer remains liable for paying the salaries to the employee during the garden leave, and the employee is not prevented from resigning during this period of time.

Are non-disclosure agreements, training repayment agreement provisions, or non-solicitation agreements permissible?

Yes. Non-disclosure agreements and training repayment agreement provisions are permissible and common in Thailand. Non-solicitation agreements are subject to the same legal tests mentioned above in No. 2.



United Arab Emirates

Are non-compete clauses legal/enforceable in your jurisdiction or are they prohibited?

Non-compete clauses are not banned outright but are generally difficult to enforce. The restrictions should clearly specify the (i) time period; (ii) geographical territory; and (iii) nature of the role. It is for the enforcing party to justify the non-compete clause.

What is the applicable legal test?

For a post-employment restraint to be enforceable, it must go no further than is necessary to protect the legitimate business interests of the employer.

All of the surrounding circumstances, including the employee's influence and relationship with customers, as well as access to confidential information and trade secrets in addition to the extent of the employee's area of responsibility, will be relevant towards a determination of reasonableness and enforceability of a restraint area and period.

Additionally, as the remedy in the UAE (except in case of certain financial free zones in the UAE) is damages, the enforcing party will need to prove the financial damage/loss suffered by them as a result of breach of the restrictive covenants.

What are some of the factors which a Court would consider in the context of enforcing non-competes?

A UAE court would primarily consider geographical scope, duration and activity scope. The more onerous the restraint of trade clause, the more difficult it will be to prove that it is intended to serve a legitimate business interest. Additionally, the UAE courts will consider the actual financial loss suffered by a party before awarding the damages.

Can non-competes be applied to non-employees e.g. independent contractors, vendors?

Yes, but the above context in relation to enforceability of non-competes would need to be taken into consideration and will not be considered as an employment claim but will be an ordinary civil claim.

Are payments during the non-compete period mandatory?

No.

Will the Courts in your jurisdiction grant an order preventing an employee from working outside of your jurisdiction?

No (except in cases of certain free zones) as onshore UAE court does not grant injunctions.

Is there a requirement for the governing law of the non-compete clause to be the law of your jurisdiction?

No strict requirement, however, the enforceability will be subject to the jurisdiction in which the applicable non-compete intends to operate. Further, if included as part of the employment arrangement, it is required that the employment contract is subject to the laws of the location where the company is incorporated in the UAE.

Does the Federal Trade Commission's ban on non-competes affect a U.S headquartered company's ability to enforce non-competes in your country?

No, provided the relevant contract and restraints contain a UAE governing law provision.

Can long garden leave be used as an alternative to non-competes?

Yes, provided a contract allowed for garden leave.

Are non-disclosure agreements, training repayment agreement provisions, or non-solicitation agreements permissible?

Both non-disclosure and non-solicitation agreements are permissible, though a non-solicitation agreement is subject to the same considerations as set out above for non-competes.

Training repayment agreements may be permissible provided no visa and/or recruitment costs are recovered.



Vietnam

Are non-compete clauses legal/enforceable in your jurisdiction or are they prohibited?

Non-compete clauses are not explicitly prohibited but the existence as well as contents of non-compete clauses is controversial and will greatly depend on the opinion of the judge on a case by case basis. In fact, the popular viewpoint leans toward the invalidity of non-compete clauses considering that it violates the right to work as regulated in the Constitution, the Labour Code and the Law on Employment.

What is the applicable legal test?

There is no specific standard as required and/or recognized by laws, however, a non-compete clause may be somewhat more workable in case of employees of high-level positions and those who possess access to the company's trade secrets and/or technology secrets, and a non-compete agreement is necessary for the purpose of confidentiality/protecting trade/technology secrets of the employer.

What are some of the factors which a Court would consider in the context of enforcing non-competes?

While a non-compete clause is generally not upheld in local courts, in our observation, the key factor that may be considered by local courts generally revolves around the equitable position available to the involved parties in a non-compete agreement. To some extent, a non-compete agreement may be more feasible before local courts and alternative hearing bodies if it contains, at the same time, the following:

- (i) the purposes on the protection of the employer's legitimate rights and interests (e.g. trade/technology secrets);
- (ii) specific limitations on one party obligations (how to not completely prevent the employee's right to work, e.g. limited specific competitors, limited scope of time or region); and
- (iii) financial remuneration (or other significant benefits) to that party in exchange for such party's agreement to the non-compete agreement.

Can non-competes be applied to non-employees e.g. independent contractors, vendors?

Yes, in such cases non-compete agreement may be recognized as a voluntary civil agreement and binding on the parties.

Are payments during the non-compete period mandatory?

No. However as we discussed in Section 3 above, a payment to one party would enhance the enforceability of a non-compete agreement.

Will the Courts in your jurisdiction grant an order preventing an employee from working outside of your jurisdiction?

As mentioned, the subject matter is quite controversial and subjective to the view of the judge in charge. But we think that it would be a slim chance for the local courts to grant an order preventing an employee from working abroad.

Is there a requirement for the governing law of the non-compete clause to be the law of your jurisdiction?

Yes, if the relation has no foreign elements, (i.e. both the parties are Vietnam-based ones) Vietnamese laws shall apply. In the case that the relation has a foreign element, i.e. either of the parties are not Vietnam-based, the governing laws can be selected by the parties; however, it is noted that under the Civil Code of Vietnam, in the following cases, Vietnamese laws shall apply instead of foreign laws regardless of whether foreign laws have been referred to govern non-compete clauses: (i) The consequences of the application of foreign laws are contrary to the fundamental principles of Vietnamese laws; (ii) The contents of foreign law are not identifiable regardless of the adoption of necessary measures prescribed by procedural law.

Does the Federal Trade Commission's ban on non-competes affect a U.S. headquartered company's ability to enforce non-competes in your country?

No. However, as we discussed in Section 1 above, non-compete clause is commonly deemed invalid.

Can long garden leave be used as an alternative to non-competes?

Garden leave is not regulated under Vietnamese laws. For this advice, we would interpret "garden leave" as a period of time when the employment is not yet terminated, but the employee is compulsorily received a paid leave and not allowed to come to work. Then, our answer is generally no. Under Vietnamese laws, employees have the right as well as the obligation to work in accordance with the labour contract, hence such garden leave may be deemed a violation of the employees' right to work. However, it would greatly depend on the employees' consent, and it should not be forced upon the employees as an alternative to non-competes.

Are non-disclosure agreements, training repayment agreement provisions, or non-solicitation agreements permissible?

Generally, yes. Non-disclosure agreements are permissible and common in Vietnam. Training repayment agreements are allowed when the employee is provided with training sponsored by the employer; in such cases, a separate training contract is preferable for the employer to stipulate a training repayment term. Non-solicitation agreements are not specifically regulated by applicable laws, but since there are no specific restrictions or prohibitions, it would be interpreted that they are permissible in Vietnam.



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'The Bird & Bird team are great at keeping a project on track as well as synthesising advice from multiple countries to find practical solutions.'

Chambers Global, 2024

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Thank you

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