



LEGAL VALIDITY AND PRACTICE OF TRIAL OF A NON-COMPETE AGREEMENT FOR LABOR RELATIONSHIP IN VIETNAM

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The below Legal Summary prepared by BLG contains a brief discussion with tailored practical information for investment and business activities in Vietnam.

The article concentrates on the legal validity and practice of trial of a non-compete agreement for labor relationship in Vietnam.

During employment relationship, the employee may access certain confidential information of a company. This confidential information encompasses various aspects of the company's operations such as commercial, technical, financial, or other proprietary matters of the company, including but not limited to trade secrets, know-how, show-how, patents, research, development, technical data, intellectual property rights,... or even details of customers, suppliers, debtors or creditors ("*Confidential Information*"). Unauthorized use or disclosure of Confidential Information, not for the company's best interest, poses implicit risks and could result in substantial harm, damages, or losses to the company. It is especially noteworthy when an employee continues to use Confidential Information for the benefit of a competing entity even after the termination of his employment relationship to attract customers from previous employer. Therefore, it is imperative for the company to establish legal safeguards to shield itself from such unforeseen and harmful behaviors of its employees. This safeguard usually takes the form of a non-compete agreement ("*NCA*").

In Vietnam, there is currently a lack of specific regulations governing NCA. Consequently, despite their widespread use in Vietnam, numerous disputes and controversies related to the legal validity of NCA.

From the labor perspective, the NCA's existence seems to obstruct the working rights and interfere with the principal of labor freedom of employees. Indeed, under clause 1, Article 35 of Constitution 2013^[1], the right to work and to choose an occupations, employment and workplaces of employee are constitutional rights. Furthermore, the right of employees to freely choose an occupation, workplace is emphasized in clause 1, Article 5 and clause 1, Article 10 of Labor Code 2019^[2]. Furthermore, Article 19.1 of the 2019 Labor Code also allows that "*the employee may enter into labor contracts with several employers, but must ensure fulfilment of the contents of the entered contracts.*" Even ensuring the right to work and freely choose jobs and workplaces are considered as one of the principles of employment under clause 1, Article 4 of Employment Law

^[1] **Article 35 (Constitution 2013)**

1. Citizens have the right to work and to choose their occupations, employment and workplaces.

^[2] **Article 5. Rights and obligations of employees (Labor Code 2019)**

1. An employee has the rights to:

a) work; freely choose an occupation, workplace or occupation; participate in basic and advanced occupational training; develop professional skills; suffer no discrimination, forced labor and sexual harassment in the workplace;

Article 10. Right to work of employees

1. An employee shall have the right to choose his employment, employer in any location that is not prohibited by law.

2019^[3]. Pursuant to the above provisions, it can be seen that employee has the right to freely work without being restricted or prevented from such freedom by any entity. The execution of an NCA would therefore imply a hindrance to the legitimate rights of employees as stipulated in the Constitution and other labor-related legal documents. As a result, NCA may be deemed invalidated due to failure to meet the condition of "not contrary to the law" under clause 1 Article 117 of the Civil Code 2015^[4].

In procedural practice, certain effective court judgments support this view:

- In the judgment No. 420/2019/LĐ-PT^[5] dated 15 May 2019 of the People's Court of Ho Chi Minh City on "*the dispute on termination of labor contract with competitors*", the Trial Panel have shown their opinion on the non-recognition of the NCA's validity. Accordingly, the Trial Panel did not agree the request of Company U (the Plaintiff) to force Mr. Phan Thanh B (the Defendant) not to continue working for Company P because that request was contrary to the provisions of clause 1, Article 3 of the 2013 Constitution 2013, point a, clause 1, Article 5 and clause 1, Article 10 of the Labor Code 2012 (*effective at the time of dispute settlement*), and clause 1, Article 4 and clause 6, Article 9 of the Employment Law 2013.
- In the judgment No. 03/2023/LĐ-PT^[6] dated 10 January 2023 of the People's Court of Thanh Hoa Province on "*Claim for compensation for breach of a labor contract*", the Trial Panel held:
 - Although between TT Company and Mr. D signed the "Non-Disclosure and Non-Compete Agreement ("*ND&NCA*") ,it was not consistent with Article 35 of the Constitution; contrary to the provisions of Article 5 and Article 10 of the Labor Code. Consequently, this agreement was not legally binding on Mr. D.
 - On the other hand, TT Company alleged that Mr. D currently working at NS Company was violating the ND&NCA but failed to produce documents proving that Mr. D had used or disclosed any secrets of TT Company.

^[3] **Article 4. Principles of employment (Employment Law 2013)**

1. Ensuring the right to work and freely choose jobs and workplaces.

^[4] **Article 117. Conditions for effective civil transactions (Civil Code 2015)**

1. A civil transaction shall be effective when it satisfies all of the following conditions:
c) The purpose and contents of the transaction are not contrary to the law and/or social ethics.

^[5] Please kindly refer to <https://congbobanan.toaan.gov.vn/2ta289648t1cvn/chi-tiet-ban-an>

^[6] Please kindly refer to <https://congbobanan.toaan.gov.vn/2ta1121072t1cvn/chi-tiet-ban-an>

- The first-instance judgment that upheld TT Company's request and forced Mr. D to compensate TT Company was unfounded, causing damage to Mr. D's legitimate rights and interests. Therefore, the Trial Panel accepted the appeal of Mr. D and the protest of the People's Procuracy of NS town, applied clause 2 Article 308 of the Code of Civil Procedure to amend the first-instance judgment to not accept the TT Company's claim.

From a civil perspective, there is an opinion that the NCA has legal validity because it is a voluntary agreement between the employee and the company under point b clause 1 Article 117 of Civil Code 2015. If a NCA is made, it means that employees are deemed to have actively restricted or waived their legitimate rights. In procedural practice, there is an effective court judgment with this view, as follow:

- On 19 February 2018, the Vietnam International Arbitration Center (“VIAC”) issued arbitral award No.75/17 HCM regarding a dispute on a non-disclosure and non-compete agreement (“NDA”) between company X as the plaintiff and Ms. T as the defendant (“*Arbitral Award No. 75*”). Accordingly, VIAC did accept the entire claim of company X and compelled Ms. T to compensate company X for her violation of the signed NDA.
- Ms. T did not agree with Arbitral Award No. 75 of the VIAC and filed a lawsuit in the People’s Court of Ho Chi Minh City (*the “HCM Court”*) seeking the annulment of Arbitral Award No. 75.
- On 12 June 2018, the HCM Court issued Decision No.755/2018/QD-PQTT^[7] rejecting the employee’s request to nullify Arbitral Award No. 75. Pursuant to Article 4 of the Civil Code 2005 (Corresponding to clause 2 Article 3 of the Civil Code 2015)^[8], the HCM Court found that Ms. T and company X did volunteer

^[7] Please kindly refer to <https://congbobanan.toaan.gov.vn/2ta161738t1cvn/chi-tiet-ban-an>

^[8] **Article 4. Principles of free and voluntary undertaking and agreement (Civil Code 2005)**
The right to freely undertake or agree on the establishment of civil rights and obligations shall be guaranteed by law, if such undertaking or agreement is not banned by law and/or not contrary to social ethics.
In civil relations, the parties shall act entirely voluntarily and neither party may impose, prohibit, coerce, threaten or hinder the other party.
Lawful undertakings or agreements shall be binding on the parties and must be respected by individuals, legal persons and other subjects.

Article 3. Basic principles of civil law (Civil Code 2015)

2. Each person establishes, exercises/fulfills and terminates his/her civil rights and obligations on the basis of freely and voluntarily entering into commitments and/or agreements. Each commitment or agreement that does not violate regulations of law and is not contrary to social ethics shall be bound by contracting parties and must be respected by other entities.

signed the NDA. At the time of signing, Ms. T had legal capacity in conformity in accordance with the law, and no threat or coercion were involved. Therefore, the NDA was deemed effective. The arbitral tribunal's recognition of the NDA's validity was consistent with the law.

From the above actual cases, it can be seen that the Vietnam competent authorities who have jurisdiction over disputes have exact arguments to protect the interests of company and employees, but there is still no consensus on the legal validity and enforceability of the NCA. Thus, the conclusion of NCA from the perspective of the employer and the employee still has some potential risks leading to concerns for the parties when signing the NCA. Therefore, in order to strengthen the validity and decrease the possibility of the NCA being rejected by the competent authority, we would recommend that:

Firstly, there should create a separate NCA and the NCA's contents should not be added into the contents of the labor contract. Because if the labor contract contains this article, the competent authority would consider this article under the labor law instead of considering it as a civil agreement under the civil law. It would be better if the NCA is entered into prior to employment commences and the employees may choose whether or not to work for the Company. In this case, maybe prove that it is a civil transaction because at the time of signing, the parties are not bound by the labor contract.

Secondly, the period of validity and the scope of application of the NCA should be reasonably limited. It should be noted that NCA is not suitable for all employment positions or for all business areas because not all positions can access confidential information of the Company. Normally, NCA should only be applied to some key positions at management level where they have the ability to receive, access and use such confidential information or the particular field in connection with research, development, technical information, intellectual property rights. Therefore, the company should identify and specify the specific subjects and certain work positions that need to apply NCA and propose reasonable terms, for example:

- In terms of the work restriction duration for competitors: The parties should only limit 6 months or 1-2 years after the end of the labor contract and have a specific list of competitors which is updated continuously from time to time during the working process;
- In terms of the territorial extent to which work is restricted: The parties should specifically note the limitation in the province, city, or country.

Thirdly, there should be a reasonable balance in terms of rights and obligations of the parties. This means that if the employee has accepted to wave his/ her rights for a time period, the company should offer reasonable compensation in return. Maybe an

amount of money or a share of profits depending on the agreement between both parties ("**Support Amount**"). This is recommended to avoid the case where the Court considers the NCA as a unilateral imposition under the Company's will for the employee.

Finally, the company should consider an imposing fine for a violation in order to (i) create an obligation towards the employee (ii) set up a basis for requesting compensation from employees in event of a breach. It would be more reasonable if this fine shall be set based on Support Amount, which may be an amount equivalent to the Support Amount in addition to the reimbursement of such Support Amount if the employee breaches the signed NCA.

In summary, for an NCA to be effective, it is necessary to conduct a comprehensive evaluation of the case's background, circumstances as well as the needs and desires of the parties for each specific case.

Thus, this article is intended for reference purposes only & BLG is not responsible if the client automatically applies. Therefore, we recommend you obtain our confirmation before implementing any of our recommendations as stated herein.

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Head office:
P7-43.08 Park 7, Vinhomes Central Park,
720A Dien Bien Phu, Ward 22, Binh Thanh
District, Ho Chi Minh City.



info@bizlegalgroup.com



www.bizlegalgroup.com

