



The Arbitrability of Non-Compete and Non-Disclosure Agreements

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On 1 October 2023, the Supreme People's Court issued Decision 364/QD-CA announcing 7 cases now considered precedents in Vietnam.

One of these precedents is Precedent No. 69/2023/AL that dealt with the question of arbitrability of non-disclosure and non-compete agreements in employer-employee contracts (the **Precedent**), which took effect as from 1 November 2023.

Summary

The Precedent involved Company R (as the employer) and Ms. T (as the employee).

On 10 October 2015, Company R and Ms. T entered into a labour contract.

On 21 October 2015, the parties entered into a separate non-disclosure and non-compete agreement (the **NDA**). The non-compete agreement, as contained in the NDA, bound Ms. T against employment in a competing business for 12 months after the termination of her employment. The NDA also contained an arbitration clause.

Company R then initiated arbitration against Ms. T at the Vietnam International Arbitration Centre (the **VIAC**), claiming compensation for Ms. T's violation of the NDA after she unilaterally terminated her labour contract. The VIAC issued an arbitral award granting Company R's claims. Ms. T then filed a petition at the People's Court of Ho Chi Minh City (the **Court**) to set aside the arbitral award. The Court rejected Ms. T's petition for the reasons summarised below.

First, Ms. T did not raise any objection or challenge to jurisdiction of the arbitration within the statutory time under the Law on Commercial Arbitration (**LCA**), as well as the VIAC Rules. She did not raise her objections to jurisdiction when she filed her Statement of Defence, did not do so at any time in the arbitration, and participated in the proceedings. Therefore, she has lost her right to challenge the jurisdiction of the tribunal.

Second, the NDA was concluded by Ms. T and Company R freely and voluntarily. Ms. T had the capacity to enter into such an NDA. Therefore, the NDA shall be deemed valid.

Third, the award was issued in accordance with the LCA and the VIAC Rules, and there was no procedural violation in the issuance of the award.

Fourth, the Court considered that the NDA is a separate agreement from the labour contract of Ms. T. The Court determined that this dispute was not a labour dispute, but rather a separate dispute between the parties at least one of whom is engaged in commercial activities. Therefore, the dispute is one capable of settlement by arbitration under Article 2.2. of the LCA. It is of note that Ms. T (through counsel) admitted that the NDA was a separate agreement from the labour contracts between Ms. T and Company R in her pleadings during the arbitration.

Fifth, there was no ground to determine that the evidence provided by Company R in the arbitration was forged.

Comments

Prior to this Precedent, there were two opposing views regarding the enforceability of non-compete agreements, and whether violations of non-compete agreements could be submitted to arbitration.

The first takes the view that a dispute involving a non-compete agreement is a labour dispute which falls under the jurisdiction of the labour mediator, or through labour arbitration, or the court (pursuant to Article 187 of the Labor Code 2019). This list excludes commercial arbitration as a mechanism to resolve non-compete disputes. Further, Article 10.1 of the Labor Code 2019 provides that "[a]n employee shall have the right to choose his employment, employer in any location that is not prohibited by law." A non-compete agreement that prohibits an employee from pursuing another employment elsewhere may be considered a violation of this right.

The other view relies on Article 2.2 of the LCA that provides: "[d]isputes arising between parties at least one of whom is engaged in commercial activities." On the basis that an agreement (such as a non-compete agreement) has at least one party engaged in commercial activities, disputes arising from such an agreement can be resolved through

commercial arbitration. Further, Vietnam law recognises the freedom of parties to contract. Therefore, a non-compete, which was freely entered into between the parties, should be respected under Vietnam law.

The Precedent appears to resolve the issue strongly in favour of the second view.

The first and arguably, the most compelling argument in favour of the second approach (at least in this case) is that Ms. T did not raise the proper jurisdictional objections in the arbitration. The outcome may have been different but for Ms. T's failure to raise a jurisdictional objection at the appropriate juncture.

Second, the NDA was a separate agreement; it was not a term nor was it incorporated into the labour contract. In the course of the arbitration, Ms. T admitted that the NDA had been entered separately from the labour contract. Notably, the Court applied the Civil Code 2015 in making its ruling on the validity of the NDA, not the Labor Code 2019. From this finding, it can be argued that a non-compete which is incorporated in a labour contract (or where a non-compete is incorporated by reference into the labour contract) may be scrutinised under a different standard.

Third, Ms. T was Company R's Head of Recruitment, an executive position. The analysis may differ as well, depending on the rank of the employee involved.

The Precedent appears to be a welcome development. It puts primacy of the parties' freedom to contract over the right to freely choose work, potentially promoting easier enforcement of arbitral awards in Vietnam. However, the Precedent involves a decision issued on 12 June 2018. Over the recent months in 2023, several court decisions were issued setting aside arbitral awards or rejecting petitions for recognition and enforcement, based on the awards having violated the fundamental principles of Vietnam law¹. These recent decisions (including some which have been hotly debated in arbitration circles) may play a role in the courts' future analysis of

similar cases. Conversely, the Precedent's clear recognition of the parties' freedom to contract, over the right to work, may signal a robust enforcement regime for arbitral awards, as it illustrates the extent of the "*fundamental principle*" ground, as is often cited against arbitral awards.

¹ You may refer to our [Fraser's Vietnam Arbitration Guide 2023](#) for more information.

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