Vol 1, No 2, July - December 2016, pp: 1 - 6

Faculty Publications
ISSN: 3008-1017
Title DOI: https://doi.org/10.62458/021024

Non-Competition Clause in the French Labor Law

Virak Prum*

ABSTRACT

This article primarily throws a glance at the essence of the non-competition clause in the French labor law. It does so by looking at the evolving jurisprudence on the requirements for the clause's validity and their current application. Since the French had influenced the drafting process of Cambodia's labor law, knowledge of the French jurisprudence may become useful when handling competition-related disputes in Cambodia in the future.

Keywords: freedom, non-competition, jurisprudence.

NON-COMPETITION CLAUSE AS A FREQUENT AND NECESSARY INGREDIENT

In the French labor law, the jurisprudence has over the years developed a set of criterions to help determine whether an employment contract exists in a given situation. This judicial technique lists, among others, several signs although none of them is necessarily self-sufficient: imposition on the time and place to perform work; respect for procedures; obligation to report; modality of remuneration; provision of tools to perform work; existence of an exclusivity clause or a non-competition clause.[2]

Called *clause de non-concurrence* in French, this charming clause is more than just a helpful sign. Essentially, it "serves to limit the freedom of an employee in performing equivalent work for a competitor or for himself after his employment contract has ended." [3] In other words, this clause puts a real "limit on the kinds of work one may exercise in another enterprise after the end of an employment contract." [4]

Employers have come to fancy this limitative clause to help protect their legitimate interests against any potential competition that could be generated or assisted by their former staff. Indeed, a recent study on the usage of this clause clearly notes that employers now frequently insert this clause in employment contracts especially when they worry that certain employees are in a position to redeploy the intangible assets of the enterprise such as technical or technological knowledge, trade secrets or even the organizational skill. [5] This worry should come as no surprise because, for one reason true in France as it is elsewhere,[6] employers usually incur expenses in investing in the so-called "human capital" which they can hardly keep to themselves but which the employees will normally gain through work and will be able to make use of in their future job.[7] For this reason, together with other typical clauses—such as exclusivity, confidentiality— the non-competition clause now often constitutes a necessary ingredient in an employment contract.

* Virak Prum, PhD
CamEd Business School
Email: pvirak@cam-ed.com

NON-COMPETITION CLAUSE IN AN EVOLUTIONAL JURISPRUDENCE

Historically and legally speaking, the French concept of the non-competition clause first arose not in the field of labor law but in the commercial law field, and was primarily aimed at protecting the clientele of an enterprise. In their literature, the theoretical conceptions of *Droit de la concurrence* revolve around two genres of relationship. The "individual relations" conception regulates competitive rapports between two competitors (against, for instance, belittlement of a competitor, deceitful publicity…etc.) whereas the "collective relations" conception more broadly speaks to the need to ensure the existence of a healthy competitive environment in a market economy (against, for instance, monopoly). [8]

Regardless of how strongly judges had felt about those conceptions, it is clear that, initially, the French judges would readily enforce the non-competition clause by arguably founding their reasoning on the famous adage used in Article 1134 of their Civil Code which stipulates that "contracts legally formed hold the force of law for the parties." [9] A non-competition clause is clearly a contractual clause. Therefore, when an employee solemnly took on a contractual pledge not to compete with his former employer, the judges would uphold its legal effect.

Consequently, the non-competition clause usually enjoyed its almost automatic validity while the arguments for its invalidity were only rarely supported. This was the standard application by French courts as long as the clause was not unlimited in time and in space.[10] However, the limitative effect allowed by the early jurisprudence became so worryingly broad that a new case law in 1992 had to create one additional requirement to the clause by which it was no longer enough that the limitation was already temporal and spatial but that its very existence would have to be "indispensible for the protection of the legitimate interests of the enterprise." [11] The strong term "indispensible" was sure to turn things around. Thus began, starting in the 1990s, a reverse course in the judicial interpretation with courts consequently turning more and more reluctant to validate a non-competition clause. Finally, ten years later, in 2002 the jurisprudence completed the evolutional path of the clause when the highest court decided to add yet again two more conditions: the obligation of the employer to pay the compliant employee (a certain amount of money over a certain period of time) and the necessity to consider the specifications of the job held by the employee, [12] the latter condition being meant to leave to the employee the possibility to normally exercise his professional activities.

Having thrown a glance at what the clause means and how the jurisprudence about it has evolved, the following focus will be on its current application. But since there remains an ongoing debate on the impact of the clause on the fundamental freedom to undertake and freedom to work, it is worth mentioning this debate briefly.

NON-COMPETITION AS A LIMIT ON THE FREEDOM TO UNDERTAKE AND THE FREEDOM TO WORK

Commonly known as *la liberté d'entreprendre*—which we may call freedom to undertake—this freedom was first implied in the most sacred republican text issued following the French Revolution in 1789. The Law of 2-17 March 1791 came to expressly recognize this freedom.[13] Although the recognition of this freedom to undertake represented one of the most significant politico-economic developments because the economic activities in the seven centuries prior to the Revolution had been strictly delimited, its constitutional status

was only confirmed two centuries later in 1982 by the Constitutional Council. [14] The freedom to undertake effectively empowers a person to engage in two spheres of actions: freedom in economic activity and freedom in the structural organization of the enterprise. [15] The "prudent" [16]and slow path to giving a constitutional status to this freedom could arguably explain why the courts did not take this freedom seriously but instead took joy in giving effect to the non-competition clause which was clearly restraining this freedom.

Closely related to the freedom to undertake, actually even inseparable from it, is the freedom to work or *la liberté du travail* because, as a leading jurist in the French labor law puts it, "there can neither be employee without an entrepreneur, nor a veritable enterprise without employees." [17] In adding two latest conditions to the non-competitive clause in 2002 as shown above, the French highest court *la Cour de cassation* usefully reasoned that these clauses are in fact contrary to the "fundamental principle of the free exercise of a professional activity." [18]

Trying to strike a right balance between the protection of *liberté d'entreprendre-liberté du travail* and the need to nurture a competitive market economy requires hard choices. Thus, in order to make room for recruiting new job seekers, the law has to set a mandatory age for retirement and use many other means such as reducing the work hours for fulltime workers. This socio-legal debate will perhaps never end. But from a point of view favorable to the employees, the application of the current jurisprudence on the protection of the freedom to work has been rigorous and shows no sign of fatigue, to which the following section now turns.

THE APPLICATION OF THE NON-COMPETITION CLAUSE

The *Cour de cassation,* in its 2002 decision, was sufficiently clear on the requirements for validity:

> A non-competition clause is lawful only if it is indispensible for the protection of the legitimate interests of the enterprise, limited in time and in space, considers the specifications of the job of the employee, and contains the employer's obligation to financially compensate the employee, all of these conditions being cumulative. [19]

The current jurisprudence thus requires four conditions for a non-competition clause to be valid:

- *It must be indispensible for the protection of the legitimate interests of the enterprise*: The true objective of the clause must be to protect the interests of the enterprise, not to ban the employee from finding a job elsewhere. The court will need to take into considerations all such facts on a case by case basis. This condition is inherently tied to the job specifications condition below. Indeed, in its famous 1992 decision, the highest court invalidated a non-competition clause in the employment contract of a window cleaner because, considering the duties of the job, the limitative clause done on vast territories for a period of four years was found to be not indispensible for the protection of the enterprise's interest. This "indispensible" jurisprudence has been applied in a consistent manner.[20]
- *It must be limited in time and in space*: The clause must specify a geographic zone and cannot be excessive in length. The French term *espace* (space) could well mean more than a geographic zone, however; it could be meant to cover a certain type of activity or even a professional sector. In practice, the time and

space components might be evaluated one against the other (longer time for smaller space or shorter time for bigger space). The size of the limitation also depends on whether the skills are totally specific to the employer (thus, resulting in a lesser time-space limitation) or could be used for numerous categories of employers independently of the employer in question (thus, resulting in a more extensive limitation). [21]

- *It must leave possibility for the employee to normally exercise his activity*: Thus, the court will consider all the specifications of the job including the qualifications, the position of the employee in the enterprise, the difficulty in finding a job, the age of the employee, and the job market. It is the condition that the judge must focus on the most as it eventually sets the parameters for all the other conditions.[22]
- *It must provide for financial payment* due to the employee: The amount cannot be derisory (ridiculously small or inadequate). The amount frequently ranges between 30% of 50% of the monthly salary to be paid every month during the period of the clause. The judge, of course, can review the amount; otherwise the judge may play around with the time-space condition. [23] Often hailed as a grand jurisprudential creation, this financial payment requirement is enforced in all types of termination including the termination for serious misconduct of the employee. [24]

Being a contractual clause, a breach by a party would entitle the other to claim damages. If the employer refuses to execute the financial payment, the judge may free the employee from the clause. It seems possible to argue that an employee who complies with a non-competition clause that does not provide for a financial payment (therefore the clause is void) should also be entitled to claim damages. [25] While the employee has no right to unilaterally put an end to the clause, the employer may renounce it within a reasonable period of one month. [26]

CONCLUDING REMARKS: WHAT IS IN THERE FOR CAMBODIAN JURISTS?

Granted, the current Cambodian labor law does not recognize the non-competition clause. Article 70 of the law solemnly reads “Any clause of a contract that *prohibits* the worker from engaging in *any activity* after the expiration of the contract is null and void.” Perhaps a sensible explanation for this denunciation may have to do with the fact that at the time of enacting this law in 1997 the Cambodian economy was just beginning to open up, the modern job market was very small, the skills that foreign investors were looking for were not widely available locally. Within that state of economic reality at the time, the recognition and implementation of non-competition clauses would affect both liberté d’entreprendre and liberté du travail, thereby, hindering the prospects for economic development. But the feeling is past.

Nowadays, however, it may not be very uncommon to see non-competition clauses appearing in employment contracts. The Arbitration Council has not yet established a jurisprudence regarding the Article 70 non-competition clause. Will the arbitrators (or judges) automatically set aside all such clauses? Or, will they interpret the Article 70 in a flexible manner? One key to appreciating Article 70 resides in the interpretation of the term “prohibit.” In terms of the period of time, should this mean an everlasting prohibition or a temporary prohibition, or both? Moreover, in terms of the substance covered under the prohibition, what is in reality prohibited under the term “any activity”?

In the abstract theoretical reasoning, the language of Article 70 may not be as simple as the drafters might have wanted it to be because any legal provision is interpretable.

Perhaps a few good cases will be able to settle the dust. Until then, as I have said elsewhere, law and jurisprudence seem to be products of the evolving interpretations of what we believe in, likely as a part of the "social construction." [27] Given the growing complexity in the types of economic activities in the present time and in the future, if Article 70 one day eventually gets abolished to help protect the legitimate interests of the enterprises, each jurisprudential requirement that this article exposes will play out in its full potential.

---

1 Dr. Virak Prum, LLB, LLM, PhD, teaches Cambodian Business Law classes at CamEd Business School. Date of the article submission: October 2016.

2 Alain Supiot (2011). *Le Droit du Travail*. Paris: Press Universitaire de France, p. 71.

3 This is the definition by the official authority in charge: https://www.service-public.fr/particuliers/vosdroits/F1910 (last accessed in September 2016)

4 Confédération française démocratique de travail-CFDT (1999). *Salariés: Guide de vos droits 2000*. Paris: Syros, p.23.

5 Christian Bessy (2009). "L'usage des clauses de non-concurrence dans les contrats de travail", *Revue d'économie industrielle*, Vol 125, available at http://rei.revues.org/3946 (last accessed in September 2016)

6 In Canada, for example, human capital is viewed as a "real competitive advantage" for which employers may have to invest in "considerable additional resources…into selection, training and development, employee communication systems, and employee relations practices." *See* Hermann Schwind, Hari Das and Terry Wagar (2007). *Canadian Human Resource Management. A Strategic Approach*. Toronto: McGrawHill, p. 194-5.

7 For instance, this is well documented in the US. *See* Oliver Hart and John Moore (1988). "Incomplete Contracts and Renegotiation", *Econometrica*, Vol. 56, n° 4, pp. 755-785.

8 Jean-Bernard Blaise and Richard Desgorces (2015). *Droit Des Affaires: Commerçants, Concurrence, Distribution.* Issy-Les-Moulineaux: LGDJ, p.303-4.

9 The original French reads: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites."

10 This follows a case law of the French highest court (Cour de cassation) in 1928. *See* Michèle Bonnechère (1997). *Le droit du travail: REPÈRES*. Paris: La Découverte & Syros, p.57.

11 Cour de cassation, chamber sociale, 14 May 1992, *see* Michèle Bonnechère, *op cit*.

12 CFDT, *Clause de non-concurrence*, available at https://www.cfdt.fr/portail/le-carnet-juridique/les-clauses-du-contrat/clause-de-non-concurrence-rec_66129 (last accessed in September 2016)

13 This law, known as le décret d'Allarde, reads "… Il sera libre à toute personne de faire tel négoce ou d'exercer telle profession, art ou métier qu'elle trouvera bon…" (any individual will be free to do such trading or exercise such profession, art or craft that he deems good). In the past, the usual legal parlance was la liberté du commerce et de l'industrie (freedom of commerce and industry). It should be noted that the European Union of which France is a member embraces this concept in the *Charter of Fundamental Rights of the European Union* (article 15 on Freedom to choose an occupation and right to engage in work) which became effective in 2009. The text of the Charter is available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT (last accessed in September 2016).

14 Jean-Bernard Blaise and Richard Desgorces, *op. cit*, at 308, 310.

15 Alain Supiot, *op. cit*, at 48-50.

16 "…la conjugaison entre le droit de propriété…et la liberté…préparait la consécration prudente de la liberté d'entreprendre…" (the connection between the property right and freedom paved the way for a prudent recognition…), *See* Guy Carcassonne and Marc Guillaume (2016). *La Constitution*. 16 edition. Paris: Éditions du Seuil.

17 Alain Supiot, *op. cit*, at 47.

18 Cour de cassation, chambre sociale, 10 juillet 2002, N° de pourvoi: 00-45135**.** Text of the decision is available in French at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007046365&dateTexte (last accessed in September 2016).

19 In French, "Attendu qu'une clause de non-concurrence n'est licite que si elle est indispensable à la protection des intérêts légitimes de l'entreprise, limitée dans le temps et dans l'espace, qu'elle tient compte des spécificités de l'emploi du salarié et comporte l'obligation pour l'employeur de verser au salarié une contrepartie financière, ces conditions étant cumulatives." Cour de cassation, *ibid.*

20 CFDT, *Clause de non-concurrence*, *op. cit*.

21 Ibid.
22 Ibid.
23 Ibid.
24 This follows a case law decided in 2006 by the highest court, Cour de cassation, chambre sociale, 28 juin 2006, N° de pourvoi 05-40990.
25 CFDT, *Clause de non-concurrence*, *op. cit*.
26 Cour de cassaction, chambre sociale, 13 juin 2007. N° de pourvoi 04-42740.
27 On “social construction”, see the classical work by Peter Berger and Thomas Luckmann (1966). *The Social Construction of Reality: A treatise in the sociology of knowledge*. New York: Doubleday, Anchor Books.