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COMMERCE AND DISTRIBUTION - CODI 2023
Tập 2

Tập 2

KỶ YẾU HỘI THẢO QUỐC TẾ
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Tập 2

NHÀ XUẤT BẢN ĐÀ NẴNG

CHỦ ĐỀ 5:
THỂ CHẾ, CHÍNH SÁCH, LUẬT PHÁP VỀ THƯƠNG MẠI VÀ PHÂN PHỐI

TOPIC 5:
INSTITUTION, POLICIES AND LAWS FOR COMMERCE AND DISTRIBUTION

PROTECTING ENTERPRISES' COMPETITIVE ADVANTAGE WITH NON-COMPETE AGREEMENTS - A LEGAL PERSPECTIVE

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Abstract: *In a fiercely competitive environment, enterprises must try to create a competitive advantage to survive and develop sustainably. Useful information or technology secrets, collectively known as business secrets, are among the factors that contribute to the enterprises' competitive advantage. Current Vietnamese law does not have a mechanism to effectively protect the business secrets of enterprises. Therefore, enterprises must actively take measures to protect their competitive advantage. Non-compete agreements are among many methods used by enterprises to avoid the risk of disclosure of business secrets from employees. In this article, the author studies protecting enterprises' competitive advantages with non-compete agreements from a legal perspective.*

Keywords: *Business secret; competitive advantage; legal perspective; non-compete agreement.*

BẢO VỆ LỢI THẾ CẠNH TRANH CỦA DOANH NGHIỆP BẰNG THỎA THUẬN KHÔNG CẠNH TRANH - GÓC NHÌN PHÁP LÝ

Tóm tắt: *Trong môi trường cạnh tranh gay gắt hiện nay, các doanh nghiệp phải cố gắng tạo lập các lợi thế cạnh tranh để có thể tồn tại và phát triển bền vững. Thông tin hữu ích hay bí mật công nghệ, gọi chung là bí mật kinh doanh, là một trong những yếu tố góp phần tạo nên lợi thế cạnh tranh của doanh nghiệp. Pháp luật Việt Nam hiện hành chưa có cơ chế bảo vệ hiệu quả bí mật kinh doanh của doanh nghiệp. Vì vậy, doanh nghiệp phải chủ động thực hiện các biện pháp để bảo vệ lợi thế cạnh tranh của mình. Thỏa thuận không cạnh tranh là một trong số các biện pháp được doanh nghiệp sử dụng để tránh nguy cơ bị nhân viên tiết lộ bí mật kinh doanh. Trong bài viết này, tác giả nghiên cứu về bảo vệ lợi thế cạnh tranh của doanh nghiệp bằng thỏa thuận không cạnh tranh dưới góc độ pháp lý.*

Từ khóa: *Bí mật kinh doanh; lợi thế cạnh tranh; góc nhìn pháp lý; thỏa thuận không cạnh tranh.*

1. Introduction

In the context of globalization, international economic integration and the impact of economic, political and social instability around the world, enterprises have to face increasingly cutthroat competition. In that situation, the creation and protection of competitive advantage determine the survival of the enterprises (Nguyen Phuc Nguyen, 2016). An enterprise is said to have a competitive advantage when it implements a value-creating strategy that no current or potential competitor can do it (Barney, 1991). The improvement of technology or innovation is one of the sources of creating and gaining enterprises' competitive advantage to reduce the cost of producing goods/providing services or to improve the quality of goods/services that enterprises provide to the market (Phan Thanh Tu et al, 2018, 167). Factors that create the competitive advantage can be considered as business secrets of enterprises. Especially, in the context of the Industrial Revolution 4.0, business secrets are considered as non-traditional assets that help create enterprises' competitive advantage. However, enterprises face more difficulties in controlling and securing business secrets in the course of conducting business activities compared to other traditional assets. Competitors tend to try to access this non-traditional asset by enticing, recruiting, or re-hiring enterprises' employees, especially employees who have created or have access to useful information and business secrets of the enterprises. To protect the competitive advantage, enterprises can take many measures, including using non-compete agreements to prevent the risk of business secret disclosure from employees.

According to Garmaise (2011), non-compete agreements are contracts that restrict employees from joining or forming a rival enterprise. Another interpretation given by Letitia James (2022), New York State Attorney General, which "*a non-compete agreement prohibits an employee from working for a competitor or opening a competing business, typically for a certain period after an employee leaves a job*". Thus, the non-compete agreement helps enterprises protect their business secrets against the risk of leakage from employees, creating a healthy competitive environment between enterprises. On the other hand, when these competitive advantages of enterprises are guaranteed, they will rest assured to invest in science, technology and innovation to compete successfully, while promoting the creation of new knowledge for mankind. However, from a human rights perspective, non-compete agreements affect employees' right to work. Concretely, an agreement to limit the employee's choice of job or other workplaces, especially after the termination of the labour contract is considered to have restricted the employee's right to work. From a macroeconomic perspective, the non-compete agreements affect the ability of employees to find work, thereby reducing their income and increasing the unemployment rate. Besides, the prohibition of employees from using knowledge and experience gained during working at the enterprise to start a business may go against the policy of promoting start-up activities and the policy of free trade.

In the face of diverse and complex realities of social relations, the article researches and analyzes the current legal situation on protecting enterprises' competitive advantage with non-compete agreements in Vietnam. Then, based on the experience of the laws of some countries, the article makes recommendations to improve the Vietnamese law on protecting enterprises' competitive advantage with non-compete agreements.

2. Literature review, theoretical framework and research methods

2.1. Literature review

Through the research process, the author found that there are some typical works related to the article that will be mentioned and analyzed below:

- Regarding the protection of enterprises' competitive advantages, the following typical studies can be mentioned: (1) In the book "*Business Theory*", Phan Thanh Tu and co-authors (2018) presented the theory of competitive advantage. Accordingly, the authors have identified innovation as one of the sources of enterprises' competitive advantage. The results of the innovation should be kept secret by the enterprise to ensure a sustainable competitive advantage; (2) Nguyen Thi Que Anh (2004) studied many issues on the protection of business secrets, which is considered as one of the factors creating enterprises' competitive advantage. In this study, Nguyen Thi Que Anh assessed the legal status of business secret protection in Vietnam; (3) Sharing the above view, Nguyen Le Thanh Minh (2020) also analyzed the current situation of business secret protection in Vietnam from the perspective of protection registration.

- Regarding the validity of the non-compete agreement, the following typical studies can be mentioned: (1) Le Thi Thuy Huong and Nguyen Ho Bich Hang (2015) acknowledged the importance of business secrets to enterprises and the risk of disclosure when employees who hold such secrets move to work for competitors. These authors argue that the non-compete agreement is the most controversial of the business secret protection methods; (2) Approaching from the perspective of not supporting the non-compete agreement, Le Thu Phuong (2018) believes that the non-compete agreement should not be acknowledged because there is no foundation to speculate that an employee working for a competitor will reveal the former employer's business secret; (3) Unlike Le Thu Phuong, Truong Trong Hieu (2020) has affirmed the necessity of non-compete agreements. However, Truong Trong Hieu also believes that it is necessary to control to avoid excessive abuse by employers.

- Regarding the issue of balancing the interests of the parties in a non-compete agreement, the following typical studies can be mentioned: (1) based on comparative research with French law, Doan Thi Phuong Diep (2015) proposed to set some limits on the application of the non-compete agreement, on the invalidity agreement, on the geographical scope and duration of non-compete to provide more detailed guidance on non-compete agreements; (2) With the same point of view, Do Van Dai and Le Ngoc Anh (2019) pointed out that it is necessary to recognize non-compete agreements. However, for this kind of agreement to take effect, it must satisfy the conditions of application, time limit, geographical space limitation and financial compensation for employees; (3) Proposing to develop a legal framework for non-compete agreements, Tran Thi Thuy Lam and Nguyen Viet Hung (2022) argue that it is necessary to stipulate the subject, purpose, limits of the non-compete agreement and the amount of compensation for employees when entering into this kind of agreement.

2.2. Theoretical framework

To solve the research problems that have been posed, the author will apply the following theories:

- ***Theory of justice***: Justice is a term associated with the development of human society, as well as the goal that a progressive society wants to achieve. The oldest evidence for the question of justice was mentioned in the Code of Hammurabi, the Bible or Sophocles

play Antigone in antiquity and continued to be developed by philosophers in medieval and modern times (Vu Cong Giao & Hoang Thi Bich Ngoc, 2020). In modern times, the theory of justice by John Rawls (1971) has profoundly influenced the study of justice and equity in contemporary philosophy. According to John Rawls, justice is the primary standard of social institutions and human activities. Laws and institutions, no matter how well established, need to be reformed or abolished if they are unjust. The theory of justice is used by the author as a theoretical basis to propose to protect the enterprises' competitive advantage through non-compete agreements. However, it is also necessary to balance the interests of the parties in this agreement to ensure fairness.

- ***Doctrine of inevitable disclosure***: The doctrine of inevitable disclosure is believed to have originated with the decision of the New York State Court (1919) in the *Eastman Kodak Co. v. Power Film Products*. The doctrine of inevitable disclosure holds that courts can outright prohibit competition, even if there is no non-compete agreement if measures to prohibit disclosure are ineffective. Some courts apply this doctrine to enact a competition ban on the assumption that an employee's new position cannot be fulfilled without disclosing the former employer's business secrets (Godfrey, 2004). The doctrine is used by the author to explain the need to protect the enterprises' competitive advantage through non-compete agreements.

- ***Principle of restriction on human rights***: Restriction of human rights is understood as the state's refusal to allow the exercise of a certain human right to an absolute extent (Barak, 2012). According to Bui Tien Dat (2018), the state must use sub-constitutional legal norms to set certain limits for most human rights to ensure a balance between the rights of an individual and the rights of other individuals and society. The issue of limiting human rights has long been mentioned in international law. Accordingly, the 1948 Universal Declaration of Human Rights (Article 29) and the 1966 International Covenant on Economic, Social and Cultural Rights (Article 4) of the United Nations have provided for the principle of restriction on human rights. In Vietnam, Article 14(2) of the Constitution 2013 stipulates: "*Human rights and citizens' rights may not be limited unless prescribed by a law solely in case of necessity for reasons of national defence, national security, social order and safety, social morality and community well-being*". In addition, Article 15(4) of the Constitution 2013 also stipulates the following principle: "*The exercise of human rights and citizens' rights may not infringe upon national interests and others' lawful rights and interests*". The author uses the principle of restriction on human rights to demonstrate the legitimacy of the non-compete agreement if such an agreement is required by law.

- ***Doctrine of unconscionability***: The doctrine of unconscionability has existed since at least Roman Law (Redwood, 2018). The doctrine allows courts to void contracts or terms of a contract that they consider to be fundamentally unfair. Currently, courts can actively balance the interests of the parties when applying the doctrine of unconscionability, instead of the traditional approach of invalidating contracts or terms of the contract because it is contrary to public policy (Spanogle, 1969). The doctrine of unconscionability is used by the author to explain why it is necessary to set limits on non-compete agreements in labour.

2.3. Research methods

In this article, the author used the following research methods:

- ***Statute law analysis***: Vietnamese law has certain similarities with the Civil Law tradition, so the analysis of written law is very important in the legal research process. The

author uses the method of statute law analysis to clarify the will of the legislator hidden in the words of specific articles. On that basis, the author can assess the current situation and propose to improve the Vietnamese law on protecting enterprises' competitive advantage with non-compete agreements.

- ***Comparative law***: This is one of the most important methods when studying jurisprudence. The author uses this method to study the legal system of some countries in the world. On that basis, the author acquires appropriate experiences to recommend improvement of the Vietnamese law on protecting enterprises' competitive advantage with non-compete agreements.

3. Current status of Vietnamese law on protecting enterprises' competitive advantage with non-compete agreements

3.1. Legal measures to protect enterprises' competitive advantage

Enterprises can create and achieve a competitive advantage based on three key resources: (1) innovation; (2) human resources; and (3) organizational structure (Phan Thanh Tu et al, 2018). In which, innovation is the factor that creates business secrets for enterprises. In common sense, a business secret is a useful information needed to create and deliver new or improved goods and services to the market (Nguyen Le Thanh Minh, 2020).

In Vietnamese law, the business secret is considered as one of the objects of protected intellectual property rights. According to the provisions of the Intellectual Property Law 2005 (modified in 2009, 2019 and 2022), a business secret must meet the following conditions to be protected: (1) It is not common knowledge; (2) It gives the holder a competitive advantage; (3) It is taken measures for security by the holder. Unlike other objects of intellectual property rights, business secrets cannot be protected by registration mechanisms with competent state agencies. In other words, information is only a business secret when it has not been disclosed to the public, so it cannot be registered with a state agency for protection. In addition, the current law on intellectual property in Vietnam is still incomplete (Nguyen Thi Que Anh, 2004). Current regulations on the protection of business secrets mainly set out the principles of protection and sanctions in case a competitor illegally accesses an enterprise's business secret. Therefore, the issue of business secrets protection depends mainly on the effectiveness of the measures taken by its holder to protect the exclusivity of the information.

3.2. Validity of non-compete agreements

Before 2012, Vietnamese law did not recognize the validity of the non-compete agreement. Specifically, pursuant to Article 29 of the Labor Code 1994, agreements restricting workers' rights are also prohibited. According to Doan Thi Phuong Diep (2015), the Labor Code 2012 has been considered a "*green light*" legal document for the existence of a non-compete agreement in Vietnam. Article 23(2) of the Labor Code 2012 provides that: "*In case the employee doing works directly related to the business secret, technical know-how as prescribed by law, the employer is entitled to reach a written agreement with the employee on the contents and term of business secret, technical know-how protection, the interests and compensation for the employee's violations*". This provision is almost entirely reserved in the Labor Code 2019.

Although Vietnamese legislators have become more open to protecting enterprises' competitive advantage by allowing parties to reach agreements regarding the protection of business secrets. However, the term "*non-compete agreement*" has not been officially

mentioned in legal documents. In addition, the provisions of the Labor Code 2019 are still general and have not yet clearly defined the validity of non-compete agreements in labour.

There have been a number of cases related to non-compete agreements that have been resolved by Courts or Commercial Arbitration. For example, in a dispute between Company X and Ms Do Thi Mai T which was resolved by the Vietnam International Arbitration Center (VIAC), the Arbitral Tribunal accepted the validity of the non-compete agreement between Ms T and Company X. Accordingly, the Arbitral Tribunal forced Ms T to compensate Company X for violating her non-compete obligation. Then, Ms T requested the People's Court of Ho Chi Minh City to annul the arbitration award. The People's Court of Ho Chi Minh City (2018) did not accept Ms T's request. However, because the law does not directly provide for the validity of a non-compete agreement, there are still some cases where the court does not recognize the validity of this type of agreement. For example, in the dispute between Company U and Mr Phan Thanh B which was settled by the People's Court of Ho Chi Minh City, Mr B is a design employee who signed a non-compete agreement with Company U. However, after leaving his job, Mr B worked for Company P which was a direct competitor of Company U. Therefore, Company U sued to ask Mr. B not to work for Company P. However, in this case, both the first-instance court and appellate court (the People's Court of Ho Chi Minh City, 2019) did not accept the request of Company U because they thought that the non-compete agreement was against the law.

3.3. Balancing the interests of the parties to the agreement

Because the current Vietnamese law does not directly provide for the validity of the non-compete agreement, the issue of balancing the interests of the parties to this agreement has not been specified. The mechanism for adjusting the non-compete agreement still depends on the general provisions of the Civil Code 2015 and the Labor Code 2019. When applying this general adjustment mechanism, the status of employees and employers is considered to be in balance. However, in reality, the negotiating and contracting position of the employee is often weaker than that of the employer (Tran Hoang Hai & Nguyen Thi Hoa Tam, 2012). Therefore, in principle, without a separate provision to balance the interests of the parties to a non-compete agreement, an employer can abuse its negotiating position to unduly restrict the rights to work of an employee with a non-compete agreement.

In some disputes, the issue of balancing the interests of the parties to the agreement has not been considered by the court. For example, in the dispute between Company X and Ms Do Thi Mai T which was resolved by the Vietnam International Arbitration Center (VIAC), the Arbitration Council did not analyze the reasonableness of the non-compete agreement to evaluate the validity of this agreement. Thereby, in case the non-compete agreement is recognized as valid, the court almost accepts the entire content of the agreement without assessing the balance of interests between the employee and the employer in this agreement.

4. Experience with some countries' legislation on protecting enterprises' competitive advantage with non-compete agreements

4.1. The United States of America

The United States is the country with the largest economy in the world and has a deep cooperation relationship with Vietnam. Therefore, it is important to understand the United States law to orient the perfection of Vietnamese law, creating a basis for further promoting the comprehensive cooperation relationship between the two countries. The United States of

America is a federal state, so each state has a different legal system. Therefore, the law on protecting enterprises' competitive advantage with non-compete agreements in each state is also different. In other words, the ability to enforce a non-compete agreement varies from state to state in the United States. In states where non-compete agreements are highly enforceable, courts are willing to recognize agreements of long terms and broad geographic scope, even without material compensation. In contrast, in states where non-compete agreements have low enforceability, it is difficult to enforce any non-compete agreements.

In general, some states rely on the following reasons to accept non-compete agreements as valid: (1) protecting business secrets; (2) encouraging training; (3) facilitating screening; (4) exploiting lack of salience (US Department of the Treasury, 2016). In these states, the degree of enforcement of the non-compete agreement also varies. In New Hampshire, for example, a company can restrict an employee from dealing independently in the future with customers he comes into direct contact with. In Georgia, a non-compete agreement can prohibit an employee from dealing with any existing company customers, even if the employee has no contact with the customer. In Missouri, a non-compete agreement will be enforceable in the region even if the company has no existing business in that region. In Virginia, non-compete agreements are often restricted to the company's current market. In Pennsylvania, the non-compete time limit is 3 years.

4.2. French Republic

The article also studies the legal system of France, the country that represents the Civil Law tradition and has a certain influence on Vietnamese law due to its historical context and certain similarities in legal culture. In France, statutory law does not refer to the validity of a non-compete agreement. However, the case law of the Court of Cassation (Cour de Cassation) provided a rule for determining the validity of a non-compete agreement. In 2002, Case Law No. 00-45.135 of the Court of Cassation clearly stated that: "*...a non-compete clause is lawful only if it is essential for the protection of the legitimate interests of the company, limited in time and space, that it takes into account the specificities of the employee's job and includes the obligation for the employer to pay the employee financial compensation, these conditions being cumulative*".

On that basis, the author clarifies the specific contents as follows. *Firstly*, the non-compete agreement is valid if it is necessary to protect the legitimate interests of the enterprise. Thus, enterprises cannot arbitrarily enter into non-compete agreements with employees. To enter into a non-compete agreement with a specified employee, the enterprise must demonstrate that this is necessary to protect its legitimate interests. *Secondly*, non-compete agreements must be limited in time and geographical space. According to lawyer Oulkhouir (2013), in practice, non-compete agreements rarely exceed 24 months. In addition, the geographical scope must be limited to the area where the employee's activities can effectively compete with the former employer. *Thirdly*, the job characteristics of employees entering into non-compete agreements are also considered. As such, not all employees may be bound by a non-compete agreement. In other words, only employees with access to the enterprise's business secrets can be the subject of a non-compete agreement. *Fourthly*, based on the principle of fairness, in exchange for the non-competitive obligation of the employee, the enterprise must pay a sum of money to compensate for the difficulties that the employee has to endure in the process of implementing the non-compete agreement.

4.3. People's Republic of China

The article also compares the legal system of China, a country with many similarities in politics, economy, culture and society. Both Vietnamese and Chinese legal systems are influenced by Marxism-Leninism and the socialist legal tradition. In China, before 2007, the issue of non-compete agreements was not mentioned by law. During this period, the legal basis governing the protection of enterprises' competitive advantage with non-compete agreements was the Labor Law 1994 and the Contract Law 1999. However, the lack of specific provisions on non-compete agreements leads to certain inadequacies. In 2007, the National People's Congress of the People's Republic of China adopted the Labor Contract Law. The Labor Contract Law has set out the legal framework for non-compete agreements in China.

Article 23 of the Labor Contract Law has allowed employers to enter into non-compete agreements with employees with confidentiality obligations. Article 24 of the Labor Contract Law has defined employees with confidentiality obligations including senior managers, senior technicians and other employees who are under the confidentiality obligation. Thus, the subject of the non-compete agreement is only the employees with the confidentiality obligation. Article 24 of the Labor Contract Law also defines the non-compete period as not exceeding 2 years. The geographical scope of the non-compete agreement shall be agreed upon by the parties and must not be contrary to the provisions of the law. In addition, Article 23 of the Labor Contract Law also requires the employer to pay financial compensation to the employee every month during the performance of the non-competition obligation.

5. Proposals to improve the law on protecting enterprises' competitive advantage with non-compete agreements in Vietnam

From the experience of some countries' legislation on protecting enterprises' competitive advantage with non-compete agreements, the author proposes some recommendations to improve the law on protecting enterprises' competitive advantage with non-compete agreements in Vietnam. As follows:

Firstly, the law needs to stipulate the validity of the non-compete agreement.

Based on the principle of limiting human rights in the Vietnamese Constitution 2013, non-competitive agreements that reasonably restrict the right to work of employees to protect the enterprises' competitive advantage are still valid. These agreements are also consistent with the principle of goodwill and honesty as prescribed in Article 3(3) of the Civil Code 2015. A clearer provision of the validity of a non-compete agreement will provide a clear legal basis for resolving disputes or related legal issues. If the law clearly provides for the validity of a non-compete agreement, disputes or related matters will be resolved consistently in accordance with the law. In addition, acknowledging the validity of the non-compete agreement also helps enterprises protect their competitive advantage from the risk of being disclosed by employees.

Secondly, the law should set limits on non-compete agreements in labour.

Setting limits for a non-compete agreement is important in ensuring the balance of interests of the parties. Besides, this is the basis for the court to determine whether a non-compete agreement is reasonable. Limitations may include the subject of the non-compete agreement, the term and geographical scope of the non-compete agreement, and financial compensation to employees in exchange for the non-compete obligation (Doan Thi Phuong Diep, 2015). Referring to the experience of some countries' legislation, the non-compete agreements should only be applied to employees

who have access to the enterprises' business secrets. In addition, the non-compete term may be specified for a maximum of 2 years. The geographical scope should also be limited to the extent to which the disclosure could affect the enterprises' competitive advantage. Finally, the law should also stipulate the minimum amount of financial compensation that the enterprise must pay to the employee during the performance of a non-compete obligation. The minimum amount of financial compensation should not be lower than the regional minimum wage in accordance with labour law. Based on applying the of unconscionability, the Courts may determine the reasonable amount of financial compensation in each particular case.

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