**The impact of Precedent No. 69/2023/AL on non-compete agreements**

 **in labor relations**

In Vietnam, until the time before Precedent No. 69/2023/AL was published, legal issues related to non-compete agreements in labor relations (“**NCA**”) had not been directly regulated by any legal documents, giving rise to many conflicting views when applying NCA in practice. Accordingly, on 01 October 2023, the Supreme People’s Court issued Decision No. 364/QD-CA to announce 07 new precedents, including Precedent No. 69/2023/AL on the jurisdiction of Commercial Arbitration in resolving confidentiality and non-compete agreement disputes. Hence, after being promulgated, will Precedent 69/2023/AL resolve the legal issues surrounding NCA?

1. **Legal basis**
* Constitution issued by the National Assembly on 28 November 2013 (“**Constitution 2013**”);
* Labor Code No. 45/2019/QH14 issued by the National Assembly on 20 November 2019 (“**Labor Code 2019**”);
* Labour Code No. 10/2012/QH13 issued by the National Assembly on 18 June 2012 (“**Labor Code 2012**”);
* Civil Code No. 91/2015/QH13 issued by the National Assembly on 24 November 2015 (“**Civil Code 2015**”);
* Law on Commercial No. 36/2005/QH11 issued by the National Assembly on 14 June 2005 (“**Commercial Law 2005**”);
* Law on Commercial Arbitration No. 54/2010/QH12 issued by the National Assembly on 17 June 2010 (“**Law on Commercial Arbitration 2010**”)
* Law on Employment No. 38/2013/QH13 issued by the National Assembly on 16 November 2015 (“**Law on Employment 2013**”);
* Law on Commercial Arbitration No. 54/2010/QH12 issued by the National Assembly on 17 June 2010 (“**Law on Commercial Arbitration 2010**”);
* Precedent No. 69/2023/AL was approved by the Judicial Council of the Supreme People’s Court on 18 August 2023 and published under Decision 364/QĐ-CA dated 01 October 2023 of the Chief Justice of the Supreme People’s Court (“**Precedent 69**”);
* Decision 755/2018/QĐ-PQTT dated 12 June 2018 of the People's Court of Ho Chi Minh City (“**Decision 755**”).
1. **Definition**

A non-compete agreement in labor relations can be understood as a commitment between the Employee and the Employer not to directly or indirectly work for a competitor of the Employer or not even to work for the same industry within a certain period after the parties terminate the Labor Contract.

In today’s globalized economy, information issues, especially trade secrets and technology secrets are considered vital for enterprises. It is also an exclusive asset, an instrument for the Employer to do business and seek profits. Therefore, the Employer is seeking better protection for these assets in the course of doing production and business, the Employee is subject to laws, regulations and confidentiality agreements, non-compete agreements even after they have terminated the Labor Contract.

In practice, the NCA has not yet been directly regulated by any legal documents. Although Vietnam’s current laws on labor have expanded the scope of the parties’ agreements, protecting the interests of employers, the term “*non-compete agreement*” has not been mentioned officially and clearly in legal documents.

1. **Impact of Precedent 69 on NCA in labor relations**

Since the right to agree on contents related to the protection of trade secrets of the Employer is recognized in the Labor Code 2012 and continues to be inherited in the Labor Code 2019, legal issues related to NCA such as the validity or competence to resolve NCA disputes have not been uniformly applied. Accordingly, Precedent 69 has had a positive impact in affirming and recognizing Commercial Arbitration with jurisdiction over NCA disputes. However, Precedent 69 has not resolved the controversy over the validity of the NCA. Specifically as analyzed below:

1. **Jurisdiction to resolve NCA disputes**

Previously, Vietnamese laws did not have any regulation on the Commercial Arbitration’s jurisdiction to resolve NCA disputes. According to Article 187 of the Labor Code 2019, previously Article 200 of the Labor Code 2012, individual labor disputes do not confer the right to arbitration but only belong to the Labor Mediator, the Labor Arbitration Council, and the Court. Since then, there have been two conflicting views on the determination of jurisdiction to settle this dispute, one point of view is that the NCA dispute does not fall under the jurisdiction of Arbitration because it is a dispute arising directly from a labor relation, and if it is already a labor relation, it is necessary to apply the laws on labor to determine the settlement authority in accordance to one of the three methods mentioned above. One point of view believes that from a civil perspective on the freedom of agreement of the subjects when entering into a civil transaction, considering that the NCA is an agreement independent of the labor contract and from a commercial perspective, the Law on Commercial Arbitration 2010 defines the competence to settle disputes if there is at least one party participating in commercial activities, in some respects, the Arbitration also has jurisdiction over NCA disputes. However, as there is no specific legal provision, the application also depends on the judgment of the Court for each specific dispute.

Upon the existence of Precedent 69, the Court determined that: “*The Court must determine that the confidentiality and non-compete agreement is independent of the labor contract and disputes arising will fall under the competence of* ***Commercial Arbitration***”.

Based on the content of the case in Decision 755 and the above judgment of the Court, it can be observed that, when there is a dispute about information confidentiality and non-compete agreement between the Employer and the Employee and there is an arbitration agreement, in which the Employer being a trader, having business registration, having commercial activities under the Commercial Law 2005, and a party does not raise any objection to the jurisdiction of the Arbitrator during the arbitration proceedings, then the NCA is determined to be an independent agreement, and when a dispute arises, it is under the jurisdiction of Arbitration as previously chosen by the parties since the execution.

With the above statements, in fact, Precedent 69 has solved the problem of determining the right of Arbitration to settle NCA disputes between the Employee and Employer. This is also an important legal ground for the parties, or competent authorities to use as a basis and make appropriate decisions.

1. **Legal validity of NCA**

Regarding the validity of the NCA, until before Precedent 69 was published, there were two streams of opinion

1. The first view is that the NCA has no legal value because it violates the Employee’s right to freedom of work. Specifically, based on Clause 1 Article 35 of the Constitution 2013 stipulates: “*Citizens have the right to work and to choose their occupations, employment and workplaces*”, Point a Clause 1 Article 5 of the Labor Code 2019 prescribes that the Employee has the right to: “*work; freely choose an occupation, job or workplace*”, Clause 1 Article 4 of the Employment Law 2013 states one of the principles of employment including: “*Ensuring the right to work and freely choose jobs and workplaces*” and Clause 6 Article 9 provides that “*Obstructing, or causing difficulties or damage to, the lawful rights and interests of workers or employers*”, an NCA that requires the Employee not to work for a competitor, or not to freely conduct business within a certain period, is not in accordance with the above regulations and is prohibited by laws, even violating the Constitution - a document with higher legal value than the laws. Therefore, based on Point c Clause 1 Article 117, Article 122, and Article 123 of the Civil Code 2015, the NCA with the above contents is invalid.
2. The second view is that the NCA has legal effect. In particular, this view argues that the NCA was entered into based on one of the basic civil principles: “*freedom, voluntarily entering into commitments, agreements*” (Clause 2 Article 3 of the Civil Code 2015). In other words, the freedom to work is the Employee’s “right”, therefore, the fact that the Employee limits his/her “right” and imposes additional “obligation” on himself/herself is similar to his/her participation in other types of civil transactions. Additionally, as mentioned above, the fact that the law recognizes the right to agree on contents related to the protection of trade secrets of the Employer in the Labor Code 2012 and continues to inherit in the Labor Code 2019 shows that Vietnam has gradually become more open in recognizing NCA.

The second view mentioned above was applied by the People’s Court of Ho Chi Minh City in Decision 755 (the source of Precedent 69) to recognize the validity of the NCA. Specifically, the Court stated as follows (the Court has abbreviated the information confidentiality and non-compete agreement as NDA): “*Considering that Article 4 of the Civil Code 2005 stipulates: “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”.* ***In this case, Mrs. T and Company R have voluntarily executed, when signing Mrs. T is a person with full capacity to act as prescribed by law, and was not coerced, deceived or imposed on Mrs. T to agree to sign the NDA. Therefore, the NDA is valid****. The arbitral tribunal’s recognition of the validity of the NDA is completely lawful*.

1. **Conclusion**

Precedent 69 was created as an important basis to provide a legal solution for asserting the jurisdiction of Commercial Arbitration over NCA disputes. Although Precedent 69 still does not recognize the value of NCA, this is a good sign that Vietnam has gradually paid more attention to NCA. Possibly, in the near future, Vietnam will promulgate more specific and clearer legal provisions to create a solid legal foundation governing non-compete agreements and thereby, protect the parties better in the labor relationship.

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