ADVISORY
MAKARIM & TAIRA S.
COUNSELLORS AT LAW

Enforceability of a Non-Competition Clause in Employment Relations in Indonesia

In an employment relationship between a company and employees, a non-competition clause, is often found in an employment agreement or confidentiality agreement, especially for employees who have access to confidential company information such as information about suppliers, clients, income, etc.

Indonesian laws do not provide any legal definition of a non-competition clause let alone regulate whether such a clause is permissible or prohibited. The Black's Law Dictionary defines a non-competition clause as, "*a promise usually in a sale-of-business, partnership or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner or employer*." Therefore, it can be concluded that a non-competition clause is a clause which obliges one party to the agreement to promise not to perform work in the same field as the other party to the agreement, for a certain time.

Some academics and lawyers do not believe that a non-competition clause is applicable in Indonesia, because it is seen as having the potential to 'eliminate' opportunities for ex-employees to do business or work elsewhere. In addition, non-competition clauses are often thought to violate the following Indonesian regulations:

1. Article 27 of The 1945 Constitution, under which every Indonesian citizen has the right to work and have a life that is worthy of humanity;
2. Article 31 of Law no. 13 of 2003 on Employment (as amended) under which employees must be given equal rights and opportunities to choose a job, obtain a job, or move to another job and earn a decent income, whether they are employed within the country or abroad; and

3. Article 38 (2) of Law no. 39 of 1999 on Human Rights under which everyone has the right to freely choose the job they like and is also entitled to fair employment conditions.

Given the above, in Indonesia, everyone has the right to choose a job and have equal opportunities. Therefore, the non-competition clause should be null and void and unenforceable, because it violates the fourth legal condition for a contract under Article 1320 of the Civil Code, which requires an agreement to have a valid cause.

On the other hand, from the employers' perspective, a non-competition clause is a very important because it prevents or at least minimizes the risk of the ex-employee divulging the company's confidential and proprietary information to a competitor. Employers argue that a non-competition clause should be binding and enforceable due to the freedom of contract principle under Article 1338 of the Indonesian Civil Code. Therefore, if an ex-employee violates a non-competition clause, the employer can take legal action to enforce the non-competition clause by, for example filing a breach of contract lawsuit against the employee and claiming damages.

In practice, in 2017, the East Jakarta District Court handed down ruling No. 54/Pdt.G/2017/PN. Jkt. Tim which found a non-compete clause in an employment relationship is a valid and enforceable clause, by ruling that an ex-employee's violation of a non-compete clause under a confidentiality agreement is a breach of contract. The Jakarta High Court upheld this ruling in 2018, and subsequently the Indonesian Supreme Court upheld the ruling in 2019, as well. The Supreme Court's ruling could have set a precedent for Indonesian manpower laws and may put an end to the long debate regarding the enforceability of non-compete clauses.

After reviewing the ruling, we would like to highlight the following key considerations on which the courts based their rulings:

- **Fairness**: non-competition clauses must be fair and reasonable. This means that the application of the clause must be limited as fairly as appropriate to obtain the protection by the company aims. For example, employees in certain positions who have access to their employers' confidential information may be placed under stricter restrictions than employees assigned to more general roles who may have no or less access to their employers' confidential or strategic information.

- **Limited time and scope**: the time limit and scope of a non-competition clause must be clear and be limited to a specific duration, be reasonable and not excessive.

- **The investment a company makes in its employees**: companies often assign their

employees to join short courses or seminars, as way for the employees to contribute to the development of the companies' proprietary and strategic market information, for which, of course, the companies incur costs. Therefore, a company can argue that its non-competition clause is reasonable, and for a breach of the clause the company should be entitled to compensation from the employee for the loss caused by the employee.

At the very least, an assignment like the above can be used to prove that the employee did indeed have access to the company's proprietary and strategic market information.

- **Liquidated damages**: Indonesian courts require plaintiffs to support their claims for monetary compensation with a detailed and concrete calculation of the exact loss caused by the ex-employee's breach of a non-competition clause, which is often, if not always, challenging and not straightforward because the exact value of divulged or misused confidential information often cannot be calculated. Furthermore, Indonesian private companies' revenue information is not published (like that of public companies). Therefore, inserting liquidated damages in an employment agreement is imperative which will give a legal basis for the plaintiff to claim for damages.

Regardless of the above, please bear in mind that the Indonesian legal system does not adopt *stare decisis* doctrine and courts do not have to follow precedent. Therefore, the Indonesian courts' view in each case is inherently casuistic, and Indonesian judges are not required to follow the ruling quoted above in similar cases.

If you have any questions, please contact:

1. Lia Alizia – Lia.Alizia@makarim.com
2. Golden Mandala – Golden.Mandala@makarim.com
