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GUIDE TO
Non-Compete Agreements

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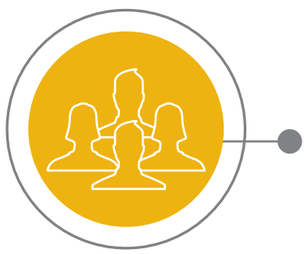
INTRODUCTION

Business practices are changing. Markets are becoming more global and employees are on the move around the world. Employees are key assets driving sales, productivity and profit over different markets. It is therefore vital that your non-compete agreements keep up with these changes to protect your business.

This is a challenge when the legal framework in each country is different and is also changing.

The following is an **easy reference guide to employee non-compete agreements across borders.** It sets out the key considerations to take into account when drafting, updating and enforcing non-compete agreements and restrictive covenants in different jurisdictions in Europe, Africa and the Middle East.

It is critical that HR professionals, in-house legal and commercial managers of expatriate staff have an international perspective and take an international approach to business protection. As this guide shows, the placement of employees in certain countries has a huge impact on the validity and enforceability of non-compete provisions and restrictions they may be signed up to in another country. In many cases, a foreign non-compete agreement may not be worth the paper it is written on.



Employees

are key assets driving sales, productivity and profit over different markets

International

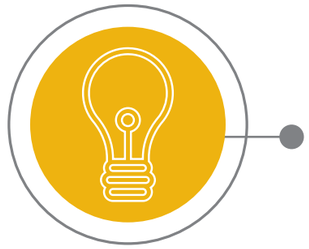
approach to business protection

THIS GUIDE WILL ENSURE THAT BUSINESSES

Have the necessary knowledge to optimise non-compete agreements when mobile staff are first taken on.

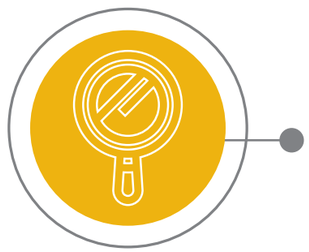
Have the foresight to implement new 'localised' agreements to safeguard the business when staff move to other countries and then the business expands into new markets.

In other words, protect your business! Don't be taken by surprise; use this guide to avoid action taken in isolation in one country from jeopardising business protection in another.



Knowledge

to optimise non-compete agreements



Foresight

to implement new 'localised' agreements

Please note: this guide is for general information purposes only and is not intended to provide comprehensive legal advice. For more information, or for detailed legal advice, please contact any of the lawyers listed at the end of each chapter.

The information contained in this guide is accurate as at 1 November 2017. Any legal, regulatory or tax changes made after this date are not included.

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Restrictions During Employment

As long as the employment contract is effective, employees have a duty of confidentiality concerning the business and trade secrets of their employer. Employment contracts often confirm such obligations. Employment contracts often confirm or expand on the statutory obligation not to compete during the employment relationship.

In addition, during employment white collar workers are neither allowed to run an independent business without the permission of their employer nor to make trades on their own bill or on the bill of their employer. If the employee does not comply with this regulation, the employer may claim compensation for the damage incurred or, alternatively, require that the bills issued on behalf of the employee are viewed as closed. This does not apply to blue collar workers. A duty of non-competition beyond the termination of employment is only possible if this has been explicitly agreed upon in the employment contract.

Restrictions After Employment

A duty of non-competition beyond the termination of employment is only possible if this has been explicitly agreed upon in the employment contract. § 36 AngG (Angestelltengesetz) places several restrictions on non-compete clauses. The clause is invalid if the employee was a minor when the agreement was entered into. In the case of non-minors, the clause is only valid if and to the extent that it:

- applies only to the business branch of the employer;
- does not exceed one year;
- does not put restrictions on the employee for employments outside Austria;
- does not put restrictions on the employee that, as compared to the business interests of the employer, inequitably impede the employee's job opportunities; and
- the employee has a monthly salary of a minimum of gross EUR 3,320.00.

Furthermore it is not possible for the employer to enforce a non-compete clause if the employer has caused the immediate or ordinary termination by the employee, or has terminated the employment without just cause. In this last case, the employer may still invoke the non-compete clause if it is willing to continue full payment of salary or wages to the former employee for the period of the non-compete clause.

In most cases, non-compete clauses are tied to a penalty clause. The penalties are limited to 6 monthly net salaries of the employee. In addition, any such clause is subject to equitable review and reduction by the Labour Court. One important point is that if there is a penalty clause, the employer is restricted from enforcing the non-competition clause by any means other than the penalty.

Top Three Drafting Tips

When drafting a non-compete clause, it is advisable to:

1. Determine whether a non-compete provision is required; this clause should be tailored to each employer.
2. Define the scope of the activities, the geographical scope and the duration.
3. Include a penalty fine in case of violation of the non-compete obligations by the employee.

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Restrictions During Employment

An employee is not allowed to compete with their employer during employment.

Restrictions After Employment

After employment, the employee is not allowed to disclose company secrets or engage in unfair competition. The employee is allowed to engage in fair competition with their former employer, unless a valid non-compete clause is signed. Strict limitations apply in order for the clause to be valid. Some obligations are less strict for "international clauses", which can be concluded for white-collar employees (not sales representatives) and companies with their own research departments or international activities. Specific rules apply for sales representatives.

A valid non-compete clause requires that:

- it is drafted in the correct language (Dutch/French);
- it is limited to 12 months (not for international clauses, for which a duration of 2 or 3 years has been accepted by courts);
- the scope is limited to (1) similar activities, (2) for a competitor or an employee's own account;
- it is limited to where competition is possible, not outside Belgium (international clauses may apply to an exhaustive list of other countries, clauses for sales representatives must be limited to their activity area which can extend outside of Belgium);
- it provides for the payment of an indemnity of at least 50% of the gross remuneration for the duration of the clause (not required for sales representatives); and
- when the contract ends, the employee's salary exceeds EUR 66,944 gross (unless a CBA at industry or company level determines otherwise) or EUR 33,472 gross for sales representatives (amounts 2017).

Non-compete clauses have effect if employment is terminated after the first 6 months of employment, unless the employment was terminated by the employee for serious cause, or by the employer without serious cause. International clauses can, if explicitly foreseen, have a wider range of effect. Employers can waive the application of a non-compete clause within 15 days after the agreement is terminated. Employees who breach non-compete clauses are to pay back twice the indemnity received (unless a court would increase or diminish it). In a clause for sales-representatives, a maximum lump sum indemnity of 3 months can be included.

Top Three Drafting Tips

When drafting a non-compete clause:

1. Carefully check whether the employee is (still!) a sales representative. If so, be aware that including a clause could make it easier for them to obtain a clientele indemnity upon dismissal.
2. Explicitly qualify international clauses as such and explain why having an international clause is possible.
3. Explicitly include the option of waiving its application (and ensure this is done in time and in writing, to avoid paying unwanted indemnities) and the indemnities due by the employee when breaching the clause.

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Restrictions During Employment

Anti-competitive restrictions are allowed during employment. One of the basic labour obligations of employees, set forth in Art. 126, item 9 of the Labour Code, is to be loyal to their employer, not to breach the employer's trust and not to disclose confidential information. The employer is also entitled to prohibit employees from working for other employers under employment contracts during the employment relationship.

Restrictions After Employment

Case law confirms that an obligation on an employee not to carry out any competitive activities after termination of the employment contract contradicts the Constitution of the Republic of Bulgaria because it limits the irrevocable constitutional right of labour of the individual. In addition, a non-compete obligation contradicts the basic principles of labour law such as the principle that the waiver and transfer of labour rights and obligations are invalid. Therefore, any anti-competitive restrictions after the termination of the employment agreement are regarded null and void. This means that such provisions cannot be enforced, even when the employer is prepared to pay compensation to the employee for the agreed non-compete period.

Top Three Drafting Tips

To protect business interests to the fullest extent possible:

1. Always include a prohibition against competitive activities during employment in the employment contract, including a prohibition against working for other employers under employment contracts.
2. Provide a definition for competitive activities in the employment contract.
3. Clearly identify any information which is deemed confidential or a business secret, duly notify the employee in writing of the prohibition to disclose such information and ensure the employee confirms in writing that they are aware of the applicable prohibitions. This will help in case of disclosure of confidential information or business secrets, should the employee start working for a competitor.

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Restrictions During Employment

Employees may engage in the same kind of activities as their employer only with their employer's prior written approval. An employer is entitled to withdraw their permission in writing but is obliged to explain the reason for the change in decision. If permission is withdrawn, the employee is obliged to promptly cease their activities.

This restriction does not apply if the employee is engaged in scientific, educational, journalistic, literary and artistic activities.

Restrictions After Employment

After the termination of the employment agreement, the employee is free to compete with their former employer, unless restrictions were agreed upon. A non-compete clause must be in writing. The restriction may last no more than one year from the end of the employment relationship. A non-compete clause may be agreed with the employee only if this commitment may be fairly requested from the employee with regard to the nature of the information, know-how and knowledge of working and technological procedures that the employee acquired while employed at the employer and the use of which could seriously impede the employer's business.

The employer may rescind a non-compete clause (in writing) but only while the employment relationship exists. No reason needs to be given.

The employer is obliged to provide the employee with monetary compensation during the period of restrictions pursuant to the non-compete clause. The compensation has to be at least one half of the average monthly income for every month that the commitments under the competition clause are observed. The compensation has to be paid to the employee on a monthly basis, unless some other arrangement is agreed.

A contractual penalty may be agreed in the competition clause in the event the employee breaches commitments laid down in the non-compete clause. Payment of the contractual penalty releases the employee from commitments under the competition clause. The contractual penalty has to be agreed in an amount that is reasonable with regard to the nature and importance of the information, procedures and knowledge acquired by the employee during the employment relationship. The appropriateness of the contractual penalty will be assessed individually according to the specific circumstances of the case.

The employee may also withdraw from the non-compete clause if the employer does not pay the compensation within 15 days of the date due. The non-compete clause then expires on the first day of the calendar month following the month in which the notice of withdrawal was delivered.

Top Three Drafting Tips

1. Include the specific activity that the employee undertakes to refrain from after termination of the employment agreement.
2. If a probationary period is agreed upon, it is recommended that the non-compete takes effect only once the employee's probationary period ends.
3. Include at least the minimum compensation in the non-compete provision.

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Restrictions During Employment

All employees are subject to implied duties during their employment designed to prevent them from competing with their employer, including loyalty and fidelity and non-disclosure of confidential information.

Duties of non-disclosure are not limited in time. However, employers are advised to make employees aware of these obligations by including express terms in their contracts of employment.

Restrictions After Employment

Under Danish law, restrictive covenants are divided into either (i) a non-competition clause, and/or (ii) a non-solicitation (of customers and/or suppliers) clause. If both clauses have been agreed with the employee, the clauses are referred to as a combined clause.

It is no longer possible under Danish law to agree to non-solicitation of employees clauses. However, it is still possible to use such clauses in connection with business transfers to a limited extent.

Non-competition clauses:

1. can only apply to "particularly trusted employees";
2. must include a description in writing on why the clause is required;
3. only apply if the employee has completed at least six months' continuous employment at the time of termination;
4. are valid for a maximum of 12 months counting from the termination of the employment (maximum six months if it is a combined clause); and
5. can only be upheld if compensation is paid during the entire term of the clause (see below).

Non-competition clauses do not apply if the employee is considered a good leaver. The clause is only valid if the employee is given information about items i-v in writing.

Non-solicitation clauses:

1. can only be enforced in regards to customers with whom the employee has been doing business himself/herself within the past 12 months before the date of giving notice to terminate the employment
2. only apply if the employee has completed at least six months' continuous employment at the time of termination;
3. are valid for a maximum of 12 months counting from the termination of the employment (maximum six months if it is a combined clause); and
4. can only be upheld if compensation is paid during the entire term of the clause (see below).

Non-solicitation clauses apply as a general rule regardless of which party has terminated the employment. The clause is only valid if the employee is given information about items i-iv in writing.

Compensation:

If the term of the non-competition or non-solicitation clause is six months or less, the compensation must be equal to at least 40% of the employee's monthly salary. If the term is more than six months, the compensation must be equal to at least 60% of the monthly salary. If the employee is restricted by a combined clause, compensation must be at least 60% of the monthly salary.

Compensation may be reduced to either 16% (if the employee is entitled to the 40% compensation) or 24% (if the employee is entitled to the 60% compensation) if the employee finds other suitable work. This, however, does not apply to the initial two months of compensation, which shall be paid out as a lump sum.

Top Three Drafting Tips

To maximise potential enforcement of post-termination restrictions;

1. Consider whether the company needs the protection of a non-competition clause or whether the protection of a non-solicitation clause is sufficient. Employers can only enforce one of the clauses for up to 12 months, and a non-solicitation clause can be enforced regardless of which party terminates the clause.
2. Restrictions should be as relevant and insensitive to time (changes in the business) as possible in terms of scope and geographical coverage.
3. Restrictions should be tailored to the employee's role and seniority.

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Restrictions During Employment

During the term of employment the employee is not allowed to compete with employer and should not carry on any activity or engage in any business that are similar to the business of the employer, whether in his or her capacity as an employee or as a partner in that business nor to engage in any work for a third party, with or without remuneration, which competes with the employer's activities.

The Egyptian Labour Law No. 12 (2003) (the "Labour Law") entitles the employer to terminate an employment contract if the employee competes with the employer in its activities, as this will be considered committing one of the grave faults that are explicitly stipulated under the Labour Law that entitles the employer to justifiably dismiss the employee.

Restrictions After Employment

After employment, the employer may limit the employee from competing through a non-compete agreement. A non-compete clause can be a part in the employment contract or in a separate agreement to be signed by the employee. The validity of such agreement requires that (i) the employee is not a minor when the agreement was entered into and (ii) the restriction imposed is limited in terms of time, place and nature of the work to the extent necessary for the protection of the legitimate interests of the employer.

However, it is not possible for the employer to enforce a non-compete clause if the employer has rescinded or refused to renew the employment contract without a justified cause. The employer cannot also invoke a non-compete clause if the employee has terminated or rescinded the employment contract due to the employer's failure to perform the obligations provided under the employment contract. Hence, a non-compete clause does not bind an employee if the employment contract is terminated due to reason(s) attributable to the employer.

There is no statutory provision requiring the employer to pay any financial compensation to the employee for maintaining a non-compete clause.

The employer may set in advance the amount of compensation that should be paid in case the employee breaches the non-compete clause (i.e. liquidated damages), however the said amount may not be due if the employee proves that the employer has suffered no harm. In addition, the judge may also reduce the amount of liquidated damages if the employee proves that the amount fixed was greatly exaggerated or that the original obligation has been partially performed.

The Law did not specify a specific term for a non-compete clause; however, the common practice is one year starting from the end of the employment contract.

Top Three Drafting Tips

1. Conclude a non-compete clause or agreement as a condition for hiring, and clearly state therein that the employee shall not directly or indirectly, engage in any business, which is similar to or competes with the employer or any of its affiliates or subsidiaries.
2. Explicitly determine the restricted activities, geographical area and ensure that they relate with the employer's activities and interests.
3. Determine the term of the non-compete, set an appropriate amount for compensation in case the employee breaches the non-compete clause and ensure that it is reasonable, as any clause with an excessive amount or time will be void.

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Restrictions During Employment

Employees have a general duty of loyalty towards their employers. During the employment relationship, the employees are not allowed to work for another party or engage in such activity that would, taking into consideration the nature of the work and the individual employee's position, cause manifest harm to their employer as a competing activity contrary to fair employment practices.

During the term of the employment relationship, the employees are not allowed to embark on any action to prepare for competing activities as cannot be deemed acceptable.

Further, during the term of the employment relationship, the employee is not allowed to utilize or divulge to third parties the employer's trade or business secrets.

Restrictions After Employment

After the employment relationship has ended, the employers are only allowed to limit their employees from competing through a non-compete agreement or a clause. Such an agreement may limit the employee's right to conclude an employment contract with an employer engaging in operations competing with the first-mentioned employer, and also the employee's right to engage in such operations on his or her own account.

A non-compete agreement can only be concluded (at the beginning of or during the employment relationship) for a ***particularly weighty reason*** in the assessment of which the following is taken into account:

1. the nature of the employer's operations;
2. the need for protection related to keeping a business or trade secret or to special training given to the employee by the employer; and
3. the employee's status and duties.

The maximum term for a non-compete agreement is six months starting from the end of the employment relationship, but it can be one year if the employee has received reasonable compensation for the imposed restrictions. The employer does not have to pay compensation for the non-compete period, if the period is up to six months.

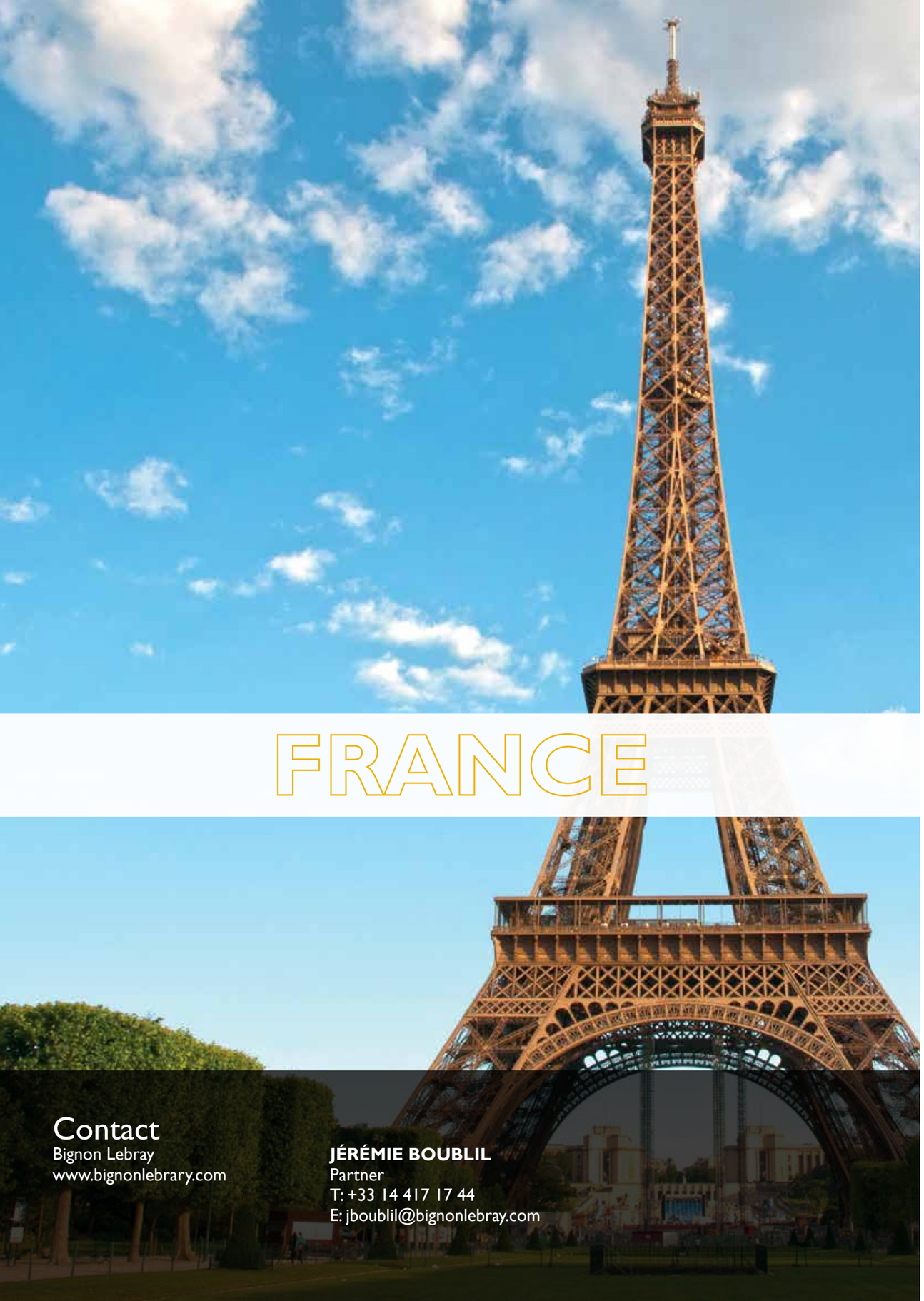
Instead of compensation for loss, non-compete agreements may include a provision on contractual penalty. The contractual penalty shall not exceed the amount of salary received by the employee for the six months preceding the end of the employee's employment relationship.

However, the above-mentioned restrictions on the duration and on the maximum contractual penalty do not apply to such employees who, in view of their duties and status, are deemed to be engaged in the direction of the enterprise, corporate body or foundation or an independent part thereof, or to have an independent status immediately comparable to such managerial duties.

A non-compete agreement does not bind the employee, if the employment relationship is terminated for a reason deriving from the employer such as financial and production related reasons.

Top Three Drafting Tips

1. Determine and assess the necessity and requirements for the non-compete agreement.
2. Add in any case separate provisions on non-disclosure and non-solicitation as these are not under the restrictions stated above.
3. Include a provision on contractual penalty (regarding non-compete obligation, non-disclosure and non-solicitation) because the amount of damage caused can be difficult to prove.



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Restrictions During Employment

The employee is not allowed to compete against its employer during employment. The employee is subject to a duty of loyalty and also should not disclose confidential information. If the employee commits a breach of one of these duties (for example, the employee is preparing to compete whilst still employed), the employer could dismiss the employee for gross misconduct and may file a claim against him to seek damages.

Restrictions After Employment

After the termination of the employment contract, the employee is not allowed to disclose company secrets or engage in unfair competition. The employee is allowed to engage in fair competition with its former employer, unless a valid non-compete clause is signed. If a non-compete clause is signed before or during employment, strict limitations apply in order for the clause to be valid. The collective bargaining agreement applicable to the employer could also include specific provisions regarding the non-compete clause.

The clause must be necessary for the protection of legitimate interests of the company (for example, the clause is legitimate for the manager of a travel agency but not legitimate for a window cleaner). The clause must also be time-limited. Generally the clause is enforceable for one year, sometimes two years. Any clause with an excessive time limit will be considered void. In addition, there needs to be a geographical limitation (for example, France/Parisian region). The clause should take into account the specificities of the employee's position. The non-compete clause may not prevent the employee from finding a position corresponding to his level/expertise.

The employer needs to pay financial consideration for the duration of the non-compete obligation. The compensation may not be insignificant and should amount to at least 30% of the monthly salary of the employee. The compensation is paid each month.

If one of the aforementioned conditions is not fulfilled, the clause is void, but only the employee can claim the invalidity of the clause. Until recently, it was considered that a void non-compete clause would necessarily cause harm to the employee. The employee was therefore entitled to ask for compensation without having to prove a damage.

A recent decision of the Cassation Court (25 May 2016) has ruled that employees may not simply invoke a void non-compete clause when asking for compensation without first proving that they have suffered a damage.

The employer could decide to waive the clause at the end of the contract. This should be done within the time-limit indicated in the clause (provided that it is a short time-limit, e.g. 8 days). It is better to waive the non-compete clause as soon as possible (e.g. in the dismissal letter or in a cover letter in case of mutual agreement). The waiver must be explicit and unambiguous and the employee must be individually notified of the waiver.

In any event, the non-compete clause must be waived no later than on the employee's effective departure date from the company.

Employees who breach non-compete clauses are required to pay back the indemnity received and could be ordered to pay damages on top.

Top Three Drafting Tips

When drafting a non-compete, we recommend to:

1. Only introduce a non-compete clause if it is really necessary.
2. Include payment of the minimum financial compensation.
3. Explicitly include the possibility of waiving its applicability (and ensure this is done in due time if needed) so as to keep flexibility.

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Restrictions During Employment

According to section 60 of the German Commercial Code (Handelsgesetzbuch, "HGB") an employee is not permitted to enter into competition with its employer during the course of the employment. In the event that an employee does not comply with this obligation, the employer may impose sanctions such as dismissal or the withholding of remuneration. The employer can also claim damages or seek injunctive relief. Furthermore it can be agreed on a contractual penalty, although case law provides for very stringent rules to validly stipulate such penalty clauses.

Restrictions After Employment

After the end of their employment an employee is not obliged to refrain from competition, unless a post-contractual non-compete agreement has been concluded by the employer and the employee according to section 110 of the Industrial Code (GewO) and section 74 to 75f of the German Commercial Code (HGB). Such an agreement is only valid and enforceable if the statutory prerequisites are met:

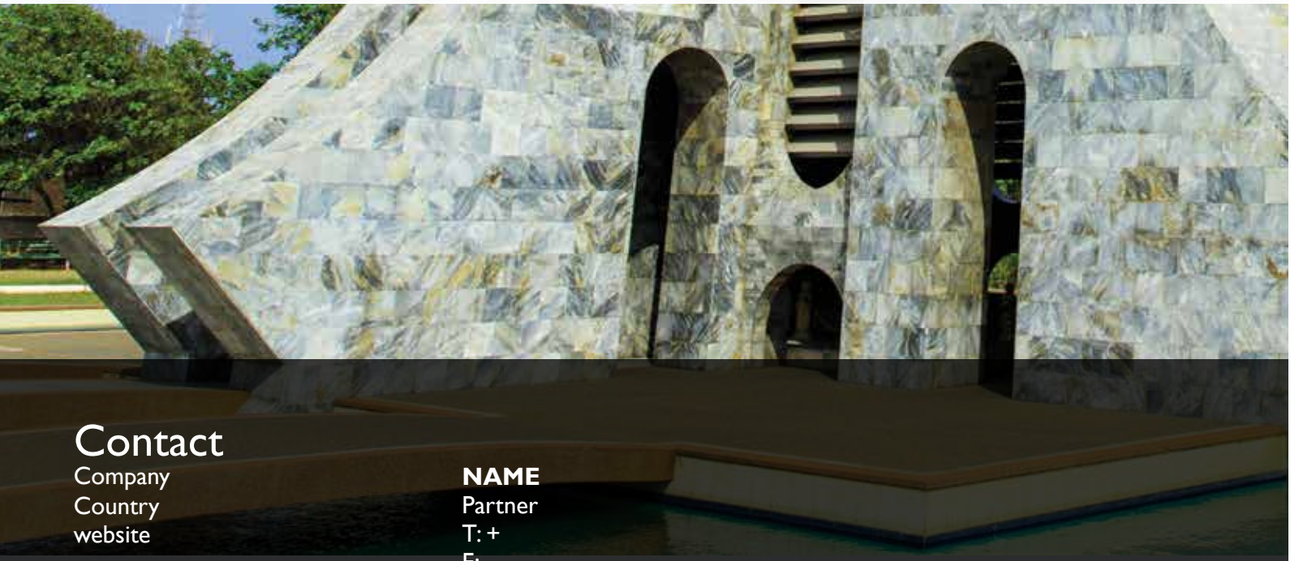
- (inked) written form (e-mail or fax is not sufficient);
- maximum duration of two years;
- employee receives a document containing the non-compete clause, duly signed by the employer;
- agreement is required to serve the protection of legitimate business interests of the employer regarding place, time and subject of restriction. The appropriate geographical scope of a non-compete agreement usually depends on the nature and scope of the employer's business. The covenant must not go beyond the area where an employee can be in competition with the employer. For example, if an employee worked in Germany only, a worldwide non-compete obligation would not be enforceable. The mere interest of the employer to keep an employee away from the market will not be considered as a legitimate interest in this respect; and
- mandatory financial compensation for the agreed non-compete period in the amount of at least 50% of an employee's benefits of the previous year (fixed salary plus all bonuses, car-allowances, premiums, etc.). If such compensation is not agreed upon, the non-compete clause is null and void. If the agreed compensation does not meet the statutory level, the clause is not binding. An employee may then decide whether they want to accept the lower level of compensation and remain bound to the clause, or to be released from it.

The employer may waive the non-compete obligation any time during the course of the employment in (inked) written form. In case of such a waiver, an employee is immediately released from complying with the non-compete obligation. However, the employer still has to pay the agreed compensation for up to 12 months. The actual period depends on the duration of the non-compete originally agreed upon.

Top Three Drafting Tips

1. Only agree on a post-contractual non-compete clause if it is really necessary (e.g. with a key employee with close relations to customers or knowledge of important confidential business information) and carefully weigh the costs of the post- contractual financial compensation against the benefits.
2. Ensure compliance with procedural formalities (e.g. in written form, the signed agreement is handed to the employee and receipt is confirmed by the employee).
3. Use tailor-made clauses that impose only reasonable restrictions on an employee (instead of pre-formulated standard clauses) – otherwise the entire clause might be null and void. Always consider an extended notice period (e.g. six months) as an alternative to avoid any intrinsic uncertainty with respect to the validity of the non-compete.

GHANA



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Restrictions During Employment

Ghana's Labour Act 2003 (Act 651) and the Labour Regulations 2007 (L.I. 1833) has no provision on employee competition during employment. Employers may however impose restrictions on an employee by entering into non-compete agreements or a clear provision in the employment contract imposing certain restrictions. Such restrictions must be reasonable and for a defined term.

The main duty of the employee under Act 651 is to protect the interests of the employer. Employees owe their employers the implied duties of confidentiality, loyalty and fiduciary duty. Employees in higher positions of employment are subject to a higher degree of fiduciary duty. The extent of employee's duty will be known once express terms are provided for in the non-compete agreement or the employment agreement between the parties.

Restrictions After Employment

Act 651 does not regulate non-compete agreements.

Employees are at liberty to do what they like subject to:

1. The implied duty not to disclose or use secret information or trade secrets of the employer without the consent of the employer and in a manner contrary to honest commercial practices;
2. The implied duty to keep confidential what has been agreed upon as confidential between the employee and the employer;
3. Restrictions on the employee working for a competitor of the employer, soliciting the customers of the employer, entering into competitive transactions with the clients of the employer and poaching staff of the employer within a defined term.
4. Any contractual restrictions agreed between the employee and the employer to safeguard the best interests of the employer.

In the event that the employee breaches the non-compete agreement, the employer may claim damages or obtain an injunction to ensure that the employee ceases to breach the non-compete agreement.

Top Three Drafting Tips

1. The non-compete agreement should clearly be limited in the prohibited activities of the employee, scope, duration and territory.
2. There should be some form of consideration for the restriction imposed on the employee.
3. The non-compete agreement should be amended, taking into account the new duties assigned to the employee, whenever the employee changes his/her position held with the employer.

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Restrictions During Employment

Non-compete clauses during employment are in principle considered permissible restrictions on the employee since the duty of an employee not to engage in competitive activities vis-à-vis the employer derives from the employee's general fiduciary duty. Similar clauses are therefore not subject to much scrutiny unless they are considered as overburdening the employee's freedom to work.

Restrictions After Employment

- Non-compete restrictions after the termination of the employment agreement, although considered as deriving from the general contractual freedom of the parties, are more strictly scrutinized.
- There is no standard applicable test regarding the enforceability of such clauses and the matter is considered on a case-by-case basis. However, in principle, a post-employment non-compete clause may be enforceable under Greek law provided that it does not overburden the employee's freedom to work.

Most commonly applicable criteria to this effect are:

- duration: the clause should be of a limited duration, normally not in excess of one to two years after the termination of the employment;
- territorial radius: the clause should be of a specific territorial radius, so as to allow the employee to be able to seek work within reasonable proximity from his home base;
- activities concerned: the clause must be restricted to activities as similar as possible to the employer's; and
- professional specialization of the employee subject to the clause along with the employee's position in the employer's business.

In general financial consideration is not necessary unless the relevant clause is viewed as overburdening.

Top Three Drafting Tips

1. Draft the clause as narrowly as possible; to this effect limit its duration to not more than 1-2 years post-employment, include a specific territorial radius and restrict it to business activities similar to the employer's.
2. Avoid imposing post-termination non-compete restrictions on non-executive employees and employees with no substantial access to the employer's trade secrets, know-how etc.
3. Include financial consideration if the non-compete clause does not fully comply with the above or if the employee's professional specialization is very narrow and strongly interrelated to the employer's professional sector.

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Restrictions During Employment

An employee may not endanger the legitimate economic interests of their employer during the term of their employment. Based upon this regulation, an employee must primarily refrain from performing work for a competitor. An employee shall hold any business secrets obtained in connection with their employment in strict confidence. In addition, an employee may not disclose to any unauthorized persons any data they obtained in connection with their employment, which if disclosed may have a detrimental effect on their employer.

Restrictions After Employment

- An employee is free to establish new employment after the termination of their employment, unless they have signed a non-compete agreement.
- Under a non-compete agreement, an employee may not violate or endanger the legitimate economic interests of their former employer for a maximum period of two years after the termination of their employment.
- An employer shall pay adequate compensation for the above undertaking. When determining the amount of compensation, the extent of the employee's hindrance in establishing a new employment – considering especially his/her education and experience – shall be considered. Should the amount of compensation be later deemed inappropriate, the court is able to make an adjustment or to classify the entire non-compete agreement as invalid. The amount of compensation for the term of the non-compete agreement cannot be less than one third of the employee's base salary for the same period. Compensation can be paid in one lump sum or in several instalments.
- Non-compete agreements can be concluded anytime during employment.
- An employee may rescind the non-compete agreement if they terminate their employment with immediate effect (as a result of a serious breach of the employer's obligations). The parties may establish a mutual right of rescission of the non-compete agreement on other grounds as well, or may even agree that the employer may rescind the non-compete agreement before the termination of employment without good reason.
- An employee shall hold their employer's business secrets in strict confidence even if a non-compete agreement has not been established.
- A non-compete agreement should be in writing.

Top Three Drafting Tips

1. Define the scope of the restricted activities, the geographical coverage and the duration.
2. Include a penalty in case of violation of the non-compete agreement by the employee.
3. Define the circumstances in which the non-compete agreement may be rescinded.

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Restrictions During Employment

Employees are bound by duties of confidentiality, however, for clarity, employers should set out any restrictive terms in a written contract of employment. Contracts typically include clauses on:

- exclusive service – the employee should not carry on or be engaged in any other business or occupation unless prior consent has been obtained; and
- confidentiality and trade secrets – any trade secrets or confidential information should be protected. Confidential information entrusted should not be used in a way which may injure or cause loss to the employer or its business. This restriction can continue to apply after termination of the agreement.

Restrictions After Employment

In drafting post-termination restrictions, there is a balance between the rights of an employer to protect its business and the right of an employee to earn a livelihood. The scope of the restrictions must be clearly defined, particularly in respect of the scope of activity restricted, the duration and geographic area covered.

Post-termination restrictions are enforceable but must go no further than what is reasonably necessary to protect the employer's business. What is reasonable will vary in each situation and each case is looked at on its own merits. In assessing the reasonableness of the duration the courts will assess how long it will take for the employer to take the necessary steps to protect the goodwill of the business. A clause providing for in excess of 6 to 12 months will be subject to challenge.

Post-termination restrictions can be critical in protecting an employer's business. Boilerplate clauses are not appropriate and each restriction should be carefully drafted, with regard to the level and role of the employee and their ability to influence key customers.

Top Three Drafting Tips

1. Clear and concise wording – any ambiguity will be read against the employer!
2. Be reasonable – know what business interests need to be protected and be effective in protecting those interests!
3. Be upfront – get the restrictions in place when the employee is first employed. It will be difficult to introduce them at a later stage!

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Restrictions During Employment

Under Article 2105 of the Italian Civil Code, during the employment relationship an employee is forbidden from acting in competition with their employer, or in favour of competitors of their employer, irrespective of any specific agreement between the parties. If the employee breaches this restriction, an employer can lawfully dismiss for serious misconduct. This restriction is only effective during the employment relationship, unless there is a specific agreement for it to continue after employment ends (see below).

Restrictions After Employment

After the termination of the employment agreement, the employee is free to compete with their former employer, unless restrictions were agreed upon. Such agreement is aimed at preventing the employee from performing certain functions, duties and activities after the termination of the employment relationship, in return for specific compensation. In any case, the non-compete clause should not frustrate the employee's working chances, preventing them from performing any activity.

To this end, according to Section 2125 of Italian Civil Code, the agreement shall be deemed as null and void in the absence of the following requirements:

- it is in written form;
- it provides for certain and specific compensation;
- it specifies time limits as to the duration of any restrictions;
- it specifies territorial limits (which can be extended even outside the National boundaries, if compensated with suitable remuneration or balanced by other objective limits); and
- it specifies objective limits (such as specific tasks, jobs, activities, competitors or categories of them).

In case of challenge, all the above elements must be as specific as possible to avoid the clause being deemed unclear/uncertain and therefore nullified.

The Italian Civil Code expressly provides mandatory time limits, which vary depending on the employee's classification, as follows:

- Executives: maximum 5 years
- Other employees: maximum 3 years

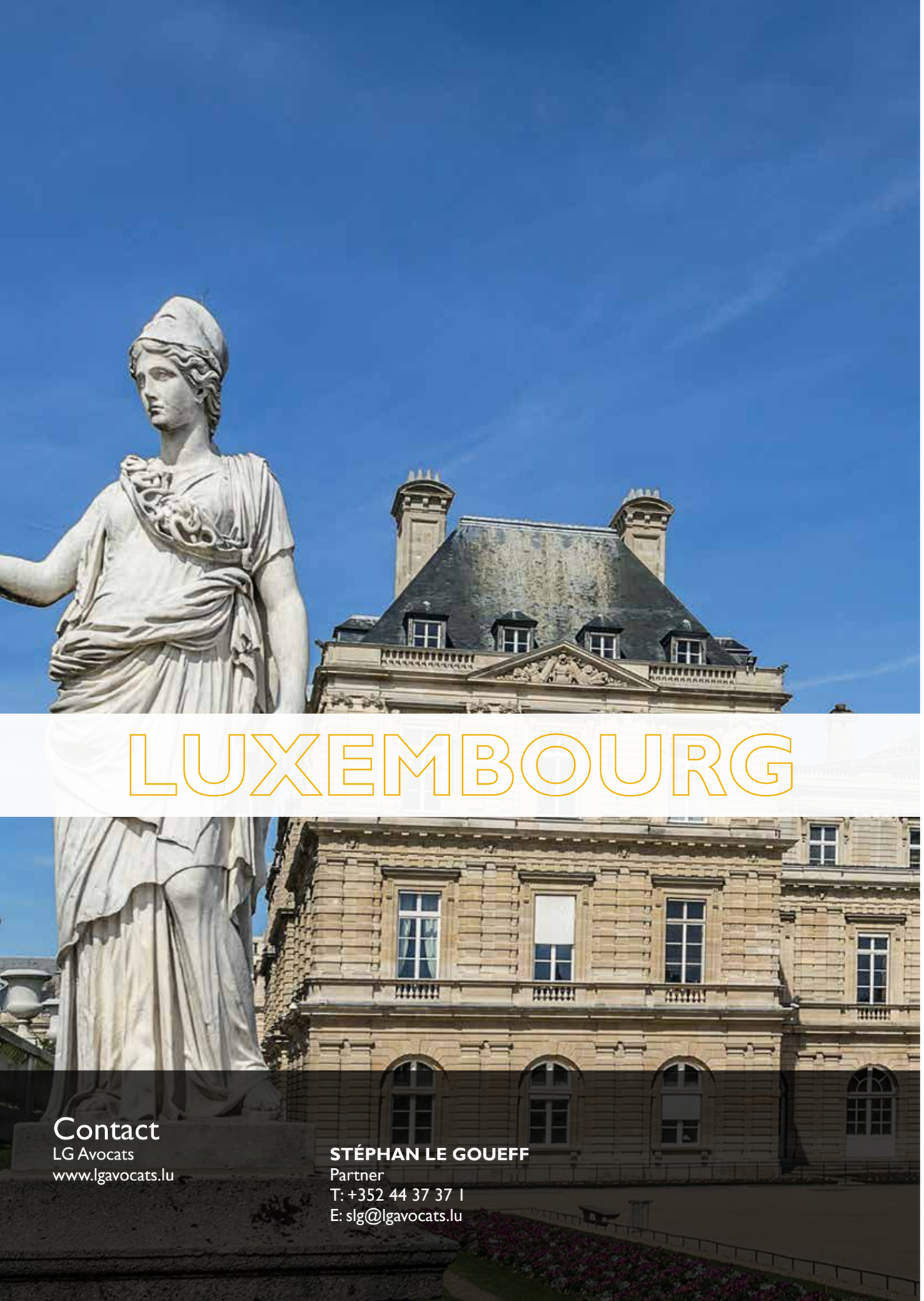
If a longer duration is agreed by the parties, the duration will automatically be reduced to the above mentioned limits.

Payment of adequate compensation is required. The territorial extent of the non-compete obligation, the duration of the agreement, and the activities which are the subject of the agreement, must be taken into consideration when determining the compensation. Moreover, the compensation should take into account the employee's residual skills and activities which are not frustrated by the obligation. The compensation can be paid as a one-off payment or in multiple installments.

The duration of the non-compete agreement must be predictable "in advance". Therefore, the employer's right to unilateral withdrawal is limited.

Top Three Drafting Tips

1. Specify the territorial limits and the time limits of the non-compete agreement.
2. Provide a detailed list of the activities restricted by the non-compete agreement.
3. The compensation should not be less than 25-30% of the annual gross remuneration of the employee to be deemed fair.



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Restrictions During Employment

An employee, subject or not to a non-compete agreement, has an implied duty of fidelity and loyalty towards their employer and is expected to comply with the general principle of good faith. The employee is also under an obligation to act solely for the benefit of their employer, rather than for a competing company or for their own interests. During the employment agreement, the employee cannot be prevented from preparing for a future activity that may be considered competitive if the employee starts their activity after the employment contract has come to an end.

Restrictions After Employment

The non-compete clause may only be enforced under Luxembourg law provided that it complies with the following conditions:

- the non-compete clause must be agreed in writing and included in the employment contract or in an addendum to the employment contract;
- the annual gross salary of the employee should exceed a certain amount at the time of termination of the employment contract (around €52,000);
- the non-compete clause must be geographically limited to a region where the employee can reasonably be considered as competitive. In any case, it cannot be extended outside the territory of the Grand-Duchy of Luxembourg;
- the non-compete clause must be restricted to a specific professional sector as well as to professional activities which are similar to those performed by the employer; and
- the non-compete clause must be limited to a 12 month period, which shall start at the end of the employment contract.

It is to be noted that financial compensation is usually granted to the employee, even if not formally required by Luxembourg law.

Top Three Drafting Tips

1. Verify that the non-compete clause complies with all the legal requirements, failing which it may be considered void.
2. State in the employment contract the sanctions applicable (penalties) in case of breach of the non-compete clause by the employee.
3. Verify that the non-compete clause is clear and precise especially when describing the professional sector restrictions.

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Restrictions During Employment

If restrictions are needed during the employment of an employee, it is advisable to agree this explicitly in a non-compete provision. However, the Civil Code also stipulates that an employee has to comply with general principles of good faith. It can be argued that this implies that an employee is not allowed to compete with their employer during the employment relationship. There is also a general obligation for an employee not to disclose confidential business information to third parties.

Restrictions After Employment

After the termination of the employment agreement, an employee is, in principle, free to start working for a competitor, unless restrictions apply pursuant to a non-compete clause (which include a non-solicitation clause as well).

However as from 1 January 2015, the following conditions apply to a fixed-term employment agreement concluded on or after 1 January 2015:

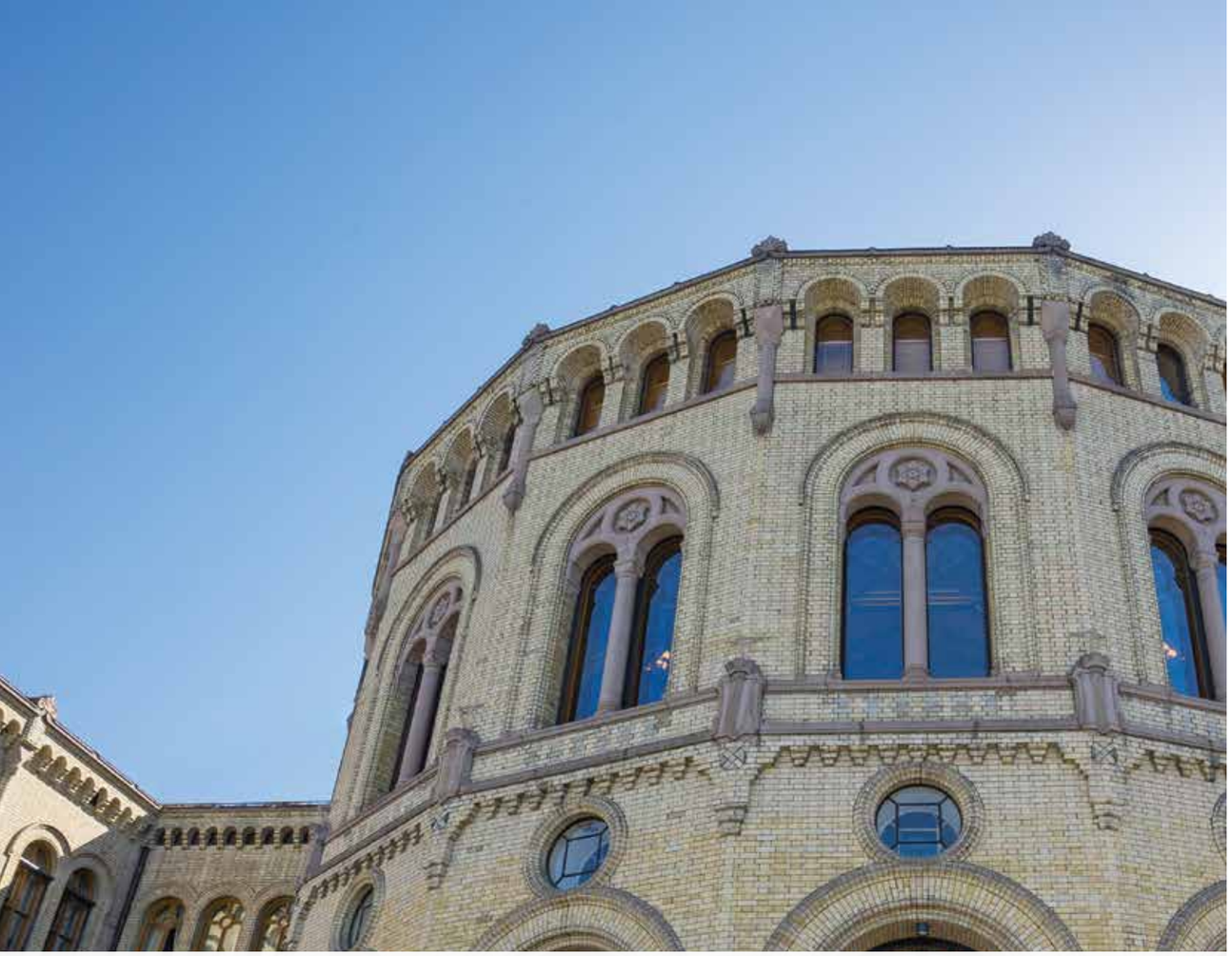
- It is no longer permitted to include a non-compete provision in a fixed-term contract, unless the employer has included 'sufficiently specific and detailed written reasons in the employment agreement as to why the provision is necessary due to compelling business or service interests'.
- The necessity for a non-compete provision due to compelling business or service interests must exist both at the time of concluding the employment agreement and at the time when the employer invokes the non-compete provision.
- The court may declare a non-compete provision void, if (i) the provision does not include any written substantiation, or (ii) no compelling business or service interests exist. Case law shows that compelling business or service reasons are not easily accepted by the court.

Furthermore, the following conditions apply both to an indefinite-term and a fixed-term employment agreement:

- The provision needs to be agreed in writing with an adult.
- The duration needs to be stipulated. There is no maximum period included in the law. However, case law shows that, in general, a maximum period of 12 months is considered reasonable.
- The court may nullify a non-compete provision entirely or partially if the employee is unfairly prejudiced by it in proportion to the interest of the employer intended to be protected.
- The employer may not derive any rights from a non-compete provision if the termination of the employment agreement is a consequence of a seriously culpable act or omission of the employer.
- If a non-compete provision restrains an employee to a significant extent from working other than in the service of the employer, the court may order the employer to pay compensation to the employee for the duration of the restraint.

Top Three Drafting Tips

1. If the employment agreement is a fixed-term agreement ensure that the agreement contains specific and detailed written reasons substantiating why the provision is necessary due to compelling business or service interests of the employer.
2. In view of the enforceability it is recommendable to (i) ensure that the duration is reasonable, (ii) that the scope of the activities and the geographical area are defined and (iii) a penalty clause is included as well.
3. Renew the non-compete provision when an employee starts working in another position within the company.



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Restrictions During Employment

All employees are subject to implied duties designed to prevent them from competing with the employer, including loyalty and non-disclosure of confidential information.

Employees are not allowed to initiate any action to prepare for competing activities or engage in competing activities for another party. It is advisable to make employees aware of these duties by including express terms in their contract of employment. It is typical to include sanctions (i.e. liquidated damages) for the breach of such obligations.

Restrictions After Employment

After cessation of the employment agreement, the employee is in principle free to compete with its former employer unless the parties have expressly agreed upon post-termination restrictions. Under Norwegian law, post-termination restrictive covenants are subject to specific statutory conditions that differentiate between (i) non-competition clauses, (ii) non-solicitation of customer clauses, and (iii) non-recruiting clauses.

1. Non-competition clauses:

- must be expressly agreed in writing;
- may only be invoked by employer as far as the clauses "are necessary in order to safeguard the employer's particular needs for protection against competition";
- may only be valid for a maximum length of 12 months from termination of the employment;
- can only be invoked by the employer in the event of (a) dismissal by the employer if the dismissal is objectively justified on the basis of circumstances relating to the employee or (b) termination by the employee if the employer himself has breached his obligations under the employment agreement and thus given the employee reasonable grounds to terminate the employment agreement;
- are only valid against payment of statutory compensation: The compensation shall be equivalent to 100 % of the employee's salary up to currently (status: October 2017) approx. NOK 750.000 (equal to 8x the Norwegian National Insurance Basic Amount), and for salaries above this amount, an addition of minimum 70 % of the employee's salary exceeding such amount, with an overall cap at approximately NOK 1.120.000 (equal to 12x the Norwegian National Insurance Basic Amount). The compensation shall be calculated on the basis of the employees' average salary during a 12 months period prior to termination. If the employees receive or earn salary or income from another employment during the period the non-competition clause is in effect, deductions equal to maximum 50% of the overall compensation amount may be made.

2. Non-solicitation clauses related to customers:

- must be expressly agreed in writing;
- may only apply to customers with which the respective employee has had contact to or which has been responsible for during the past 12 months prior to termination of the agreement (and prior to the statement as mentioned below);
- may only be valid for a maximum length of 12 months from termination of the employment;
- can only be invoked by the employer in the event of (a) dismissal by the employer if the dismissal is objectively justified on the basis of circumstances relating to the employee or (b) termination by the employee if the employer himself has breached his obligations under the employment agreement and thus given the employee reasonable grounds to terminate the employment agreement;
- are not subject to any statutory compensation by the employer.

3. Non-recruiting employee clauses:

- are generally prohibited between the employer and another company if the clause reduces or hinders the employee to take employment at another company;
- may though be entered into between the employer and another company in relation to transfers of undertakings (TUPE);

Note that clauses prohibiting a leaving employee to recruit other employees of his former employer into his new business are not governed by the aforementioned statutory rules under Norwegian law and may validly be entered into.

Statements in connection with non-competition and non-solicitation clauses:

Upon written request from the respective employee, the employer is obliged to provide a written statement regarding whether and to what extent he intends to invoke the contractually agreed non-competition and/or non-solicitation clauses. Such written statement is binding on the part of the employer for a period of three months. If the employer has already issued a notice of termination, the statement is binding for the entire notice period.

If requested by the respective employee, the written statement by the employer shall be given:

- within four weeks after the employee's request;
- within four weeks if the employee terminates the employment if the employer has not yet issued a binding written statement;
- at the same time as the dismissal if the employer terminates the employment if the employer has not yet issued a binding written statement;
- within one week if the employer summarily dismisses the employee if the employer has not yet issued a binding written statement.

If the requirement regarding statement is not met, the contractually agreed non-competition and/or non-solicitation clauses becomes null and void.

Exceptions for the company's CEO

Please note that Norwegian law opens for exception from the above rules for the company's employed CEO. It is usual business practice to have the CEO waive any of the aforementioned statutory rules against compensation payment, the amount of which is negotiable.

Top Three Drafting Tips

1. Consider whether the protection from a non-competition clause is necessary or whether the protection from a non-solicitation clause is sufficient, enabling the company to terminate the non-competition clause without having to pay any kind of compensation.
2. The clauses should be as relevant and insensitive to time as possible in terms of scope and coverage. The assessment as to whether and to what extent a clause will be invoked, shall be set out in the written statement.
3. Include a fixed penalty for violations of the restrictive covenants.

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Restrictions During Employment

As a general rule, one of the employees' basic duties is to care for the employer's interests and keep confidential any information disclosure of which could cause damage to the employer.

To clarify an employee's duties, the employer may execute with the employee a separate non-compete agreement defining the scope of the ban (activities that are prohibited and entities that are considered competitors). According to Polish courts, agreements of this type may also be part of the employment contract (and in practice often are). The employer is not obliged to pay any additional compensation or remuneration to the employee for observing a competition ban during the employment term. The employer may not impose financial penalties on the employee for breaching the ban during the employment term (statutory liability under the Labour Code applies only).

Restrictions After Employment

After the employment ends, the employee is prohibited from disclosing the former employer's business secrets for three years (this term may be prolonged by an agreement). The employee is also prohibited from engaging in unfair competition. It is advisable to execute an agreement specifying the scope of the non-disclosure and non-solicitation duties imposed on the former employee.

Other than that, the employee is free to take up employment in another company (also in a competitive company) or to engage in business activity that is competitive to that of the former employer. If the employee had access to key information and the employer wishes to prevent him/her from engaging in competitive activity, a written non-compete agreement should be executed with the employee (it may also be included in the employment contract).

A non-compete agreement for the period following employment termination needs to:

- be made in writing (otherwise it will be invalid);
- specify the term of the competition ban (there is no statutory maximum length but it is usually from three to 12 months);
- specify the amount of compensation the employee is entitled to (not less than 25% of the remuneration received by the employee during the term prior to employment termination corresponding to the length of the ban) and the payment method (e.g. in monthly installments);
- specify the scope of the ban (activities considered to be competitive and entities considered to be competitors of the employer);

It is also advisable for non-compete agreements for the period following employment termination to contain:

- a clause enabling the employer to unilaterally terminate the non-compete agreement early (otherwise it will be possible only by mutual agreement between the parties);
- a clause imposing a contractual penalty on the former employee if he/she breaches the competition ban and allowing the former employer to seek compensation in excess of the contractual penalty if the damage suffered by the employer is higher.

According to Polish courts, an employee refusing to sign a non-compete agreement is justified grounds for terminating the employment contract with notice.

Top Three Drafting Tips

1. Execute in writing a non-compete agreement for the period following employment termination with key employees.
2. The compensation for observing the ban after employment termination should not be lower than 25% of the remuneration received by the employee.
3. Include financial penalties in the event of the employee breaching the competition ban after employment termination and allow the employer to unilaterally terminate the ban early.

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Restrictions During Employment

During employment, unless the parties agree differently in the employment contract or any other agreement, employees have a duty of loyalty to their employer. This means that they must not perform any negotiations on their own or on behalf of a third party in competition with their employer.

This does not mean that the employee is prohibited from working for other employers (unless the parties agree to this kind of restriction as well), provided that in doing so the employee does not compete with their employer or disclose any information regarding the employer's organization, methods of production or business.

Restrictions After Employment

Generally, post-termination covenants not to compete, solicit or deal may be enforceable on the following terms:

- if the development of a particular activity by the employee is potentially capable of causing damage to the employer; and
- if the employee is given compensation for the period in which his or her activity is restricted.

These covenants are only allowed for a maximum of two years after the termination of the employment agreement and they must be agreed in writing, either in the employment agreement or in the termination agreement.

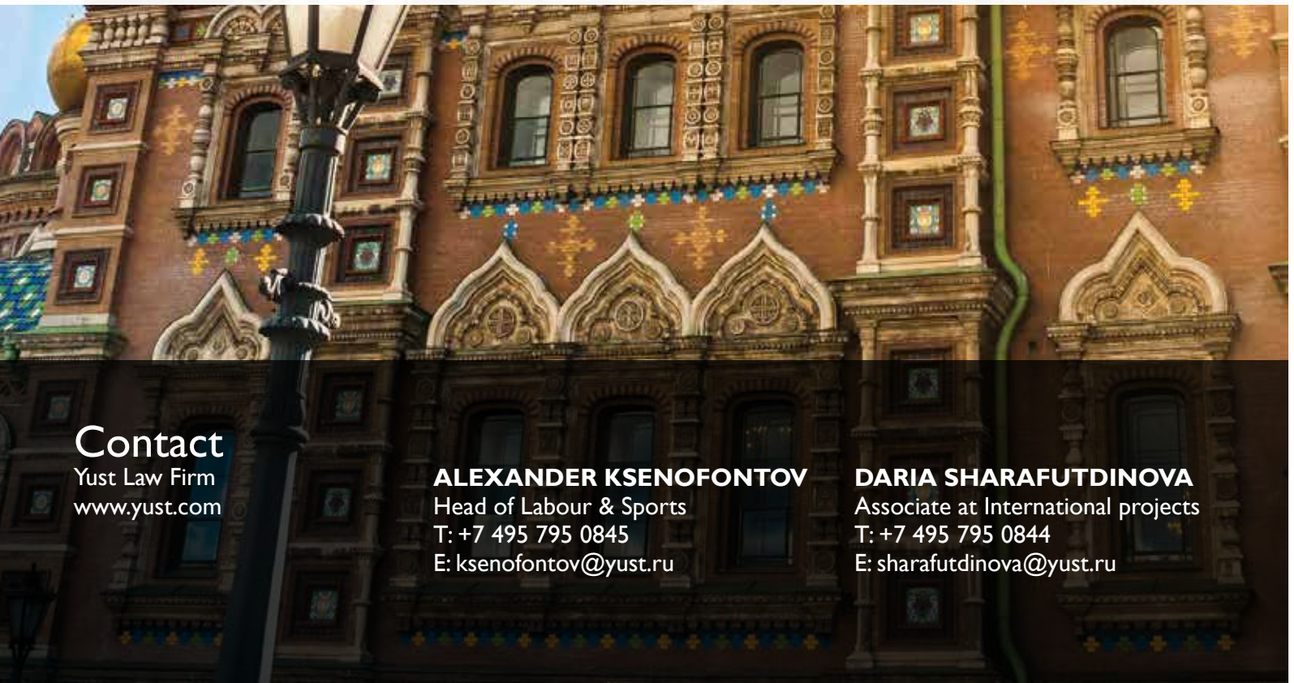
If the activity developed by the employee is based on a relationship of trust, or to the extent that such activity grants the employee access to particularly sensitive information, the maximum period may be extended to three years.

The employee is entitled to compensation for such restrictions. The amount is to be agreed between the parties and is paid during the whole limitation period.

Top Three Drafting Tips

1. Post-termination restrictions are usually concluded with employees holding a senior management position, or having a high degree of responsibility.
2. There is no legal rule establishing the amount that should be paid to the employee for the period of the non-compete clause. Courts have generally ruled that the amount to be paid for the non-competition must be fair, i.e., enough to compensate the employee for the loss of income arising from the non-compete agreement. Apart from this, courts do not clarify what would be the specific reasonable amount to compensate for the restrictive covenant, and usually decide on a case by case basis.
3. Portuguese labour courts are quite demanding with respect to the grounds used by employers for such restrictions. The restrictions should relate to, and should not be geographically wider than, the employer's activities and interests.

RUSSIA



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Restrictions During Employment

Based on the constitutional principle of freedom to work, Russian legislation enables an employee to work concurrently for another employer during the time out of the employee's main occupation.

Entrepreneurial or any other activity generating income is also permitted during the time out of an employee's main occupation since the Constitution guarantees free enterprise.

Any agreements restricting the right to work for more than one employer cannot be applicable because they worsen the employee`s position as compared to the one provided for by the law.

An exception is made in the case of CEOs who are obliged to get the consent of shareholders or the board of directors at the main occupation when working concurrently for another employer.

At the same time, the legislation prohibits disclosing employer's commercial secrets by the employees and its usage for personal interest by an employee. To some extent, this prohibition restricts the possibility for an employee to compete with the employer.

Restrictions After Employment

After an employee is dismissed the same legal regime applies.

Former CEOs can work without any restrictions.

Top Three Drafting Tips

1. A commercial secret protection policy should be adopted and an employee should become acquainted with it. This is to be certified by their signature;
2. An employee should become acquainted with the list of information to be considered commercial secrets of an employer. This is to be certified by their signature;
3. A labour contract should contain an employee's non-disclosure obligation regarding commercial secrets, as well as an obligation to abstain from using it for personal interest. This obligation continues after dismissal and while the exclusive right of an employer to the respective information is maintained.

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Restrictions During Employment

All employees are subject to duties of loyalty and non-disclosure of confidential information. However, given the general character of the statutory regulation, employers are strongly advised to further protect their businesses by including specific terms in their employees' employment contracts, the work code or other relevant internal documents.

Employees may engage in the paid activities competitive to those of their employer with the employer's prior written consent only. The employer is required to explicitly respond to the employee's notice of such engagement in 15 days; otherwise the employer is deemed to have granted such consent. The employer's consent may be subsequently withdrawn by a written notice served to the employee for serious reasons only, such reasons to be specified in the notice. The non-compete duty does not apply to the employees' scientific, educational, journalistic, literary and artistic activities.

Restrictions After Employment

The employee is free to compete with its former employer, unless a post-contractual non-compete clause was agreed upon. The non-compete clause must be in writing, be a part of the employment agreement and cannot impose a restriction lasting for more than one year.

The non-compete clause may only be agreed upon if the employee has, while employed, an opportunity to acquire information, know-how and knowledge, which are not readily available and the use of which could seriously impede the employer's business. The scope of the non-compete clause must be in all respects reasonable to the required level of the employer's protection.

The non-compete clause is subject to the mandatory financial compensation in the amount of at least 50% of an employee's average monthly income payable for each month of the employee's restriction on a monthly basis.

The employer may withdraw from the non-compete clause by a written notice served to the employee before his/her employment terminates. No reason needs to be given. If this is the case, no financial compensation is payable to the employee.

The employee may only terminate the non-compete clause with immediate effect by a written notice of termination served to the employer if the employer defaults on the payment of the financial compensation for more than 15 days.

A contractual penalty payable in case of breaching the non-compete clause by the employee may be agreed upon. Payment of a penalty releases the employee from his/her commitments under the non-compete clause. The penalty cannot exceed the amount of the agreed financial compensation.

Top Three Drafting Tips

1. Be specific – relevant provisions of Slovak employment law are broad and the Slovak courts tend to primarily protect the employees.
2. Ensure compliance with procedural formalities (e.g. written form, hand the signed agreement to the employee and have the receipt confirmed by the employee).
3. Use tailor-made clauses that impose only reasonable restrictions on an employee (instead of pre-formulated standard clauses) – otherwise the entire clause might be null and void.

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Restrictions During Employment

The decision of ***Magna Alloys and Research (SA) (Pty) Ltd v Ellis*** 1984 (4) SA 874 (A) settled the question regarding the enforceability and validity of a restraint of trade agreement in South Africa. The decision survived the enactment of our Constitution Act more than 10 years later. The point of departure is that a restraint of trade provision does give rise to rights and obligations provided that the provision is not contrary to public interest, does not offend public policy and is reasonable.

Practically, the enforcement of a restraint of trade provision challenges the principle of the freedom of parties to choose with whom they wish to contract and trade. As a general rule, section 22 of the Constitution of the Republic of South Africa, 1996 reads, "every citizen has the right to choose his or her trade, occupation or profession." However, it is common practice that, during employment, an employee is restrained from engaging with competitors in order to protect the employers protectable proprietary interests such as confidential business information, goodwill or trade connections.

In a recent judgment, the Johannesburg Labour Court in ***Vodacom (Pty) Ltd v Motsa*** 2016 3 SA 116 (LC), confirmed a new feature found in South African restraint law, the so called "garden leave" provision. What this has meant is that an employee who has given notice of intention to terminate employment, can be validly restrained from commencing alternative employment or business in the same or similar field during the stipulated notice period. Should the employer have a proprietary interest worthy of protection, the employer can, upon receiving notice of intention to terminate the employment relationship, insist that the employee no longer comes to work but stays at home for the duration of the notice period. In this way, the employer can safeguard confidential information and trade connections to which the employee ordinarily would have had access in the workplace and keep the employee from the grasp of a direct competitor. This is a particularly useful provision for employers of senior executives who can require extended notice of termination of several months and wish to protect confidential organizational information and trade secrets.

Restrictions After Employment

There is no ***numerus clausus*** of protectable interests in South Africa. It is a question of fact whether a protectable proprietary interest(s) exists for an employer wishing to enforce a restraint of trade provision in a particular case. Two kinds of proprietary interests can be protected by a restraint, the first being the incorporeal property of a business which consists of customers, potential customers, suppliers and others who make up the trade connections of a business. The second is confidential information which make up a business's organisational information and trade secrets and could be used unfairly by a competitor to the detriment of the business. These interests are capable of protection in the employment agreement during and after termination. Commonly rights and obligations arising from a restraint provision will survive termination of the agreement.

Organisational information of the employer is a protectable interest only if its disclosure will be objectively useful to a competitor. This means that the disclosed information must not have been otherwise known to the public and it must be of economic value to the employer and competitor.

An employee cannot be restricted from using his own expertise, knowledge, skill and experience, despite such skills set having been acquired through training and work exposure offered by the employer. Those skills do not constitute a proprietary interest vesting in the employer. If knowledge depends on the skill or discretion of the employee alone, it will generally not be sufficiently secret to constitute a protectable interest worthy of restraint protection.

In general, the sanctity of contract prevails over freedom of trade, unless the enforcement of the restraint clause is unjust or unreasonable. The reasonableness of a restraint of trade provision often rests on four elements, the nature of the restricted activity, the geographical area applicable to the restraint, the time period or duration of the restriction and most importantly, whether the employer has a proprietary interest that is worthy of protection. The protection of the proprietary interest of an employer enjoys preference over the subsequent conflicting right of choice of the employee to terminate employment because public policy requires parties to honour their contractual undertakings and obligations.

Restraint provisions must be reasonable. If not, the offending part of the restraint provision may be severed from the employment agreement by a court or similar tribunal with the remainder of the agreement remaining in force and effect. The unenforceability of a restraint provision can have dire consequences for an employer which may end up having legitimate interests to protect but is unable to do so because of a poorly worded and conceptualised restraint clause.

Top Three Drafting Tips

1. Garden leave – When including a "garden leave" restraint clause in an agreement, consideration must be given to the length of the notice of termination required from the employee. Each case must be assessed on its own facts but generally an employer will be able to insist on an employee serving out a period of garden leave ranging between two to six months. Garden leave beyond six months may have the result of rendering the employee commercially inactive for an extended period of time and this can be viewed as an attempt to punish the employee rather than to protect the employer's legitimate interests. An extended period of garden leave is likely to be found to be unreasonable and unenforceable.
2. Proprietary and protectable interest – The organizational information being protected such as trade secrets, customers and trade connections must be properly identified so that the protected information is clearly recognisable and the value to the employer is determinable. The information sought to be protected must be unique and peculiar to the business of the employer and not a matter of public general knowledge. The information must objectively be of economic value to the employer and to a competitor. Protectable information includes trade agreements, technological information, goodwill, client lists, price lists, chemical formulae, IT software designed for a particular application and strategic business plans.
3. Scope, area and duration of restraint – The restraint of trade clause and its terms should not be broader than necessary. The period of restraint must be reasonable taking into account the nature of the employer's business activities and the position occupied by the employee.

   Bear in mind that the risk of unenforceability of a restraint provision increases as the stringency of the restraint increases with respect to the scope, geographical area and duration of the restraint provision.

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Restrictions During Employment

In the absence of a specific agreement only unfair competition is prohibited. Such prohibition is a direct consequence of an employee's legal obligation to perform their duties in good faith. This principle does not prevent an employee from working for several employers, but rather prevents them from engaging in unfair competitive practices whilst being employed. These practices may be understood as any conduct potentially harmful towards their employer, carried out without consent and with the intention of benefitting from their employer's organization, or from the acquired knowledge of their employer's activities. To strengthen an employee's non-competition obligations during employment, parties can expressly agree additional covenants, such as exclusivity of employment, which, to be valid, requires paying additional financial compensation.

Restrictions After Employment

Post-employment non-compete covenants can be agreed and included in an employment contract or they can be agreed by the parties at a later stage. In any event, enforcement of such restrictions requires an express agreement between the parties as they are deemed to restrict the free initiative of employees.

In order for a non-compete covenant to be valid:

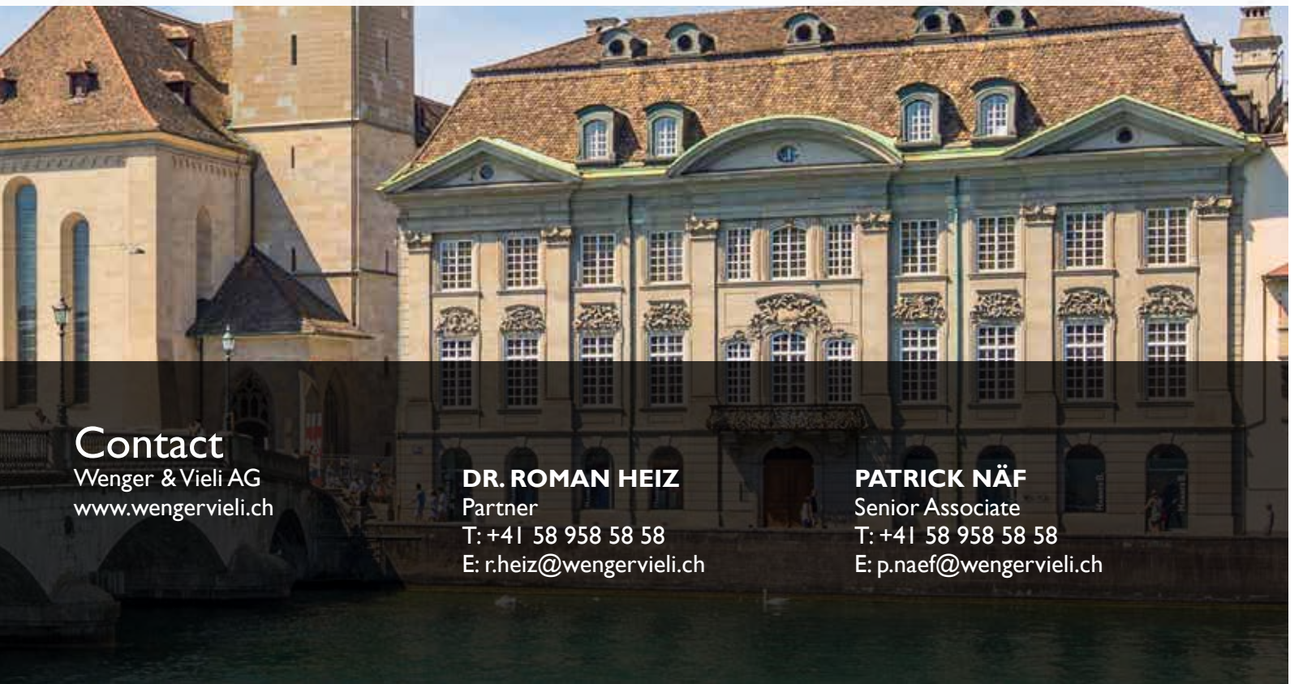
- the prohibition must refer to the performance of similar duties to those which the employee was previously carrying out for their former employer, and be restricted to a territory;
- the employer must have an industrial interest to impose the non-compete agreement. It is therefore advisable to include a detailed explanation of the risk run by the former employer in the event the employee would use insider knowledge. Without a well-documented legitimate interest the clause risks having little practical effect even if expressly agreed by the parties;
- the prohibition cannot exceed 2 years' duration for qualified technicians and 6 months for other employees, from the date of termination of the employment relationship; and
- the employer must pay adequate financial compensation. As the law does not give any indication of the amount of compensation, a factual assessment is required to determine an appropriate figure. The economic impact on the employee must be taken into account. There is no guarantee that any amount of compensation will be declared suitable by the courts.

An employee's breach of their non-compete agreement entitles the employer to claim compensation for damages. An agreed penalty may be included in the non-competition covenant, again based on a factual assessment of the situation. If the court considers the penalty to be disproportionate, the clause risks being declared invalid.

Top Three Drafting Tips

1. Emphasize the employer's legitimate commercial or industrial interest as the basis for including the non-competition clause.
2. Fix an "appropriate" amount of compensation to be paid to the employee and specify in the employee's pay slip the amount paid as "compensation for the non-compete clause".
3. Fix a proportionate penalty to be paid by the employee in case of breach of the non- compete clause.

SWITZERLAND



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Restrictions During Employment

For the duration of the employment relationship an employee may not perform any work (remunerated or not) for third parties if such work is in competition with the employer's business. According to the Swiss Federal Tribunal a competitor is someone who offers similar services, satisfies the same needs and has at least partially overlapping clients.

Restrictions After Employment

The employer and employee may agree that the employee refrains from engaging in any activity that competes with the employer beyond the termination of the employment agreement. Such an agreement is subject to the following conditions:

- the non-compete clause must be agreed upon in writing, this means it must be (hand-)signed by both parties;
- the prohibition of competition is only binding if the employee has a personal relationship with the employer's clientele or knowledge of manufacturing and trade secrets;
- the competing activity must be potentially harmful to the employer;
- the non-compete clause must generally be geographically limited to the region where the employee performed his work;
- the prohibition of competition may only exceed three years under special circumstances; and
- the scope of the non-compete provision must be appropriate and may not go further than the function actually performed by the employee.

A non-compete agreement is valid only if these requirements are met. Furthermore, it may not inappropriately limit the employee's economic development. To determine whether a prohibition is excessive all three factors (region, time and scope) must be taken into account. It is possible to have, for example, a longer period if the prohibition is limited to a very small region. Should the prohibition be excessive it is still valid, but may be restricted by the court.

Even if the non-compete agreement is valid and adequately restricted, it is still possible that it is not binding. This is the case when the employer no longer has a substantial interest in its continuation, when the employer terminates the employment without any good cause, when an employee terminates it for reasons attributed to the employer, or if clients follow a former employee due to his personal characteristics, which is typically the case with, for example, doctors.

Top Three Drafting Tips

1. Prohibit any legal form of competition, i.e. irrespective of whether the former employee competes as an employee of a competing company, as a founder of a competing company or a shareholder of a competitor or a self-employed consultant.
2. Specifically agree that the employer may request by way of injunctive relief that the employee discontinues competition.
3. Specifically agree upon a penalty (liquidated damages) for non-compliance with the non-compete obligation.

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Restrictions During Employment

The Tunisian Labour Code (Article 14) lays down restrictions to the employee during the employment contract, i.e. the employee should not unlawfully obtain material advantages or accept favors in connection with the operation of the enterprise or to the detriment of the latter; use for his own interest or for that of a third person, of funds, titles or objects entrusted to him because of the workstation he occupies. The employee is required to keep the company's trade secrets, except as permitted by law. Also, he cannot run an independent business.

The Code does not regulate the issue of employee competition. Nevertheless, reading its provisions suggests that the legislature implicitly treated the competition of employees during the employment contract.

The employee is bound by this obligation throughout his belonging to the company even if the clause has not been expressly provided for in the employment contract.

The Tunisian Supreme Court differentiates between acts of actual competition which result in a breach of the principles of good faith and fairness, and the preparatory acts to competition accomplished just before the employee leaves the firm in which he has worked permanently. It considered that the dismissal by the company of one of its employees on the pretext that the latter had committed serious misconduct by forming a competing company which had not yet caused real and palpable harm to the employer , would be an unfair dismissal if competition did not materialize.

It should be noted that this does not prevent the employer from inserting a clause within the employment contract requiring the employee to abstain from carrying out any activity (whether competitive or not) in parallel with his functions as provided for in the contract and to provide for compensation in the event of a breach of that clause.

Restrictions After Employment

The Tunisian Labour Code does not regulate the non-competition clause that applies after the end of the employment contract. Case law has succeeded in laying down the conditions of validity of the clause, namely its limitation in time and space. It should be also noted that case law does not provide for any financial compensation to be paid to the employee as compensation.

No statutory requirement has provided for the period and sector in which the former employee will be prohibited from competing with his former employer. It is therefore up to the parties to negotiate these two issues and to insert them into the non-competition clause.

Nevertheless, the territory and the time period must be limited in a reasonable manner so that the clause is not abusive to the employee who is the secular party to the contract. It should be noted that the former employee will always have the possibility of appealing to the courts to challenge the non-competition clause.

As example, the Collective Sectoral Convention on Electricity and Electronics dealt with the issue of non-competition for employees working in companies operating in the electricity, electronics, Electrical appliances and lifts.

Thus, the said Convention prohibits employees in the managerial and supervisory categories recruited for an indefinite time period and who had voluntarily left their employment, to work in a competing company or to work for their own account in the same activity as that of their employer during 2 Years and within a radius of 100 km from the headquarters of their former employers and their technical centers and their commercial and administrative agencies. It should be noted that this prohibition also applies to workers admitted to retirement.

Article 44 of the Convention even provides for compensation to the former employer under the terms of the employment contract.

Top Three Drafting Tips

1. Limit the scope of the clause in time and space in order to avoid any cancellation by the judge in the event of litigation for abuse.
2. Limit the prohibited activities subject to the non-compete.
3. Include compensation in the event of a violation of the clause by the employee.

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Restrictions During Employment

The Turkish Labour Code imposes a requirement of loyalty on employees to their employer. The employee cannot be engaged in any activity that is in competition with their employer. Therefore, it is not necessary to include an explicit provision on this matter in the employment agreement.

Restrictions After Employment

There is no statutory requirement for an employee not to compete with their employer after the termination of the employment relationship. Nevertheless, employers can impose restrictions through a non-compete agreement. Case law requires non-compete agreements to be limited in time, scope and territory. Non-compete restrictions should not exceed 2 years and they should be limited to the employer's field of activity. Moreover, there should be a reasonable territorial limitation relevant to the employer's business.

It must also be noted that the Turkish Labour Code and case law do not require the employer to pay compensation to the employee for the non-compete period. However, there may be circumstances where compensation might be necessary in the interests of fairness.

Top Three Drafting Tips

1. For a non-compete clause to be enforceable, it should be clearly limited in terms of scope, time and territory.
2. To avoid conflicts, restricted activities should be clearly defined.
3. A penalty clause can be included to deter an employee from breaching the non-compete agreement.

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Restrictions During Employment

There are no defined restrictions under UAE Labour Law (UAE Federal Law No 8 of 1980 as amended) imposed on employees with respect to any competitive activities they carry out while being employed. Generally, an employee cannot work for another employer:

- during the period of their employment unless with the approval of their current employer and, where relevant, with the express permission of the UAE Ministry of HR and Emiratisation / Free Zone Authority; or
- while on annual leave or sick leave.
- In the event where an employee breaches the above restrictions, the employer will have the right to terminate him/her without notice and deprive him/her of their remuneration in respect of any period of leave.

Restrictions After Employment

Non-compete agreements are not enforceable unless signed and accepted by the employee. In order for a non-compete arrangement to be considered valid and enforceable by the local Courts:

- the employee must be at least 21 years' old at the time when he/she signs the non-compete restriction;
- the non-compete clause must be limited in its geographical territory;
- the non-compete clause must be limited in its duration (generally between 3 to 24 months); and
- the non-compete clause must be limited to the nature of the business activity of the former employer.

Non-compete clauses are not easily enforced. In the event of a breach, the employer must file a claim against the employee and prove to the Court that it has sustained damages as a result of such breach. In most cases, the ultimate recourse can be limited to imposing on the employee to pay a financial compensation to the employer in reparation of the damages caused.

There is no statutory provision requiring employers to pay financial compensation to an employee committing to a non-compete clause/agreement, however parties can agree otherwise.

Top Three Drafting Tips

We recommend the following when drafting non-compete clauses or agreements:

1. Specify the time frame (not more than two years), geographical territory and nature of business.
2. Use clear and detailed language, i.e. specify if possible the details of competitors or the nature of confidential information the employee cannot disclose.
3. Specify the different aspects of restrictions imposed on an employee as a result of the non compete agreement such as not being able to, directly or indirectly, work for another employer or establish an entity or enter into a partnership that competes with the employer.

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Restrictions During Employment

All employees are subject to implied duties of loyalty, fidelity and non-disclosure of confidential information. Senior managers are also subject to higher level fiduciary duties, and Board Directors are subject to additional statutory duties, which give an employer even greater protection.

However, employers are advised to further protect their business by including express terms in their employees' contracts of employment, typically relating to confidential information and outside interests.

Where an employee is preparing to compete whilst still employed and commits a breach of a fiduciary duty or duty of confidence, the employer may seek an account of profits as an alternative to damages.

Restrictions After Employment

Employees are free to do as they wish subject to:

- an implied duty to keep their employer's "trade secrets" confidential (very limited);
- any additional contractual obligations relating to confidential information; and
- any contractual restrictions agreed between the parties which are a proportionate means ("no more than necessary") of protecting the employer's legitimate business interests. Usual restrictions cover working for a competitor (in a specified geographical area), soliciting and dealing with clients/potential clients, and poaching staff. There is no obligation for an employer to pay the employee during a period of restriction. There is no maximum duration but shorter restrictions are more likely to be enforceable than longer ones (especially in excess of 12 months). If an employer wrongfully terminates an employee's contract (for example, without giving notice), the employee is freed from any post-termination restrictions.

If employees breach their restrictions the principal remedies for employers are damages or an injunction to enforce the restrictions and stop the employee from competing. A special "springboard" injunction may be obtained to neutralise any head start/unfair advantage an employee has gained from any prior breach of a legal obligation.

Top Three Drafting Tips

To maximise enforcement of post-termination restrictions:

1. Restrictions should be as narrow as possible in terms of scope, duration and geographical coverage.
2. Restrictions should be tailored to an employee's role and seniority and fresh agreement sought periodically but always upon promotion.
3. Consider including contractual provisions to allow payment in lieu of notice on termination (to avoid wrongful termination and invalidation of covenants).