A global guide to ‘restrictive covenants’
Introduction

There are few areas of employment law which differ as significantly between countries as the laws relating to post-termination restrictions. The increasing trend for key employees to have international responsibilities, be globally mobile, and for post-termination restrictions to apply across many different jurisdictions is a challenge. In reality when enforcement issues arise the decisions taken in the early stages of action may determine the outcome weeks or months later.

That’s why we have created a Guide to Restrictive Covenants in over 40 key countries. We discuss non-compete covenants, non-solicitation covenants and non-solicitation of employees’ clauses, issues relating to employee benefits, pension, stock plans and more...

We hope you find this publication useful. It has been made possible by input from lawyers from across Mayer Brown’s global office network and partner law firms in other jurisdictions.

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Firm Practice Leaders
Employment and Benefits Group, Mayer Brown

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A. OVERVIEW:

Post-employment restraint clauses or restrictive covenants are commonly used by Australian employers to protect their business interests, particularly in employment contracts for professional or senior/managerial employees.

A typical restraint clause will impose restrictions on the employee not to work in any capacity for a competitor, for a specified period after they leave the employer’s business; not to solicit their former employer’s clients, customers or staff; and not to use their former employer’s confidential information.

These types of clauses operate subject to the common law doctrine of ‘restraint of trade’. This means that a restraint clause must be directed at protecting specific interests of the employer (such as trade secrets or business goodwill). The courts will not uphold a restraint clause that restricts competition per se, or unduly interferes with an employee’s right to sell his or her own labour.

In assessing the validity of a restrictive covenant, an Australian court will determine whether the restraints imposed on the employee are reasonable having regard to their duration; the geographic area in which they apply, and the activities of the employee that they seek to control.
There is some capacity for a court to sever a restraint clause that it finds to be unreasonable, enabling the reasonable elements of the clause to be enforceable against the employee. Except for the State of New South Wales (where specific restraints of trade legislation applies), severance is usually only possible where the clause contains a series of overlapping restraints, known as a ‘step’ or ‘cascading’ restraint clause.

An employer will usually seek to enforce a restrictive covenant against a former employee through an application to a Federal, State or Territory court for an interlocutory injunction. Other remedies that may be available include a permanent injunction or an order for damages.

**B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?**

An employer cannot unilaterally impose such a covenant upon an existing employee, although the employer can condition any new offer of employment upon the prospective employee (and sometimes on the offer of a promotion) into such a covenant. The inclusion of a restraint clause in an employment contract is a matter to be negotiated between the employer and employee. However, as indicated above, such clauses are commonly entered into by senior executives, managers and other professional employees.

**i. Are they capable of being valid?**

Although post-employment restraints are commonly used, they are presumed to be invalid and unenforceable unless it can be shown that they are necessary to protect a legitimate business interest: Nordenfeldt v Maxim Nordenfeldt Guns and Ammunition Company [1894] AC 535.

The onus rests with the party seeking to enforce a restrictive covenant to demonstrate that the clause imposes no greater restraint than is reasonably necessary to protect its legitimate commercial interests: Lindner v Murdock’s Garage (1950) 83 CLR 628. Employers cannot use a restraint clause to protect themselves against mere competition: Stenhouse Australia v Phillips [1974] AC 391.

**ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?**

The legitimate interests of an employer that are recognised as supporting a valid post-employment restraint include the employer's confidential information or trade secrets; customers and clients of the employer’s business; and the employer’s staff (each of these is explained further in the relevant sections below).

A typical post-employment restraint clause that would be upheld by an Australian court would be one of between three and twelve months' duration: see e.g. Smith v Nomad Modular Building Pty Ltd [2007] WASCA 169 (six months); Seven Network (Operations) Limited v Warburton (No 2) [2011] NSWSC 386 (eight months). The period must be reasonable to protect the legitimate interest.

That said, a restraint clauses of two years’ duration was upheld in a recent decision of the Full Federal Court of Australia: Pearson v HRX Holdings Pty Ltd [2012] FCAFC 111. In that case, relevant factors supporting enforcement of the restraint (which also contained no geographic limitation) included:

- the fact that the former employee against whom the restraint clause was directed had access to almost all of the employer’s confidential business information, such as sales and client retention strategies;
- the former employee’s status as a key figure within the employer’s human resources consultancy, until his attempt to move to a direct competitor in breach of the restraint clause;
- the original employer’s legitimate interest in protecting its client relationships;
- the fact that the former employee received shares in the business and payment for 21 months of the two-year restraint period, as part of what the Full Federal Court described as a ‘reasonable commercial arrangement as between the parties’.
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Australia

In contrast, in Wallis Nominees (Computing) Pty Ltd v Pickett [2013] VSCA 24, the Victorian Supreme Court (Court of Appeal) refused to enforce a restraint clause which purported to prevent a former employee from working for a competitor for 12 months after his employment had ended. The Court found that the duration of the restraint was longer than necessary to protect the employer’s legitimate interests in its relationships with customers.

Wallis Nominees (Computing) Pty Ltd v Pickett also illustrates that when drafting restrictive covenants, employers must be careful not to cast the restraints on an employee’s post-employment activities too broadly; and should use ‘step’ or ‘cascading’ clauses. The Court of Appeal would not sever the parts of the restraint clause which it had found to be invalid in this case, because the restraint did not include ‘cascading’ provisions which would have enabled the unreasonable parts to be excluded and the remaining parts of the clause to have effect. As the Court stated: ‘the impugned part [of the clause] must be capable of simply being removed — as if simply crossed out with a blue pen; a court can remove words from a restraint clause but not rewrite it ...’. See also Integrated Group v Dillon [2009] VSC 361; Hanna v OAMPS Insurance Brokers Limited [2010] NSWCA 267.

In New South Wales, specific legislation (Restraints of Trade Act 1976 (NSW)) enables the courts of that State to read down an invalid restraint clause, to give it the extent of operation that the court considers reasonable (irrespective of whether the clause contains ‘step’ or ‘cascading’ provisions). This legislation will apply in respect of any employment contract (containing a restraint clause) that has a close and real connection with NSW: see e.g. Provida Pty Ltd v Sharpe [2012] NSWSC 1041 (where the employer’s head office was in NSW, but the employee carried out work in both NSW and Victoria, the NSW legislation was held to apply).

iii. Is it necessary to pay an employee during the period of the covenant?

No, but this may be a relevant factor in determining the validity of a restraint clause (see Pearson v HRX Holdings Pty Ltd [2012] FCAFC 111, discussed above). At the same time, the fact that payment is provided to an employee during the restraint period will not make an otherwise invalid restraint lawful (see e.g. Tullett Prebon (Australia) Pty Ltd v Purcell [2008] NSWSC 852).

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

This is a matter for negotiation between employer and employee (as explained at the commencement of section b. above).

i. Are they capable of being valid?

Yes, provided the restraint clause does no more than protect the employer’s legitimate business interests; and is reasonable in terms of its duration and geographical reach.

ii. What does it take to show they are valid?

The nature of an employer’s interest in protecting its customer base through express contractual provision binding on a former employee was described by the Full Federal Court in Pearson v HRX Holdings Pty Ltd [2012] FCAFC 111, as follows: ‘HRX had an evident interest in preserving the customer connections which are the source of its income. It is well established that an employer’s customer connection is a legitimate business interest which can support a reasonable restraint of trade where the employee in question controls the employer’s customer connections (see, for example, Jardin v Metcash Limited [2011] NSWCA 409 …)’.

In Wallis Nominees (Computing) Pty Ltd v Pickett [2013] VSCA 24, the Victorian Court of Appeal stated that the obligations of an employee under the non-solicitation provisions of a restraint clause are dependent on two factors: ‘First, that an employee must be in a position to gain trust and confidence so as to be relied on in a client’s affairs. Secondly, that the relationship between employee and client is such that there is a possibility that if the employee leaves the business of the employer he or she may carry away the client’s business with them.’
A valid post-employment restraint clause will typically preclude an employee from approaching or seeking to lure away clients or customers of their former employer, during the restraint period. Usually, such a clause will only be effective in respect of clients/customers with which the employee actually had contact during his/her employment with the former employer: see e.g. John Fairfax Publications Pty Ltd v Birt [2006] NSWSC 995.

Of course, it may be possible for an employee to avoid the application of a non-solicitation clause by establishing that the former employer’s clients ‘came to them’, rather then being approached by the employee during the restraint period.

iii. Is it necessary to pay an employee during the period of the covenant?

No, but this may be a relevant factor in determining the validity of a restraint clause (see section b. (iii) above).

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

This is a matter for negotiation between employer and employee (as explained at the commencement of section b. above).

i. Are they capable of being valid?

Yes, provided the restraint clause does no more than protect the employer’s legitimate business interests; and is reasonable in terms of its duration and geographical reach.

ii. What does it take to show they are valid?

An increasing tendency in recent Australian case law is the recognition of an employer’s legitimate interest in the maintenance of a stable workforce, through post-employment restraints prohibiting an employee from poaching his/her former employer’s staff: see e.g. BDO Group Investments (NSW-Vic) v Ngo [201] VSC 206; Informax International Pty Ltd v Clarius Group Limited [2011] FCA 183.

However, post-employment restrictions on poaching or soliciting other employees of the former employer will not be enforceable in certain situations – for example, where those employees simply respond to a general employment advertisement (Allied Express Transport Pty Ltd v Mears [2010] NSWSC 1112); or there is other evidence that the employee subject to the purported restraint has not initiated contact with or sought to persuade those employees to move over to the new employer.

In some circumstances, the rival firm to which a former employee moves may also be held liable where the move occurs in breach of an express contractual restraint clause (i.e. the rival firm may be found liable for inducing the breach of contract): see e.g. Wilson HTM Investment Group Limited and Others v Pagliari and Others [2012] NSWSC 1086.

iii. Is it necessary to pay an employee during the period of the covenant?

No, but this may be a relevant factor in determining the validity of a restraint clause (see section b. (iii) above).

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Post-employment restraint clauses typically provide an employer with protection against a former employee’s use of the employer’s confidential business information or trade secrets, during the restraint period. This aspect of a restrictive covenant will be valid provided that it does no more than protect the employer’s legitimate business interests, and is reasonable in terms of its duration and geographical reach.
The kinds of information that may legitimately be protected in an express confidentiality provision in a restraint clause include information that the employer specifically designates as confidential (e.g. John Fairfax Publications Pty Ltd v Birt [2006] NSWSC 995), and information that was only made available to the employee because of the special nature of his/her position or role within the employer’s business (e.g. Smith v Nomad Modular Building Pty Ltd [2007] WASCA 169). However, protection would not extend to information that is readily available in the public domain (e.g. GlaxoSmithKline Australia Pty Ltd v Ritchie [2008] VSC 164).

So, for example, business operational information, financial data and reports, details of customers and suppliers, marketing/strategic plans, pricing models, and trade secrets such as manufacturing formulae or processes, would all constitute genuinely confidential information which may be the subject of protection through an appropriately worded restraint clause.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law may become an issue in the enforcement of a restrictive covenant under Australian law in one of two ways:

1. Choice between Australian and foreign law: this could arise, for example, in relation to enforcement of a post-employment restraint against an employee of an overseas-based company working in Australia. In this situation, it is likely that an Australian state or territory court would apply the law applicable to restraint clauses in that state or territory – even if the contract had been entered into in an overseas jurisdiction (following the approach adopted in Rousillon v Rousillon (1880) 14 ChD 351). An alternative approach (based on Apple Corps Limited v Apple Computer Inc (1992) Fleet Street R 431 (ChD)) would see the Australian state or territory court being guided by the law nominated by the parties in their contract (i.e. the proper law of the contract). If they chose the law of an overseas jurisdiction to regulate their agreement, then the restraint of trade principles operating under that overseas law would be applicable. Conversely if they nominated the law of an Australian jurisdiction, that would be applicable. Although the issue has not been finally determined, the Rousillon approach is considered more likely to apply (see A Stewart and J Greene, ‘Choice of Law and the Enforcement of Post-Employment Restraints in Australia’ (2010) 31:2 Comparative Labor Law and Policy Journal 305, 322-326).

2. Choice of law among Australian jurisdictions: this is generally not a major issue given the similarities in restraint of trade laws operating throughout Australia, with the exception of the specific legislation operating in NSW (see section b. (ii) above). Given that the Restraints of Trade Act 1976 (NSW) provides employers with greater scope to enforce post-employment restraints than other Australian jurisdictions, it might be expected that employers would seek to make NSW the governing law of their employment contracts (perhaps, in some instances, artificially). However, this does not (in our view) occur to any appreciable extent. As outlined in section b. (iii), for the NSW legislation to apply, there must be a real and close connection between the employment contract and the State of NSW. In some cases, this has been expressed in terms of requiring that the proper law of the contract is NSW in order to attract the operation of the NSW legislation (see e.g. K.A. and C. Smith Pty Ltd Co v Ward (1998) 45 NSWLR 702; Professional Advantage Pty Ltd Co v Smart [2008] NSWSC 873, discussed in Stewart and Greene, supra, 326-328).

i. Can an employer impose a dispute resolution method on the employee?

Like the issue whether a restrictive covenant is included in an employment contract to begin with, the dispute resolution method that operates in respect of the covenant is a matter for negotiation between employer and employee. This will usually be determined by the general dispute resolution clause which the parties include in their employment contract; and/or the clause relating to the governing law applicable to the contract.
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**Australia**

**G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?**

The usual remedy sought by an employer seeking to enforce a post-employment restraint is an injunction (on an interlocutory basis) restraining the former employee from taking up a new position, soliciting the employer’s clients or staff, and/or using confidential information in breach of the applicable restraint clause. The granting of such an injunction (pending a full trial of the matter) requires the employer to establish a prima facie case of breach by the employee of the restrictive covenant, and that the balance of convenience favours the injunction being granted (American Cynamid Co v Ethicon Ltd [1975] AC 396).

If an interlocutory injunction is granted, it is rare for the employer’s claim to proceed to trial. However, when that does occur, the other main remedy that is available is an order for damages to compensate the employer for any monetary loss suffered as a result of the employee’s breach of contract. For example, in Commercial & Accounting Services (Camden) Pty Ltd v Cummins [2011] NSWSC 843, the NSW Supreme Court awarded A$117,995 in damages following an employee’s misuse of confidential client information belonging to his former employer (although note that the employer’s action in this case was based on the equitable duty of confidence rather than a contractual restraint clause).

Importantly, an employer may not be able to obtain remedies to enforce a post-employment restraint where the employee has been wrongfully dismissed or made redundant: see e.g. Ecolab Pty Ltd v Garland [2011] NSWSC 1095.

**H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:**

i. Do the same principles of enforcement outlined above at g. apply?

Under Australian law, the enforceability of post-employment restraints is a separate matter from the entitlements of employees under pension schemes (known in Australia as ‘superannuation’ entitlements) and stock plans. Employees are entitled to receive minimum superannuation contributions under federal legislation. These entitlements cannot be foregone in the event that an employee breaches a restrictive covenant (even if an employment contract made provision for such an arrangement, it would be unlawful). Stock plans are common for senior executives, through provisions setting out an employee’s share entitlements in the employment contract or a separate deed. This could conceivably include provision for the foregoing of share entitlements in the event of the employee’s breach of a restraint clause.

ii. Which covenants are typically imposed?

See (i) above.

iii. What sanctions are/can be imposed by the employer for non-compliance?

See (i) above.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

See (i) above.

**I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?**

Some aspects of a restrictive covenant which are found to be invalid may be struck out with the balance remaining enforceable, although this will depend on the form and substance of the particular clause (see sections a. and b.(ii) above). There is greater flexibility to read down an invalid restraint clause in New South Wales (see section b. (ii) above).

Contributed by Anthony Forsyth, Chris Leong and Heidi Roberts
Hong Kong

A. OVERVIEW:

Post-termination restrictive covenants are fairly common in Hong Kong employment contracts, particularly for senior employee or those with valuable connections, relationships or access to confidential information.

The principles for restrictive covenants are well established.

Contractual terms restricting an employee’s activities after the termination of their employment are generally void for being in restraint of trade and contrary to public policy unless the employer can show that the provision is reasonable in all the circumstances to protect a legitimate interest of the employer.

In broad terms, the legitimate interests a court might allow to be protected fall into the following categories:

(a) trade connections such as customers or suppliers and, more generally, goodwill;

(b) trade secrets and other confidential information; and

(c) stability of the workforce.
Once a legitimate interest has been established, the employer should impose a restrictive covenant which only goes so far as to be reasonably necessary to protect that particular interest by reference to the relevant activities, the duration and the geographical scope sought to be covered by the restraint.

Whether a restriction is reasonable is judged at the time the restriction is entered into.

Common post-employment restrictions in the employment context include non-solicitation, non-dealing and non-competition clauses.

The most common remedy for breach of a restrictive covenant is an injunction, using the civil courts, to restrain the employee’s or the new or prospective employer’s activities but other forms of remedies are available.

Other remedies include damages for breach of contract although this is often difficult to establish.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes

i. Are they capable of being valid?

Yes

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The general principles mentioned above apply. A non-competition restriction is typically harder to enforce than a non-solicitation and non-dealing clause.

It is arguable that the employer’s interests are adequately protected by a non-solicitation and/or non-dealing covenant and the employee’s implied, and usually express, confidentiality obligations.

Although restrictions for up to six months can in certain circumstances be enforceable, a three month restriction is much more likely to be effective, particularly where the period of restraint is reduced by any period of garden leave served by the employee.

An issue with non-competition restrictions in Hong Kong is the geographical limitation.

A general blanket restriction which prohibits the employee from taking employment within the whole of Hong Kong will only be enforceable where it can be shown to be justifiable to protect an employer’s legitimate interests. In some circumstances even restricting someone from taking up employment in Central does, in reality, often mean that he is being restricted from taking up employment in Hong Kong and may be unenforceable.

In each case it will depend on the specific circumstances of the employee and the particular legitimate interests which the employer is trying to protect.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement to pay an employee during the period of a non-compete post-termination restrictive covenant. However, paying the employee could help address the argument against a non-compete covenant being enforceable because it prevents the employee from earning a living.
C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes. These can either prevent the solicitation of clients/customers or additionally the acceptance of work from the client/customer even if not previously solicited by the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

Although non-solicitation/dealing clauses are generally easier to enforce than a non-competition covenant in the sense that they are less obstructive on an employee, the general principles mentioned above apply.

The covenants should be restricted by reference to customers/suppliers with whom the employee has had dealings during a specified period before the date of cessation of the employee’s employment.

Again, a reasonable time limit to this restriction may be the amount of time that it is likely to take for the influence of the departing employee to be replaced by the influence of that employee’s successor.

These restrictions can cover non-solicitation of, or non-dealing with, customers/clients. Solicitation tends to cover more active targeting of customers. Non-dealing prevents the employee from accepting business from a customer even if they had not actively sought out that business.

A non-dealing covenant is therefore more difficult to enforce, although it has been upheld where the employer can demonstrate that solicitation is hard to police, and is usually used together with a non-solicitation covenant. It is necessary for the employer to show a legitimate interest in having the covenant upheld.

Prospective customers/clients can be included in this type of restriction but this would generally be limited to those that the employee was actively targeting prior to cessation of employment.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement to pay an employee during the period of a non-solicitation of customer post-termination restrictive covenant.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Non-solicitation clauses have been upheld by the Court.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

If a post-termination of employment non-solicitation of employee covenant is sufficiently tightly worded then certain employees can be protected. It has been held that an employer may have a legitimate interest in maintaining a stable workforce in a highly competitive business.
Hong Kong

Therefore, any clause which seeks to prohibit the poaching of employees will need to assess how long the departing employee will have influence over existing employees and the scope of the class of employees over whom the influence will exist.

In order to improve the chances of the clause being enforceable, the scope should be limited to employees with whom the departing employee had contact for a period prior to departure and be limited to senior employees already in the employ of the employer. Smaller companies may be able to enforce a restriction that covers a wider set of employees.

Unfortunately, the ability for an employee to make payment of wages in lieu of notice and leave tends to reduce the effectiveness of these clauses and in practice it is often difficult to prove that the employee was solicited by the ex-employee.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement to pay employees during the period of a non-solicitation of employees post-termination restrictive covenant.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Yes.

There are a variety of restrictions that can apply during or after termination of employment.

A common clause is to restrict the use and disclosure of confidential information and company property, during employment and after its termination. The restriction on use and disclosure of confidential information often does not have a set time limit after termination and instead apply for as long as the information retains its confidential nature.

Other post-termination restrictions can cover non-solicitation of or non-dealing with suppliers, distributors or intermediaries such as brokers, depending on the employer’s business. These are similar to the customer/client restrictions mentioned above. Employees can be prevented from interfering with the ex-employer’s business or connections, although this tends to require some kind of active attempt or intention to damage the ex-employer’s business.

Restrictive covenants are sometimes supplemented by provisions such as a requirement to inform their employer if they are aware of a raid on the employer’s workforce (a team move), to alert the employer to another employee’s wrongdoing or even to the employee’s own wrongdoing, or to provide a prospective new employer with a copy of the restrictive covenants. However, breach of this type of clause may only result in nominal damages.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law will be relevant to which law governs the contract (and therefore how the contract should be interpreted and enforced).

In summary, if Hong Kong law applies to the contract, then the principles mentioned above will apply to the interpretation and enforcement of restrictive covenants.

i. Can an employer impose a dispute resolution method on the employee?

It is generally still unusual to see alternative dispute resolution procedures provided for in Hong Kong employment contracts.

Since the primary remedy for enforcing restrictive covenants is an injunction, which is usually obtained through the Courts, there would typically be no obvious benefit in having an alternative dispute resolution procedure which prevents the employer from seeking an order for an injunction.
Hong Kong

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

The most common remedy for breach of a restrictive covenant is an injunction using the civil courts, to restrain the employee’s or the new or prospective employer’s activities but other forms of remedy are available including an order to pay damages.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

A forfeiture of an award or partial award, for prohibited competitive activities can be challenged if the employee claims that the provisions allowing forfeiture are unenforceable as being in restraint of trade. The same approach will be taken to evaluating these clauses as is taken when looking at the equivalent clauses in employment contracts.

ii. Which covenants are typically imposed?

Covenants imposed will tend to mirror the covenants contained in the standard form employment contracts, although there is no requirement that this is the case. As such these covenants could range from non-competition covenants through to non-dealing and non-solicitation of customers clauses.

iii. What sanctions are/can be imposed by the employer for non-compliance?

Injunctive relief is less common, as the plan documentation does not usually impose a specific prohibition on the relevant behaviour – rather forfeiture of all parts of the award if the behaviour occurs. It is more common for a forfeiture provision to apply to unvested incentive awards if the participant engages in the relevant behaviour. In addition, there may be claw back of amounts paid (or repayment of any value realised on sale of shares delivered) on the vesting of awards. Where shares are delivered, it may be possible to prohibit sale of the shares until expiry of any relevant covenant period, possibly coupled with some form of security over the shares. Injunctive relief may be available if the award documentation contained a prohibition on the relevant behaviour.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

There are generally no specific limits in relation to long term incentive arrangements. However, there may be limits to what the employee is prepared to agree to. In addition, the provision must meet the criteria outlined in (a) above to be enforceable.

An employer should be conscious of obligations under the Employment Ordinance in relation to timing of the payment of sums due to the employee and unlawful deduction from wages, to the extent that the relevant incentive arrangement may be caught by the employment Ordinance (eg the payment is “wages” or is an “end of year payment”).

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

An invalid clause is unenforceable.

Although a court will not rewrite an invalid clause to make it enforceable, it may apply the ‘blue pencil test’ and sever a particular part (which is considered invalid) of the restrictive covenant and uphold the remainder of the covenant.

For example, if the non-competition clause is held to be invalid, then the employer could still rely on the non-solicitation and non-dealing clauses provided those aspects of the restrictive covenant were found to be enforceable.

It is important to note that a court will only apply the ‘blue pencil test’ if the unenforceable element can be severed without having to modify or add to the remaining wording and if, by doing so, it does not materially change the nature of the original restriction.

Contributed by Duncan Abate, Hong Tran, Kay McArdle
A. OVERVIEW:

In India, post-termination restrictive covenants, such as non-solicit and non-compete clauses are routinely included in employment contracts. While Indian courts have upheld non-solicitation of customer clauses, non-compete provisions which extend beyond the term of employment are not enforceable. Companies generally retain post-termination non-compete clauses in the employment contracts since they act as a deterrent to the employees.

Under section 27 of the Indian Contract Act, 1872 any agreement in restraint of trade is void. Consequently, non-compete covenants (requiring past employees not to accept employment with competitors of the employer) extending beyond the term of the employment contract are not enforceable in India. Courts do not recognize reasonable non-compete restrictions and have on several occasions held that all post-termination non-compete provisions are in the nature of restraint of trade and therefore unenforceable.

However, commercial non-solicitation clauses between parties restricting them from offering inducements to employees, customers, clients and suppliers of the other are enforceable. Usually employers include post-termination non-solicitation for any period between 6 – 12 months.
India

The most common remedy for breach of non-solicitation obligations is an injunction using the civil courts, to restrain the employee’s activities. Other possible remedies, though untested, include damages for breach of contract and other forms of financial compensation.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

No.

i. Are they capable of being valid?

No.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

As mentioned above, non-compete clauses, in any form, are unenforceable in India.

iii. Is it necessary to pay an employee during the period of the covenant?

Not applicable in the Indian context.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes. Such clauses can prevent the solicitation of a client/customer by a former employee, but cannot be wide enough to prohibit acceptance of work from the client/customer if not previously solicited by the employee.

i. Are they capable of being valid?

Yes, to a limited extent.

ii. What does it take to show they are valid?

It is not common to have contact prohibition clauses. Even when such clauses are present they would be enforceable to the extent of non-solicitation of customers/clients. As mentioned earlier, such obligation cannot be wide enough to prohibit acceptance of work from the client/customer if not previously solicited by the employee.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement to pay employees during the period of post-termination contact prohibition clauses.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Clauses on non-solicitation of employees have been upheld by the Court in commercial contracts. Similar principles should apply to non-solicitation of former colleagues as well. However recruiting former colleagues, where there is no solicitation, is not unlawful.

i. Are they capable of being valid?

Yes.
India

ii. What does it take to show they are valid?

Most restrictions of this type will define the employees who cannot be approached or hired by reference to their seniority, grade or level, or their role in or importance to the business. They often only apply to colleagues that the departing employee had a reasonable level of contact with, knowledge of or responsibility for, and within a defined period before the departing employee leaves. Smaller companies may be able to enforce a restriction that covers a wider set of employees.

While non-solicit obligations are enforceable, the onus would be on the employer to prove that there was actual solicitation by the former employee which led to the hiring. In India, while solicitation can be prohibited, it is not possible to prohibit the hiring of employees by a former employee. Accordingly, in practice, it is difficult for employers to prove that a non-solicitation of employees’ clause has been breached, because merely showing that the employee has been hired by a former colleague is not necessarily a breach of the non-solicitation clause.

Therefore, non-solicitation of employees clauses are generally the weakest type of covenant and the easiest to circumvent.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement to pay employees during the period of post-termination non-solicit clauses.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

During the existence of an employer-employee relationship, employers will be able to enforce non complete clauses, which prevent the employee from engaging in any competing business, colluding with a competitor etc. As mentioned above, though such clauses will not be enforceable post termination, they would be enforceable during the course of employment.

Additionally, in order to protect trade secrets and confidential information, employers often include a clause prohibiting employees from disclosing certain defined forms of confidential information (such as client information, intellectual property related information etc.) during the course, and after the termination of the employment. Such covenants are enforceable.

The scope of non-solicitation covenants, similar to the customer/client restrictions mentioned above, can be wide enough to cover suppliers, contractors, dealers, distributors or intermediaries such as brokers, depending on the employer’s business.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Irrespective of the choice of law provision, the Indian courts would continue to have jurisdiction when the employee is working in India. When the parties are in India, the courts would normally apply the local law when determining whether the restrictive covenant is enforceable. Hence the choice of law provision would have no impact.

Can an employer impose a dispute resolution method on the employee?

The primary method for seeking relief for breach or threatened breach of restrictive covenants is injunction, which can be sought by approaching the courts. Therefore, the use of methods of alternate dispute resolution, such as arbitration, mediation etc., may not achieve the desired result since it will prevent the company from seeking injunction.
India

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

As mentioned above, the courts are unlikely to enforce non-compete covenants. However, with regard to the other restrictive covenants, an employer can pursue the following remedies:

• Damages – The company may approach a court to seek remedies for breach of contract. However, the remedies are likely to be limited to damages only based on the actual loss suffered by the company.

• Injunction – Where the restrictive covenants have not been breached, the company could approach the court for an injunction (which would prevent the employee from approaching employees and customers/clients of the company or disclosing confidential information, as the case may be).

• Tortious Interference - Another option that exists (in cases where the former employee has joined a competitor) is to seek damages from the company which the former employee has joined. The damages can be claimed under the law of torts if it can be shown that such a company had induced the former employee’s breach of contract. Considering the company will have a greater paying capacity than the former employee, this could be a viable option.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Generally, restrictive covenants are not relevant to, or enforceable against, an employee’s pension benefits. Benefits and pensions which are statutorily due to an employee cannot be withheld subject to his/her non-adherence to any restrictive covenants. If the employer and employee have entered into a contractual arrangement whereby the employee will become entitled to certain additional amounts if he complies with some specific restrictive covenants, the same may be enforceable.

However, even these contracts should be worded so that the amounts payable are purely contractual. The language of the contract should not be such that these amounts may be deemed to be ‘wages’ and capable of being claimed by the employee as a matter of right, as wages.

ii. Which covenants are typically imposed?

See h. (i) in relation to pension benefits.

If the employer and employee were to contractually enter into agreements of the nature mentioned above, then the restrictive covenants that can be enforced may include non-solicit, confidentiality and other standard clauses in the employment contract (but not post-termination non-compete clauses, which, as discussed above, are void in India).

iii. What sanctions are/can be imposed by the employer for non-compliance?

See h. (i) in relation to pension benefits.

For others, sanctions will usually include claw back/forfeiture of the amount that would have become due if the employee had complied with the restrictive covenants.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

Claw back of paid or vested amount would normally be difficult to implement because once a right has accrued and been paid, it is difficult to claim it back under Indian law. In addition to the difficulty of recovering such benefits from employees, there will also be difficulties from a tax regulation perspective since an employee will not be able to recover paid income tax from the government directly.
Further, for employees earning less than INR 10,000 the provisions of the Payment of Wages Act would be applicable which permits deductions in only certain limited circumstances.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Restrictive covenants that are invalid are unenforceable. A court can apply the rule of severability and hold that a particular element of a restrictive covenant is invalid and uphold the remainder of the covenant.

However, a court will not re-write a covenant. It will only apply the rule of severability if the unenforceable element can be severed without having to modify or add to the remaining wording and if, by doing so, it does not materially change the nature of the original restriction.

Contributed by Ajay Raghavan
A global guide to ‘restrictive covenants’

Japan

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A. OVERVIEW:

Post-termination restrictive covenants are frequently used in Japan, especially in contracts that involve employees in senior positions or specialists who have access to valuable and/or confidential information. Although post-termination restrictive covenants are useful to protect the employer’s trade secrets, they may infringe on an employee’s right to choose his/her occupation which is guaranteed under Article 22 of the Constitution of Japan. Accordingly, post-termination restrictive covenants may be deemed invalid on the ground that they are against public order under Article 90 of the Civil Code of Japan.

Courts will generally examine if a post-termination restrictive covenant is “reasonable in scope,” taking into account:
(1) if and how the post-termination restrictive covenant is necessary to protect the employer’s legitimate interest, and
(2) if and how the post restrictive covenant restricts the employee’s freedom to choose his/her occupation.

Whether a post-termination restrictive covenant is “reasonable in scope” is based on factors such as:
(1) the purpose of the post-termination restrictive covenant,
Japan

(2) the position, role and seniority of the employee,

(3) the time period of restriction,

(4) the geographical extent of the restriction,

(5) the scope of restriction in terms of type of business or job, and

(6) the existence and amount of compensation paid in return for the restriction.

Remedies for breach of a post-termination restrictive covenant are:

(1) an injunction to restrain the employee’s activities, and

(2) a claim for compensation for damages against the employee.

In addition, many companies in Japan include a provision in their retirement allowance rules that either no retirement allowance, or only a reduced retirement allowance, will be paid to the employee if the employee takes any action which can be a ground for a disciplinary dismissal, including the breach of a post-termination restrictive covenant.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The general principles mentioned above regarding post-termination restrictive covenants also apply to the validity of a post-termination non-competition covenant. In determining the validity of a post-termination non-competition covenant, the court will examine factors such as:

(1) the purpose of the covenant,

(2) the position, role and seniority of the employee,

(3) the period of restriction,

(4) the geographical extent of the restriction,

(5) the scope of restriction in terms of type of business or job, and

(6) the existence and amount of compensation paid in return for the restriction.

When drafting post-termination non-competition restrictions, it is important to ensure that the period of restriction, the geographical extent of the restriction and the scope of restriction (in terms of type of business or job) are reasonably limited considering the purpose of the restriction (i.e., the contents of the interest that the employee wishes to protect by the covenant) and the position, role and seniority, etc. of the employee.
Japan

iii. Is it necessary to pay an employee during the period of the covenant?

No, not necessarily. That said, payment of compensation is one of the factors that the courts will consider to determine the validity of a post-termination non-competition covenant. Payments by an employer to an employee equal to the employee’s base salary during the period of the restriction are the most direct method of paying compensation. However, payment of a relatively high salary to an employee during employment and/or a relatively high retirement allowance may be considered as indirect compensation.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

Although the general principles mentioned above regarding the validity of post-termination non-compete restrictions will apply, post-termination non-solicitation clauses do not directly infringe upon an employee’s constitutionally guaranteed right to choose his/her occupation. Thus, non-solicitation clauses are generally enforceable. In practice, the scope of the prohibited customers/clients is often limited to customers/clients with whom the employee actually had contact, or for whom the employee was responsible in the course of the performance of his/her duties for a limited period during his/her employment (e.g. 12 months before the termination of employment).

iii. Is it necessary to pay an employee during the period of the covenant?

As in the case with post-termination restrictions, compensation is one of the factors that courts will consider to determine the validity of a clause prohibiting contact with customers/clients. In some cases, the courts have enforced post-termination clauses prohibiting contact with customers/clients even where no compensation was paid.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

During the term of employment, in general, even if there is no agreement between the employer and the employee that specifically prohibits the employee from soliciting his/her colleagues, it is considered that the solicitation of colleagues is prohibited. However, the court will determine whether the employee breached the prohibition based on various factors such as:

(i) the employee’s position (i.e., if and how strongly the employee has the power to influence his/her colleague), and

(ii) the manner of solicitation (i.e., if the solicitation is made in accordance to a plan; if the solicitation involves a large number of employees; and whether the manner of solicitation performed infringes against general societal appropriateness).
Japan

After termination of employment, in principle, a former employee is not restricted from soliciting his/her former colleagues unless otherwise agreed with his/her former employer. In the case involving an agreement between the former employee and the former employer, the agreement on the restriction is treated in the same basic manner as a restriction against soliciting colleagues during the employment.

iii. Is it necessary to pay an employee during the period of the covenant?

During the term of employment, no additional compensation is required for covenants to be valid. After the employment is terminated, as mentioned above, compensation is one of the factors that the courts will consider in determining the validity of the post-termination restrictive covenant, including a clause prohibiting solicitation of colleagues.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Yes. During the employment and after the termination of employment, it is fairly common to restrict the employee from disclosing or using confidential information and the company’s property. Companies often do not set a limitation on the period of such restrictions; instead, these restrictions apply as long as the company’s information retains its confidential nature. The former employer and former employee sometimes dispute whether or not certain information qualifies as “confidential information” or “company property” and whether such information or property is subject to the confidentiality obligation. Accordingly, it is important for the employer to clearly specify, to the greatest extent possible, the information and company property that is subject to the confidentiality obligation (e.g. in a written oath submitted by the employee at the termination of employment etc.).

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

An agreement between an employer and an employee to choose a governing law other than Japanese law is, in principle, valid. However, under the Act on General Rules for Application of Laws of Japan, even if the employer and the employee choose a governing law other than Japanese law, if the employee manifests his/her intention to the employer that a specific “mandatory provision” from within the law of the place with which the employment contract is “the most closely connected” should be applied, such a mandatory provision shall apply.

If the employment contract provides that the employee should work in Japan, Japanese law is deemed to be “the most closely connected” to the employment contract.

Also, the principles regarding the validity of post-termination restrictive covenants mentioned above are considered to be “mandatory provisions.” Accordingly, even if it is agreed that laws other than Japanese law govern the post-termination restrictive covenant, if the employee who worked in Japan during his/her employment manifests his/her intention to the employer to apply the principles regarding the validity of post-termination restrictive covenants, these principles shall apply. The employee may manifest that he/she would like the mandatory provisions to apply at any time. Typically, the employee does so when a dispute regarding the non-competition restrictive covenants arises after termination of his/her employment.

i. Can an employer impose a dispute resolution method on the employee?

Generally speaking, no. Under the Arbitration Act of Japan, an arbitration agreement between an employer and an employee regarding a future employment dispute (including future disputes regarding non-competition restriction covenants) is invalid. Rather, either the employer or the employee is entitled to seek release by filing a formal litigation claim, a preliminary injunction and/or a labour tribunal proceeding in Japan.
A global guide to ‘restrictive covenants’

Japan

Regarding international jurisdiction over a future employment dispute (including disputes involving post-termination restrictive covenants), an employer may agree with an employee that courts in a particular county where the employee provided his/her services at the time of termination of employment shall have such jurisdiction, although the agreement must be made at the time of termination of employment and jurisdiction must be non-exclusive.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

The most direct remedy for breach of a restrictive covenant is an injunction or preliminary injunction in order to restrain the employee’s and/or the new prospective employer’s activities. The employer may also claim compensation for damages caused by the employee’s breach to the post-termination restrictive covenants. Finally, prior to commencement of legal proceedings, a lawyer’s warning letter is frequently sent. In many cases, the warning letter is sufficient to either cease the breaching activity or else to facilitate a negotiated settlement.

In addition, many companies in Japan include a provision in their retirement allowance policies that no retirement allowance or only a reduced retirement allowance will be paid to employees if employees take any action which can be a ground for a disciplinary dismissal, including the breach of a post-termination restrictive covenant. As retirement allowances are generally considered as a type of deferred payment of salary for an employee’s work during his/her employment, courts will examine whether the application of such a provision in the retirement allowance rules is reasonable on a case-by-case basis.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

In addition to covenant enforcement described above, the Labour Standards Act of Japan prohibits the employer from agreeing with the employee in advance on the amount of the compensation for damages owed to the employer in the event of the employee’s breach of the employment contract. A provision in the contract or a company’s rules on the benefits, pensions or stock plans regarding the forfeit of the employee’s rights to receive these forms of compensation in a case where the employee breaches a post-termination restrictive covenant may be interpreted as such an agreement and deemed invalid depending on the contents of the provision.

ii. Which covenants are typically imposed?

ANSWER: It is common to include a provision in the retirement allowance rules that no retirement allowance, or only a reduced retirement allowance, will be paid to the employee if the employee takes any action which can be a ground for a disciplinary dismissal, including the breach of a post-termination restrictive covenant. All types of the post-termination restrictive covenants mentioned above can be the subject to such a provision.

iii. What sanctions are/can be imposed by the employer for non-compliance?

In the event of an employee’s non-compliance, the employer may decide not to pay any benefits or reduce the amount of the benefits that the employee will receive based on a provision in the contract or a company’s rules regarding the forfeit of the employee’s rights to receive the benefits. However, the employee may then make a claim to the court to receive these denied payment benefits, arguing that the provision itself is invalid or that the provision should not apply to the employee.
iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

As mentioned above, the Labour Standards Act of Japan prohibits the employer from agreeing with the employee in advance on the amount of compensation damages the employer would receive for the employee’s breach to the employment contract. After the employee’s right to receive the benefits vests, retroactive forfeiture may be interpreted as such an agreement and invalidated.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

In principle, a post-termination restrictive covenant that unreasonably restricts the employee’s freedom to choose his/her occupation is invalid and unenforceable as a whole. However, there are some court cases that determined the validity of broad post-termination restrictive covenants by limiting the scope of such covenants’ application. That said, it is prudent to draft a “cascading” type of restrictive covenant (e.g., a time period of one (1) year, but if that is held to be invalid, a time period of six (6) months, and if that period is held to be invalid, a time period of three (3) months).

Contributed by James M. Minamoto & Emi Uchida
A global guide to ‘restrictive covenants’

Malaysia

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A. OVERVIEW:

The present law in Malaysia is in favor of rigid statutory interpretation and is protective of an individual’s right to earn a livelihood. Unlike the Common Law jurisdiction, Section 28 of the Malaysian Contracts Act 1950 (“CA 1950”), which deals with restraint of trade, is not concerned with reasonableness of the restraint in trade. Once the Malaysian court finds that a covenant is in restraint of trade and none of the exceptions applies, the clause will be void.

This is evident from the case of Wrigglesworth v Wilson Anthony wherein the judge held that under Section 28 of the CA 1950, English law decisions relating to restraint of trade were not relevant as all covenants in restraint of trade were void under the same provision. Hence the test of reasonableness could not be applied in such cases.

Section 28 of the CA 1950 provides that “Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void” with three exception situations, as follows, where:

1. There is an agreement not to carry on business of which goodwill is sold; or
2. There is an agreement between partners prior to dissolution;
3. There is an agreement during the continuance of a partnership.

Exception 1 is concerned with an agreement for the sale of goodwill of a business. The seller of the goodwill of a business may agree with the buyer that he would restrain himself from carrying on a similar business, within specified local limits, so long as the buyer or any subsequent buyer thereto, carries on a similar business. Such covenant is valid and enforceable, provided the limits imposed appear to the court reasonable, considering the nature of the business.

A covenant in which a partner agrees not to carry on a business similar to that of the partnership within such local limits as are referred to in Exception 1, upon or in anticipation of a dissolution of the partnership is valid and enforceable under Exception 2. A covenant in which a partner agrees not to carry on a similar business during the continuance of the partnership is similarly valid and enforceable under Exception 3.

The High Court in Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon took a different view on the law of restraint of trade. In this case, Clause 10 of the employment contract provided that upon the defendant’s resignation, he shall not be engaged in work or own the same trade as the plaintiff company in Malaysia, Singapore, Thailand, Indonesia, Philippines and Taiwan for an immediate period of three years from the date of resignation. It was held that a restraint is permissible if it is fashioned in such a way as to prevent a misuse of trade secrets or business connection. In so ruling, Abdul Malik Ishak J held:

“In considering s 28 of the Contracts Act 1950, there must be some measure of flexibility. The commercial reality of the matter dictates this kind of approach. Regard must always be had to the nature of the business conducted by the employer. The test of reasonableness must be applied in construing a restraint of trade clause.”

We are of the view that the aforesaid decision of Worldwide Rota Dies Sdn Bhd (supra) run foul of the express provision of Section 28 of the CA 1950 and is not reflective of the present law in Malaysia relating to restraint of trade. As restraint of trade in Malaysia is absolute regardless of the geography and duration it seeks to cover, any form of restrictive covenant is therefore void and unenforceable.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

No

i. Are they capable of being valid?

No

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The effect of having a non-competition clause in an employment contract is that the employee will be prohibited from joining any organization that is deemed to be a competitor to its employer. When the employee is prohibited from joining any organization after they cease employment with their former employer, this will amount to restraint of trade which is expressly prohibited under Section 28 of the CA 1950. No matter how narrow or wide the covenant was drafted, the employer would not be able to impose a non-competition covenant against its employee. However, if the employer can prove that the non-competition clause falls within the exception to Section 28 of the CA 1950, it may be valid and enforceable.

iii. Is it necessary to pay an employee during the period of the covenant?

Not applicable.
C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

No

i. Are they capable of being valid?
No

ii. What does it take to show they are valid?
Based on our answer in b(ii) above, a post-termination clause that seeks to prohibit contact with customers/clients will be caught by Section 28 of the CA 1950 as it amounts to restraining an employee’s trade.

In the case of Svenson Hair Centre Sdn Bhd v Irene Chin Zee Ling, an injunction was sought by the employer against the ex-employee to restrain the ex-employee from contacting or corresponding with all or any of the employer’s present customers. The injunction was allowed. The Court held that the injunction sought was merely to stop her from calling, approaching or contacting the employer’s customers that appear on the customer’s list, as opposed to stopping the employer from working with the competing business.

We take the view that the restrain sought by the employer in the above case amounts to restraint of trade under Section 28 of the CA 1950. By prohibiting contact with customers/clients, the ex-employee is restrained from freely conducting their own trade in any manner they wish. Although it is arguable that the list of customer is the employer’s confidential information but that does not mean that the customer can only conduct business with the employer. In the circumstances, the injunction should not be allowed as it contravenes the express provision of the law. It is unlikely that the above decision will be followed by other Malaysian courts.

iii. Is it necessary to pay an employee during the period of the covenant?
Not applicable

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

No

i. Are they capable of being valid?
No

ii. What does it take to show they are valid?
In addition to our answer in b(ii) above, it will be very difficult to prove that the employee was solicited or enticed by the ex-employee to leave the employer.

However, it is arguable that the restrictive covenant serves to limit the ability of the ex-employee to hire the employee of the employer. It does not restrain the ex-employee from hiring the current employee of the employer. It is useful to refer to the case of Hua Khiow Steamship Co Ltd v Corp Chop Guan Hin (1930) that drew the distinction between restraining the manner in which a trade is carried out and restraining the trade itself.

iii. Is it necessary to pay an employee during the period of the covenant?
Not applicable
E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Another type of restrictive covenant is to restrain the employee or ex-employee from using, divulging or disclosing any confidential information or trade secrets of the employer. This type of restrictive covenant was held to be valid on the ground that the employee owes an implied duty to the employee prohibiting the employee from using any confidential information obtained during the course of employment. It must be emphasized that the law imposes a general duty on the employee to act in good faith and hence comes the obligation not to use or disclose trade secrets or to do what they have covenanted not to do.

In order to prove that the information in question constitutes a trade secret of the employer, the following would be considered.

- the nature of the employment, i.e. whether the employee was regularly exposed to confidential information and only a limited number of employees had access to the information;
- the nature of the information itself;
- whether the confidentiality of the information was emphasized by the employer; and
- whether the relevant information could easily be isolated from other non-confidential information which was part of the same package of information.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law refers to the set of law that parties to an agreement choose to govern the agreement. A choice of law clause is vital especially when the agreement involves multiple parties from different jurisdictions. Generally, the Malaysian courts would give effect to an express choice of law clause. In the absence of an express choice, the Court will have to determine if there is an implied choice by reference to which the contract was made, and such implied choice is to be inferred from the terms of contract or surrounding circumstances.

If the Court is unable to imply the choice of law, the Court may adopt the system of law, with which, the transaction has the closest and most real connection. Examples of this are; (a) the place of performance of the contract; (b) the place where the contract was made; (c) the links of the parties of the contract to any particular countries; (d) the site of the immovable property if such property is involved, and (e) the currency in which money under the contract is expressed.

While a choice of law clause governs the law that will apply, a jurisdiction clause refers to a situation whereby parties have agreed to the courts of a named country taking jurisdiction over any disputes that may arise from the contract.

Malaysian courts, like the English courts, can give effect to the agreement of parties to apply foreign law (being the choice of substantive law).

With regards to the effect of the choice of law clause on the restrictive covenants, it would very much depends on the express choice made by the parties. If the parties agree to apply Malaysian law, it faces the risk of being caught within Section 28 of the CA 1950. In the event the parties chose to apply UK law, the court would still have the jurisdiction to hear the matter. However, the application of English law is subject to variation, if it is contrary to public policy in Malaysia.

i. Can an employer impose a dispute resolution method on the employee?

It is unusual for an employment agreement to provide for a dispute resolution method. This is on the basis that the Malaysian Industrial Relations Act 1967 has provided that when an employee filed a written complaint over unfair dismissal, both the employee and the employer are required to attend a reconciliation process. When the matter could not be settled at reconciliation stage, the matter will then be referred to the Industrial Court for adjudication.
Malaysia

Even if the employment agreement provides for a dispute resolution method, the clause does not debar the employee from filing a complaint for unfair dismissal under Section 20 of the Industrial Relations Act.

Therefore, a dispute resolution method does not serve any purpose or benefit to the employer and the same might be held invalid as it purports to curtail the employee’s statutory right under Section 20 of the Industrial Relations Act.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?
Since restrictive covenants are prohibited under Section 28 of the CA 1950 and therefore invalid, it is impossible to enforce the same in our jurisdiction.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:
   i. Do the same principles of enforcement outlined above at g. apply?
      Not applicable
   ii. Which covenants are typically imposed?
      Any restrictive covenants that an employer seeks to impose do not extend to employee benefits, pensions and stock plans as the same are provided by a third party and not within the power of the employer. By reason of the foregoing, there are no restrictive covenants imposed in relation to employee benefits, pensions and stock plans.
   iii. What sanctions are/can be imposed by the employer for non-compliance?
      Since any restrictive covenants will be caught by Section 28 of the CA 1950, the employer will not be able to enforce sanctions for non-compliance.
   iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)
      Not applicable for reasons in h(i), (ii) and (iii) above.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?
A restrictive covenant which is found to be in breach of restraint of trade will be void and unenforceable. However this does not affect the remaining provisions in the contract as the Court will apply the principle of severability, i.e the void provision will be severed from the contract.

Contributed by Nadarajah Sivabalah and Nadia binti Abu Bakar
New Zealand

A. OVERVIEW:

Restraint of trade clauses in employment agreements are generally presumed to be unenforceable because they are anti-competitive and contrary to the public interest. They will only be upheld by the Employment Relations Authority (Authority) or Employment Court (Court) if they are deemed necessary and reasonable in order to protect an employer’s genuine proprietary interests. In the event of a challenge, the onus is on the party seeking to enforce the clause to demonstrate that it is reasonable.

In determining the “reasonableness” of restraint of trade clauses, the Authority and Court consider factors such as:

(a) whether the employer had a genuine proprietary interest/s;
(b) the scope and duration of the restraint;
(c) the geographical area of the restraint;
(d) the nature of the business;
New Zealand

(e) the seniority of the employee;
(f) whether any consideration has been paid to compensate for such restrictions; and
(g) the impact on the restraint on the individual (for example the ability to earn a living).

The Authority or Court are unlikely to enforce a clause which simply seeks to restrain competition in general and does not protect a legitimate proprietary interest that the employer is able to point to.

The courts are able to apply section 8 of the Illegal Contracts Act 1970 in the context of actions relating to restraint of trade clauses. This section allows the courts to modify a restraint of trade clause (i.e. its duration, geographical coverage and/or scope) to make it reasonable. If the restraint is modified by the court, the employee will be bound to comply with the restraint in its modified form.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes

i. Are they capable of being valid?
   Yes

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

   The factors mentioned above apply in determining whether a non-compete clause is reasonable, and thus enforceable. As well as duration, geographic coverage and scope, the clause must be necessary to protect a legitimate proprietary interest of the employer in the nature of trade secrets or business connections.

   Non-compete clauses are more difficult to enforce than those prohibiting solicitation only (e.g. of customers, suppliers or employees).

   The roles for which a non-compete clause may be appropriate include senior sales staff, senior management and any staff that have important relationships with clients or access to trade secrets or other highly confidential information.

   In most cases, a restraint against competition will also only be reasonable for a period of one to three months. In exceptional circumstances, a restraint for a longer period of time may be justified, particularly if the employee is key and separate consideration is paid to the employee for entering into the restraint.

   For a restraint of trade to be enforceable the employee must have received consideration for their agreement to be bound by the restraints. This is not to say, however, that extra consideration is a pre-requisite for an enforceable restraint. There does not need to be “extra consideration” over and above the consideration for the underlying employment agreement, provided the restraint is entered into at the commencement of employment.

   Additional and separate consideration will be critical where the restraint (or a more onerous restraint) is proposed by way of a variation, or attempted variation, to the original employment agreement.

iii. Is it necessary to pay an employee during the period of the covenant?

   No. There is no legal obligation to pay employees during the period of a restraint of trade. Doing so will however assist with the enforceability of a restraint.
New Zealand

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes

i. Are they capable of being valid?

Yes

ii. What does it take to show they are valid?

The same principles that are outlined above in relation to non-compete clauses apply to contact prohibition clauses. Such restraints will only be enforceable if reasonable.

Non-solicitation clauses are, generally, easier to enforce than non-compete clauses. Therefore, a longer restraint period and/or a wider geographical restriction and scope will more likely be held to be reasonable.

Reasonable prohibitions on non-solicitation will usually be confined to clients, suppliers or customers whom the employee has actually dealt with (usually within the 6 to 12 months prior to termination of the employee’s employment).

iii. Is it necessary to pay an employee during the period of the covenant?

No, for the reasons given in (b)(iii) above.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes

i. Are they capable of being valid?

Yes

ii. What does it take to show they are valid?

The principles outlined above also apply to non-solicitation of employees.

iii. Is it necessary to pay an employee during the period of the covenant?

No, for the reasons given in (b)(iii) above.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

As well as non-solicitation of clients, customers and employees, it is common for employment agreements to contain a clause restricting the solicitation of suppliers of the employer. The same principles that apply to non-solicitation of clients and customers apply for suppliers.

It is common for employment agreements to restrict the use or disclosure of confidential information relating to the affairs, clients or trade secrets of the employer. These clauses usually apply during employment and after termination. There will also be common law protections based protecting the misuse of confidential information obtained during employment.
New Zealand

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Generally, where parties have expressly selected a system of law to govern the agreement, that choice will be given effect provided that it is bona fide and legal, and there is not public policy reason for avoiding the choice.

However, the courts have held that a choice of law clause will not be effective where a foreign system of law is chosen which has little or “no connection” with the employment agreement and thus comprises a contracting out by the parties of the governing application of New Zealand employment law.

i. Can an employer impose a dispute resolution method on the employee?

In New Zealand, the Authority has exclusive jurisdiction to make determinations about employment relations problems generally, including disputes over restraints of trade. However, the Authority must consider whether mediation is required in the first instance. The Court deals with de novo hearings, appeals and matters removed from the Authority.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Either an employer or an employee may seek to have the Authority determine whether a restraint of trade clause is enforceable.

An employee may apply to the Authority seeking a declaration that a restraint of trade is invalid.

Employers seeking to enforce a restraint of trade clause can apply for an injunction to restrain the employee from commencing employment for another employer. Injunctions can be granted by both the Authority and the Court.

Before the Authority or Court will order an injunction it must:

(a) be satisfied that there is an arguable case in respect of the alleged breach of the restraint clause;
(b) consider the balance of convenience; and
(c) consider the overall justice of the case.

In addition to seeking an injunction to restrain an employee from working for a competitor, an employer can also seek remedies for breach of the restraint clause if it is held to be enforceable.

To be successful in a claim for remedies, the former employer must be able to show that they suffered financial losses as a direct result of the employee’s breach of the restraint of trade clause. If this occurs, the employee may be ordered to pay damages for the losses incurred as a result of the breach of the clause (including an account of profits).

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Generally, restrictive covenants are not relevant to, or enforceable against, an employee’s pension benefits.

In relation to long term incentive awards, the sanction is usually forfeiture of the award, or, in some cases, claw back of any amounts already paid. The former would not need enforcement (as it would be in the employer’s powers not to deliver the cash or shares pursuant to the award) – although it may be challenged by the participant, but such challenges would generally involve a claim for breach of contract. Employers should ensure that any such provisions do not, in practice, operate as a penalty clause, which are typically unenforceable.
New Zealand

Historically it was usually determined at the time of termination whether a participant would retain his award (“good leaver”) or lose his award (“bad leaver”), and if the award was retained it would usually vest and be paid out at the time of termination. It is becoming more usual for retained awards to be paid out to good leavers at the original vesting date, rather than on termination, which has led to an increase in forfeiture or claw back provisions relating to specified post-termination activities.

A forfeiture of an award or partial award, for prohibited competitive activities can be challenged if the employee claims that the provisions allowing forfeiture are unenforceable as a restraint of trade. The same approach will be taken to evaluating these clauses as is taken when looking at the equivalent clauses in employment contracts.

ii. Which covenants are typically imposed?

See h. (i) in relation to pension benefits.

Covenants imposed will tend to mirror the covenants contained in employment agreement, although there is no requirement that this is the case. As such these covenants could range from non-competition covenants through non-dealing and non-solicitation of customers clauses.

iii. What sanctions are/can be imposed by the employer for non-compliance?

See h. (i) above in relation to pension benefits.

Injunctive relief is less common, as the plan documentation does not usually impose a specific prohibition on the relevant behaviour – rather forfeiture of all parts of the award if the behaviour occurs. It is more common for a forfeiture provision to apply to unvested incentive awards if the participant engages in the relevant behaviour. In addition, there may be claw back of amounts paid (or repayment of any value realised on sale of shares delivered) on the vesting of awards. Where shares are delivered, it would be possible to prohibit sale of the shares until expiry of any relevant covenant period, possibly coupled with some form of security over the shares. Injunctive relief may be available if the award documentation contained a prohibition on the relevant behaviour.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

See h. (i) above in relation to pension benefits.

There are generally no specific limits in relation to long term incentive arrangements. However, there may be limits to what the employee is prepared to agree to.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Restraints of trade that are invalid are unenforceable. Under section 8 of the Illegal Contracts Act 1970, the Court or the Authority has the ability to modify a restraint of trade clause to make it reasonable. This is typically done by reducing the duration, geographic coverage or scope of the restraint. If the restraint is modified, the employee will be bound to comply with the restraint in its modified form.

Contributed by Phillipa Muir and Carl Blake
A. OVERVIEW:
The employer and employee may agree on confidentiality of commercial secrets and intellectual property. Employees with a confidentiality obligation can also be bound by a non-compete obligation after cessation of employment. For such provision to be enforceable, the employer must pay consideration on a monthly basis during the post-employment non-compete period. Violation of a non-compete provision will subject the employee to a preset penalty for breach of contract. The employer and the employee may agree upon the scope, area and period for non-competition. The maximum period may not be more than two years after the end of employment.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?
Yes.
i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?
The following elements should be considered:

1. Length of the restricted period: the non-compete period is capped at two years after the termination/expiry date of the employment.

2. Applicable positions: employees who could be subject to non-compete obligations are limited to senior managers, senior technical employees, and other employees restricted by confidentiality obligations.

3. Scope: the employer can restrict the employee, after the termination or expiry of employment between the parties, from:
   a) being employed by any of its competitors who manufacture, operate or engage in products or business falling within the same category as those of the employer;
   and/or
   b) engaging in, on their own behalf, the manufacture or operation of products or business falling within the same category as those of the employer.

4. Compensation: an employer shall pay economic compensation [see paragraph 5 below] to an employee for his continuous observance of a non-compete obligation on a monthly basis after the termination / expiry of his employment. Otherwise, the employee will no longer be bound by the agreed responsibilities.

5. Standard of compensation: no currently effective national law or regulations have imposed any minimum or maximum standard. However, according to the Judicial Interpretation IV of the Supreme People’s Court on Several Issues Concerning the Application of Law in Hearing Labor Dispute Cases (“JI IV”), which came into force on February 1, 2013, 30% of the monthly average of the employee’s salary over the last 12 months prior to departure may be considered by the courts as the minimum reasonable compensation for non-compete obligations.

6. Termination: according to the JI IV, during the non-compete period, an employer is entitled to terminate the non-competition agreement with the employee at any time. However, in such case, the employee will be entitled to an additional 3-months’ non-compete compensation.

There is an unanswered question as to whether such additional compensation may also be payable where the employer releases the employee before the start of the Restricted Period. The courts may, in practice interpret this additional compensation to be payable to help tide over the employee while finding a new (competing) job and require a period of prior notice (corresponding to the 3 months’ compensation) to be served to release in advance or payment in lieu of notice to be paid.

7. Continuous Performance: according to the JI IV, where an employee is in breach of the non-compete restrictive covenant then, in addition to liquidated damages, the employer is entitled to request the employee to continue his performance of the non-compete obligations in accordance with the contract.

iii. Is it necessary to pay an employee during the period of the covenant?
Yes, please refer to Para. 4 and Para. 5 to ii above.
C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
PRC employment law is silent on this aspect. Such a covenant is negotiable and can be contractual.

iii. Is it necessary to pay an employee during the period of the covenant?
No, there is no legal requirement.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
PRC employment law is silent on this aspect. Such a covenant is negotiable and can be contractual.

iii. Is it necessary to pay an employee during the period of the covenant?
No, there is no legal requirement.

E. OTHER COVENANTS: Are there any other types of employment - and post-employment-related covenants which are common in this jurisdiction?

Confidentiality covenant.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

In the context of employment within China, PRC law will be the governing law. No choice of law is permissible.

i. Can an employer impose a dispute resolution method on the employee?

It is a mandatory legal requirement that labour disputes must be submitted to the competent labour dispute arbitration committee first, before going to the court. In terms of disputes relating to non-compete covenants, these can be either resolved as a labour dispute (in which case the labour dispute arbitration procedure will be gone through first) on the basis of PRC employment laws, or resolved as a civil tort case on the basis of PRC Anti-unfair Competition Law (in which case it can go directly to the court).
G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Where an employee violates the non-compete obligations, the employer is entitled to:

(i) claim for the agreed liquidated damages, and

(ii) demand that the employee continue to observe their non-compete obligations. However, due to the lack of effective judicial measures, in reality it would be difficult to prevent the employee from working with the competitors.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

No.

ii. Which covenants are typically imposed?

PRC law is silent in this regard.

iii. What sanctions are/can be imposed by the employer for non-compliance?

PRC law is silent in this regard.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

PRC law is silent in this regard.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

It will be ruled as void and the Court will not re-write the covenant.

Contributed by Andy S.K. Yeo and Helen Liao
A global guide to ‘restrictive covenants’

Philippines

A. OVERVIEW:
Post-termination restrictive covenants are often assessed against the precepts of public policy, management prerogative, legitimate business interests and reasonableness.

These restrictive covenants are typically embodied in employment contracts that are governed by the Labour Code of the Philippines and the Civil Code of the Philippines. There is no specific Labour Code provision that prohibits post-termination restrictive covenants, but it must be emphasized that the law favors the employees, and all doubts must be resolved in favor of the employee. Nevertheless, this does not necessarily mean that post-termination restrictive covenants are invalid, per se. An employment contract, just like any other contract under the Civil Code, may contain provisions as the employer and employee may deem convenient, provided that they are not contrary to law, morals, good customs, public order or public policy. In the same vein, the courts cannot stipulate for the parties nor amend their contract if their contract does not contravene the law, morals, good customs, public order or public policy.
Philippines

Management prerogative means that the law recognizes the rights of management, which are protected and recognized in the interest of fair play. Post-restrictive covenants, which are often imposed to protect the rights of management, are upheld so long as these are exercised in good faith for the advancement of the employer’s interest and not for the purpose of defeating or circumventing the rights of the employees under the Labour Code, Philippine law or regulations.

Legitimate business interests are also considered, such as safeguarding business confidentiality and protecting one’s competitive position.

Lastly, the restrictive covenants must be reasonable as to time, trade (or scope) and place.

If an employee violates a post-employment restrictive covenant, the employer may seek injunction from the courts and/or file an action for damages against the employee.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The general principles discussed above apply. In a 2007 Supreme Court decision, the Supreme Court upheld a non-compete clause because it was specifically limited as to time (i.e. two years) and limited as to trade (i.e., only businesses akin to the employer’s business). Earlier jurisprudence also requires that the clause should be limited as to place.

iii. Is it necessary to pay an employee during the period of the covenant?

It depends. If the covenant is incorporated in the employment contract, the employee is deemed already compensated as the non-compete clause is one of the terms and conditions of employment. On the other hand, if the non-compete clause is required at the time of the separation of the employee, it must have additional consideration to be valid following the law on contracts.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

There is no Supreme Court decision with a categorical ruling on the requirements for validity of contact prohibition clauses. However, given that these are generally incorporated in employment contracts that are governed by the Labour Code of the Philippines and the Civil Code of the Philippines, it is arguable that like other post-termination restrictive covenants upheld by the Supreme Court, these contact prohibition clauses must yield to the general principles discussed above.

iii. Is it necessary to pay an employee during the period of the covenant?

Please see answer to c (ii) above.
**Philippines**

**D. NON-SOLICITATION OF EMPLOYEES CLAUSES:** Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

There is no Supreme Court decision with a definitive ruling on the validity of non-solicitation clauses. However, inducing an employee of a competitor to move to one’s business may constitute a tortious interference under the Civil Code of the Philippines. For a third person to be liable for tortious interference under the Civil Code of the Philippines, it must be proven that: (1) there is a valid contract; (2) there is knowledge on the part of the third person of the existence of a valid contract; and (3) interference of the third person is without legal justification or excuse.

iii. Is it necessary to pay an employee during the period of the covenant?

The covenant is typically incorporated in the employment contract, for which the employee receives compensation.

**E. OTHER COVENANTS:** Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Generally, employment contracts in the Philippines contain conflict of interest clauses where employees are required to avoid any activity, relationship or interest that may run counter to the responsibilities which they owe to their employer. The Supreme Court upheld a provision where an employee of a certain drug company was prohibited from marrying an employee from a competing drug company.

Also, non-disclosure/confidentiality provisions are valid in the Philippines. Where businesses have trade secrets or business secrets to protect, employees and employers may validly stipulate that the employee is not allowed to disclose or use any such information obtained during the period of his employment. However, Courts are reluctant to implement non-disclosure/confidentiality clauses against employees who by virtue of their rank or position, eg., rank and file employees, do not have access to confidential or secret information.

**F. CHOICE OF LAW:** What is the impact of the choice of law on the enforcement of a restrictive covenant?

The employer and employee are free to stipulate their choice of law, but in no case can they deprive the Labour Courts of their original and exclusive jurisdiction over the enforcement of restrictive covenants insofar as these involve claims for damages arising from the employer-employee relationship.

i. Can an employer impose a dispute resolution method on the employee?

Yes.. Sec. 3, Art. III of the Philippine Constitution upholds the “preferential use of voluntary modes of settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.” In this regard, the National Labour Relations Commission has recently issued a department order requiring the submission of labour complaints cognizable by the Commission to mediation or conciliation before the same is submitted to the Labour Arbiter for resolution.
G. ENFORCEMENT: How are covenants typically enforced in your jurisdiction?

The employer may seek an injunction and/or file an action for damages against the (former) employee. Alternatively, if there is still an existing employer-employee relationship, the employer may have grounds to dismiss the employee.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Yes. Please note that for termination for violation of a restrictive covenant (i.e., a termination for just cause), the employee is deprived of separation benefits, without prejudice to the benefits or privileges they may have that are voluntarily agreed upon by both employer and employee.

ii. Which covenants are typically imposed?

The employer and employee are free to stipulate which covenants are imposed.

iii. What sanctions are/can be imposed by the employer for non-compliance?

This is subject to stipulation of the employer and employee, as long as these do not contravene law, morals, good customs, public order or public policy.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

Please see answer above.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

It is considered as not written and it has no force or effect.

Contributed by Enriquito J. Mendoza, Rena M. Rico Pamfiolo and Amanda F. Nograles
Singapore

A. OVERVIEW:

Commonly used in contracts of employment to prevent employees from taking advantage of resources or goodwill obtained during their employment to unfairly put themselves in competition with their former employers after resignation, post-termination restrictive covenants have featured quite prominently in recent jurisprudence in Singapore.

The general position is that post-termination restrictive covenants are prima facie against public policy and thus unenforceable, unless an employer can prove that

(1) there was a legitimate proprietary interest to be protected,

(2) the restrictions satisfy the twin-tests of reasonableness and

(3) the restrictions go no further than is necessary to protect the legitimate proprietary interest(s) concerned.
Singapore

Traditionally, domestic Courts have recognized three groups of legitimate proprietary interests capable of being protected by restrictive covenants: trade secrets and confidential information; trade connections, and to maintain a stable and trained workforce. Although the Courts have stopped short of any express statement that these categories are not capable of expansion under appropriate circumstances, there has yet to be any instance of such arguments being canvassed by employers.

The crucial time for ascertaining whether or not the restrictive covenant in question is in fact reasonable is at the time at which the contract is made.

As to whether the scope of such restrictive covenant is reasonable, Courts have in particular, usually assessed them in terms of the geographical limit and period of restriction. Relevant considerations in such an assessment include the roles, duties and seniority of that particular employee and whether there are any additional factors in respect of that particular industry. However, note that no one factor is decisive. The Courts have consistently stated that no two cases are the same and what is reasonable will depend on the particular factual matrix of the case, thus the Court will conduct a holistic assessment before determining if a restrictive covenant is reasonable.

In a majority of cases, the remedy asked for by employers for a breach of a restrictive covenant is an injunction, to restrain either the employee or the new or prospective employer’s activities. However, depending on the category of legitimate proprietary interest that the employer has sought to protect, financial compensation may also be appropriate in certain circumstances.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes. Assuming that this has been crafted in as part of the employment agreement at the time the employee joins, then the key consideration is whether such a clause is reasonable or otherwise as explained in the response in (a) above. Where this has been requested at the time of the termination of the employment agreement, then in addition to reasonableness, there must be valid consideration provided.

i. Are they capable of being valid?

Yes

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The general principles mentioned above apply. However, the Courts generally adopt a stricter approach towards restrictive covenants in an employment context compared to the context of the sale of a business. It is clear that a bare and blatant restriction of the freedom to trade will not be enforced and the likelihood of any post-termination restrictive covenants being upheld following the Courts’ scrutiny will depend on whether the scope and duration of the restriction is reasonable, followed by a consideration of whether a less onerous restriction, such as a non-solicitation clause, would have been sufficient.

With regrad to the period of restriction, the relevant industry concerned and the employee’s seniority and role in his/her former employer’s business will make for key considerations. For example Courts have found a 1-year restriction to be too long in the context of a Managing Director in charge of business strategy and operations, while the same was held valid in relation to a Managing Director for a brokerage firm. While there is no existing jurisprudence to indicate either way, it may be that restrictive periods of 1 – 3 years may be held reasonable as a preliminary benchmark, while the Courts have held that a restrictive period of 3 years to be unreasonable. However, note that should the employee have been put on garden leave by the employer previously, such period may be taken into account by the Court in assessing whether the period of restriction is reasonable.

More recently, the Courts have held that, where an employment contract already contains a confidentiality clause, an employer seeking to uphold any restrictive covenants must show another legitimate proprietary interest apart from that being of the protection of trade secrets. In such a case, the alternative legitimate proprietary interest of protecting trade connections, if proven, will generally suffice.
Singapore

iii. Is it necessary to pay an employee during the period of the covenant?

There is currently no legal requirement for employees to be paid during the period of any post-termination restrictive covenants. However, whether an employee is paid during such period will also be relevant in the assessment of whether any restriction is reasonable.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes. Such non-contact clauses are usually in the form of non-solicitation clauses which may prohibit the solicitation by the employee of either their former employer’s customers, including existing customers and those from which the employer is trying to solicit business.

i. Are they capable of being valid?

Yes

ii. What does it take to show they are valid?

The general principles mentioned above apply. In general, such non-solicitation will extend to persons who are existing customers, persons who are not customers yet but with whom negotiations are going on with a view of making them customers and customers who are no longer patronising the employer at the time that the employee leaves, but remain in the habit of dealing with the employer.

However, for such non-solicitation clauses to be held valid, such aforementioned persons must be either persons with whom the employee had contact or about whom they became aware or informed about in the course of their employment or persons with whom the employee worked or supervised the work of during a defined period of time prior to the employee leaving their employment; usually 1 year.

iii. Is it necessary to pay an employee during the period of the covenant?

No, for the reasons noted in the response to (b)(iii) above.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment); and

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The general principles mentioned above apply. In respect of clauses regarding the non-solicitation of former colleagues, the Courts have stated the preference not to lay down any blanket rule. However they have also stated that it would generally be more difficult to justify a non-solicitation clause which covers the solicitation of just “any” employee.
Singapore

A clause prohibiting the solicitation of any employee, without reference to their importance to the business and whether or not they have any knowledge or experience in relation to the employer’s field of activity would generally be regarded as unreasonable and thus unenforceable. Therefore, such clauses are usually restricted to colleagues over whom the employee had influence and may well be inappropriate in relation to members of staff whom the employer can easily replace. However in the final analysis, much is dependent upon the particular factual matrix.

While in practice it may be that it is usually difficult for employers to prove that a non-solicitation of employee’s clause has been broken, in certain circumstances, the employer may well consider taking action against its former employee for breaching a non-solicitation clause by way of an action in tort for inducing breach of contract.

iii. Is it necessary to pay an employee during the period of the covenant?

No, for the reasons noted in the response to (b)(iii) above.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Confidentiality clauses that restrict the use or disclosure of confidential information during and after employment are commonly used in addition to post-termination restrictive covenants. Such confidentiality clauses are intended to apply during and after termination, and generally have no time limit to their applicability insofar that the information is not in the public domain. However, note that where there is a confidentiality clause, the matters stated in the response to question (b)(ii) above must be considered.

In addition to confidentiality clauses, intellectual property clauses are also used to restrict the employee from using intellectual property discovered by them during the course of their employment or those belonging to the former employer. Similarly, such clauses generally have no time limit to their applicability.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

If Singapore law applies to the contract, the principles mentioned in the response above will apply to the interpretation and enforcement of restrictive covenants. Being a common law jurisdiction as well as a commonwealth nation, the Courts may in certain circumstances also consider relevant cases from other jurisdictions such as Australia, New Zealand, Hong Kong and the United Kingdom in coming to their decision.

i. Can an employer impose a dispute resolution method on the employee?

It is generally unusual to see alternative dispute resolution procedures imposed in employment contracts. While there may be internal dispute resolution procedures in-place in an employment contract, these are usually intended to be grievance procedures that kick-in if an employee is dissatisfied with the employer’s disciplinary process for one reason or an other.

As injunctions are the most commonly preferred remedy for enforcing restrictive covenants, most enforcement is sought through the Courts.
G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Typically, where an employer is successful, the Court will order an injunction in the employer’s favour, restraining the employer’s or the new or prospective employer’s activities, in so far as such activities breach the terms of the restrictive covenants sought to be protected by the former employer. However, injunctions remain equitable remedies in the Court’s discretion and there is no guarantee that the Court will or will not grant an injunction in any given case. In limited circumstances, such injunctions may also be in the interim, and last until the case is decided whereby the Court may order a final injunction or otherwise.

Other forms of injunction such as those to enforce a garden leave provision preventing a third party from unlawfully inducing a breach of contract or to restrain their unlawful activity may also be sought for. However, the form of the injunction generally depends on the scope of the restrictive covenants sought to be protected and how it has been breached.

Apart from injunctions, remedies including damages and other forms of financial compensation for breach of contract are most frequently imposed by the Courts.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

There are currently few or no local cases where restrictive covenants are tied against an employee’s pension benefits.

In relation to financial incentives, the Court has made a distinction between those that have ‘vested’ in the employee and loyalty payments. In relation to the former, conditions attached to the payment of such amounts (forfeiture provisions), if they have been vested, due and payable to the employee as at the termination of his employment, if they prohibit the employee from joining a competitor under the threat of forfeiture, will be assessed by the Court under the doctrine of restraint of trade. However, loyalty payments, where additional moneys are paid to employees if they do not join competitors for a certain period may be permissible compared to the forfeiture provisions mentioned previously. The Court will consider the true nature of any provisions in an employment contract, to ensure that they do not escape its scrutiny if it is in fact a restriction regardless of how a clause is phrased.

Sometimes, where an employee’s training/education has been paid for by the employer, the employer will seek to claw-back such payments should the employee leave the employment of that employer or join a competitor. Note that in such cases, the sum sought to be clawed-back must represent a genuine pre-estimate of loss suffered by the employer. Otherwise, the clause(s) may be found to constitute penalty clauses, which are typically unenforceable.

ii. Which covenants are typically imposed?

In the majority of cases, the covenants imposed relate to non-compete by the employer upon termination or will tend to mirror the covenants contained in the standard form employment contracts, although there is no requirement that this be the case. As such these covenants could range from non-competition covenants through to non-dealing and non-solicitation of customers clauses.

iii. What sanctions are/can be imposed by the employer for non-compliance?

Due to the nature of such clauses, where there is usually no imposition of prohibition on any specific behaviour, but rather the forfeiture of such incentives, or parts, on the occurrence of a behaviour, injunctive relief is less common than financial disincentives. However, as stated in the response to question (h)(i) above, the extent or validity of any forfeiture will depend on whether such incentives have already been vested and accrued to the employee in question prior to their termination or after.

In relation to claw-back of other payments/benefits, the general principles as stated in the response to question (h)(i) above apply.
iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

As stated above, for any forfeiture provision to be held valid, the Court will assess it based on the principles applicable to restraint of trade in general.

In relation to claw-back of other payments/benefits, the general principles as stated in the response to question (h)(i) above apply.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

As stated, restrictive covenants that do not meet the requirements under the general principles are invalid and thus unenforceable. In practice, most restrictive covenant clauses are accompanied with a modification clause which allows that in the event that any part thereof is deleted or reduced in duration, such restriction shall continue to apply to the extent allowed by such deletion or reduction.

Such clauses are intended to provide for the event that the Court applies the ‘blue pencil’ test and severs a particular element (which is considered invalid) of a restrictive covenant and upholds the remainder of the covenant which is considered valid. To the extent that such practices unconsciously encourage the use of ‘cascading’ clauses, there is no definitive judicial pronouncement on whether such clauses are acceptable.

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A. OVERVIEW:

Post-termination restrictive covenants are essentially contractual provisions made between the employer and the employee and so are, in principle, enforceable. However, because they are imposed on the employee for the benefit of the employer, there have been cases where the Korean courts have invalidated or limited the effects of such covenants because they affect the employee’s freedom to choose an occupation specified in the constitution and guarantee of livelihood. In such cases, the most important factor that the courts would consider is whether or not the purpose of the post-termination restrictive covenants is to protect the justifiable interests of the employer.

If post-termination restrictive covenants are found to be enforceable, the employer can file a civil claim for a preliminary injunction and damages against the employee who violated the covenants. In special cases, (e.g. the employee infringing upon the employer’s trade secrets) criminal proceedings may be commenced. However, because it is difficult to prove the amount of damages, it is helpful to include a liquidated damages clause. Nonetheless, we must bear in mind that the court may reduce the amount of the liquidated damages.
B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes. A number of Korean companies include a non-compete clause in employment contracts or enter into separate, non-compete agreements. Judicial precedents regarding non-compete clauses define such clauses as ‘an agreement that the employee will not engage in competitive behaviour such as being hired by the employer’s competitors or establishing and managing a competing company.’

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

There is no law that clearly limits non-compete clauses. Therefore, a non-compete clause, which is an agreement between the employer and the employee, is in principle enforceable under the freedom of contract principle. However, according to precedents, if a non-compete clause is deemed to excessively limit the employee’s freedom to choose an occupation, which freedom is guaranteed by the constitution, the non-compete clause can become invalidated under the Article 103 of the Korean Civil Code as it would violate the principle of good morals and social order. In deciding whether to invalidate a non-compete clause, the court would take into consideration the following factors:

(i) the interest sought to be protected under the non-compete clause;
(ii) the position of the employee prior to their termination;
(iii) the scope of the restriction including the length of the restriction period, geographical restriction, etc.;
(iv) the compensation to the employee in consideration of unavoidable encroachment on the employee’s right to work;
(v) the reason(s) for termination of employment; and
(vi) the public interests

‘The interest sought to be protected’ includes not only the employer’s trade secrets, but also exclusive knowledge and information of the employer that the employee agrees to keep as secret. It also includes the employer’s relationship with its customers and maintenance of the employer’s credibility. ‘The interest sought to be protected’ is the most important factor in assessing the validity of a non-compete clause. Generally the protection of technology information of the employer is deemed to be more important than the protection of management information of the employer (such as business plan, sale strategy, price, profit margin, etc.) in assessing the validity of a non-compete clause.

As for ‘the prior position of the employee’, a non-compete clause is more likely to be deemed valid if, for example, the employee was a high-ranking executive officer responsible for handling confidential business information or the employee handled such confidential business information for a long period of time.

As for ‘the scope of the restriction’, a non-compete clause is likely to be deemed to be valid if the scope of the non-compete clause (as it relates to length of period of restriction, restricted geographical area and restricted line of business) is excessively wide (considering the employee’s position at the employer), because the employee’s freedom to choose an occupation becomes more limited as this scope becomes wider.

‘The compensation in consideration of non-compete clause’ has recently being considered as an important factor in determining the validity of a non-compete clause. There are precedent cases, however, where a non-compete clause was deemed to be valid in light of other factors despite an absence of compensation. Therefore, compensation is not absolutely necessary. However, in the case of an employee who does not handle technology information, such as a sales employee, it is safer to provide compensation in order to have the non-compete clause be deemed valid. Compensation need not be monetary benefit. Benefits provided in non-monetary forms such as promotion, or opportunities to study abroad, etc., can constitute consideration in connection with a non-compete clause.
A global guide to ‘restrictive covenants’

South Korea

According to the precedents, if ‘the reason for termination’ was not a voluntary separation by the employee but a unilateral termination by the employer, a non-compete clause is unlikely to be deemed valid. However, in case of a voluntary resignation, precedents exist where a non-compete clause was deemed valid.

Lastly, in light of ‘the public interests’ factor, if a non-compete clause would harm fair competition in the market, a non-compete clause used by an employer that is a monopoly, for example, is likely to be invalidated. Conversely, if a violation of a non-compete clause can lead to infringement of confidential business information, such a clause is likely to be deemed valid.

iii. Is it necessary to pay an employee during the period of the covenant?

As explained above, compensation is not necessary. Also, there are many types of non-monetary compensation. Some precedents have held the following as being compensation: (i) a payment of USD 100~200 as monthly stipend for security purposes, (ii) a severance package, and (iii) an offer of an opportunity to study abroad.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes. In businesses such as insurance where customer sales profoundly affect the business, post-termination clauses often prohibit solicitation of current or potential customers for a certain period of time after separation.

i. Are they capable of being valid?

ANSWER: Yes.

ii. What does it take to show they are valid?

ANSWER: A non-solicitation agreement, like a non-compete clause, limits an individual’s business activity, and therefore the discussions on non-compete clauses above will be similarly applied to non-solicitation agreements. However, a non-solicitation clause does not limit the employee’s freedom to choose an occupation as much as a non-compete clause. Therefore, the court is more likely to consider it to be valid.

A lower court, for example, invalidated a non-compete clause but held a non-solicitation clause as valid where a branch manager entered into a contract with one insurance company, which included a non-compete clause and a non-solicitation clause, and then transferred to another insurance company.

iii. Is it necessary to pay an employee during the period of the covenant?

ANSWER: No. Although no clear precedent exists, it is reasonable to assume that compensation for a non-solicitation clause is not necessary as it is not necessary for a non-compete clause. In the lower court case mentioned above, the lower court held the non-solicitation clause as valid without taking into consideration whether there was any compensation for the non-solicitation clause.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes. In an industry such as the Information Technology industry where technology and manpower are considered important, it is common to prohibit solicitation of the employer’s employees or business partners for a certain period of time after separation. In many cases, the relevant agreement contains both a clause prohibiting any contact with the employer’s employees and customers and a clause prohibiting solicitation of the employer’s employees or business partners for a specific period of time.
South Korea

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The answer to section c (ii) above applies here. A lower court held that both the non-compete and the non-solicitation of employees clauses as valid in a case where a director of a systems integration company transferred to a competitor after having signed an agreement containing both a non-compete clause and a non-solicitation of employees clause. However the restriction period for the non-compete clause was 1 year and the restriction period for the non-solicitation of employees clause was 2 years. The court reduced the restriction period of the non-solicitation of employees clause to 1 year to match the restriction period for the non-compete clause on the principle of equity between the non-compete clause and the non-solicitation of employees clause. The court’s decision does not mean that the enforcelability of the non-solicitation of employees clause and enforceability of the non-compete clause is judged as being the same.

iii. Is it necessary to pay an employee during the period of the covenant?

Although no clear precedent exists, compensation for the non-solicitation of employee clause is not mandatory and nor is it mandatory for the non-compete clause.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

The most common covenant among post-employment covenants is the confidentiality agreement. In most cases, a confidentiality agreement consists of (i) an agreement that the company has work-for-hire related rights, (ii) prohibition of the possession, use, and disclosure of the company’s confidential information after resignation, and (iii) a consent to monitoring to ensure compliance with the confidentiality agreement.

One point to be careful about is that the protection period for trade secrets may be more restricted by Korean courts depending on the length of time necessary for a competitor to develop and/or acquire such trade secrets even if the protection period is not defined under the contract. The range of the trade secret protection period held as valid is wide. It ranges from 4 months to 3 or 5 years. In addition, lower courts have held as valid trade secret protection periods of up to 10 years.

Also, in regard to post-employment covenants, if the employee finds a new employment or an offer of an employment, he or she may become obliged to provide in advance information about the identity of the new employer or the offeror and/or working conditions to the current employer. He or she may also be obliged to notify the new employer or the offeror in advance of his or her obligations under the post-employment restrictive covenants.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

The choice of law question can be divided into two issues: (i) jurisdiction and (ii) applicable law.

With regard to jurisdiction, Korea’s Private International Act states that if ‘the party or the source of dispute has actual relation to Korea,’ the Korean courts will have jurisdiction. Also, most precedents invalidate clauses specifying foreign courts as having exclusive jurisdiction if the relevant party’s address or location of evidence is in Korea. Therefore, it is difficult for foreign companies to block litigation in Korea regardless of the relevant jurisdiction clause, if such foreign companies hire Korean employees and such Korean employees work in Korea.
South Korea

With regard to applicable law, Korea’s Private International Act views parties’ agreement as the most important factor in determining choice of law. However, with regard to employment contracts, the Private International Act states that ‘it is impossible to deprive a worker of protection imposed by compulsory provisions of a country where such worker provides his or her labor’. Therefore, if a court holds post-employment restrictive covenants as part of a valid employment agreement, it is difficult to rule out the possibility in which the court holds in light of the factors in section b (ii) above that post-employment restrictive covenants (including non-complete clauses) are invalid as they violate a compulsory provision of the Article 103 of the Korean Civil Code even if the parties contractually agree to a foreign law as the applicable law. However, a lower court precedent exists where it was held that a violation of the non-compete clause is not a violation of the employment contract as it is a covenant that becomes effective only after the employment is terminated.

i. Can an employer impose a dispute resolution method on the employee?

Depending on the parties’ agreement, disputes regarding post-employment covenants can be decided via ADR procedures such as mediation, arbitration, etc. However, from the point of view of the former employer who requires a prompt remedy against infringement of its rights, it may be ineffective to go through mediation or arbitration procedure that requires additional steps (e.g., judgment for enforcement). In particular, as Korean courts hold the restrict period in non-compete clauses as valid up to 1 year in most cases, it is not desirable in enforcement of such clauses to go through redundant procedures.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Generally, with regard to a former employee who violates post-employment covenants, it is most common for the employer to seek a preliminary injunction. Theoretically, damage claims are possible. However, if no liquidated damages clause exists, it is very difficult to prove the amount of damages.

In addition, although it is possible to seek preliminary injunction and a damages claim against the new employer, it is insufficient that the new employer was simply aware of the employee’s post-employment restrictive covenants regarding the former-employer. It must be proven that the new employer proactively induced the employee’s breach of the post-employment restrictive covenants.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Under Korean law, a provisional attachment for damages claim will not be granted against half of the amount of the retirement pension or more.

With regard to employment benefits such as ex-gratia settlement payments, it is usually provided in the resignation agreement together with the post-termination agreement that the settlement payment shall be returned if the employee breaches any obligations in the resignation letter including the post-termination covenants, which is a kind of liquidated damage. In this case, provisional attachment against settlement payments already paid will be effective.

With regard to stock options, the stock option agreement may provide that the exercised stock option shall be subject to forfeiture when the employee breaches any material obligations to the employer including the post-termination covenants.

ii. Which covenants are typically imposed?

Non-competition covenant is mostly imposed.

iii. What sanctions are/can be imposed by the employer for non-compliance?

See sections g and h. (i) above.
iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

See section h. (i) above.

Further, with regard to the return of the settlement payment, the court may at its discretion reduce the liquidated damages if it finds the amount to be excessive.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Even if the validity of the post-employment restrictive covenants is established, the Korean courts may reduce the scope of the restriction if it finds the scope of time/location to be excessive. For example, in case of the non-compete clause, even if a restrictive period longer than 1 year has been prescribed the court could reduce such a period to between 6-12 months.

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A. OVERVIEW:

The laws of Sri Lanka, like those of South Africa, have been influenced by two of the world’s important legal systems - the civil law and the common law systems. The English common law, which originated in England and spread to English colonies, has exercised a much greater influence in Sri Lanka than the Roman-Dutch law. Roman-Dutch law is the residuary law of Sri Lanka, and is applied in all situations where there is no relevant statute law or, in the case of those subject to the special personal laws, (e.g the Thesawalamai, Kandyan law), where those laws are inapplicable or silent. English law was also imposed into the domestic legal system through the Civil Law Ordinance which enacted that English law would apply in various areas including banking, partnership, maritime matters etc. Statute law is the primary source of law in Sri Lanka. The content of statute law may be based on English law or may be enacted in view of local needs and circumstances, or may be a restatement of customary or religious law or principles of common law. Some statutes incorporate by reference the English law on a particular subject. Where there is no applicable statutory provision, the Courts will first ascertain whether the parties are governed by one of the special personal systems of law, and if not, the Courts would then apply the Roman-Dutch law.
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It is common practice that employers will, where there is a risk of confidential information being divulged by an employee, impose obligations of confidentiality and/or impose restraints on employees being employed by a competitor/soliciting customers. There is not much reported case law in Sri Lanka dealing with restrictive covenants, and the legal position with regard to the validity of restraint of trade clauses is neither very clear nor well settled. There is considerable uncertainty in this area of law though it is likely that a Court would be guided by English law principles.

In Sri Lanka, the law of contract is a mixture of English common law principles and of Roman Dutch law principles and concepts. In general terms, English common law appears to recognize the category of agreements in restraint of trade as illegal and void unless reasonable, whereas under the Roman-Dutch Law there does not appear to be any express principle expounded by the authors per se that invalidates such agreements. As a result, agreements in restraint of trade should, arguably, be treated as valid since the residuary law of Sri Lanka is the Roman Dutch law. However, the influence of English common law decisions and principles in this area is strong, and there has been a tendency by the Sri Lankan judiciary to follow the persuasive authority of decisions of the Courts in England in regard to restraint of trade. Courts in Sri Lanka have held that all contracts in restraint of trade are prima facie void and each case must be examined having regard to its special circumstances to ascertain whether or not the restraint is justified. The only ground of justification is that the restraint is reasonable having regard to interests of both contracting parties as well as to the interests of the public. These decisions followed the British case law precedents brought to the attention of the Court in which it had been held that whether partial or general, covenants in restraint of trade, are prima facie void and unenforceable unless the test of reasonableness can be proved.

The Sri Lankan Constitution accords certain fundamental rights to citizens which include the freedom to engage by himself/herself or in any association with others in any lawful occupation, profession, trade, business or enterprise subject to such restrictions as may be prescribed by law in the interests of national economy or in relation to the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise, and the licensing and disciplinary control of the person entitled to such fundamental right, and the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise. [Article 14 of the Constitution].

The Constitution provides that the fundamental rights enshrined therein are justiciable in respect of State or administrative action which infringes such rights. However it is possible that an argument based on the fundamental right could be raised. We are not aware of any reported judgment in which the impact (whether direct or indirect, if any) of the provision in the Sri Lankan Constitution has been considered.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes

i. Are they capable of being valid?

Yes

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Generally, an employer cannot prevent an ex-employee from competing as this is considered by some Court decisions as being contrary to the important public policy underpinnings – freedom of contract and competition. Sri Lankan Courts, over the years, have heavily restricted the application of restrictive covenants emphasizing that such agreements must be reasonable and should not unreasonably restrict an employee’s right to continue in employment and ability to make a living.
Sri Lanka

However such a restriction may be justified if it is designed to protect a legitimate business interest such as confidential information, and if it is reasonable as between the parties as well as in the public interest. The mere fact that an employer has a legitimate interest to protect does not of itself provide legality to a restraint of trade clause imposed by such an employer in the contract of employment. A covenant which restrains an employee from competition would invariably be held to be void as being unreasonable, unless there is some exceptional proprietary interest owned by the employer, whether in the nature of a trade connection or in the nature of trade secrets, which requires protection. A restraint against competition by an employee has been held to be justifiable if its object is to prevent the exploitation of trade secrets learned by the employee in the course of his employment. In such a trade secrets case the employer would have to prove definitely that the employee has acquired substantial knowledge of some secret process or mode of manufacture used in the course of his business. Even the general knowledge derived from secret information which has taught an employee how best to solve particular problems may not suffice.

Following English case law precedent, it is likely that an agreement not to trade in a particular place for the lifetime of the promisor would not be considered to be such an unreasonable restraint as to be void if the trade is unique/extraordinary to that particular place. If a partial restraint is limited as to time but unlimited as to space and unreasonable, the restrictive covenant would likely be held to be void. However, a condition which limits the space but does not fix the time may be held to be valid if reasonable in the circumstances. Where the type of business to be protected is specialised and the market limited, it is likely that a Court would hold that even a restriction covering the entirety of the county is not unreasonable.

There is not sufficient case law on the basis of which particular lessons in drafting/drafting points can be obtained.

iii. Is it necessary to pay an employee during the period of the covenant?

No, there is no principle mentioned in the little locally reported case law that is available, which provides that it is necessary to pay an employee during the period of the covenant.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes

i. Are they capable of being valid?

Yes

ii. What does it take to show they are valid?

It would appear from case law that a restraint protecting an employer’s customers being enticed away from the employer by a former employee would only be valid in cases where the nature of the employment is such that the customers dealt with the former employee directly and personally, with the result that such former employee would probably gain their custom if the former employee were to set up a business of his/her own. It would also appear that a court would more readily enforce a customer specific restriction but enforcing this restriction must also be reasonable so as to permit freedom of trade and the ability for the employee to use his skills.

iii. Is it necessary to pay an employee during the period of the covenant?

No. There is no principle mentioned in the little locally reported case law that is available, which provides that it is necessary to pay an employee during the period of the covenant.
A global guide to ‘restrictive covenants’

Sri Lanka

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes. There is no principle mentioned in the little locally reported case law that is available which provides that an agreement restricting solicitation and hiring of former colleagues would be invalid.

However if a former employee engaged in such conduct and such conduct was viewed by a Court as amounting to unfair competition, irrespective of whether or not the restraint was legally valid, it could be prevented.

Unfair competition is defined by section 160(1) of the Intellectual Property Act No. 36 of 2003 (“the IPA”) as any act or practice contrary to honest practices in trade or industry and in particular in terms of section 160(2) of the IPA as any act or practice carried out or engaged in, in the course of industrial or commercial activities, that causes, or is likely to cause, confusion with regard to another’s enterprise or its activities, in particular, the products or services offered by such enterprise.

Section 170(1) of the IPA provides that where a person to whom any recognised rights granted under the Intellectual Property Act, including an infringement of section 160, proves to the satisfaction of the Court that any person is threatening to infringe or has infringed his rights or is performing acts which makes it likely that infringement of a right under the IPA, will occur, the Court may grant an injunction restraining any such person from commencing or continuing such infringement or performing such acts and may order damages and such other relief as the Court, may deem just and equitable. The IPA also provides that an injunction may be granted along with an award of damages and shall not be denied only for the reason that the applicant is entitled to damages.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

That the restraint is reasonable in the circumstances of the case.

iii. Is it necessary to pay an employee during the period of the covenant?

No. There is no principle mentioned in the little locally reported case law that is available, which provides that it is necessary to pay an employee during the period of the covenant.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

The Supreme Court of Sri Lanka in Coats Thread Lanka v. Sumarasundara 2011 BLR 37 discussed restrictive covenants that are imposed on the employee whilst the employee is in the service of the employer. In this case the restrictive covenant provided that “You will not be able to enter into any activities similar to that for which you are employed by this company or obtain employment elsewhere while in service with us.” The Court was of the opinion that a person is entitled to seek employment with multiple employers so as to maximize his monthly income so far as the test of reasonableness is satisfied. The Court held that where such employment impacts adversely on the quality of his work, appropriate action can be taken at that stage and that such concerns of the employer cannot restrict a person’s reasonable right to seek employment at multiple establishments.

Another familiar category of covenants in restraint of trade is that type of covenant by which a vendor of the goodwill of a business agrees with the purchaser not to carry on a similar business in competition with the purchaser. Such restraints would likely be successfully enforced more readily and more widely in favour of a purchaser than in the case where such a restriction on carrying on a similar business is imposed on an employee in a contract of employment. The argument for resolving the issue more readily in favour of a purchaser would be that the purchaser has paid the full market value for the requisition of his interest, and the interest so purchased would suffer if the vendor were free to continue his trade/business with former customers.
Sri Lanka

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

The question of the applicable law or choice of law, would come into play once it has been established that a court hearing the matter has jurisdiction over the matter and one party is seeking to apply foreign law instead of the law of the forum. Sri Lankan Courts have had experience with choice of law disputes in the commercial law context. In situations where a choice of law clause was not contained in a contract, the Supreme Court of Sri Lanka held that the choice of law may be ascertained within the context of a contractual agreement. The Court in International Science and Technological Institute (ISTI) v. Rosa and Others, (1994) 1 S.L.R. 413 adopted both English and Australian private international law principles and held that the proper law may be ascertained through either express selection of the parties, by inferred selection from the circumstances, or through a determination by the court of the system of law with which the transaction has the closest and most real connection. However, even if a restrictive covenant were found to be governed by foreign law and the substantive content of the governing law would consider such a restrictive covenant as legally enforceable, it is possible that a Sri Lankan Court requested to enforce the restrictive covenant might decline to do so if it was of the view that the covenant sought to be enforced was contrary to public policy.

i. Can an employer impose a dispute resolution method on the employee?

Section 47A of the Industrial Disputes Act provides that any contract or agreement whereby any right conferred on any workman (employee) by or under the said Act or by any award made under the Act by an arbitrator or an industrial court or a labour tribunal is in any way affected or modified to his/her detriment, or whereby any liability imposed on any employer by or under the Act or by any such award is in any way removed or reduced, shall be null and void in so far as it affects or modifies any such right or removes or reduces any such liability. It is likely therefore that any provision imposing regular arbitration (what is meant by “regular arbitration” is arbitration other than arbitration provided for under and in terms of the Industrial Disputes Act) would be null and void. Since there is a time limit of six months within which an application to a Labour Tribunal can be made by an employee for relief, it is likely that any provision imposing a requirement of going through conciliation/mediation, would be null and void.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

As mentioned previously, an agreement in restraint of trade would likely be considered to be prima facie void, yet if it could be justified as being reasonable it would likely be enforceable.

Sri Lankan law follows the English remedy for a breach of a restrictive covenant which is injunctive relief. A Court may issue either an interim or final injunction. Enjoining orders are also available under certain circumstances. A Court would have to be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief in order to issue an injunction. The Court would also take into consideration whether the circumstances are such that a decree which may ultimately be entered in favour of the party seeking the injunction would be nugatory or ineffective if the injunction is not issued.

It should be noted that, Courts here have long followed English law authority that an injunction will not be allowed against an employee if the consequences of that injunction would be to put the employee in a position that he could have to go on working for the former employer or starve.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

There is nothing expressly stipulated in Statute law or in reported case law in regard to the specific issues which may arise relating to employee benefits, pensions and stock plans in the context of restrictive covenants. Employee share ownership schemes are not very common and the contents of such schemes are not generally publicly known.
Sri Lanka

ii. Which covenants are typically imposed?
Not applicable.

iii. What sanctions are/can be imposed by the employer for non-compliance?
Not applicable.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)
Not applicable.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?
If a covenant is found to be null and void/unenforceable as against public policy, it is unlikely that a Court would re-write the covenant. If the covenant were found to be void it would not be possible for the person seeking to enforce the covenant to obtain an order for specific performance. In Sri Lanka the doctrine of severability may apply. Under this doctrine the invalid part or element of the contract or covenant may be severed whilst keeping the rest of the wording unchanged. It is likely that a Court in Sri Lanka would apply the English “blue pencil rule” pursuant to which severance could be effected when the part severed can be removed by running a blue pencil through it without affecting the meaning of the part remaining.

Contributed by John Wilson
A global guide to ‘restrictive covenants’

Taiwan

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A. OVERVIEW:

The right of enterprises to stipulate post-termination restrictive covenants to protect their interests is well recognized in Taiwan, and includes non-competition, prohibition on contact, and prohibition on solicitation/inducement. There is no strict differentiation between the above types of restrictive covenants and such provisions are often included under the umbrella of a “non-compete clause”.

The basis and enforceability of restrictive covenants originates in the principle of fairness under contract law. The concepts of contract law by which all post-termination restrictive covenants are evaluated are whether one party has exploited an unfair advantage in bargaining power in the negotiation of the contract, and whether there is a clear inequality in the rights and obligations of the parties in the contract.

To provide more clarity on the above abstract legal concepts, the Council of Labor Affairs has outlined five factors under which a post-termination restrictive covenant will be judged as fair and enforceable:

(1) The enterprise has a legitimate interest to protect through such non-compete covenant;
Taiwan

(2) the employee held a certain job or position at his/her former employer’s enterprise;

(3) the restrictions on who, where and when the employee may seek his/her next employment must be reasonable;

(4) a measure to compensate the employee in consideration of the losses resulting from such restrictions; and

(5) whether the act of the employee working for a competitor would result in a breach of trust or a breach of the principle of good faith in fact.

However, as all of the above are necessarily fact-intensive evaluations, it is not always easy to discern how the Taiwan courts will rule on a particular issue. In terms of relief sought for a breach of the non-compete covenant plaintiff-employers often first seek an injunction to halt the breach and then seek damages from the ex-employee.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?

Yes. Subject to the balancing factors above, there is no law that prohibits a post-termination non-competition restrictive covenant on an employee.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The five balancing tests mentioned above in Section (a) are the primary factors that a court would apply to determine whether a non-competition restrictive covenant is enforceable. As alluded to above, non-competition restrictions are used by employers to prevent ex-employees from disclosing “legitimate business interests” to competitors. The “legitimate business interests” have been interpreted broadly beyond simple trade secrets to include business strategies, or any other matter that could seriously interfere with the employer’s business operations. Notwithstanding the breadth of the term, the employer is still required to concretely demonstrate how the disclosure of the “legitimate business interest” would seriously impact the continued operations of the employer’s company (e.g. if the employer alleges that it has a legitimate interest to protect its “trade secrets”, the employer must show how such “trades secrets” actually qualify as a type of trade secret to be protected under the Trade Secrets Act.)

The second factor is fairly straightforward, as only employees that are operating at a level in the employer’s organization where he or she comes in to contact with the employer’s trade secrets or research data should be bound by such a non-competition covenant after the end of his/her employment.

In terms of duration, the courts have commonly found that a period of two years or less for a non-competition covenant is acceptable. The employer would also be required to state a specific geographical region in which the non-competition obligation is in effect; the general rule here is that, for the sake of competition in a free market, markets where the employer has not yet developed a presence or is planning to move into are off-limits for non-compete obligations on the employee.

Finally, the requirement of good faith means inquiring whether the ex-employee appeared to act with malice in its employment with competitors, such as poaching the former employer’s clients or stealing key information from the former employer, or otherwise engaging in bad faith behavior that would make the ex-employee’s acts unworthy of protection under Taiwan law.

Given the above, a reasonable non-competition clause should be in writing and expressly contain the following elements:

- Duration of the non-competition period

- The region in which the non-competition clause applies
Taiwan

- Type and scope of employment prohibited during the non-competition period
- Penalties for breach
- Special circumstances (e.g. force majeure conditions)

iii. Is it necessary to pay an employee during the period of the covenant?

Currently, opinion in Taiwan is split with regard to whether an employer is obliged to pay an employee during the period of the covenant. Part of the question depends on whether the ex-employee would be severely hindered in pursuing his/her livelihood as a result of this stipulation. As such, while there are no guidelines on the amount an employer should pay or the payment method to be applied, it remains one of the factors that the court will review in evaluating the fairness of the covenant and, by extension, whether it is enforceable. Therefore, if an employee is paid in consideration for his/her non-compete obligation, a Taiwan court is more likely to find the non-compete covenant to be enforceable.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes. This could involve a prohibition on the ex-employee from contacting, visiting or inviting the employer’s clients, as well as soliciting them with services or sales.

i. Are they capable of being valid?

Yes, and they generally face a lesser level of scrutiny than non-competition covenants in court because it does not necessarily impose a heavy restriction on the right to choose employment provided under the Constitution.

ii. What does it take to show they are valid?

As stated above, in practice, a court will examine the same factors as it does with respect to non-competition covenants because Taiwan law does not mandate a separate review procedure for a covenant prohibiting the ex-employee from contacting customers/clients.

iii. Is it necessary to pay an employee during the period of the covenant?

The reasonableness analysis would be similar as in Section (b)(iii) above.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes.

i. Are they capable of being valid?

Yes.
Taiwan

ii. What does it take to show they are valid?

The same balancing factors for non-compete clauses will once again apply to prohibitions on solicitation of employees. The analysis, however, will depend on whether the plaintiff-employer is able to show causation that the ex-employee induced current employees of the employer to leave. This is a very high bar, as the employer is unlikely to be aware of every detail of the lives of the ex-employee or of the current employees that are allegedly induced to leave his/her position with the employer to satisfactorily prove to a court that the current employees quit solely due to the improper exhortations and inducements of the ex-employee. For example, a court refused to find tortious interference of the employment contract between the current employee and the employer when an ex-employee established a competing company and hired his former colleague through offering a better compensation package. Therefore, since there is no effective way this kind of clause can prevent an ex-employee’s former colleagues from working with him/her in law or in practice, it can be said that the primary intent of a non-solicitation clause is to prevent ex-employees from improperly soliciting his/her former colleagues instead of interfering with an individual’s right to choose his employment under the Constitution.

iii. Is it necessary to pay an employee during the period of the covenant?

The reasonableness analysis would be similar as in Section (b)(iii) above.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

1. Minimum service requirement

While there is no prohibition against requiring an employee to stay for a minimum amount of time before leaving the employer, the Taiwan Supreme Court has recognized that such requirement may be enforceable under certain circumstances and should not be rejected as a matter of fact. A minimum service requirement will be evaluated on the “necessity” and “reasonableness” of such an agreement. “Necessity” has been interpreted as an employer’s need to protect its investment or interests, such as large employee training expenses, and “reasonableness” with respect to whether the duration specified is appropriate.

2. Confidentiality agreement

Generally, the only factor for confidentiality agreements post-termination would be the duration of agreement. For information that is very critical to the operations of the employer, a court is likely to find that requiring the ex-employee to maintain confidentiality for an extended period of time to be reasonable. On the other hand, if the confidential information involves a particular product cycle, the duration should only be as long as the lifetime of that particular product. Note that while the justification for a non-competition clause is usually based on confidentiality concerns, the propriety of a confidentiality agreement is not evaluated at the same scrutiny level or legal bases as that of non-competition clauses.

As both of these are fact-intensive inquiries, the enforceability of such covenants will depend largely on the circumstances of the matter in question.
Taiwan

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

For the choice of law in restrictive covenants, like any other contract, the Taiwan court will examine whether the contract has stipulated a specific set of laws to apply, and whether the terms stipulate that the Taiwan courts have jurisdiction. In the absence of either or both of the above, the Taiwan court will engage in a jurisdiction analysis to determine whether the court is able to hear the case, and whether Taiwan law may be applied to the issues.

In matters where foreign law governs the contract but the Taiwan court has jurisdiction, the court will apply the foreign law unless the application of such law violates public policy or disturbs the moral standards of the Taiwanese public.

i. Can an employer impose a dispute resolution method on the employee?

While an employer may stipulate in the employment contract to resolve disputes through arbitration or other alternative dispute resolution mechanisms, in practice, the most effective method for an employer to enforce the restrictive covenant is obtaining an injunction in court against the ex-employee before initiating an action to seek damages. As such, the courts remain the employer’s best option to obtain a remedy in restrictive covenants in comparison to other dispute resolution mechanisms.

With regard to requiring the employee to bring a claim in a foreign jurisdiction, it would be very difficult, if challenged by the employee, for an employer to argue that a Taiwan court has no jurisdiction in hearing a labor complaint that involves a Taiwan-based employee. Therefore, in practice, if a Taiwan-based employee initiates a claim against the employer in a Taiwan court despite express stipulations otherwise in his/her employment contract, a Taiwan court would likely find that it has jurisdiction to hear the matter.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

As stated above, an employer would typically seek a preliminary injunction against the ex-employee in court to stop the offending act. There are two elements used by the Taiwan courts in determining whether a preliminary injunction is appropriate:

(1) The damages suffered by the employer if the preliminary injunction is not granted would be greater than the damages suffered by the ex-employee if the preliminary injunction is granted; and

(2) the preliminary injunction order is necessary to prevent serious harm or imminent danger.

For the first inquiry, the court will measure between the harm to the employer based on the legitimate business interest at issue (e.g. disclosure of certain trade secrets) versus the harm to the ex-employee (restriction on his/her choice or opportunity to obtain a livelihood, the scope of the restrictive covenant, etc.).

The key issues for the second inquiry are “whether the employer can demonstrate that a preliminary injunction order is necessary to prevent the harm, and the urgency of such a measure that requires a court to take this action before debating the merits of the case.”

Due to the timeframe involved, under Taiwan law, the court may at its discretion order the petitioner-employer to post a monetary security against the harm suffered by the ex-employee due to the preliminary injunction as a condition to granting the preliminary injunction. In practice, the amount of security required is often based on the compensation received by the employee during the period of the restrictive covenant.

Money damages, unless otherwise stated as punitive damages (which are allowed under Taiwan law), will fall under damages for non-performance of contract. If liquidated damages are stipulated, the court will evaluate whether the amount is appropriate based on objective facts, which include evidence on the overall socio-economic environment at the time, the damages incurred by the employer as a result of the breach, the ex-employee’s gains from the breach, the compensation due to the ex-employee during the period of the restrictive covenant, etc. As such, the stipulated damages may be reduced if the court finds that the amount disproportionately favors the plaintiff-employer at the expense of the ex-employee’s interests.
H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Under Taiwan law, restrictive covenants can never be enforceable against an employee’s statutory pension benefits. While an employer may stipulate in the restrictive covenant to require the employee to return the bonuses, dividends, incentives awards and other monetary benefits, or received during his/her employment. In practice, however, since the employee will be required to return such monetary awards in cash, the above is generally included as part of the damages sought from the ex-employee for his/her breach of the covenant.

For shares in the enterprise held by the ex-employee, if the employment contract stipulates that such shares shall be converted to cash based on the closing price on the date of the employee’s departure and returned to the company as such, the net effect is the same as above. Besides, the courts have allowed private contracts between the employee and the company restricting transfer of the company shares that the company issued to the employee gratuitously, and that the company has the right to seek ownership of such shares from the employee upon breach of the non-compete covenant, as such contract is an expression of the intent of the employee and should therefore remain enforceable.

ii. Which covenants are typically imposed?

Other than statutory pension benefits as stated above, there are a wide variety of restrictive covenants that may be based on the forfeiture of dividends, bonuses and stock, such as non-competition, prohibition on contact and minimum service requirements. Covenants on the above items will generally be incorporated in the employment contract.

iii. What sanctions are/can be imposed by the employer for non-compliance?

As above, in case of breach, the employer may require the employee to forfeit the bonuses, dividends, etc. that he/she has received, or an amount equivalent to their value or benefits as damages.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

Please see Subsection i under this Section above. For limitations to the amount of damages an employer may seek from the ex-employee, please see Section g above.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

A restrictive covenant that is found to be invalid based on the criteria stated above in this questionnaire will be deemed unenforceable against the ex-employee. Under Taiwan contract law, while an unenforceable provision will generally render the entire contract unenforceable, the contract may still remain enforceable if the invalid section is severed without materially modifying the rest of the contract. In practice, if a court finds that the scope of the restrictive covenant is so wide that it infringes on rights under the Constitution (i.e. restricting the ex-employee’s ability to obtain a livelihood), the court may take steps to reduce the scope of the restrictive covenant by severing the provisions that overstep the legal bounds.

Contributed by Jaclyn Tsai
A. OVERVIEW:

Restrictive covenants are governed primarily by the Civil and Commercial Code, the Unfair Contract Terms Act, and Section 14/1 of the Labour Protection Act.

Pursuant to Section 150 of the Civil and Commercial Code, an act is void if its object is expressly prohibited by law, is impossible, or is contrary to public order or good morals. It is possible that particular restrictive covenants could be held invalid on the basis that they are illegal or contrary to public order or good morals. For restrictive covenants which are not void, the Unfair Contract Terms Act and the Labour Protection Act potentially apply.

The Unfair Contract Terms Act stipulates that contract terms which are not void, but which cause a person whose right or freedom has been restricted to shoulder more of a burden than a reasonable person could have anticipated under normal circumstances, shall only be enforceable insofar as they are fair and reasonable in the circumstances. Courts are to consider the geographic scope of the area specified and the period of restriction of right or freedom, as well as the ability and opportunity of the employee to carry on his or her occupation or otherwise engage in business, as well as all legitimate advantages and disadvantages of the contracting parties.
A global guide to ‘restrictive covenants’

Thailand

In determining to what extent particular terms are enforceable as fair and reasonable, courts are to take all circumstances into account, including good faith, bargaining power, economic status knowledge and understanding, adeptness, anticipation, guidelines previously observed, other alternatives, and all advantages and disadvantages of the contracting parties according to actual conditions; ordinary usage applicable to such kind of contract; time and place of performance or making the contract; and whether one party is made to bear a much heavier burden than the other.

In some circumstances, the Trade Competition Act may also be relevant. Under the Trade Competition Act, certain contractual provisions can be held void on the basis that they are anticompetitive.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The court has the authority to consider whether non-competes are valid, taking into account the factors outlined in section a above. Generally, to be enforceable, a non-compete should have a defined geographic scope and a defined period of time which does not extend beyond two years after termination of employment.

iii. Is it necessary to pay an employee during the period of the covenant?

The law does not require payment to a former employee during a non-compete period. Even though this is not required by statute, some practitioners take the position that payment in respect of a non-compete functions to make it more enforceable.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The court has the authority to consider whether such restrictions are valid, taking into account the factors outlined in section a above. It should be noted that we more frequently see clauses providing for non-solicitation of customers/clients, rather than clauses prohibiting all contact.

iii. Is it necessary to pay an employee during the period of the covenant?

The law does not require payment to a former employee during a period of no-contact or non-solicitation of customers/clients.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes.
Thailand

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
The court has the authority to consider whether such restrictions are valid, taking into account the factors outlined in section a above.

iii. Is it necessary to pay an employee during the period of the covenant?
The law does not require payment to an employee/former employee in respect of a period of non-solicitation/restriction on hiring of such person’s colleagues/former colleagues.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?
Other frequently included restrictive covenants concern intellectual property and protection of employers’ confidential information. Enforceability of such provisions is also subject to other laws beyond those outlined here.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?
This issue typically arises in the larger context of considering the extent to which an employment agreement can provide for the applicability of foreign law. The Act on Conflict of Laws provides that the parties to a contract can agree on the governing law of the contract, so long as the chosen foreign law is not contrary to the public order or good morals of Thailand. On the basis that the Labour Protection Act, the Labour Relations Act and the Unfair Contract Terms Act implement matters which are arguably fundamental public policy, the position would be that the parties could agree to apply foreign law, but only insofar as such foreign law does not run contrary to the above laws.

i. Can an employer impose a dispute resolution method on the employee?
Thai courts are not bound by contractual provisions on choice of forum. With respect to arbitration provisions, however, Thailand is a party to the New York Convention and, as a general matter, Thai courts will enforce arbitration provisions in contracts, so long as one of the parties raises the issue and so long as the agreement to arbitrate is not void, inoperative, or impossible to perform under the Arbitration Act or the Civil and Commercial Code, or other laws. In this regard, there remains some question as to the validity of arbitration clauses in employment agreements.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?
Final remedies include payment of monetary damages, delivery of property, specific performance, and/or restraint from performance of a particular act. The specific award would depend on the circumstances of each case, but courts typically prefer to award monetary damages. However, permanent injunctions are sometimes issued to prevent infringement or unauthorized disclosure of an employer’s trade secrets.

Temporary relief (which can include injunctions, restraining orders, and attachment) is typically difficult to obtain as the courts usually require very strong evidence of an imminent threat to justify such relief.
H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

In principle, restrictive covenants can be contained in any document which constitutes part of an employee’s employment agreement. In this regard, the same principals of enforcement as outlined in section g above would be applicable, regardless of whether the relevant restrictive covenants are contained in an employee’s ‘main’ employment agreement, or in a separate document signed by both parties.

Questions commonly arise, however, with regard to what enforcement actions the employer might have beyond those remedies described in section g above. In the event of breach of a restrictive covenant, it would generally not be lawful for the employer to deny payment of any benefits to which an employee is entitled by statute (e.g. statutory severance, payment for unused annual leave, etc.). As for provident funds, these are handled by a separate fund manager, and it would generally be beyond the ability of an employer to deny payment to an employee, if the employee is lawfully entitled to payment in accordance with the applicable provident fund regulations.

With respect to employment benefits which are not required by statute, such as those under performance bonus plans and employee share schemes, it would be possible to write the applicable terms such that entitlement would be lost if an employee breached particular restrictive covenants. Were the matter to proceed to litigation, however, the employee may challenge the validity of the restrictive covenant(s) (see factors in section a above), as well as the forfeiture provisions.

ii. Which covenants are typically imposed?

It is unusual for restrictive covenants to be written into performance bonus plans and employee share schemes.

iii. What sanctions are/can be imposed by the employer for non-compliance?

Performance bonus plans and employee share schemes could be written to provide for an employee to lose entitlement to certain benefits, but as noted above, an employee may challenge the validity of the restrictive covenant(s) (see factors in section a above), as well as the forfeiture provisions.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

The law does not impose specific limits on what could be forfeited under performance bonus plans or employee share schemes. However, the relevant restrictive covenant(s) and/or forfeiture provisions may be subject to challenge.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Pursuant to the Civil and Commercial Code, a restrictive covenant could be void on the basis that it is illegal or contrary to public order or good morals, in which case it would simply not be enforceable; depending on the agreement in which it exists, this may or may not invalidate the entire agreement. With respect to restrictive covenants which are not void, courts are empowered, pursuant to the Labour Protection Act and the Unfair Contract Terms Act, to order that terms which excessively restrict the right or freedom of an employee in professing an occupation, shall only be enforceable insofar as they are fair and reasonable in the circumstances, and do not cause the employee to bear an unforeseeable burden.

Contributed by Tilleke & Gibbins
Vietnam

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A. OVERVIEW:
Post-termination restrictive covenants are not common in Vietnam. Except for confidentiality obligations, other restrictive covenants are not provided for by the laws of Vietnam and are unlikely enforceable by Vietnamese courts.

The remedies available for breach of the confidentiality obligations under Vietnamese law are compensation for actual and direct damages and penalty. To require for compensation and penalty, there should be in place an agreement between the employer and its ex-employee.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?
Yes.
Vietnam

i. Are they capable of being valid?

Although an employer can require a post-termination non-competition covenant from an employee it is unlikely to be enforceable by a Vietnamese court because of the existence of a general principle of the Constitution according to which a citizen has the right to work. Any restriction of this right would be deemed as an incursion on the fundamental rights of citizens. In practice, such a restrictive covenant would be enforceable if the employer pays the employee an amount for the period during which the employee is not allowed to work for a competitor.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Please see (i) above. The employer should provide evidence that the employee has been paid for the period during which he/she is not allowed to work for a competitor.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement. It is subject to agreement between the parties.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

There is no law regarding contract prohibition. In practice the parties may agree on prohibition of contact with customers/clients but this prohibition would be hard to enforce.

i. Are they capable of being valid?

Please see response above.

ii. What does it take to show they are valid?

The employer would need to show that there is an agreement in place and that due to the employee’s breach, the employer has incurred actual and direct damages/losses.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement. It is subject to agreement between the parties.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

There is no law regarding non-solicitation. In practice, the parties may agree on prohibition of solicitation and/or hiring of former colleagues (both during and after employment) but this prohibition would be hard to enforce.

i. Are they capable of being valid?

Please see above.

ii. What does it take to show they are valid?

The employer would need to show that there is an agreement in place and that due to the employee’s breach, the employer has incurred actual and direct damages/losses.
iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement. It is subject to agreement between the parties.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

The only restrictive covenant which are recognized and provided for by the laws of Vietnam are confidentiality obligations. In this regard, the Labour Code provides that for an employee working in a position directly involving business or technological secrets, an employer has the right to agree with the employee in writing on the contents, duration of confidentiality obligations and compensation for damages in case of breach.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

For an employment matter, the governing law must be the laws of Vietnam.

i. Can an employer impose a dispute resolution method on the employee?

No, the dispute resolution method must be in accordance with the labour laws of Vietnam. The parties are encouraged to settle any dispute through negotiation and mediation.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

An employer seeking to enforce a covenant has the remedies of compensation for actual and direct losses/ damages and/or penalty. It may initiate a lawsuit to recover damages caused by the breach. Please see in the overview section above.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

There is no legal provision regarding employee benefits, pensions and stock plans in case of breach of post-termination restrictive covenants. Where the parties agree on these matters, the principles of enforcement of these specific issues are same as those outlined at item (g) above.

ii. Which covenants are typically imposed?

Only confidentiality obligations may be enforced.

iii. What sanctions are/can be imposed by the employer for non-compliance?

Compensation for direct and actual damages/losses and penalty.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

Damages/losses to be compensated must be direct and actual.
Vietnam

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

The court would declare that the covenant is void.

Contributed by Phuong Mai Nguyen
Belgium

A. OVERVIEW:

Post-termination restrictive covenants are fairly common in Belgian employment contracts, particularly for managers, sales representatives or employees with access to confidential information.

The most common covenants are non-competition and confidentiality clauses. However, in order to be valid, the clause must respect strict legal conditions.

An employer will generally use the Labour Courts in order to obtain an injunction against its (former) employee for breach of a restrictive covenant and/or a financial compensation.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, if agreed with the employee.
Belgium

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Under his employment contract, an employee must refrain from competing with his employer, since he is obliged to perform his contract in good faith. However, upon termination of this contract he is fully entitled to take up any activity whatsoever, either on an independent basis or under an employment contract concluded with a competing firm. He may waive this fundamental right by agreeing to have a non-competition clause inserted in the employment contract. The employee thereby undertakes not to engage in any similar activity – either on an independent basis or as an employee of a rival firm – whereby he could prejudice his former employer and put his industrial or commercial knowledge to use either for his personal benefit or to the advantage of his new employer. The non-competition covenant implicitly prohibits solicitation of, and dealing with, clients of the employer.

As a non-competition covenant restricts an employee’s fundamental freedom to work, it will only be considered valid if certain strict legal conditions are met.

There are three types of non-competition clauses:

• A general non-competition covenant

The general non-competition covenant is only valid if inserted into the contract of an employee whose yearly gross remuneration exceeds EUR 64,508 (as of 1 January 2013). The clause must also: (i) relate to similar activities; (ii) be geographically restricted to the area where the employee could compete with his former employer (in any case, it cannot exceed the Belgian territory); (iii) be limited in time to a maximum period of twelve months as from the final day of the parties working relationship; and (iv) provide for a lump sum to be paid by the employer (unless it decides to waive the non-competition covenant within fifteen days of the end date of the contract): this compensation must equal to half of the employees gross salary for the duration of the non-competition covenant.

The non-competition covenant will only be applicable if, after the end of the trial period, the employment contract is terminated: (i) by the employer on serious grounds; (ii) by the employee (upon provision of a notice period, or payment of a notice indemnity); (iii) by mutual consent; and (iv) upon expiry of the fixed term (in case of a contract concluded for a fixed duration of time) or upon completion of the specified job (in case of a contract concluded for a certain job).

An employee held to be in breach of the non-competition covenant will not only be obliged to reimburse the compensation he received from his employer, but will also have to pay an additional indemnity equal to this amount. However, the judge may, at the employees request, reduce the amount of this indemnity, taking into account the actual damage inflicted by the employee during the period of time when the covenant was not respected. Conversely, the judge may, at the employers request, award a higher indemnity if the employer succeeds in proving that he has been damaged and is able to quantify the damage.

• A specific non-competition covenant

A specific non-competition covenant can only be inserted in employment contracts for white-collar employees of certain companies. It concerns companies that comply with one or both of the following conditions: (i) companies which have an international field of operations or important economic, technical or financial interests on the international markets; or (ii) companies which have their own research services.

In such companies, the specific non-competition clause can only be applied to the employees whose work allows them to acquire, directly or indirectly, knowledge or a practice peculiar to the enterprise, the use of which outside the enterprise could be prejudicial to it.
Belgium

Under these conditions it is possible to deviate from: (i) the maximum period of twelve months; and (ii) the limitation to the national territory. Unlike the general covenant, this covenant can also apply during the trial period, or after the trial period in cases where there was a dismissal by the employer without serious cause.

- Specific rules apply to sales representatives

Specific rules apply to sales representatives. An employee will be considered a sales representative when his main function is to visit clients with a view of negotiating and/or concluding deals.

The conditions regarding the non-competition covenant for a sales representative differ slightly from the conditions mentioned above: (i) the clause is valid if inserted into the contract of a sales representative whose annual gross remuneration exceeds EUR 32,254 (threshold as of 1 January 2013); (ii) the clause must not provide for a lump sum to be paid by the employer; (iii) the clause must not be restricted to Belgian territory but must be restricted to the specific area where the sales representative actually executes his activities.

A sales representative held to be in breach of the non-competition covenant will be obliged to pay an indemnity equal to three months remuneration.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes, the employer must pay a lump sum compensation equal to half of the employees gross salary for the duration of the non-competition clause (except for sales representatives) (see above, under b ii).

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

No. The non-competition restriction mentioned in (b) above implicitly prohibits solicitation of and dealing with clients of the employer.

i. Are they capable of being valid?

No. The only way to prohibit contact with clients of the employer after termination is to have a valid non-competition restriction. See b above.

ii. What does it take to show they are valid?

See b above.

iii. Is it necessary to pay an employee during the period of the covenant?

See b above.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes.

i. Are they capable of being valid?

Yes.
Belgium

ii. What does it take to show they are valid?

At no time may an employee perform or take part in any act of unfair competition, not even after the termination of his employment contract. Any endeavour to entice away some employees employed by his (former) employer may be viewed as constituting unfair competition. As such, although not frequently used in Belgium, a clause can be inserted into an employee’s contract in order to bring to the employee’s attention this specific aspect of unfair competition. It is recommended to limit, in time, the application of the covenant following the end of the employment contract.

However, the hiring of employees by a former employee cannot normally be prohibited. Therefore, in practice, it is often difficult for employers to prove that a non-solicitation of employees clause has not been respected: an employee hired by a former colleague has not necessarily been solicited by the (former) employee.

iii. Is it necessary to pay an employee during the period of the covenant?

No.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

A common clause is to restrict the use or disclosure of confidential information. However, it is generally admitted that such a clause cannot contain an extension of the employee’s legal obligation in that regard, but only provides some clarification of issues that are not defined by the law. Belgian law stipulates that an employee must refrain, both during his employment and after its termination, from revealing manufacturing or business secrets or any personal or confidential matter which he has learnt while in the performance of his duties. Therefore, in order to be valid, a contractual confidentiality clause must be restricted to manufacturing or business secrets or any personal or confidential matter, and cannot define such terms too broadly. Moreover, a confidentiality clause prohibiting in broad terms an employee to use, for the benefit of his new employer, experience and knowledge that he acquired from his former employer, could be construed as a prohibition to perform an activity in the same field, i.e. a kind of non-competition clause, and would be null and void.

Employees can also be prevented from making disparaging comments about their former employer or its employees.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Generally, choice of law has no impact on the enforcement of a restrictive covenant. Belgian law may apply to employment contracts regardless of the parties intention, based on criteria provided for by regulations relating to the designation of the applicable national law. For example, the fact that the employee habitually carries out his work in Belgium. In addition, many provisions of Belgian labour law are mandatory or are part of public policy (particularly the rules on restrictive covenants), and therefore applicable regardless of whether the parties agreed to apply the law of another country in the employment contract. Therefore, it is recommended to have covenants drafted in accordance with Belgian legal provisions.

i. Can an employer impose a dispute resolution method on the employee?

Alternative dispute resolution procedures are generally not included in employment contracts.

An arbitration clause stating that grievances related to the employment contract will be submitted to arbitration is null and void. It is only when the grievance has actually arisen that the parties can agree to submit the dispute to arbitration. An arbitration clause covering future grievances is only valid in the case of employees responsible for the day-to-day management of the company or a section of, and whose annual remuneration exceeds a legal threshold (in 2013: EUR 64,508 gross). Arbitration is rarely used in employer-employee relations.
Belgium

Moreover, with regard to the competent national court, the Brussels Regulation governing the jurisdiction of courts requires the employer to sue a Belgium based employee before the Belgian courts. A contractual clause cannot deprive the employee of any rights under the Brussels Regulation regarding the choice of whether to sue his employer before the courts.

G. ENFORCEMENT: How are covenants typically enforced?

An employer will generally use the Labour Courts in order to obtain an injunction against its (former) employee for breach of a restrictive covenant and/or a financial compensation. Procedures before the Commercial Courts against the new employer can also be envisaged in order to obtain an injunction and/or damages (for example, in case of illegal enticement of employees).

As explained above in b ii, if applicable, an employee held to be in breach of the non-competition covenant will not only be obliged to reimburse the compensation he received from his employer, but will also have to pay an additional indemnity equal to this amount.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

Generally, restrictive covenants cannot be linked to the employees compensation and benefits. A forfeiture of any element of the employees remuneration for prohibited competitive activities would not be allowed. An employment contract may stipulate that the employee can receive an award (for example, an annual bonus linked to the employees individual performances and/or to the company’s financial results) on the condition that his employment contract still exists on the date of payment (although the validity of such a clause is still disputed by case law). However, with the condition of existence of the contract on a given date, the employers intention must be to reward the employees loyalty and not to impose a sanction based on the employee leaving the company. In the latter case, the clause would be null and void.

It is generally acknowledged that a penalty clause imposing the payment of a lump sum indemnity can be agreed by the parties in case of a breach of confidentiality or non-solicitation of employees clause, occurring after the end of the employment contract. Such a penalty clause would not be applicable during the contract, because the employee’s civil liability is legally restricted.

   i. Do the same principles of enforcement outlined above at g. apply?
   No.

   ii. Which covenants are typically imposed?
   None.

   iii. What sanctions are/can be imposed by the employer for non-compliance?
   N/A.

   iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?
   N/A.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Restrictive covenants that are invalid are unenforceable. A court will not re-write a covenant.

Contributed by Stéphane Baltazar
Czech Republic

A. OVERVIEW:

Post-termination restrictive covenants, mainly non-compete clauses, are quite common in Czech employment contracts, particularly for managers or those with information about and knowledge of the working and technological procedures of their employers.

Non-compete restrictions are regulated by the Czech Labour Code. Other types of restrictive covenants are not recognised by Czech labour law regulations, and their validity is disputable; there is no relevant case law applicable to them.

The non-compete restriction must be in writing, and must include appropriate remuneration in order for it to be valid. The non-compete restriction must be for not more than one year in duration, following termination of the employment contract. The employer may only withdraw from the non-compete restriction during the term of employment.

The most common remedy for breach of a restrictive covenant is to claim a contractual penalty and compensation for damages.
Czech Republic

**B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?**

Yes, if agreed with the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

To be valid, the non-compete clause must be in writing and include appropriate remuneration (at least half of the average monthly earnings of the employee for each month that the obligation applies).

iii. Is it necessary to pay an employee during the period of the covenant?

Yes.

**C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?**

Contact prohibition clauses are not recognised by Czech labour law regulations. Thus, their enforcement is disputable in the Czech Republic.

i. Are they capable of being valid?

N/A

ii. What does it take to show they are valid?

N/A

iii. Is it necessary to pay the employee during the period of the covenant?

N/A

**D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?**

Non-solicitation of employees clauses are not recognised by Czech labour law regulations. Thus their enforcement is disputable in the Czech Republic.

i. Are they capable of being valid?

N/A

ii. What does it take to show they are valid?

N/A

iii. Is it necessary to pay an employee during the period of the covenant?

N/A
Czech Republic

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

No.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

If a Czech court has jurisdiction to hear the dispute, it would apply Czech conflict of laws rules. The applicable legal regulation to apply will depend on when the respective covenant was entered into (as different EU provisions may apply). However, as a general approach, both under Czech legal doctrine and EU regulations, although parties may choose the law applicable to their employment contract the contracts will still be subject to overriding mandatory provisions of Czech law. Therefore, if Czech law was applicable to the employment contract in the absence of a choice of law, the non-competition restriction must comply with the respective Czech legal regulations regardless of the choice of law of the contract. This is because the regulation of a non-competition restriction is considered mandatory under Czech law.

   i. Can an employer impose a dispute resolution method on the employee?

      Under Czech law it is not possible to impose a dispute resolution method on the employee.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

In practice, the covenants are not typically enforced in the Czech Republic. However, a contractual penalty clause can be agreed in respect of a breach of the covenant. Therefore, if an employee breached a non-compete covenant, the employer could request a contractual penalty, provided that the contractual penalty was agreed, and/or claim for compensation of damages.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

   i. Do the same principles of enforcement outlined above at g. apply?

      Generally, restrictive covenants are not relevant to, or enforceable against, employee benefits, pensions and stock plans.

   ii. Which covenants are typically imposed?

      N/A

   iii What sanctions are/can be imposed by the employer for non-compliance?

      N/A

   iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

      N/A

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Restrictive covenants that are invalid are unenforceable. Should the non-compete covenants regulated by the Labour Code be invalid, the court will declare it void.

Contributed by Petra Sochorová
A global guide to ‘restrictive covenants’

Denmark

Contributed by: Kromann Reumert

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A. OVERVIEW:

Post-termination restrictive covenants are fairly common in Danish employment contracts, particularly for senior employees or those with valuable connections, relationships or access to confidential information.

However, post-termination restrictive covenants are unenforceable unless certain validity conditions are satisfied.

In general the restrictive covenant must aim to protect a legitimate business interest and go no further than reasonably necessary (in geographic scope, covered activities, duration, penalty for violation etc.).

If the validity of the restrictive covenant is challenged in court and the covenant is deemed unreasonable, the court can set aside the covenant in whole or in part to the extent necessary to render it reasonable (e.g. by reducing duration).

Furthermore, special validity conditions are set out in the Danish Salaried Employees Act in respect of non-compete and non-solicitation of customers covenants as well as the Danish Act on Non-Solicitation of Employees/Colleagues. In particular, restrictive covenants require a written agreement with the affected employees which must stipulate that the employees are entitled to compensation for being subject to the covenants equal to no less than 50 per cent of the employees’ monthly total compensation.
The most common remedy for breach of a restrictive covenant is an injunction using the civil courts to restrain the employees’ or the new or prospective employer’s activities. Other remedies include a contractual penalty (liquidated damages) if agreed and damages for losses suffered as a result of the breach.

The comments above and below only apply in full to white-collar employees and not to blue-collar employees and CEOs. This is because provisions of the Danish Salaried Employees Act apply to salaried employees only. It will apply to senior managers in most cases, unless it can be shown that the manager is comparable to the employer and thus outside the framework of the Act. Managing directors registered with the Danish Central Business Register are usually not considered to be salaried employees. Therefore an employer can, and often does, enter into restrictive covenants with the managing director without paying compensation during the term of the covenant.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, if agreed with employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The validity of a non-compete covenant is conditional upon: (i) the employee having a position of trust (e.g. a management/senior role or a sales role); and (ii) the non-compete being agreed in a written agreement stipulating that the employee is entitled to 50 per cent of his total remuneration for being subject to the non-compete which is paid during the entire restrictive period. Moreover, the non-compete will only be enforceable if: (i) the employee resigns; (ii) the employee is dismissed and the dismissal is reasonably justified based on the employees circumstances; or (iii) the employee is summarily dismissed for cause (e.g. a material breach).

Furthermore, the restrictive covenant must aim to protect a legitimate business interest and go no further than reasonably necessary (in geographic scope, covered activities, duration, penalty for violation, etc.).

iii. Is it necessary to pay an employee during the period of the covenant?

Yes.

The non-compete clause will only be valid if it has been agreed in writing with the employee that he shall be entitled to compensation in cash equal to 50 per cent of his total compensation (as at the expiry of the notice period).

Compensation for the first 3 months after the end of the employment is payable as a lump sum on termination of employment. For the remaining part of the restriction period the compensation is paid monthly in arrears (the first time at the expiry of the 4th month after the end of employment).

If the employee works for another non-competing employer during the restriction period, the employer can set off the income from such work against the compensation paid monthly. If he becomes self-employed, no monthly compensation will be payable from the commencement of the period of self-employment.

The employer cannot set off any money received by the employee against the lump sum payment for the first 3 months.

The employer can terminate the non-compete and extinguish the obligation to pay compensation upon 1 months notice. However, if the non-compete is terminated less than 6 months before the expiry of the employment, the lump sum compensation will still be payable.
Denmark

For the avoidance of doubt, no compensation is payable if the non-compete is invalid, e.g. due to the reason for termination.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, if agreed with employee.

i. Are they capable of being valid?
Yes

ii. What does it take to show they are valid?

The non-solicitation clause will only be valid if it has been agreed in writing with the employee and the employee is entitled to compensation in cash equal to 50 per cent of his total compensation (as at the expiry of the notice period), according to the Danish Salaried Employees Act.

According to the same Act, the non-solicitation clause may only apply to customers or other business contacts with whom the employer has had business relations within the period of 18 months immediately preceding the date of the notice of termination, and (i) with whom the employee has had business relations during his employment with the employer; or (ii) who appears on a list provided by the employer to the employee prior to the date of the notice of termination stating that the non-solicitation covenant applies to the listed customers and other business contacts.

The clause must also aim to protect a legitimate business interest and go no further than is reasonably necessary.

The validity is not conditional upon a certain reason for leaving or the employee having a position of trust.

iii. Is it necessary to pay an employee during the period of the covenant?

The rules are the same as the rules regarding payment for non-compete covenants, except that the compensation is paid monthly in cash in arrears for the entire duration of the covenant and that no minimum lump sum payment is required. If the employee is entitled to compensation for a non-compete covenant, the employee is not also entitled to compensation for the non-solicitation covenant too.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes, if agreed with employee.

i. Are they capable of being valid?
Yes

ii. What does it take to show they are valid?

They will only be valid if a written agreement is made with the employees/colleagues affected by the clause, i.e. the employees/colleagues which the employee is restricted from soliciting etc., according to the Danish Act on Non-Solicitation of Employees. The written agreement must specify the extent of the restriction and the affected employee/colleague must have a right to compensation in cash equal to no less than 50 per cent of their total compensation (as at the end of the employment).

The employee agreeing not to solicit his colleagues/other employees will not be entitled to any compensation as his job opportunities are not restricted by the clause.
Denmark

A recent Supreme Court ruling found that a covenant in a senior employees contract which prohibited him from actively soliciting employees reporting to him (but did not prohibit those employees from being employed by the new employer of the senior employee) was not a covenant under the Danish Act on Non-Solicitation of Employees. This means that the validity conditions mentioned above would not apply to that particular type of covenant.

The clause must also aim to protect a legitimate business interest and go no further than is reasonably necessary.

The validity is not conditional upon a certain reason for leaving or the employee having a position of trust.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes

The rules are the same as the rules regarding payment for non-solicitation of customers covenant. If the employee is entitled to payment for a non-compete or non-solicitation of customers, no additional payment for the non-solicitation of employees covenant is required.

E. OTHER COVENANTS: Are there any other types of employment and post-employment related covenants which are common in this jurisdiction?

It is very common to impose a covenant which restricts an employee using confidential information that he has learnt while in employment, following the termination of employment. Protection is also provided under Danish legislation in respect of an employee abusing, disclosing or using an employers trade secrets.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Assuming the employee habitually works in Denmark, the contract will be governed by mandatory Danish employment law, including the rules mentioned above, regardless of the stated choice of law. If in such context foreign law is chosen in the contract, then the foreign law in question will also apply to the non-compete covenant. Therefore, it is generally most favourable to choose Danish law for employees habitually working/based in Denmark.

For employees based in Denmark the applicable law will not generally be an issue because clauses stipulating foreign law are rare. The issue of whether the clause can be enforced abroad is much more relevant, in particular in relation to non-compete covenants.

Restrictive covenants often have a wider geographic scope than Denmark and consequently violations may occur outside Denmark. In such a scenario, the employers ability to enforce the restrictive covenant outside Denmark will also depend on the rules in the country in question. Consequently, if protection against post-employment activities of former employees in certain geographic areas outside Denmark is important, it is generally recommended that the employer seeks advice on the enforceability of the intended restrictive covenants in the relevant jurisdictions before concluding the agreement with the relevant employee.

i. Can an employer impose a dispute resolution method on the employee?

Alternative dispute resolution clauses are fairly common in service agreements with members of the executive management. However, such clauses are rarely included in the employment contracts of lower level staff.

Based on case law the Danish ordinary courts will likely accept the case irrespective of a clause stipulating dispute resolution by way of arbitration, assuming that the clause is found in the employment contract of an employee (rather than a senior management member such as a CEO).
A global guide to ‘restrictive covenants’

Denmark

Furthermore, since an important remedy for enforcing restrictive covenants is an injunction, which is only available via the courts, there will be no obvious benefit in having a dispute resolution procedure preventing the employer from seeking an order for an injunction.

According to the Brussels Regulation, a duty to sue the employer outside Denmark cannot be imposed on an employee based in Denmark for any employment-related claim, unless the employee has accepted having to sue the employer in the foreign country in question after the dispute has arisen.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

The most common remedy for breach of a restrictive covenant is an injunction using the civil courts to restrain the employee’s or the new or prospective employers activities. Other remedies include a contractual penalty (liquidated damages) if agreed and damages for losses suffered as a result of the breach.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Generally, restrictive covenants are not relevant to, or enforceable against, an employees pension benefits.

In Denmark restrictive covenants are typically only seen in benefits/stock plans issued by foreign companies.

In order for the covenants to be valid they must satisfy the same validity requirements as restrictive covenants in an employment contract or any other employment-related document.

In practical terms it is very rare that restrictive covenants in benefits/stock plans satisfy the requirements as they have typically not been adapted to Danish rules. Thus, in practical terms hardly any restrictive covenants in benefits/stock programmes covering Danish employees are enforceable.

Assuming that a covenant is valid and enforceable, the enforcement possibilities mentioned under g apply. However, in practical terms the relevant remedy is typically forfeiture/clawback of awards.

Violating a restrictive covenant condition in a benefits/stock plan will probably be a valid reason for forfeiture/clawback of awarded stock option, RSUs or other similar share-based remuneration assuming that the covenant applies both during and for a certain period after the end of employment, whereas an employee will be more likely to be entitled to keep non-share-based benefits regardless of any breach of any restrictive covenant. No case law exists and so we can only give a general assessment as to how the situation would work in Denmark.

ii. Which covenants are typically imposed?

As mentioned under i, restrictive covenants are typically only seen in benefits/stock plans issued by foreign companies. In most cases, the only covenant imposed is a non-compete covenant.

iii What sanctions are/can be imposed by the employer for non-compliance?

See comments to f i and h i.

iv. Are there any limits to what an employer can forfeit?

There are generally no specific limits in relation to long-term incentive arrangements implying forfeiture of rights due to the violation of a valid restrictive covenant.
However, there may be limits to what the employee is prepared to agree to.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Restrictive covenants that are invalid are unenforceable. A court can apply the “blue pencil test” and sever a particular element of a restrictive covenant (that is considered invalid) and uphold the remainder of the covenant that is considered valid. Furthermore, a court can “re-write” a covenant, e.g. by reducing the duration or geographical scope if the clause is deemed excessive.

Contributed by Helene Amsinck
A. OVERVIEW:

Post-termination restrictive covenants are very common in Egyptian employment contracts. Such post-termination restrictive covenants are not explicitly regulated under Egyptian law.

However, Restrictive covenants in Egypt include non-competition, non-solicitation of clients and customers and non-disclosure of the employers information, which includes trade secrets.

As restrictive covenants are not expressly regulated under Egyptian law, an Egyptian judge will only enforce such covenants if they are reasonable. The reasonableness of the restrictive covenants depends on the sole discretion of the judge taking into consideration market practice.

Some previous court judgments suggest post-termination covenants should be limited in terms of duration and territory.

The common duration for such restrictive covenants is 12 months following the termination of the employment relationship. Such duration is usually increased for senior and high-level employees.
The most common remedy for breach of restrictive covenants is damages for breach of contract. In this case, compensation is determined by the judge and the judge takes into consideration the losses incurred and the profits foregone by the employer.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, if agreed with the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The non-competition covenant must be considered reasonable. In terms of drafting, the employment contract should include a duration for the non-competition covenant, in addition to a limitation of territory and scope.

Non-competition clauses usually restrict direct and indirect competition, i.e. the employee may be restricted from, directly or indirectly, engaging in any business which is similar to or competes with the employer or any of its affiliates or subsidiaries. Furthermore, the employee may be prohibited from, directly or indirectly, having any interest in, owning, managing, operating, controlling, being connected with as a shareholder, being a joint venture participant, officer, employee, partner or consultant, or otherwise engaging, investing or participating in any businesses conducted by the employer or any of its affiliates or subsidiaries, or any business in which the employer plans to engage, provided such plans are known to the employee.

Is it necessary to pay an employee during the period of the covenant?

No.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients; and

Yes, if agreed with employee.

i. Are they capable of being valid?

Yes

ii. What does it take to show they are valid?

The general rules above apply. It is very common in Egypt for employment contracts to include non-solicitation of the employers customers/contacts, including suppliers and distributors. Such restrictions are usually limited in duration. The market practice for such duration is 12 months following termination. Furthermore, the restrictive covenant is usually defined by reference to a limited period of time before termination. For example, the covenant may state that the employee is prohibited from soliciting or enticing away the employer's customers/clients which have, at any time during the previous 6 months before the termination date, been a customer of, or in the habit of dealing with, the employer or any of its affiliates or subsidiaries.

iii. Is it necessary to pay an employee during the period of the covenant?

No.
D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment); and

Yes, if agreed with employee.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
The general rules above apply.

Non-solicitation of employees covenants are the least common restrictive covenant, as it is hard to prove that the former employee actually solicited her/his former colleagues given the fact that a prohibition on the employee hiring her/his colleagues is rarely included in employment contracts.

iii. Is it necessary to pay an employee during the period of the covenant?
No.

E. OTHER COVENANTS: Are there any other types of employment and post-employment related covenants which are common in this jurisdiction?

Yes. Please see below:

• Non-disclosure of Information:
A non-disclosure of information covenant is a very common restrictive covenant. Such a covenant usually states that the employee undertakes not to divulge, either directly or indirectly, confidential information, data and other secrets related to the employer's business, employers clients and/or employers related or affiliate companies. Such a covenant usually continues to apply after the termination of the employment relationship, and, unlike other restrictive covenants, it is not necessary to put a time limit on the covenant.

• Conflict of Interest:
Often employment contracts include a clause obliging the employee to inform the employer in the event of a conflict of interest arising between the employers interests and the employees personal interest. Usually, the employee must notify the employer of any property, interest or personal connections that might affect the performance of his work. This type of covenant would apply during the employment relationship.

• Prohibition to Work for a Third Party:
Often employment contracts include a clause that the employee must not, without the prior express written permission of the employer, engage in any work for a third party, with or without remuneration, including outside official working hours or during holidays, or participate, directly or indirectly, in any commercial activity or in any activity which, in the employer’s opinion, conflicts with its interests. This type of covenant would apply during the employment relationship.
F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

According to Egyptian law, employment contracts between Egyptian employers and their employees must be governed by Egyptian law. Accordingly, in the event restrictive covenants are included in the employment contract, Egyptian law must apply, i.e. the employment contract will be interpreted in accordance with Egyptian law and any dispute shall be referred to the competent Egyptian courts.

If a restrictive covenant is included in a separate agreement (for example, Non-Disclosure Agreement), the parties may choose a governing law other than Egyptian law. Enforcement will depend on whether there is a bilateral enforcement of judgments treaty between Egypt and the other jurisdiction. If there is no bilateral enforcement of judgments treaty, a court in Egypt would uphold the choice of foreign law and the submission by the parties to such foreign courts. However, if a judgment is obtained in the foreign jurisdiction, it will be enforced by the courts of Egypt provided that:

• the foreign courts offer reciprocal treatment to judgments obtained in the courts of Egypt. Otherwise, the Egyptian courts will re-examine the merits of the case in the same manner as that adopted by such courts;
• the courts of Egypt are not exclusively competent to hear the dispute which constituted the object of the foreign judgment while the foreign courts are shown to have been competent to hear the dispute in accordance with their own respective laws;
• the parties to the dispute were duly notified and properly represented in the hearings; and
• the foreign judgment does not conflict with a prior Egyptian judgment in the same case and is not contrary to public order or morality in Egypt.

However, it is very unusual to have a separate agreement for the restrictive covenants; i.e. such covenants are usually included in the employment contract.

i. Can an employer impose a dispute resolution method on the employee?

If the restrictive covenants are included in the employment contract, the dispute resolution mechanism has to be Egyptian courts. If the covenants are in a separate agreement, the dispute resolution mechanism does not have to be Egyptian courts, and may include arbitration. A foreign arbitral award is usually enforceable in Egypt since Egypt is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

G. ENFORCEMENT: How are covenants typically enforced?

The most common remedy for breach of restrictive covenants is damages for breach of contract. In this case, compensation is determined by the judge and the judge takes into consideration the losses incurred and the profits lost by the employer.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Restrictive covenants are only enforceable in relation to benefit schemes (including private pension and stock plans schemes) where such covenants are included in the scheme itself or if the benefit scheme is considered an integral part of the employment contract.

Commonly, benefit schemes may stipulate that if the employee breaches any of his obligations or the employment relationship is terminated for cause, the employee will not be entitled to receive the benefit.

In relation to pensions, by law, employers are obliged to register their employees with the social insurance authority and make the necessary contributions. Restrictive covenants will not apply to such pensions.
Egypt

ii. Which covenants are typically imposed?
Usually the restrictive covenants included are the same as the covenants included in the employment contract.

iii. What sanctions are/can be imposed by the employer for non-compliance?
Please refer to h i above. The employee may not be entitled to receive
the relevant benefit under the scheme.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw
back provisions)?
Please refer to h i above. In particular, note that pensions cannot be conditional on an employee complying with a restrictive covenant.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it
void?
If a covenant is invalid, it is considered to be void, and accordingly, unenforceable. The court cannot re-write the covenant.

Contributed by Dittmar & Indrenius
Finland

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A. OVERVIEW:

The most common post-termination restrictive covenants used in Finnish employment contracts are non-competition, confidentiality and non-solicitation covenants.

A non-competition restriction will only be justified if there is a “particularly weighty” reason related to the employer’s business and operations which can be relied upon. Such an agreement is usually considered valid if the employee’s duties relate to product development, research or other similar activities and the employee possesses information and know-how which is not in the public domain. Non-competition obligations are generally included in employment contracts of the more senior management of the company.

The legitimate reason for allowing a non-competition restriction must be present both when concluding the contract and at the time of enforcing it. The assessment of the particular weight of the reason is made on an overall basis, considering the nature of the business, the need to keep a business or trade secret confidential, special training provided to the employee by the employer as well as the employee’s status and duties.
Finland

There are no specific rules regarding post-termination confidentiality and non-solicitation in Finnish law. Thus, the legal assessment of such agreements is based on general contract law principles. The rules regarding non-competition may, however, sometimes serve as interpretative guidelines.

During the term of employment, employees have a statutory obligation to keep the employer’s trade and business secrets confidential. The parties may further agree that the secrecy obligation remains in force after the termination of employment. The obligation to keep unlawfully received information confidential, however, automatically remains in force after the end of employment.

The employer and the employee may agree on non-solicitation of employees and customers of the employer after the end of employment. Such an obligation may, however, be considered unreasonable to the employee and thus be unenforceable.

The most common remedy for breach of a post-termination restrictive covenant is the payment of a fixed contractual penalty separately agreed on between the parties. In the absence of an agreement on a contractual penalty, possible remedies include damages for breach of contract and injunctions.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, if agreed with the employee.

i. Are they capable of being valid?

Yes, provided that certain conditions are met.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

A non-competition agreement may restrict the employee’s right to engage in competing activities for a maximum period of six months from the end of employment. If the employee receives fair compensation, the restricted period may be extended to a maximum of one year. Although not defined by law and always determined on a case-by-case basis, “fair compensation” has in case law generally amounted to between 50% and 100% of the employee’s last monthly salary. The employer and employee may agree that the compensation is paid as a lump sum or on a monthly basis.

The restrictions on the duration of the non-competition obligation (and the amount of contractual penalty, see e. below) do not apply to employees who are considered to be engaged in the management of the company or an independent part of it or have an independent status comparable to such positions (for example administrative directors reporting directly to the top management). A managing director is always excluded from the limitations to applicability of the above restrictions.

The legitimate reason for justifying a non-competition restriction must be present both when concluding the contract and at the time of enforcing it. The assessment of the particular weight of the reason is made on an overall basis, considering the nature of the business, the need to keep a business or trade secret confidential, special training provided to the employee by the employer and the employee’s status and duties.

A non-competition obligation may not cover duties that do not need to be subject to competitive restrictions from the employer’s point of view. Neither is it allowed to enter into a non-competition agreement only in order to restrict normal, healthy competition or to prevent the employee from exploiting his expertise. Thus, with reference to the freedom of trade, the employee’s possibilities to make a living through work corresponding to his expertise and the right to freely choose the place of work will affect the assessment of the validity of the restriction. In general, the more restricted the non-competition obligation is (e.g. based on length of period, geographical scope and general scope), the more likely it will be found to be reasonable.

A non-competition agreement that has been concluded without a particularly weighty reason is considered void as a whole. However, if the covenant is for a longer time than is permitted by law, the covenant is void only to the part exceeding the statutory maximum limit.
Finland

The employee is released by law from non-competition obligations if the employment relationship is terminated on grounds related to the employer and not the individual employee. In practice, this relates to redundancy situations. If the grounds for termination are related to the employee’s work performance or behaviour, the non-competition covenant is binding. The employer has the burden of proof in showing that the employee has violated the non-competition obligation.

In some cases, other clauses which are not explicit non-competition clauses can be treated as statutory non-competition restrictions if the effect of such a clause is considered close enough to a clause on non-competition.

iii. Is it necessary to pay an employee during the period of the covenant?

Compensation is only required if the restricted period exceeds six months. See section b ii above.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, if agreed with the employee and provided that the prohibition specifically concerns non-solicitation of customers (i.e. not mere communication with customers).

i. Are they capable of being valid?

Yes, provided that certain conditions are met.

ii. What does it take to show they are valid?

No distinction is generally made between non-solicitation of customers and non-solicitation of employees in Finland. Consequently, the same principles apply to both types of non-solicitation. See d ii below.

iii. Is it necessary to pay an employee during the period of the covenant?

No, unless otherwise agreed between the parties. See d ii below.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment); and

Yes, if agreed with the employee.

i. Are they capable of being valid?

Yes, provided that certain conditions are met.

ii. What does it take to show they are valid?

The parties to the employment relationship may agree on non-solicitation of the employer’s customers and employees to apply after the termination of employment. A non-solicitation covenant generally prohibits the employee from soliciting individuals, who have been customers of the employer during the employee’s employment, and to entice them to end their customer relationship with the employer. Usually, the non-solicitation obligation will only cover customers that the employee has been in contact with during the term of his employment. It is also common practice for the parties to agree on the prohibition of solicitation of employees of the employer. Non-solicitation covenants are typically concluded with high-level management employees and employees responsible for customer relations.

There are no specific legal provisions in respect of non-solicitation covenants, so a case-specific assessment of their reasonability based on general contract law would take place. Thus, in order to be valid, the non-solicitation restriction must be reasonable.
iii. Is it necessary to pay an employee during the period of the covenant?

No, unless otherwise agreed between the parties.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

During the term of employment, the employee has a statutory obligation to keep the employer’s trade and business secrets confidential. It is, however, common practice for the employer and the employee to agree that the secrecy obligation will remain in force after the termination of employment. The obligation to keep unlawfully received information confidential automatically remains in force after the end of employment. It is recommended to limit the secrecy obligation in scope and to the time when the information subject to confidentiality is of financial value. Indefinite secrecy obligations are generally considered invalid by the court.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

The law applicable to an employment contract with connections to more than one jurisdiction is determined in accordance with the Rome I Regulation. The basic principle of the Regulation is that the parties to the employment relationship are free to choose the applicable law. In the absence of such a choice, the contract will be governed by the law of the country to which it is most closely connected, usually the country where the work is performed.

Regardless of any choice of law made between the parties, the employee is protected by mandatory rules of the law that would have applied if no choice had been made, i.e. generally the law of the country where the work is performed. Consequently, if the work is performed in Finland and Finnish law regarding restrictive covenants is more favourable to the employee than the law chosen by the parties, Finnish law will be applied. However, where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated above, the law of that other country applies. If it is unclear which law should be applied to the contract, the court will apply the law that leads to the most favourable outcome to the employee.

i. Can an employer impose a dispute resolution method on the employee?

In Finland, individual employment disputes are usually handled by the general courts. An alternative to issuing proceedings or reaching an out-of-court settlement is for the parties to agree to settle their dispute by arbitration. This route may be taken where there is a specific arbitration clause in the employment contract that either party may enforce or if the parties voluntarily agree to submit to arbitration. An arbitration clause preventing an employee from taking his case to the general court of law may, however, be found unreasonable and thus not binding on the employee. Consequently, arbitration clauses are used mainly in contracts of high-level management employees such as managing directors and other senior managers and directors of the company.

G. ENFORCEMENT: How are covenants typically enforced?

Breaches of a restrictive covenant are usually backed up with a contractual penalty to be paid by the employee for each breach. The contractual penalty is always subject to agreement, whereas general tort law is applied to the breach in the absence of an agreement on contractual penalty. The penalty constitutes the minimum compensation for the breach. Thus, if the damage caused to the employer exceeds the amount of the contractual penalty, the employer can claim both the penalty and damages from the employee. As the employer has the burden of proof in showing that the employee has breached a restrictive covenant, employers generally insert a clause on contractual penalty in employment contracts, since payment of the penalty does not require proving loss or the suffering of damage.
For non-competition restrictions, the contractual penalty may not exceed the employee’s pay for the six months preceding termination of employment (although this does not apply to employees who are considered to be engaged in the management of the company or an independent part of it or have an independent status comparable to such positions, such as administrative and commercial directors reporting directly to the top management). Although there is no statutory maximum amount to the contractual penalty in violation of non-solicitation and secrecy obligations, the abovementioned upper limit can generally be used as a guideline for breaches against these as well. However, this does not necessarily apply if the employee’s actions have been deliberate or grossly negligent.

In the absence of an agreement on contractual penalty, breaches against a covenant are primarily handled through the issuance of a written warning to the employee, along with a reminder of the obligation. Stronger measures include requesting an interim injunction or seizure of goods in court, the latter of which is usually undertaken in order to safeguard evidence.

When it comes to non-competition restrictions, the employer cannot prevent the employee from taking up employment at a competitor or from undertaking other activities prohibited under the agreement. Consequently, the employer may only request compensation for damage suffered due to the breach or, if agreed in the contract, payment of the contractual penalty. In practice, the mere awareness of the obligation to pay damages or contractual penalty for a breach will reduce the employee’s interest to engage in competing activities.

An injunction restraining a breach or further breach by the employee (or a former employee), as well as interim injunctions, also exist as potential remedies. However, injunctions are generally sought only in clear cases, where the validity of the restrictive covenant is indisputable (in practice this will be situations where the employee’s duties and position demonstrate the need for a valid restrictive covenant and the employee deliberately breaches the covenant, refusing to pay damages or the agreed contractual penalty). If the validity of the covenant is unclear, injunctions are rarely used.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

There are no legal provisions on the relationship between restrictive covenants and employee pensions, benefits or stock plans in Finnish law. Thus, the terms of the agreements concluded will determine their legal treatment, provided that the terms are considered valid in respect of the employee in question.

Payment of an award upon termination of employment is usually determined by whether the participant is considered a “good leaver” or a “bad leaver”. An employee who has been made redundant is generally regarded as a good leaver, thus retaining the award upon termination. A bad leaver, on the other hand, is usually someone who chooses to resign or someone whose employment is terminated for reasons deriving from the employee’s person or work performance. Bad leavers may be subject to forfeiture of awards, if so stated in the terms of the relevant incentive scheme.

A forfeiture of an award or partial award for prohibited competitive activities can be challenged, if the employee claims that the provisions allowing forfeiture are unenforceable as a restraint of trade. The validity of such provisions will be assessed on a case-specific basis by the court.

ii. Which covenants are typically imposed?

See section h i above.

iii. What sanctions are/can be imposed by the employer for non-compliance?

Regarding long term incentive awards, the sanction may be forfeiture of the award or claw back of amounts which have already been paid to the employee. Forfeiture does not require enforcement, as the employer may choose not to deliver the award. Such a decision may, however, be challenged by the employee.
iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

The employer may be entitled to set off pay owed to an employee against counterclaims. However, the main rule is that no more than a third of the net amount of the employee’s monthly salary can be set off. The concept of “salary” may also cover incentive scheme receivables. The right to set-off requires that the employers claim is clear and uncontested and that it has fallen due for payment.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

A restrictive covenant can be considered wholly or partly invalid, if the covenant is regarded as generally unreasonable or if it imposes restrictions or obligations on the employee in violation of mandatory employment law. The court can, however, not re-write a covenant entirely.

If possible, the court will strike out the part of the restrictive covenant that contradicts mandatory law. For example, a non-competition covenant that is otherwise valid but has been concluded for a longer time than allowed by law is void only to the part exceeding the statutory limit. The same applies to the maximum amount of contractual penalty.

Non-solicitation and secrecy agreements concluded without an appropriate reason and thus considered unreasonable by the court will be void as a whole. However, if otherwise valid but concluded for a longer time than considered reasonable by the court, the court may adjust the period.

Contributed by Seppo Havia & Jessica Brander
France

A. OVERVIEW:

Post-termination restrictive covenants are fairly common in French employment contracts, particularly for senior employee or those with valuable connections, relationships or access to confidential information, senior responsibilities or sensitive positions. The basic principle under the French Labour Code is that a restrictive covenant is unenforceable against an employee unless such provision is (i) justified by the nature of the duties to be performed, and (ii) proportionate to the aim that is pursued.

When determining the validity of restrictive covenants, French labour courts will consider the following: the employee’s role, duties and seniority, the nature of the employer’s business, the scope of the restriction (such as the type of activity, its geographical scope and its duration).

Certain restrictive covenants must also provide for financial compensation.

The most common remedy for the breach of a restrictive covenant is specific performance of the covenant and/or damages.
France

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, if agreed with employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The general principles mentioned above apply. More specifically, to be valid, non-compete covenants must:

• be in writing. In most cases, the covenant is agreed at the time of hiring, but it may also be inserted into the contract by mutual agreement during the course of the employment. Non-competition covenants may also be provided by an applicable collective bargaining agreement (“CBA”). In such cases the contractual non-competition covenant, if any, cannot be more restrictive than the one included in the CBA;

• be limited as to duration and geographical scope;

• be deemed to protect a legitimate interest of the employer;

• be proportionate when considering the employee’s duties, and

• provide for reasonable financial compensation.

Courts will look closely at whether, given the employee’s duties and position within the company, the company is likely to incur an actual and significant economic and commercial risk if the former employee competed with it.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes.

By reference to case law and CBAs, 30% to 50% of gross monthly remuneration is likely to be reasonable consideration for such restrictions.

The compensation should be paid regardless of the grounds for termination (i.e. even in cases of dismissal for gross misconduct).

The financial compensation may be paid in one instalment upon the termination of the employment contract, or in several instalments during the performance of the non-competition covenant. It cannot be paid in addition to the regular pay during the performance of the employment contract, nor can the payment be delayed until the termination of the non-competition period.

If no financial compensation is provided for, or if the amount is too small, courts may rule that the non-competition covenant is void.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, if agreed with the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The general principles mentioned above under section a apply.
France

Contact prohibition covenants do not prohibit the employee from being hired by a competitor of his former employer or setting up his own company in the same field of activity.

Therefore, they should theoretically be considered as less restrictive than non-competition covenants. However, courts often consider that the covenant that prohibits the employee from contacting, or being contacted, by clients of his former employer, or of his former employer’s group is a restriction to the liberty of work, and as such, should be analyzed as a non-competition covenant.

This means, the covenant should comply with the above-mentioned conditions (see section b) in order to be valid.

iii. Is it necessary to pay an employee during the period of the covenant?

Given French case law, contact prohibition clauses should provide for financial compensation if the employee is prohibited, after the termination of the employment contract, from contacting most of the clients of his employer, or most of the clients he was in contact with during the performance of the contract.

See section b iii for further details.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes, if agreed with the employee.

Restrictions of this type will tend to define the employees who cannot be approached or hired by reference to their seniority, grade or level, or their role in or importance to the business. They often only apply to colleagues that the departing employee had a reasonable level of contact with, knowledge of or responsibility for, and within a defined period before the departing employee left employment.

In practice, it is difficult for employers to prove that a non-solicitation of employees covenant has been breached, because merely showing that the employee has been hired by a former colleague is not necessarily a breach of the covenant. Therefore, non-solicitation of employees covenants are generally the weakest type of covenant and the easiest to circumvent.

Such covenants are often also inserted in commercial contracts.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The non-solicitation covenant is usually valid as long as it does not restrain the employee’s freedom to work (for example, it does not prohibit the employee from being hired by a competitor).

iii. Is it necessary to pay an employee during the period of the covenant?

It is not necessary to provide for financial compensation since this type of covenant does not restrain the employee’s freedom to work.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

There are a variety of restrictions that can apply during or after termination of employment.
It is common to include a confidentiality clause, which seeks to restrict the use or disclosure of confidential information and company property, during employment and after its termination. Such clauses often do not have a set time limit after termination and apply for as long as the information retains its confidential nature.

Another common restrictive covenant is the exclusivity clause. This clause seeks to prohibit the employee from working for other employers during the employment contract, regardless of whether the other employers are competitors or not.

Another type of restrictive covenant is a clause that requires the repayment of training costs by the employer in the event of an early departure from the company if the employer has received training funded by the company during his employment. This type of clause must comply with the general principles mentioned under section a above and should also comply with the following conditions:

- the restriction must be in consideration for the employer’s commitment to fund training costs which are in excess of what is required by law;
- the amount of the repayment must be proportionate to the training costs incurred by the employer;
- the clause must not prevent the employee from terminating the employment contract over too long a period following the training;
- the clause should be inserted into the employment contract or in a separate agreement entered into before the training starts, and should indicate the date, the nature, and the duration of the training, as well as the actual costs incurred by the employer, and the amount and the terms and conditions of repayment by the employee.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

The choice of law will be relevant to what law governs the contract (and therefore how the contract should be interpreted and enforced):

- if French law applies to the contract, the French law principles mentioned above will apply to the interpretation and enforcement of the restrictive covenants.
- the parties can choose to apply a foreign law to the contract, but the employee cannot be deprived of the protection offered to him by the law that would have been applicable in the absence of choice. This law may be French law if the employment contract is usually performed in France or if the employee was hired in France. In this case, an employee could not waive the protection provided by the French labour code.

i. Can an employer impose a dispute resolution method on the employee?

Under French law, an employer cannot impose a dispute resolution method on the employee (e.g. mediation, arbitration). However, the procedure before the French labour courts imposes a preliminary conciliatory hearing which aims at helping the parties to reach an agreement.

G. ENFORCEMENT: How are covenants typically enforced?

Under French law, restrictive covenants can be enforced in different ways depending on the situation:

- If the employee is in breach of the restrictive covenant, the former employer can issue a claim before the labour courts in order to obtain an injunction to stop the employee carrying out the activity.

The former employer may also claim for damages for the loss sustained. Instead of claiming for damages, the employer may request the application of a penalty clause, if one is contained in the employment contract.
France

The former employer can also issue a claim for damages before the civil courts against the new employer who hired an employee knowing that the latter was subject to a non-competition clause, and who did not dismiss him despite the former employer’s request.

If the restrictive covenant provided for financial compensation, the employer may also claim before the courts the reimbursement of the amount paid to the employee which corresponds to the period during which the employee violated the covenant.

If the employee is in breach, the employer may want to stop paying financial compensation. However, in doing so, the employer would release the employee from the restriction for the future.

• If the employer is in breach of the covenant by not paying the financial compensation, the employee may issue a claim before the labour courts in order to obtain the payment if he complied with the clause himself and damages for breach of contract.

If the covenant does not comply with the conditions mentioned above, and is thus void, the employer will not be able to enforce it and the employee may claim for damages.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

The principles above are not relevant regarding employee benefits, pensions and stock plans.

ii. Which covenants are typically imposed?

With regards to pension plans, no restrictive covenants can be imposed except, in some cases, a condition of employment. A distinction should be made between two different types of pension plans:

• Pension plans under “Article 83” of the Tax code, also called “defined contribution plans”. In those plans, the employer and/or the employee pay a defined contribution. Upon retirement, the employee will be entitled to a certain amount of pension, which will depend on the amount of contributions, and the financial performance of the plan.

• In such plans, the employee cannot be deprived of his pension rights (except due to bad performance of the plan).

• Pension plans under “Article 39” of the Tax code, also called “defined benefit plans”. In those plans, the contributions are paid by the employer, and the employee is entitled to a certain amount of pension which is predetermined.

In order to benefit from preferential social security treatment, a condition of employment on the day of retirement is required. This condition of employment could be seen as a restrictive covenant.

With regard to long-term incentive plans and stock plans, the only restrictive covenant which is usually imposed is a condition of employment. In such a case, the beneficiary will lose his rights in the event of resignation or dismissal before the end of the vesting period or before the date of payment.

It is possible to provide for a condition of employment during the vesting period for both long-term incentive and stock plans.

A condition of employment after vesting is not possible for stock plans. With regard to long-term incentive plans a condition of employment after vesting (e.g. on the date of payment) is illegal. Indeed, the plans must not infringe the right of the employees to resign at any time, which is part of the freedom to work. The risk of losing a significant part of remuneration may be considered an illegal obstacle to the freedom to work, and thus, unenforceable.

iii. What sanctions are/can be imposed by the employer for non-compliance?

With regard to pension plans, under an “Article 39” pension plan, the benefit may be forfeited if the employee leaves the company before retirement.
France

With regard to long-term incentive plans or stock plans, the employer can impose a forfeiture of awards, or a reduced period of time to exercise the rights. However, the employee must have been informed of these restrictions on his rights. This information should be provided in French.

“Bad leaver” clauses (which impose forfeiture of rights in some cases of termination of employment such as dismissal for gross misconduct or resignation) are a prohibited monetary sanction, and as such will not be enforceable with regards to both long-term incentive and stock options plans.

iv. Are there any limits to what an employer can forfeit?

With respect to “Article 39” pension plans, pursuant to case law the employee does not have any acquired rights before having effectively retired. This means that if the employee leaves before the date of retirement, all his rights are forfeited.

Except for this, claw back provisions are not possible in pensions and stock plans. It remains possible for carried interests.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

In principle, invalid restrictive covenants are void. Only the employee can claim that a restrictive covenant is void. The employer cannot claim that a restrictive covenant is void in order to avoid paying the financial compensation.

If the judge rules that the covenant is void, the employee is released from the restriction. If financial compensation was provided in consideration of the covenant, the employee is not entitled to receive any further payments. However, the employer cannot retrieve any sums already paid to the employee. The employee may also claim for damages, even if he did not have to perform his obligation under the invalid restrictive covenant.

If the covenant is found to be void, but the employee was in breach of it, the employee may not be entitled to any damages, since he did not suffer from any restriction to work.

In certain cases, the judge may re-draft the covenant if it prevents the employee from performing an activity corresponding to his education and professional experience. This is only possible if requested by the employee, and if the covenant already complied with the conditions of validity. The judge may re-define the geographical scope if it is too wide, or shorten the duration of the covenant.

Contributed by Laurence Dumure Lambert
Germany

A. OVERVIEW:

In Germany, during the term of the employment contract, the employee is, in general, not permitted to compete with his employer. After the employment contract has terminated, there is no general post-contractual duty for the employee to refrain from competing, therefore post-termination restrictive covenants are sometimes agreed with the employee. Post-termination restrictive covenants are mostly agreed with employees with valuable connections, relationships or access to confidential information. As the freedom to engage in a profession is a right guaranteed by the German Constitution, restrictive covenants must be carefully drafted to meet the requirements of the statutory law and respective case law.

The most common remedies for breach of a restrictive covenant are injunctions using the employment court to restrain the employee’s activities, contractual penalties and damages for breach of contract.
Germany

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Post-termination non-competition covenants can be agreed between the employee and the employer.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Non-compete covenants are valid only if the employer can establish that: (i) it has a legitimate business interest that it is seeking to protect; (ii) that the restriction does not complicate the professional advancement of the employee in an unfair way; (iii) the duration of the covenant is no longer than 2 years; (iv) the covenant is agreed in writing and the employee has received a copy of the document containing the original signature of the employer; and (v) the employee receives compensation which is at least 50% of the previous year’s total remuneration (including all monetary and non-monetary benefits) for each year during which the restriction is in effect.

Legitimate business interests include trade secrets and confidential information, and trade connections such as customers or suppliers.

In order to determine if a non-compete covenant complicates the professional advancement of the employee in an unfair way, the court will generally consider (i) the scope of the restriction: geographical scope, content and duration; and (ii) the compensation the employee receives for the duration of the restriction. According to current German case law, a post-termination contractual non-compete covenant must be adequate regarding duration, territory and content matter to be effective. Courts will decide, on a case-by-case basis, what they deem is adequate in this respect, and will consider the employee’s role and duties and the nature of the employer’s business.

In terms of drafting, it is particularly important to make sure that the scope and duration of the restriction is limited.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes, the employee must receive compensation which is at least 50% of the previous year’s total remuneration (including all monetary and non-monetary benefits) for each year during which the non-compete covenant is in effect.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Post-termination clauses prohibiting contact with customers/clients can be agreed between the employee and the employer. These can either prevent the solicitation of clients/customers or additionally prohibit the acceptance of work from the client/customer even if not previously solicited by the employee. In Germany, the solicitation of clients/customers is prohibited by statutory law for tax accountants, lawyers and auditors (a non-dealing restriction has to be agreed between the parties though).

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The principles mentioned under section b ii above apply. These restrictions can cover non-solicitation of, or non-dealing with, customers/clients. Solicitation tends to cover active targeting of business. Non-dealing prevents employees from accepting business from a customer even if they had not actively sought out that business. In post-termination covenants which prohibit contact with customers/clients, it is necessary to define which kind of customers/clients and which kind of activities are covered by the restriction. Purely social contact cannot be restricted.
Germany

iii. Is it necessary to pay an employee during the period of the covenant?

Yes, as with non-competition covenants, the employee must receive compensation which is at least 50% of the previous year’s total remuneration (including all monetary and non-monetary benefits) for each year during which the covenant is in effect.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment); and

Non-solicitation clauses restricting the solicitation of employees can be agreed. However, clauses prohibiting the hiring of employees by a former employee are non-binding according to statutory law.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The principles mentioned under section b ii above apply.

As clauses prohibiting the hiring of employees by a former employee are non-binding according to statutory law, it is difficult, in practice, for employers to prove that a non-solicitation of employees covenant has been broken. Merely showing that the employee has been hired by a former colleague is not a breach of the non-solicitation covenant.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes, as with non-competition covenants, the employee must receive compensation which is at least 50% of the previous year’s total remuneration (including all monetary and non-monetary benefits) for each year during which the covenant is in effect.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Yes, a common clause is to restrict the use or disclosure of confidential information and business/trade secrets, during employment and after its termination. The principles mentioned under section b ii above usually do not apply to these clauses, therefore they usually do not have a set time limit after termination and the employee does not receive any compensation. The principles mentioned under section b ii above only apply if the particular covenant complicates the professional advancement of the employee in an unfair way.

Other post-termination restrictions can cover non-dealing with service providers and suppliers, depending on the employer’s business. These are similar to the customer/client restrictions mentioned above.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law will be relevant to what law governs the contract (and therefore how the contract should be interpreted and enforced) and the jurisdiction which can hear any dispute in connection with that contract.
In general, the parties of an employment contract can freely choose the law governing the contract. It is, in principle, also possible to choose a law governing the restrictive covenant, which is different from the law governing the rest of the employment contract. However, mandatory provisions of German law protecting the employees cannot be overruled if they would apply if no choice of law had been made. Mandatory provisions of German law protecting employees will therefore apply, regardless of the choice of law. For example, a post-termination non-competition covenant under foreign law prohibiting competition without any compensation would be invalid because it breaches mandatory provisions of German law (the employee’s entitlement to compensation).

i. Can an employer impose a dispute resolution method on the employee?

No, alternative dispute resolution procedures can, in general, not be included in employment contracts. Clauses in employment contracts stating that disputes in connection with the employment contract (and therefore also disputes with regard to restrictive covenants agreed in connection with the employment contract) will be handled by an arbitration committee or a court not competent according to German law (e.g. courts in a foreign country) are invalid. An exception to this principle may be possible if the place of jurisdiction is agreed in writing after the dispute has already arisen.

G. ENFORCEMENT: How are covenants typically enforced in your jurisdiction?

The most common remedy for a breach of a restrictive covenant is an action for an injunction or preliminary injunction using the employment courts. The injunction would look to restrain the employee’s or the new or prospective employer’s activities. Other remedies include an injunction for disclosure of information about the employee’s activities and damages for breach of contract.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

No, the sanction is usually forfeiture or clawback.

Case law in respect of the validity of forfeiture or clawback clauses is constantly changing in Germany, e.g.:

• Clauses stating that the entitlement to a pension will be forfeited should the employee start working for a competitor are likely to be considered as invalid, as they circumvent the statutory law on restrictive covenants. However, clauses stating that salary paid by the competitor for the employee’s work will be offset against his pension are often considered valid. Clauses stating that the entitlement to a pension rests during the time the employee works for a competitor are likely to be considered invalid.

• The validity of clawback clauses, in general, depends on the amount which is to be paid back by the employee if he breaches the covenant. Such clauses may not establish an unreasonable disadvantage for the employee.

• There is little case law on stock (option) plans. Such plans are often international programs, e.g. where a foreign parent company grants the shares/stock options, and so there is usually the problem of the choice of law as described under section f above. Legal literature tends to consider that clawback clauses will be invalid, if they seek to claw back awards which have already been granted to the employee. Forfeiture clauses are likely to be considered valid if the forfeiture occurs before the awards have been granted.

ii. Which covenants are typically imposed?

In general, these covenants could range from non-competition covenants through to non-dealing and non-solicitation of customers covenants.
iii. What sanctions are/can be imposed by the employer for non-compliance?

Injunctive relief is unusual, but forfeiture and clawback clauses are fairly common.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/clawback provisions)?

See section h i above. Courts will decide on a case-by-case basis if forfeiture and clawback clauses are invalid.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

If a covenant is found to be invalid, the court will reduce the respective covenant to a level at which it is legally valid. This is, generally speaking, the case if the covenant is not adequate regarding duration, territory and content matter. However, in some cases, the covenant will be void, for example, if it does not include compensation for the employee at all or if the court considers it to be immoral.

Contributed by Dr. Guido Zeppenfeld & Dr. Nicolas Rößler
A. OVERVIEW:

Post-termination restrictive covenants are fairly common in Greek employment contracts, particularly for senior employee or those with valuable connections, relationships or access to confidential information.

Whether a restriction is lawful depends on: its necessity to protect the employer’s legitimate business interests (i.e. if the interests of the employer would otherwise be harmed, for instance, through disclosure of trade secrets, work methods or soliciting customers); the restriction being limited in duration and geographical scope taking into account the employee’s role and other matters relevant to the particular employee; and the obligation being accompanied by reasonable consideration by reference to the damage suffered by the employee due to the restriction (although the payment of compensation is not a prerequisite per se for the validity of the restriction).

The initial remedy for breach of a restrictive covenant is obtaining an interim relief, provisionally ordering the employee to cease the competitive conduct pending the court’s definitive decision. The employment contract may also include a penalty payment to remedy any potential breach and payment of this amount may also be enforced in the event of a breach of a valid restrictive covenant.
Moreover, where non-compliance with a specific restrictive covenant can be regarded as an act of unfair competition, an order to refrain from competing in the future can be obtained from the court based on legislation protecting unfair competition. In particular, if confidential data is disclosed to third parties concerning the employer’s business for the purposes of competing with or harming the employer then a criminal complaint may be brought under this legislation which criminalises this conduct and provides for a sanction of imprisonment of up to six months and a financial penalty.

**B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?**

This is a matter of negotiation between the parties. Non-compete clauses are not necessarily used on a standard basis, but they are frequently used in contracts with employees working for local subsidiaries of international companies.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The general principles mentioned in section a above apply. The prevailing criterion is the need to clearly protect the employer’s legitimate business interests, while other factors, such as the duration, geographical and professional scope of the restriction, will also be taken into account. The restriction will also be considered in light of the principle of good faith and whether the employee’s freedom to work is restricted more than is necessary for the purposes of protecting the employer’s legitimate business interests.

These types of covenants are primarily intended to protect confidential information, trade secrets, work methods and clientele although they can also provide for a prohibition from being employed by another employer or from carrying out a business or profession that competes with the employer.

In terms of drafting, it is particularly important to ensure that the scope and duration of the restriction is limited, bearing in mind the general principles mentioned above. Non-competition covenants sometimes apply for different periods compared to non-solicitation covenants although non-solicitation may be linked to non-competition where the solicitation of employees facilitates competing against the former employer.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement to pay employees during the period of a post-termination restrictive covenant. However, when balancing the conflicting interests of both parties in good faith, an important criterion will be whether the employee will be reasonably remunerated particularly where the employee would be prevented from working. Therefore the payment of remuneration in consideration for the employee undertaking not to compete with the employer’s activities will benefit the employer. The employee can be remunerated during the period of the covenant or it can otherwise be agreed, particularly in the case of senior and highly remunerated employees, that the compensation received in the course of employment includes consideration for the post-termination covenant.

**C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?**

Yes, if agreed with the employee. These can either prevent the solicitation of clients/customers or additionally prohibit the acceptance of work from clients/customers even if not previously solicited by the employee.
Greece

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?

The general principles mentioned above apply. These restrictions can cover non-solicitation of, or non-dealing with, customers/clients. Solicitation tends to cover more active targeting of business. Non-dealing prevents the employee from accepting business from a customer even if they had not actively pursued that business. It is necessary for the employer to show a legitimate interest in having the covenant upheld. This interest is likely to be either a concern that the employee might use their influence over clients/customers in which the employer has invested or it may be a concern regarding the use of the employer’s confidential information to attract business to the detriment of the employer.

These types of covenants are often included in employment contracts of members of management and are broadly drafted to include all clients of the Company, whether current or potential. They are usually complemented by a general obligation not to directly or indirectly engage, assist or have any interest in any business competing with that of the employer. This would therefore extend to acts of competition directly by the employee but also indirectly through a third party intermediary. The covenant would cease to apply where the employer tacitly consents. Consent would be considered to have been provided where the employer obtains knowledge of the competitive acts and fails to object in a timely manner.

In each case the activity which is to be prohibited must have a business element to it. Usually, the employee would be looking to competing with the former employer’s business, or soliciting business in competition with the former employer.

Prospective customers/clients can be included in this type of restriction without being limited to those that the employer was actively targeting prior to termination.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement although this is advisable for the reasons noted in section b iii.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment); and

Yes, non-solicitation of employees covenants may be upheld by the Court in certain situations. However, it is usually assumed that it is not possible to prohibit the hiring of employees by a former employee.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?

The general principles mentioned above apply.

Most restrictions of this type will provide that the employee agrees not to directly or indirectly seek to entice away from the employer any person employed by the employer for a reasonable time period after termination of employment. The restriction would usually apply regardless of whether the solicitation involves a breach of contract on the part of the (former) colleague concerned.
It is usually assumed that it is not possible to prohibit the hiring of employees by a former employee. Accordingly, in practice, it is difficult for employers to prove that a non-solicitation of employees covenant has been breached, because merely showing that the employee has been hired by a former colleague is not necessarily a breach. However, where the former employee hired an employee with the knowledge that the employee was breaching a restrictive covenant, then this would be regarded as an act of unfair competition. The former employer would then be able to claim damages although it would not be able to bring a claim for the new employer to cease employing the solicited employee. Where, however, the solicited employee discloses confidential information such as trade or industrial secrets of the former employer, a claim can be brought to prohibit the disclosure of such secrets. Therefore, non-solicitation of employees covenants are generally the weakest type of covenant and the easiest to circumvent.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement although this is advisable for the reasons noted in section b iii.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

There are a variety of restrictions that can apply during or after termination of employment.

A common clause is to restrict the use or disclosure of confidential information or events, during employment and after its termination. These clauses tend to refer to the type of information that the employee is required to keep confidential and can also provide that any non-compliance with the confidentiality obligation or the solicitation of another to infringe the confidentiality obligation is a material breach of the employee’s obligations. This would allow the employer to claim for the remedy of damages, including loss of profit, in addition to any claim based on the unfair competition legislation mentioned at section a above. These clauses are also drafted to survive termination of employment and their continuing validity may be included in the terms of any settlement.

Employees can be restricted from holding themselves out as being connected to the former employer after their departure. They can be prevented from making disparaging statements about their former employer or its personnel.

Other restrictions may have an impact on an employee’s ability to compete, although they are not restrictive covenants in the standard sense, e.g. bad leaver provisions in a bonus plan which apply if an employee leaves and competes with his employer.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law will be relevant to what law governs the contract (and therefore how the contract should be interpreted and enforced) and the jurisdiction which can hear any dispute in connection with that contract.

If Greek law applies to the contract, and the employee is domiciled and provides its services in Greece, then it is very likely that the Greek law principles mentioned above will apply to the interpretation and enforcement of restrictive covenants, and proceedings would normally be brought before the Greek employment tribunals. If another country’s law applies to the contract, although this would not be advisable where employees provide their services in Greece, and the Greek court has jurisdiction to hear the dispute, then mandatory Greek law could override the interpretation or enforcement of the contract or impact the remedies available via the Greek court.

i. Can an employer impose a dispute resolution method on the employee?

It would not be reasonable to impose alternative dispute resolution procedures in employment contracts.
Since the primary remedy for enforcing restrictive covenants is obtaining interim relief, which is available via the Courts, there will be no obvious benefit in having a dispute resolution procedure which prevented the employer from seeking an order for an injunction. An employer may only bring proceedings before the courts of the jurisdiction in which the employee is domiciled.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

The most common remedy for breach of a restrictive covenant is obtaining interim relief through the civil courts, to restrain the employee’s or the new or prospective employer’s activities pending the court’s definitive decision. The court has discretion as to whether or not to grant an injunction. The court’s final ruling which is not subject to any other rights of appeal can order the employee to refrain from further acts of competition as well as provide for the payment of a financial penalty.

Other remedies include obtaining an order from the court pursuant to the unfair competition legislation, damages for breach of contract and other forms of financial compensation.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Generally, restrictive covenants are not relevant to, or enforceable against, an employee’s pension benefits.

In relation to long term incentive awards, the sanction is usually forfeiture of the award, or, in some cases, claw back of any amounts already paid. The former would not need enforcement (as it would be in the employer’s powers not to deliver the cash or shares pursuant to the award) — although it may be challenged by the participant for breach of contract.

Historically it was usually determined at the time of termination whether a participant would retain his award (“good leaver”) or lose his award (“bad leaver”), and if the award was retained it would usually vest and be paid out at the time of termination. It is also possible, however, for retained awards to be paid out to good leavers at the original vesting date, rather than on termination, which could potentially lead to an increase in forfeiture or claw back provisions relating to specified post-termination activities.

A forfeiture of an award or partial award, for prohibited competitive activities can be challenged if the employee claims that the provisions allowing forfeiture are unenforceable on grounds of good faith and proportionality principles. The same approach will be taken to evaluating these clauses as is taken when considering equivalent clauses in employment contracts.

ii. Which covenants are typically imposed?

See section h i in relation to pension benefits.

Covenants imposed may reflect the covenants contained in the standard form employment contracts, although there is no requirement that this be the case. As such, these covenants could range from non-competition covenants to non-dealing and non-solicitation of customers covenants.

iii. What sanctions are/can be imposed by the employer for non-compliance?

See section h i above in relation to pension benefits.

A forfeiture provision may apply to unvested incentive awards if the participant engages in the relevant behaviour. In addition, there may be claw back of amounts paid (or repayment of any value realised on sale of shares delivered) on the vesting of awards.
iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/clawback provisions)?

See section h i above in relation to pension benefits.

There are generally no specific limits in relation to long-term incentive arrangements, although an employee would be entitled to be treated in a similar way to former employees to the extent that the employer did not exercise its right of forfeiture in similar circumstances. Moreover, where any amounts payable to employees under such arrangements are set-off against mandatory minimum compensation requirements, then it would not be possible to reduce the amount payable.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Restrictive covenants that are invalid are unenforceable. A court can provide that a particular element of a restrictive covenant (that is considered invalid) is unenforceable and uphold the remainder of the covenant. However, a court will not re-write a covenant.

Contributed by Dr. Guido Zeppenfeld & Dr. Nicolas Rößler
A. OVERVIEW:

Post-termination restrictive covenants are fairly common in Hungarian employment contracts. They are commonly used for senior or executive employees who have information about the company’s confidential matters. Most employers also use covenants for medium level employees who might have access to confidential business information.

As a general rule, the employee, during the term of the employment, must take into account and respect the legitimate business interests of the employer. Following the termination of the employment, however, the employee is required to take into account such business interests only if a separate post termination restriction is agreed between the employer and the employee.

A post-termination covenant is legal and enforceable if the employer pays appropriate consideration for it. If the employer does not pay compensation for the employee’s post-termination restrictive covenant, the employee, following the termination of the employment, does not need to take into account the legitimate business interests of their earlier employer and may undertake any work he wishes to in the market.
The employee may withdraw from the covenant if he terminates their employment with an extraordinary (immediate effect) termination notice which is possible if the employer seriously breaches the employment contract and behaves in a way which makes continued employment impossible. The employer may also withdraw from the covenant with no justification. A non-compete restriction generally contains a provision that the employer may withdraw from the restriction upon the termination of the employment. So the employer, at the time of termination, may decide whether (i) it wishes the employee to abide by the covenant and not to work at a competitor, in which case, the employer has to pay consideration to the employee, or (ii) it does not require the employee to abide by the post-termination covenant, so the employee may freely undertake any work for any company, and the employer does not pay consideration to the employee.

The only exception to the obligation to pay for the employee’s post-termination restrictive covenant relates to the general confidentiality obligation on the employee. The employee must keep the business secrets of the employer and treat all information obtained during the employment confidential following the termination of the employment, without entitlement to consideration for such confidentiality restriction.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes. The non-compete restriction would need to be mutually agreed between the employer and the employee. It is generally included in the employment contract or in a separate agreement signed by the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Several conditions have to be fulfilled for the non-compete covenant to be valid and enforceable. Firstly, the employer has to pay for it (see point iii below). Secondly, according to case law, the non-competition restriction cannot restrict, unreasonably and unnecessarily, the employee’s living and ability to undertake work. The courts emphasize that such restriction should be reasonable with respect to its geographical scope and the activity covered. A non-competition covenant that restricts the employee’s work all over the world (or for a Hungarian employee all over Europe) and all kinds of activities might be considered an unreasonable restriction and, as such, declared as invalid and unenforceable by the court. Thirdly, the length of the non-compete covenant cannot exceed two years.

Therefore, when drafting a non-competition covenant it is advisable to take into account the above principles in order to eliminate the risk of the clause being invalid and unenforceable.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes. The payment for the non-compete covenant is an essential element of its validity. For non-compete restrictions entered into prior to 1 July 2012, according to court practice applicable at that time, at least half of the employee’s salary had to be paid for the term of the non-compete restriction (e.g. for a 12 months’ non-compete clause, 6 months’ salary had to be paid.) From 1 July 2012, the new Labour Code provides that at least one-third of the employee’s salary has to be paid for the non-compete period (e.g. for a 12 month non-compete period, at least 4 months’ salary).
The new Labour Code further provides that when determining the consideration payable for the non-compete covenant, the extent to which the covenant prevents the employee from undertaking new work, with special regard to their expertise and education, should be taken into account. Their means that for a senior employee who has significant experience in their profession and where the non-competition covenant significantly restricts him from undertaking new work (e.g. based on their specialist knowledge, he could only undertake work for a competitor, which is prohibited by the non-compete covenant), compensation higher than the one-third of their salary may be reasonable. However, there is no clear court guidance under the new Labour Code about the level of payments due to different group of employees.

The payment of one-third salary covers all types of covenants below, not only the non-compete restriction. All these post-termination restrictions comprise one ‘package’, for which one lump-sum payment has to be made.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients; and

Yes, if agreed with the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

Their restriction should form part of the non-compete restriction, so the general rules are applicable to their type of restriction as well (payment of consideration, reasonable geographical and target scope, maximum 2 years’ length). It is quite common for an executive or a sales representative who has daily contact with the employer’s customers to try to ‘transfer’ those clients to their new employer or to their newly established own enterprise. These covenants are therefore commonly used.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes. The same principles are applicable as mentioned in section b iii above.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment); and

Yes. Their can be part of the general post-termination restriction covenant to be agreed between the employer and employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The above mentioned general principles must be considered. The actual enforcement of the covenant against the employee could raise practical difficulties. An employee may, at any time, decide to terminate their employment without any cause and join a new employer where their former colleague works. Their is not necessarily a breach of the non-solicitation restriction and it is very difficult (almost impossible) to prove that an employee decided to join another employer because of a breach of the non-solicitation restriction by the ex-employee. So, although the non-solicitation clause is generally part of a non-compete clause, it is not easy to enforce in reality.
iii. Is it necessary to pay an employee during the period of the covenant?

Yes. The same principles are applicable as mentioned in section b iii above.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

A confidentiality obligation on the employee is common, both during the course of, and following the termination of employment. Their obligation originates from the labour and civil law regulations. Therefore, even in the absence of a contractual obligation, the employee is bound to protect their employer’s confidential information. According to the labour courts, the employee is obliged to keep their obligation following the termination of the employment without receiving specific consideration.

Another post-employment restriction can be to restrict the employee from working with clients, suppliers or distributors of the employer. The enforcement of their restriction can be difficult for the employer because their restriction may also be considered a restriction of competition, which is prohibited by competition law.

Another usual clause in the post-termination restrictive covenant is the protection of the intellectual property of the employer following the termination of employment. Their clause may cover inventions, improvements, know-how, industrial property rights of the employer which were obtained by the employee in the course of their employment. These clauses generally provide that: (i) such intellectual property rights become the property of the employer; (ii) the employee, as author, gives unrestricted using rights to the employer; and (iii) the employee’s salary already includes payments due to the employee for using such rights, so the employee cannot raise any claim against the employer in connection with such intellectual property rights. As a part of such an obligation, the employee is required to sign and complete all documents, patent letters and all formalities which are necessary for the employer to obtain national, international, or foreign patent rights with regard to the inventions and improvements.

It is also common that a new employer requests that an employee provides a copy of the post-employment restrictive covenant the employee is bound under in respect of an earlier employer.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law will be relevant to what law governs the contract (and therefore how the contract should be interpreted and enforced) and the jurisdiction which can hear any dispute in connection with that contract.

If Hungarian law applies to the non-competition restriction, the courts will apply Hungarian law and it is very likely that the above non-compete principles will be followed. Their is likely to be the case since the post-employment restrictive covenants are generally part of the employment contract, and Hungarian law is applicable between a Hungarian employer and Hungarian employee. If the place of work is in Hungary, then Hungarian law will also be applicable.

However, since the parties either in the employment contract or in the separate non-compete clause, may select another law, it is possible to apply and interpret the non-compete clause according to the laws of another country. However, their would be very rare.

i. Can an employer impose a dispute resolution method on the employee?

If a post-employment restrictive covenant is included in an employment contract and the employment contract is governed by Hungarian law, the competent Hungarian labour courts have exclusive jurisdiction for the case. Arbitration in employment matters is not possible.
Hungary

G. ENFORCEMENT: How are covenants typically enforced in your jurisdiction?

The remedy depends on the provisions of the restrictive covenant. The most common remedy is to repay the consideration received by the employee for the non-competition covenant and pay damages suffered by the employer as a result of the employee’s breach of the covenant. If the employer pays the employee the whole amount of compensation at the beginning of the non-compete period, and the employee then breaches the restriction, the employee must repay the compensation received, plus, depending on the contract, a fixed amount of liquidated damages to the employer or pay any damages suffered by the employer. If the employer, instead of paying the whole amount of compensation in advance, pays the consideration in monthly instalments, once the breach has occurred, the employer may stop the monthly payments and reclaim any instalments which have already been paid. The employer should first, in a written notice, warn the employee that he must make these payments, and if the employee does not voluntarily do so, the employer may start legal proceedings against the employee claiming such payments.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Restrictive covenants are not related to, or enforceable against an employee’s pension benefit. The pension benefit is solely connected to the employee’s employment and not to any post-employment restrictive covenants.

It would theoretically be possible to include restrictive covenants in employee benefits and stock plans and to seek to forfeit (or clawback) awards if the employee breached the restricted covenant. However, we have not seen such provisions before. It would be necessary to specifically set out in the restrictive covenant clause the sanctions which could be imposed for breach of the covenant.

ii. Which covenants are typically imposed?

See section h i above.

iii. What sanctions are/can be imposed by the employer for non-compliance?

See section h i above.

It is very rare and unusual that the sanction of breaching the non-compete clause would be the (partial) loss of the pension-benefit. Such a sanction might be unenforceable as well, because the pension benefit is connected to the length of employment and not to the possible post-employment covenants.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

See section h i above.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Restrictive covenants that are invalid are unenforceable. Since, in Hungary, consideration has to be paid for the post-termination restrictive covenant, the most likely practical sanction if an employee breaches a covenant but the covenant is then found to be invalid, is that the employee does not need to repay the payment received for it. The employee may also freely undertake work at any company and will not be obliged to abide by the covenants contained in the contract.

Contributed by Dr. Péter Szemán
Iceland

A. OVERVIEW:

As a general rule all the rights and obligations of an employment relationship come to an end when the employee leaves employment and is no longer on the payroll. If some of the terms of employment are to survive termination of employment, this must be clearly stated in the agreement including the extent the surviving terms shall be valid and for how long. Such terms usually contain restrictions on the employee.

Certain post-termination restrictive covenants are common in Icelandic employment agreements, particularly for management and other senior employees. They also apply widely in professions which involve specialists with certain skills and know-how.

The most common provisions relate to non-competition and confidentiality and professional secrets. In order to be valid and binding on the employee the provisions must be very clearly stated in a written employment agreement. It is recommended that, if a new legal party takes over as the employer, the new parties enter into a new agreement, containing such restrictive covenants in order for them to be valid and binding.
Iceland

For post-termination restrictive covenants to be valid and binding, they must be drafted very narrowly and be well-defined, both with respect to substance and duration. The purpose for such restrictions must be clear and it must be obvious what the terms are intended to protect.

It is usual for covenants to seek to protect the employer’s interests. It is therefore in the employer’s interest and its responsibility to ensure that the relevant covenants are binding and enforceable under law. Any doubt regarding validity will be construed to the employer’s disadvantage.

The most common remedy for breach of a restrictive covenant is to claim damages (often in the form of fixed damages provided in the agreement) or to seek an injunction, as provided under Icelandic civil law. Additionally, it is possible to claim damages under the general rules of tort.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, if agreed with the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The general principles mentioned in section a above apply.

Non-compete covenants diminish the employee’s freedom to work and must therefore be based on solid grounds that clearly show how such provisions are of significant importance to the employer and necessary to protect its interests.

Non-compete covenants can vary in content and scope. The most common provide that the employee shall, during a certain time after the termination of his employment, refrain from being engaged in any business activities that are in competition with the employer. Such covenants restrict the employee’s right to use his skills, education and experience to work in his field after termination of employment.

Terms of an agreement may be found void under Icelandic legislation. It is therefore necessary to keep in mind certain general principles when drafting non-compete covenants, which includes the following:

- the restrictions must be narrow, specific and to the point;
- each restriction should take into account the area of work, the employee’s scope of work and his duties;
- the restriction should not be more extensive than is absolutely necessary, taking into account the field of work and the interests the restriction is intended to protect;
- the more senior the employee is, the more extensive the restrictions may be;
- it is important that provisions on remuneration and non-compete restrictions are directly connected in the agreement i.e. by referring to the fact that the non-compete restriction was taken into account when remuneration was decided;
- the duration of the provisions should be limited and it is not recommended that the period be more than two years from the termination of employment;
- it should be clearly stated in the restrictions that they are to remain in force after the termination of the employment;
Iceland

• the restriction should clearly define what the employee is to refrain from doing, i.e. that he is prohibited from establishing a
compound, whether directly or indirectly, that is in competition with the business activities of the employer, being employed or being
a consultant to such a company, soliciting employees and/or customers of the employer etc.

The general rule is that non-compete restrictions only apply after termination if the employee himself gives notice but not if his
employment is terminated by the employer. In that event, it may be possible to enter into a special employment termination
agreement with the employee which includes post-termination non-compete restrictions.

iii. Is it necessary to pay an employee during the period of the covenant?

No, it is not necessary that the employee receives any specific remuneration from the employer during the term of the post-
termination restriction, unless otherwise provided in the employment agreement or the employment termination agreement.
However, remuneration for such restrictive covenants is generally reflected in the wages and other benefits the employee received
while employed.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with
customers/clients; and

Yes, if agreed with the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The general principles mentioned in sections a and b above apply.

Such restrictions usually form part of the non-compete restriction in the employment agreement. Such restrictions tend to prohibit
the employee from soliciting or trying to solicit employees or any of the employer’s clients for a certain period of time. Clauses like
these sometimes only refer to the clients the employee had contact with during his employment or for a certain period of time before
termination of employment. However, they may also cover all the business and all the employer’s clients. It would depend on the type
of business and what position the employee had within the company as to how extensive such provisions need to be in order to meet
their purpose, i.e. to protect the interests of the employer.

The same principles apply as with non-compete restrictions generally (see section b ii, in respect of validity). It is up to the employer
to ensure that such restrictions meet all the conditions necessary to make them valid and binding and it is responsible for the clarity
of the clauses. The employer also bears the burden of proof in respect of its legitimate interests for such clauses and the necessity of
having them upheld.

As with non-compete restrictions, these clauses only apply after termination of employment if the employee gives notice, but not
if his employment is terminated by the employer. In that event, it may be possible to enter into a special employment termination
agreement with the employee which includes post-termination restrictions. This would be particularly relevant for senior employees.
All of the same conditions for the validity of the clauses as explained above would apply.

iii. Is it necessary to pay an employee during the period of the covenant?

No. See answer to section b iii above.
Iceland

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

It is not common for Icelandic employment agreements to include specific clauses prohibiting employees from soliciting and/or hiring former colleagues. However, they are occasionally included. The conditions that apply to non-compete restrictions in respect of validity also apply to these restrictions, and these restrictions, if included, would usually form part of a non-compete clause.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The same general principles apply as explained above. The employee is prohibited from soliciting and/or hiring former colleagues, usually in respect of the same line of business as his former employer, for a certain period of time after the termination of his employment.

The drafting of such restrictions must be very clear and demonstrate what the employee is prevented from doing. It would be advisable to clearly state which type of colleagues the restrictions apply to, including their field of work, their position within the company and even specify certain employees.

In practice, such restrictions may be difficult to enforce, and it may be a challenge to prove a breach. It might be preferable to check if the employee in question was himself in breach of his non-compete restriction by perhaps operating in competition with his employer (which may have also involved taking on his former colleagues) as this will be easier to prove.

Again, this type of restriction (if in an employment contract) will only apply if the employee himself gives notice.

iii. Is it necessary to pay an employee during the period of the covenant?

No. See answer to section b iii above.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

In addition to non-compete restrictions, it is fairly common in Icelandic employment agreements to include a specific clause on confidentiality. Such clauses are particularly common in relation to certain types of business such as those involving research and development.

Clauses on confidentiality provide that the employee undertakes to maintain confidentiality regarding anything which he may have learnt regarding the business activities and customers, both during his course of work and after termination of employment. The extent of such clauses varies. It is preferable that the clause provides guidelines on what information is considered to be confidential, how the employee may use such information, what information may be disclosed, and in what manner and to whom. Confidentiality clauses may also provide to what extent the employee has access to confidential information and how he may use it in his line of work. Additionally, there may be provisions relating to the duty to return to the employer all material that belongs to it, or relates to the employee’s work, upon termination of the employment.

There is also protection for employers under Icelandic legislation. In particular, the Act on surveillance of commercial practices marketing provides terms on confidentiality. Under the Act, an employee may not, without permission from the employer, disclose information about or exploit processed secrets gained during the course of his employment. This prohibition remains valid for three years as of the time work is ceased or a contract is invalidated.
Iceland

All provisions on confidentiality are based on the fact that businesses have the right to have their interests legally protected as confidential, particularly interests that concern their competitive position. Though professional secrets are protected by the Act, the employer must make it clear that it wishes to gain such protection (unless it is very clear from the nature of the interests that this is the case). It is therefore necessary for the employer to activate the protection of the Act concerning confidentiality by stating this in the employment agreement. The employer will need to provide proof that the interests in question and/or knowledge should be protected by the confidentiality provisions of the Act.

The same principles apply to post-termination confidentiality clauses as with the other restrictive covenants. Therefore, such clauses must clearly state what they are intended to protect. The clause must make clear what the employer considers to be professional secrets relating to its activities and/or confidential information/material and what is not. The more detailed and clear the clauses are the better and the more likely that they will be upheld if there is a dispute and/or breach.

Is it essential that the employee knows what information is considered to be confidential, both during his employment and also after its termination. Common knowledge and experience is generally not considered to be a professional secret nor confidential information that must be protected. The burden of proof lies with the employer as to what should be covered by confidentiality clauses in the employment agreement.

Confidentiality clauses generally apply regardless of the cause of termination, but it is recommended that this be stated in the agreement, i.e. confidentiality obligations remain, even though the employment is terminated by the employer.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Generally, Icelandic law governs employment agreements in Iceland and therefore how the terms of such agreements are interpreted and enforced.

According to the general rule on freedom of contracts, parties to an agreement may choose the law that shall govern the agreement. If parties to an employment agreement agree the governing law will be a foreign law, Icelandic courts would apply that law, if possible.

When it comes to employment agreements, the general rule on freedom of contracts is limited for the protection of the employee’s rights. In employment agreements, a choice of law will not have the result of depriving the employee of the protection afforded to them by the mandatory rules of the law which would be applicable in the absence of choice of law.

In the event that parties have agreed to a foreign law governing the employment agreement in Iceland, the Icelandic courts would examine the employee’s legal status according to Icelandic law, when interpreting restrictive covenants in the agreement, in order to establish under which law the employee’s position would be better. The court could also provide that, although it is possible to choose a foreign law to govern an employment agreement, this might be considered unfair to the employee. If so, the clause would be set aside on that ground.

i. Can an employer impose a dispute resolution method on the employee?

Parties can agree to alternative dispute resolution. Such clauses are, however, unusual. An award or a settlement made before an arbitral tribunal is enforceable under the same rules that apply to the enforcement of judgments/settlements rendered by Icelandic courts.

It is not possible to request an injunction under an arbitration process.
Iceland

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Non-compete covenants are usually enforced by an injunction if breached. In that case, the injunction is aimed at stopping the action, or non-action, that is causing the breach. An injunction must be validated by the courts.

It is often provided in the agreement that, in case of a breach, the employee shall pay the employer damages. Damages can be fixed at a certain amount for a certain time (date/week/month) while the breach is ongoing. In that case, the employer does not have to prove damages due to the breach, but only that the breach itself has occurred. Damages can also be claimed in accordance with general rules of tort. In that case, the employer must provide proof of the breach, and the actual damage the breach has caused it. A claim for damages can be enforced through the courts.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Agreements, such as those relating to pension benefits, incentive awards, stock units etc, are subject to the general rule of freedom of contracts. Generally, all rights under such agreements are independent and not connected with the employment contract. If agreed by parties, the same principles of enforcement as outlined in section g. above would apply. In relation to long-term incentive awards, the sanction is usually forfeiture of the award, or, in some cases, claw back of any amounts already paid. The former would not need enforcement, although it may be challenged by the participant, but such challenges would generally involve a claim for breach of contract.

ii. Which covenants are typically imposed?

Generally no covenants are imposed in such agreements. Covenants imposed could mirror the covenants contained in the standard form employment contracts, although that is not common and there is no requirement that this has to be the case. If imposed, such covenants could, for example, range from non-competition covenants through non-dealing and non-solicitation of customers covenants.

iii. What sanctions are/can be imposed by the employer for non-compliance?

As stated above, covenants are not common in such agreements. However, if agreed by parties, sanctions could include, where shares are delivered, the prohibition of the sale of the shares until expiry of any relevant covenant period, possibly coupled with some form of security over the shares. There may be claw back of amounts paid. Injunctive relief may be available if the award documentation contained a prohibition on the relevant behaviour.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

Limits on forfeiture would be subject to the general rule of freedom of contracts. Generally, there are no specific limits in relation to long term incentive arrangements but will be a matter of what the employee is prepared to agree to. However, such clauses could, according to the Icelandic Contract Act, be considered unreasonable and therefore be null and void (e.g. an option for the employer to limit bonuses retrospectively may be unreasonable) so it is important they are drafted in a reasonable manner. In addition, such clauses should, in general, meet the criteria outlined in section a above in order to be enforceable.
Iceland

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

If a court considers a term in an agreement to be illegal, and therefore not valid, the court can decide to set it aside in full or in part. Generally, the court does not amend the term in order to make it valid but it has the authority to do so. If a term is found void by the court, it will not be enforceable. That does not affect any other terms of the agreement that are valid and binding.

Contributed by Svanhvít Axelsdóttir
A. Overview:

Most employment agreements in Israel include clauses regarding confidentiality, assignment of intellectual property, non-competition and non-solicitation, particularly for employees with valuable connections, relationships or access to confidential information and senior employees.

According to the Israeli Supreme Court and National Labour Court, restrictive provisions concerning the future employment of an employee (non-compete provisions) are not enforceable per se and certain specific circumstances have to exist in order for a non-compete provision to be legally binding. The specific circumstances that are recognized as legitimate for the purpose of restricting one’s basic right of freedom of occupation are: providing protection to the employer’s legitimate interests, including without limitations, trade secrets and confidential information; the investment of special and expensive resources in training the employee; special consideration for the employee’s undertaking not to compete; and breach of the duty of good faith and the fiduciary duties of the employee. In addition, the non-compete provisions have to be reasonable (in scope of duration, geographic and scope of limitations) in order to protect the employer’s legitimate interests.
B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, subject to the limitations set forth below.

i. Are they capable of being valid?

Yes, subject to the limitations set forth below.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The validation of such covenants depends on demonstrating a need to provide protection for the employer’s legitimate interests, including trade secrets and confidential information; the investment of special and expensive resources in training the employee; special consideration for the employee’s undertaking not to compete; and breach of the duty of good faith and the fiduciary duties of the employee.

Nevertheless, the Israeli labour courts will not hasten to deny the employee’s freedom of occupation; validity should be attributed to a non-competition clause, only if it is reasonable, proportional and actually protects the interests of both parties, including the former employer. The court will look to establish whether there are tangible trade and commercial secrets for example, and other legal interests. In the absence of the existence of these circumstances, particularly in the absence of a valid trade secret to protect, the principle of freedom of occupation will overcome the principle of freedom of contract. It is necessary that in the drafting of the non-competition is reasonable and proportionate.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement to pay employees during the period of a post-termination restrictive covenant. Nevertheless, the ruling of the Israeli labour courts is that a non-compete provision restricting the freedom of an employee’s practice shall be enforced if there are special conditions. According to current case law, the existence of a special payment given to the employee in return for the obligation not to compete with the employer is one of the specific factors that is recognised as legitimising the restriction of an individual’s basic right of freedom of occupation. Thus, if an additional consideration is paid for a non-compete period, and the court decides that this special remuneration given is satisfactory, the prospects of enforcing the non-competition clause, would increase.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, in most cases.

Israel

It should be noted that the existence of one of the above circumstances will not oblige the court to grant validity to the restriction on commercial activity stipulation and the decision will be made according to all the principles and interests relating to the matter and according to the entirety of individual circumstances of the case. There are always risks that such restrictive terms might not be held to be enforceable.

The employer may apply for temporary, preliminary or permanent injunctions, or other appropriate orders to restrain any breach by the employee or the prospective employer of such post-termination restrictive covenants or to enforce the terms and provisions of such covenants. An employer may also apply for damages and financial compensation, which are more common remedies that the courts tend to grant. However, overall, legal proceedings regarding post-termination restrictive covenants are rarely upheld by the Israeli courts.
Israel

i. Are they capable of being valid?
Yes, subject to the limitations set out below.

ii. What does it take to show they are valid?
Even though these types of restrictions can be considered as part of the non-solicitation clause, it is actually a different type of restriction; while a non-solicitation clause tends to cover active actions in order to solicit and gain an employer’s clients, a non-dealing clause actually prevents from an employee any “passive” actions of contact as well, such as accepting business or employment offers.

Since it is necessary for an employer to demonstrate the existence of a legitimate interest in any restrictive covenant, a non-dealing restriction would be more difficult to enforce than a non-solicitation clause. Therefore, a non-dealing restriction would usually be included alongside a non-solicitation covenant.

iii. Is it necessary to pay an employee during the period of the covenant?
No, the same principles as set out in b.iii. apply.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?
Theoretically, such a clause can be upheld by the Israeli courts, and an employer can require a post-termination clause to prohibit the solicitation of employees, both during and after the employment, as part of the employment agreement between the employer and the employee. The labour courts have not specifically addressed the issue of non-solicitation of employees, but have referred it generally in the context of non-competition clause. Therefore, all the above limitations which apply regarding non-competition provisions would forcefully apply on non-solicitation of employees clauses.

It should be noted that according to Israeli law, it is prohibited to include any stipulation in a contract which prohibits, either absolutely or temporarily, an actual employer in the workplace where the manpower contractor’s employee is employed from directly employing that employee.

i. Are they capable of being valid?
Yes, subject to the limitations set forth below.

ii. What does it take to show they are valid?
The aforementioned circumstances and conditions apply.

There are no unique rulings on non-solicitation clauses, and any judicial review on the matter is usually upheld as part of any non-competition clauses and without distinctions. Nevertheless, in some rulings it has been held that non-solicitation prohibitions are derived from the fiduciary duties that an employee is required to toward an employer. When the employee uses the employer’s confidential information, including list regarding customers, other employees and suppliers, in order to use them for a competitive business, whether within the period of employment with the employer nor after the employment period ended, the right to claim a breach under the fiduciary duties that the employee is bound by, may arise to the employer. This restriction applies to the employee even without an explicit prohibition in the agreement.

iii. Is it necessary to pay an employee during the period of the covenant?
No, the same principles as set out in b.iii. apply.
E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

A variety of covenants can apply during or after an employment. These may include:

- A covenant prohibiting disclosure of confidential and proprietary information and tangible trade secrets, which is very common. The general principle and conditions apply.

- A non-disclosure covenant, in respect of third-party information. Such a non-disclosure clause of any third-party information would prohibit the employee from making any use of any information given to him through his/her employment that is not considered to be the employer’s proprietary information.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

The choice of law has a significant impact on the enforcement of restrictive covenant, since it would define the law governs the employment agreement, and hence, the geographic jurisdiction in which the dispute would be held and the interpretation and enforcement of the agreement, and the remedies provided.

It is advisable to law a clear and explicit provision in the contract that defines the choice of law in the employment agreement is necessary. Unless there is an explicit provision that specifies the applicable law is to be a choice of law, outside Israel, assuming that the day-to-day work is done in Israel, the Israeli labour law will govern as the territorial law.

If a foreign law applies to an employment agreement, but the contract does not include an explicit provision regarding the forum of law in which the dispute would be decided, the Israeli court will have jurisdiction to hear the dispute assuming a significant connection with Israel. However, even in such case where a foreign law will conclusively and explicitly be defined as applicable in the agreement, there is no certainty that such law will apply. When interpreting the agreement, the Israeli court may apply public policy considerations and mandatory Israeli law and rules, that could override the interpretation or enforcement of the agreement or impact the remedies available in the Israeli law.

i. Can an employer impose a dispute resolution method on the employee?

As a principle, an employer can impose a dispute resolution method in the employment agreement, but it is rare and unusual. This matter is controversial as to whether an instance which is not a judicial one (e.g. arbitration, mediation etc.) can rule injunctions at all.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

The most common remedy for a breach of a restrictive covenant is an injunction using the labour courts in order to prevent the employee’s prospective actions. It is at the courts discretion whether or not to grant an injunction. Nevertheless, the Israeli labour court would not hasten to order an injunction to an employer, and the courts are more likely to award damages and financial compensation for breach of contract or for breach of the fiduciary duties and a financial compensation. However, all the above legal proceedings regarding post-termination restrictive covenants are rarely upheld by the Israeli courts.
H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

In relation to long-term incentive awards and grants, the sanction for breach of covenant contained in such a plan is usually forfeiture of the award or grant, or, in some cases, claw back of any amounts or benefit already paid or granted (respectively). Such clauses should be reasonable and proportionate. For example, sometimes retention bonus plans and agreements include a provision according to which such a retention bonus shall be considered as a special compensation for the employee’s obligations not to compete. However, such a provision may not stand a judicial review since the aim of the retention bonus is to incentivise the employee to continue employment and the non-compete obligations are mainly for the period following termination of employment. Therefore, the connection between the retention bonus and the employee’s undertaking regarding non-compete may be viewed by an Israeli court as artificial and may not serve to strengthen the ability to enforce the non-compete provision. However, the parties may agree that in the event of a breach of the non-compete undertaking, the employee shall repay the employer any amount of the retention bonus payment made to the employee by the employer. Option plans and agreements may include a provision according to which if the termination of employment of the employee to whom an option has been granted is under severe circumstances (which may include breach of non-compete covenants), all of the options, whether vested or not, shall expire immediately. Such clause is more relevant for the non-compete provisions during the employment period.

ii. Which covenants are typically imposed?

See above. In relation to long term incentive awards and grants, the sanction is usually forfeiture of the award or grant, or, in some cases, claw back of any amounts or benefit already paid or granted (respectively).

iii. What sanctions are/can be imposed by the employer for non-compliance?

See above.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

The employer cannot forfeit benefits to which the employee is legally entitled by law or by the contract.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

As a guiding principle, the Israeli courts tend to adopt a cautious approach to their ability to rewrite an agreement. Nevertheless, if the Israeli courts see fit to intervene, it is possible that modifications or amendments would be made to such covenants as part of the balance of interests which the court will uphold. Furthermore, some parts of such covenants may be found enforceable and other parts not; for example, the period of limitation may be shortened, and the restriction on field may be modified to be valid only in certain areas/customers/certain suppliers. Moreover, the parties may add a provision according to which if the period of time or the geographical area specified in the agreement should be determined to be unreasonable in any judicial proceeding, then the period of time and area of the restriction shall be reduced so that the agreement may be enforced in such area and during such period of time as shall be determined to be reasonable by such judicial proceeding.
A. OVERVIEW:

In Italy a non-competition covenant is governed by the Civil Code.

The employer and the employee can agree that, after the termination of the employment relationship (for whatever reason), the employee will be prohibited from working (in a self-employed capacity or otherwise) in competition with the former employer. The agreement can be signed at any point during the employment relationship and also after its termination. In order to be valid, the restrictive covenant must be signed in a written form, and must establish the kind of activity/industry which is subject to the restriction, along with the duration and the territory of the covenant. It must also provide for remuneration for the employee. The enforceability of the restrictive covenant is linked to protecting the interest of the employer and it must be limited, as referred to above. The aim of such limitations is to prevent the restriction from excessively impacting on the employee’s ability to carry out any other work and also to ensure the employee does not completely lose his professional expertise.
Italy

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, if agreed with the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

In order to be valid, the non-competition covenant must fulfil the requirement set out in section a. above, namely it must set out:

- the kind of activity/industry the restriction is to cover;
- the duration the restriction after termination of employment;
- the territory it will cover; and
- the payment of “fair remuneration”.

The non-competition covenant can cover all work activities that could be in competition with the employer’s business. However, it cannot be so wide as to prevent the employer from earning an income or losing his professional skills, despite the potentially high financial compensation for the covenant. When considering the appropriate territory, it is important to take into consideration the employee’s work. If, for example, he worked in a wide geographical area, perhaps the whole of Europe, the restriction could be as wide as that and still be valid. This is provided that the restriction is not so wide as to prevent the employee taking on any other employment according to his expertise.

The time limit for the covenant is set out under the Civil Code. It is set at five years for senior managers (Dirigenti), and three years for all other employees. This time period runs from the first day after termination of employment (the notice period is not part of the restrictive covenant duration).

It is worth noting that the employer cannot include a provision in the covenant that allows it to withdraw from the covenant unilaterally, unless the employee’s consideration for the covenant is left untouched.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes.

Italian law does not set a specific level of consideration or mode of payment required for restrictive covenants. The payment can therefore be provided during the course of the employment relationship or after it has ended. If it is paid during the employment, the amount may be set at a fixed level, or be a percentage related to pay or other elements of remuneration. Recent case law suggests that the covenant will be found to be void if the payment for that covenant is not fixed at a set amount, which would apply even if the relationship only lasts a few months. On that basis, the amount to be paid for the covenant should be fixed and then paid in monthly instalments during the employment. If required, any final outstanding amount would need to be paid as a lump sum if the employment terminated prematurely in order to reach the fixed amount agreed for the covenant.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, if agreed with the employee.
Italy

i. Are they capable of being valid?

Yes, provided the restricted contact will constitute “qualified contacts”, which means that the contacts relate to business objectives and are not simple social contacts. In Italy, it is very rare that such a covenant is included as they are very difficult to enforce on a practical level.

ii. What does it take to show they are valid?

The general principles mentioned in respect of non-competition covenants apply.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes. The general principles as set out for non-competition covenants apply.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes, if agreed with the employee.

i. Are they capable of being valid?

It is assumed in Italy that it is not generally possible to prohibit the hiring of employees by a former employee. However, the former employee must not use confidential information or infringe the “fair competition” law which prohibits so-called “raids”. This means that individuals are prohibited from orchestrating a team move to a competitor if the reason for that move is to weaken the former employer rather than to purely improve its own workforce.

If these restrictions are included, they would tend to define the employees who cannot be approached or hired by reference to their seniority, grade or level, or their role in, or importance to, the business. They often only apply to colleagues that the departing employee had a reasonable level of contact with, knowledge of or responsibility for, and within a defined period before the departing employee leaves. Smaller companies may be able to enforce a restriction that covers a wider set of employees.

In practice, it is difficult for employers to prove that a non-solicitation of employees covenant has been broken because merely showing that the employee has been hired by a former colleague is not necessarily a breach of the covenant. Nonetheless, the penalties provided for the breach of the covenant, alongside the possibility that the former colleagues may tell the employer of the work proposal received, can prevent the former employee soliciting his former colleagues.

ii. What does it take to show they are valid?

It will be necessary to show that the former employee is not using confidential information or there is no infringement of the “fair competition” law, as referred to in section d above. This covenant effectively forms part of the non-competition covenant and therefore the same validity conditions would also apply to it.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes, since it will be considered part of the non-competition covenant.
Italy

E. OTHER COVENANTS: Are there any other types of employment- and post-employment- related covenants which are common in this jurisdiction?

There are a variety of covenants that can apply during or after the termination of employment; for example, those relating to confidentiality, intellectual property rights, and also provisions aiming to retain certain employees.

Confidentiality – This is a common clause to include in an employment contract. It restricts the use or disclosure of confidential information and company property, both during employment and after its termination.

Retention Agreements – This is a clause often inserted into an employment contract for executives, which is for an indefinite period. The parties agree not to terminate the contract for a fixed period of time.

Other restrictions – There may be other clauses in an employment contract that impact on an employee’s ability to compete, although they may not strictly be termed restrictive covenants e.g. bad leaver provisions in a bonus plan which apply if an employee leaves and competes with his employer, or deferred compensation that is only payable if an employee does not compete for a period after he leaves employment. The general principles that apply to standard restrictive covenants can also apply to these types of indirect restrictions.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law will be relevant to which law governs the contract (and therefore how the contracts should be interpreted and enforced) and the jurisdiction which can hear any dispute in connection with that contract.

In summary, if Italian law applies to the contract, then it is very likely that the Italian law principles mentioned above will apply to the interpretation and enforcement of restrictive covenants. If another country’s law applies to the contract but the Italian court has jurisdiction to hear the dispute, then the Italian court will generally apply that other country’s law when interpreting the contract, but public policy considerations and mandatory Italian law could override the interpretation or enforcement of the contract or impact the remedies available via the Italian court. This potentially creates a double-hurdle, since if the Court takes this approach, for a covenant to be enforced, it would need to be enforceable both in the law of the country specified in the contract itself, and also in accordance with Italian law principles.

i. Can an employer impose a dispute resolution method on the employee?

An arbitration clause can be valid, but the parties can, in any case, still go before the court if they prefer. Generally, arbitration clauses are not agreed initially because the arbitration finding is not immediately enforceable (as it is subject to appeal first), but a court finding is immediately enforceable.

G. ENFORCEMENT: How are covenants typically enforced?

If the non-competition covenant is violated by the employer, the employee may sue the employer before the court to obtain the compensation owed to him, or to terminate the contract.

If the breach is by the employee, the employer can seek to have any compensation already paid reimbursed, and also seek damages for losses caused by the employee’s breach. The employer may also be able to obtain an injunction to stop the breach. For some cases, it can be possible to file for a precautionary injunction.
H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Generally, restrictive covenants are not relevant to, or enforceable against, an employee’s pension plan, while it may affect other benefits and stock plans.

In relation to long-term incentive awards, the sanction is usually forfeiture of the award, or, in some cases, claw back of any amounts already paid. The former would not need enforcement (as it would be in the employer’s powers not to deliver the cash or shares pursuant to the award), although it may be challenged by the participant, but such challenges would generally involve a claim for breach of contract.

Historically, it was usually determined at the time of termination whether a participant would retain his award (“good leaver”) or lose his award (“bad leaver”), and if the award was retained, it would usually vest and be paid out at the time of termination. It is becoming more usual for retained awards to be paid out to good leavers at the original vesting date, rather than on termination, which has led to an increase in forfeiture or claw-back provisions relating to specified post-termination activities.

ii. Which covenants are typically imposed?

Covenants which prevent the participant being hired or acting as a freelance agent for competitors, as well as becoming a shareholder of a competitor, setting up a company acting in competition, or becoming a member of the board of directors of a competitor, may be typically imposed.

iii. What sanctions are/can be imposed by the employer for non-compliance?

Penalties may be sought if that is allowed for under the contract, and it is also possible to seek an injunction to stop the former employee continuing in a prohibited activity. Forfeiture or claw back of the awards may also apply. Injunctive relief is less common as plan documentation often does not impose a specific prohibition on a particular behaviour, but rather sets out that forfeiture of all or part of the award will occur if the behaviour takes place.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

The plan documentation is likely to set out details of forfeiture/claw back provisions. It is more common for a forfeiture provision to apply to unvested incentive awards if the participant engages in certain relevant behaviour. In addition, there may be claw back of amounts paid (or repayment of any value realised on sale of shares delivered) on the vesting of awards. Where shares are delivered, it would be possible to prohibit sale of the shares until expiry of any relevant covenant period, possibly coupled with some form of security over the shares. Injunctive relief may be available only if the award documentation contained a prohibition on certain behaviour.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Italian courts will not re-write a covenant, but may amend it according to mandatory rules. For example, if the duration of the covenant for an executive is more than five years, the court would reduce it to the statutory five-year limit. The amount of compensation awarded under the covenant may also be modified so that a more equitable level is provided for. If the employee seeks to show the covenant is void due to the lack of one of the requirements under the Civil Code, the court can declare the covenant void and this would then require the employee to pay back any monies paid to him by the employer in respect of that covenant.

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A. OVERVIEW:

The Dutch Civil Code contains conditions relating to the validity of restrictive covenants. It is designed to safeguard the interests of the employee, as the weaker party, to an employment agreement, given that it can be difficult for an employee to be aware of, and to protect, his interests.

The Dutch Civil Code sets out rules on restrictive covenants between an employer and an employee:

1. A restriction on an employee’s right to work in a certain way after the end of his contract is only valid if agreed in writing between the employer and an employee who has reached the age of majority.

2. The Court may set aside all or part of such a restriction on the grounds that the employee is unfairly prejudiced, having regard to the interest of the employer which the restriction is intended to protect.

3. The employer may not derive any benefit from a restrictive covenant if it is liable for damages due to the way in which the employment contract ended.
Netherlands

4. If a restrictive covenant restrains an employee to a significant extent from working, the court may order that the employer pays damages to the employee for the duration of the restraint. The court will set these damages at such amount as appears fair in view of the circumstances; it may allow the damages to be paid in instalments. The damages are not due if the employee is liable for damages on account of the way in which the contract ended.

The regular (civil) courts are competent to hear cases regarding restrictive covenants and to apply the relevant rules. The county courts (the cantonal divisions of the district court) have jurisdiction on most matters regarding employment agreements, so these courts are competent to rule on restrictive covenants between an employer and an employee.

Employees are, in principle, not treated differently according to the level or position within the organization. However, in deciding if the restrictive covenant should be limited, a court will weigh the interests of the employer against the interests of the employee. The employer usually has a greater interest in maintaining a restrictive covenant in respect of senior personnel.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, if agreed with the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Non-competition restrictions between employers and employees are governed by the Dutch Civil Code and are, in principle, enforceable under Dutch law. However, certain conditions have to be met as to their validity.

A non-competition covenant is only valid in cases where it is agreed in writing between the employer and an employee of at least 18 years of age.

Usually, non-competition covenants are agreed at the start of employment (in the signed employment contract), although it is possible to agree to a non-competition restriction during employment. Non-competition restrictions can be made or altered in settlement agreements dealing with the termination of employment.

Since the non-competition restriction has to be made in writing, it is generally advisable to insert the non-competition clause fully into a signed (employment or termination) agreement. Even if the non-competition restriction was not included in the written employment agreement itself, a non-competition restriction has been found to be valid and binding on the parties if the non-competition clause is in writing and it appears, from a clear declaration of the employee, that they read and understood the agreement and has accepted to be bound by it. The Supreme Court of the Netherlands has ruled that a non-competition restriction is valid in cases where an employment agreement or letter refers to attached written employment conditions in which a non-competition clause is inserted and the employee declares agreement, by signing the employment agreement or letter for agreement, to these employment conditions.

The Supreme Court of the Netherlands has determined that in cases where a non-competition restriction becomes a considerably heavier burden on an employee because their position has changed substantially during employment, the non-competition restriction has to be confirmed in writing. If the non-competition restriction is not confirmed in writing in such a situation, it lapses. When determining if a non-competition restriction has become a considerably heavier burden on an employee, courts take into account the extent to which the change of position was reasonably foreseeable for the employee when the non-competition restriction was first entered into.
Netherlands

The enforceability of a non-competition restriction is not limited to the term of the employment. There are no statutory restrictions to the duration or the geographical scope of a non-competition restriction. In most cases, non-competition restrictions are for the duration of employment and for a period of one year after termination of the employment agreement. In specific cases, the employer and the employee may agree upon a longer period, for example, two years after the termination of employment. However, a court can nullify a non-competition restriction fully or partially on the grounds that an employee is unfairly impacted in comparison to the interests of the employer being protected. The court can, in such instances, restrict the duration or the geographical scope of the non-competition obligation or nullify the entire non-competition restriction.

A non-competition covenant is, in principle, enforceable irrespective of whether the employer or the employee terminates the employment agreement and irrespective of the reason for which the employment agreement is terminated. However, the non-competition restriction lapses in cases where an employer is liable for damages because of the way in which the employment agreement ended. This liability exists in different situations. An employer is liable for damages if it dismisses an employee with immediate effect without a valid reason or without simultaneous notification of this reason; if it terminates an employment agreement without giving the applicable notice period; if its conduct gives an employee a valid reason to terminate the employment agreement with immediate effect; or where the employee is dismissed in an unfair manner (this can occur when there is no sound reason to terminate the employment or when insufficient compensation is offered to the employee).

Parties can agree that a non-competition covenant will not be enforceable under certain circumstances, for example, when the employment agreement terminates within a year of the start of employment.

iii. Is it necessary to pay an employee during the period of the covenant?

An employer is not required to pay an employee any compensation for being bound by a non-competition covenant. Parties can, however, agree that compensation will be paid to the employee.

If a non-competition covenant prevents, to a significant extent, an employee from finding work elsewhere, a court can decide that the employer has to pay compensation to the employee for the duration of the restriction.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients; and

Yes, if agreed with the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

Non-solicitation of clients and customers falls within the scope of the Dutch Civil Code, because they restrict for whom or with whom an employee can work after the termination of their employment. This means that the conditions and rules described above regarding non-competition restrictions also apply to non-solicitation restrictions.

A non-solicitation of clients and customers covenant can, for example, provide that an employee is not allowed during a certain period of time after the termination of his employment to contact clients of the employer. The restriction should describe which clients and customers fall under the restriction. Non-solicitation covenants can, for instance, restrict an employee from contacting clients and customers with whom the employer in general worked during the employee’s employment or be limited to only those with whom or for whom the employee himself worked. There is no distinction in the law between old and current clients and contacts of the employer.
Netherlands

iii. Is it necessary to pay an employee during the period of the covenant?

No. However, parties can agree that compensation will be paid to the employee. Furthermore, if the covenant prevents, to a significant extent, an employee from finding work elsewhere, a court can decide that the employer has to pay compensation to the employee for the duration of the restriction.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes, if agreed with the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

There is no specific statutory rule governing non-solicitation of employees. Because agreements on non-solicitation of employees do not restrict an employee in the way he can work after employment, these clauses fall within the regular freedom of contract principles.

There are fewer restrictions as to the validity of such covenants and, in principle, employers and employees can agree to whatever they want in this respect. These clauses do not have to be in writing, although this is advisable from an evidentiary point of view.

Agreements regarding non-solicitation of employees can, for example, state that an ex-employee may not, for a certain period — perhaps one year — employ persons who were employed during the last two years of his employment with the former employer.

iii. Is it necessary to pay an employee during the period of the covenant?

No. However, parties can agree that compensation will be paid to the employee. Furthermore, if the covenant prevents, to a significant extent, an employee from finding work elsewhere, a court can decide that the employer has to pay compensation to the employee for the duration of the restriction.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment- related covenants which are common in this jurisdiction?

Yes. Covenants on confidentiality of information, during employment and after its termination, are commonly included in a written employment contract. They often do not have a set time limit after termination and instead apply for as long as the information retains its confidential nature.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

For a Dutch court to hear a restrictive covenant case, it must declare itself competent to hear the case. The court will look at which law applies to the agreement. Choice of law will be relevant to what law governs the contract (and therefore how the contract should be interpreted and enforced).
Netherlands

An individual employment contract is governed by the law that the parties have chosen. However, such a choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement based on the law that, in the absence of choice, would have been applicable (e.g. provisions in relation to the validity restrictive covenants). The law that applies when a choice of law provision is absent is usually the law of the country where the employee customarily performs his work in the performance of the employment contract.

i. Can an employer impose a dispute resolution method on the employee?

According to Dutch employment law, it is possible to agree to a forum clause (choice of competent court). The right of access to the courts is guaranteed by both the Dutch Constitution and international conventions which bind the Netherlands. This right can be waived, however, for example by voluntarily submitting to binding arbitration. Parties may also agree to submit their existing or future disputes to an arbitrator, and they may agree to solve disputes via mediation.

The choice of an international Forum is governed by the EC Regulation Brussels I.

An employee can bring proceedings against an employer (before the competent court) in the country in which the employer is domiciled, or in the place where the employee habitually carries out his work or the last place where he did so.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

1. Temporary restraining orders

Summary proceedings are the most common proceedings regarding restrictive covenants because both a breach of a restrictive covenant and nullification of the covenant require quick court intervention. In cases where a procedure on the merits follows, the restrictive covenant would probably have lapsed by the time a judgment was received.

A court can provide specific provisional remedies in summary proceedings, but cannot finally decide a dispute. Therefore, a court is generally reluctant to award damages. In summary proceedings, an employer can, for example, claim an injunction regarding a breach of a restrictive covenant, but cannot obtain a declaratory judgment stating that the covenant is valid. An employee cannot ask the court in summary proceedings to (partly) nullify the restrictive covenant. It is, however, possible for an employee to ask for the suspension of the restrictive covenant until a court has decided on the validity of the covenant in proceedings on the merits.

It is only possible to conduct preliminary proceedings in cases requiring urgency, which will have to be decided based on the relevant facts and circumstances of the case. The rights of the parties in the proceedings on the merits are unaffected by a decision in the preliminary proceedings. Preliminary decisions can however have a decisive effect, because very often parties will abide by this decision and not start proceedings on the merits afterwards.

2. Preliminary injunctions

Injunctive preliminary relief is widely available under Dutch law. In urgent cases, these injunctions can be obtained at short notice. An employer can ask the court for an injunction that orders an employee to abstain from breaching a restrictive covenant. A court can include a penalty for non-compliance with its decision. This can be done in cases where no penalty clause was attached to the restrictive covenant or if the court considers the penalty attached to the covenant insufficient to make the employee refrain from breaching his obligation. Obtaining an injunction can be advisable in summary proceedings when the court cannot ultimately decide on the validity of a restrictive covenant. The injunction can prevent the employee from breaching the clause until a court has decided on the merits.

3. Final remedies
There are different final remedies available in cases regarding restrictive covenants. Under Dutch law, a party can ask for specific performance provided that performance is possible. In most cases, a party may ask for specific performance without the need to prove that damages would be an inadequate remedy. The employee could therefore be ordered to act in conformity with a restrictive covenant agreed with the employer. A claimant may also claim damages in court instead of specific performance. A party who decides to claim specific performance may also claim additional damages if the specific performance does not eliminate all the damage he suffered.

Under the Dutch Civil Code, the court can order an employer to pay compensation to an employee for the duration of a non-competition restriction. The court sets the amount of compensation at a reasonable amount, taking into account the circumstances of the case. This compensation is not due in cases where the employee is liable for damages because of the way in which the employment agreement was ended. This can, for example, be the case when the employee has, by his behaviour, given the employer a valid reason to terminate the employment with immediate effect and the employment was consequently ended by the employer or a court for this reason.

Parties to a contract can also ask a court for an annulment. A contract can, for example, be annulled if it has been concluded on the basis of fraud, undue influence, or misrepresentation. The Dutch Civil Code expressly provides for the possibility of (partly) nullifying the non-competition restriction.

Another final remedy is rescission. In cases where a party breaches a contractual obligation, the other party can rescind the contract, unless the breach does not justify the rescission. The party claiming rescission can claim additional damages caused by the rescission. After the rescission, the parties are no longer bound to the relevant contractual obligations. The parties to the contract have an obligation to undo the performance of the obligations that have already been carried out. If undoing an obligation is not possible, this can be substituted by compensation.

Both annulment and rescission can be accomplished by a written statement of a party or by a court judgment. In cases relating to a written statement, the court can be asked for a declaratory judgment stating that the contract has been validly rescinded or annulled through the written statement.

An injunction is also available as a final remedy. A party can be ordered to refrain from certain behaviour, for example, the breach of a contractual obligation.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Generally, restrictive covenants are not relevant to, or enforceable against, employee’s benefits, pensions and stock plans. Restrictive covenants must apply between a (former) employer and the employee in order to be governed by Dutch Civil Code. It is not uncommon to have a restrictive covenant (for example a non-compete clause) in a shareholder agreement, a consultancy agreement (company and individual consultant) or an agreement between a company and a management company. If the agreement including the restrictive covenant, is not an employment agreement, the provisions of the Dutch Civil Code do not apply. Dutch statute does not provide provisions in respect of restrictive covenants in shareholders agreements or consultancy or management agreements. As a result, there are no specific formalities that must be complied with besides regular contractual principles.

The principles of enforcement of restrictive covenants included in agreements other than employment agreements are the same as outlined above in section g.

ii. Which covenants are typically imposed?

See the answer to section h i above. Non-competition restrictions and restrictions on non-solicitation of clients and customers may be included.
iii. What sanctions are/can be imposed by the employer for non-compliance?

ANSWER: Dutch statute does not provide for specific provisions on restrictive covenants, other than those included in an employment agreement. Therefore the concept of “freedom of contract” applies. Compliance with a non-competition clause, non-solicitation clause and secrecy clause is usually enforced with a penalty clause.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

See the answer to section h iii above.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

If the covenant does not comply with the formal requirements described above, it will be void and cannot be enforced. A court cannot re-write the covenant.

However, if the non-compete covenant complies with the formal requirements, but is found to be unreasonable in certain aspects, the court can “rewrite” the covenant (see the answers b ii and g above). In doing so, the court will take all relevant circumstances into account and balance the interests of both the employer and the employee. It will consider if there are grounds for suspension, moderation or annulment of the clause.

Contributed by Els de Wind
Poland

A global guide to ‘restrictive covenants’

A. OVERVIEW:

Under Polish law, post-termination restrictions can be divided into statutory restrictions and contractual covenants.

Statutory restrictions apply to each employee by operation of law (based on the Counteracting Unfair Competition Act), irrespective of whether they are included in the employment contract (i.e. confidentiality obligation for three years after termination of an employment contract and basic non-solicitation for an indefinite time).

In addition to the statutory restrictions, the parties to an employment contract may agree on some post-termination restrictive covenants (i.e. non-competition or confidentiality obligations for more than three years after termination of an employment contract). Polish law specifies the terms and conditions under which such covenants are valid. The covenants should not be excessive and in particular, the post-termination non-competition covenant should be applied only to those employees who have had, during their employment, access to particularly sensitive information. In practice however, it is up to the employer to decide whether it is reasonable to propose such covenants to a particular employee (and to pay the applicable compensation for it).
Poland

The most recommended remedy for breach of post-termination restrictive covenants is a contractual penalty. Obtaining damages is possible but difficult in practical terms (it is necessary to prove damage occurred). Restraining injunctions are not usually granted by Polish courts.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

No. If, however, an employee has, during employment, access to particularly sensitive information the disclosure of which could cause damage to the employer (the exposure to such a risk being ultimately assessed by the employer), the parties to the employment contract may enter into a post-termination non-competition agreement. An employer cannot force the employee to conclude such agreement, but an employee’s refusal may be the sole reason for the termination of an employment contract upon notice.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Under Polish law, a post-termination non-competition covenant is valid provided that the following requirement are met:

1. The employee has, during employment, access to particularly important information, the disclosure of which could cause damage to an employer. However, it is widely accepted that it is the employer that decides whether its employee’s have access to such particularly important information. In practice, post-termination non-competition agreements are entered into mainly with managerial staff.

2. The post-termination non-competition agreement must be in writing.

3. The duration of the non-competition covenant is specified. The provisions of law do not specify the maximum period. Currently, the market standard is between 6 and 12 months. The covenant is invalid if its duration has not been specified.

4. The agreement should provide for compensation for the non-competition obligation at not lower than 25% of the employee’s monthly pay (including any variable elements) received during the period prior to the termination of employment and corresponding to the duration of the non-competition obligation. If the agreement provides for compensation at an amount lower than 25% or if the compensation is not provided in the agreement at all, the employee can claim 25% of monthly salary for the period of the non-competition obligation.

5. The agreement should specify the definition of ‘non-competition’. The more junior the position an employee holds, the more detailed the definition of non-competition should be. In practice, it is recommended to describe both the scope of the activity (type of business) as well as the form of the prohibited activity (employment, providing services, holding equity interest, etc.).

Moreover, from the employer’s perspective, in order to ensure flexibility, it is important to include a unilateral right for the employer to terminate/withdraw from the post-termination non-competition agreement.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes, see section b ii 4 above.
A global guide to ‘restrictive covenants’

Poland

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

No, such a covenant would likely be unenforceable unless it is limited to the non-solicitation restriction described in section d below or unless this would fit into the confines of the non-competition obligation referred to in section b above (for instance the employee could be prohibited from establishing his own business and providing competitive services to customers of his former employer).

i. Are they capable of being valid?
No, see section d below in relation to non-solicitation.

ii. What does it take to show they are valid?
See section d below in relation to non-solicitation.

iii. Is it necessary to pay an employee during the period of the covenant?
N/A

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

This issue is controversial although such a clause could arguably be enforceable for the duration of any valid non-competition covenant.

In any case, a basic non-solicitation restriction applies by operation of law to each employee. Under the Counteracting Unfair Competition Act, it is an act of unfair competition to: (i) encourage a person performing work for an entrepreneur on the basis of an employment contract or any other contract to breach his duties in order to gain benefits for himself, third parties or to harm the entrepreneur; or (ii) encourage the entrepreneur’s customers or others to terminate contracts with the entrepreneur or not to perform or perform such contract improperly, in order to gain benefits for themselves, third parties or to harm the entrepreneur. It should be noted however that offering better working conditions in a competitive market is generally not regarded as dishonest or unethical and would not be deemed as an act of unfair competition.

i. Are they capable of being valid?
Arguably, yes.

ii. What does it take to show they are valid?
In order to be able to defend the enforceability of the covenant exceeding the scope of the statutory non-solicitation restriction it is recommended to include such covenant in a post-termination non-competition covenant and have it covered by the payment stemming from it. The duration of such covenant should not exceed the duration of the stipulated non-competition obligation.

iii. Is it necessary to pay an employee during the period of the covenant?
Strictly speaking, it is not required. It is however, recommended to increase the chances of its enforceability (see section d ii above).
E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Yes. A confidentiality obligation, under which an employee cannot reveal any confidential information regarding the employer to third parties, is a very common restriction in Poland. This restriction applies by operation of law during employment and for 3 years after its termination unless otherwise agreed. Thus, it is very common in Poland to also include this clause in employment contracts in order to extend the above period to e.g. 5 years, or to specify in more detail the actual scope of the confidential data subject to the clause.

Another restriction which is quite common in Poland and applies during employment is an exclusivity clause. This type of clause requires an employee to request the employer’s consent before undertaking any remunerated activity, including activities that do not compete with the employer. Under Polish law, the validity of this clause can be questioned as violating the freedom of work. However, the Supreme Court has recently allowed a narrow application of such a clause. The clause needs to be justified by the scope of the employer’s business, the characteristics of its market environment and the character of the employee’s tasks as well as the significance of those tasks for the employer.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

If the employment contract is governed by Polish law, then such law will also apply to the interpretation and enforcement of restrictive covenants concluded between the parties to such an employment relationship.

If the parties to the employment contract choose another law other than Polish as the governing law for the employment contract, pursuant to the Rome I Regulation, such choice of law must not have the result of depriving the employee of the protection afforded to them by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable, i.e. the law of the country in which or from which the employee habitually carries out their work in performance of the contract or, where the law applicable cannot be determined, the law of the country where the place of business through which the employee was engaged is situated.

Therefore, even if the parties to the employment contract subject such contract to a foreign law, the Polish rules of enforceability of restrictive covenants will in any case constitute the minimum standard of protection, if Polish law would have been applicable in the case of an absence of choice pursuant to the provisions described above.

i. Can an employer impose a dispute resolution method on the employee?

No, it is not possible to unilaterally impose a dispute resolution method. In any case, alternative dispute resolution procedures are extremely uncommon in employment matters in Poland.

Employment law disputes involving Polish employees are, as a rule, subject to the jurisdiction of Polish labour courts. Any changes to this rule (in particular, submitting the matter for arbitration) are only possible once the dispute has arisen, and not in advance.

The parties to an employment contract may submit their disputes to mediation (and a mediation provision in an employment contract is generally admissible). However, mediation clauses are very weak and do not prohibit the parties from skipping the mediation phase and going directly to court.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

The recommended remedy for breach of a post-termination restrictive covenant is a contractual penalty. This must be stipulated in the agreement. This minimises litigation costs, as only a breach of the contract needs to be proved in order to obtain the penalty. It is generally accepted that contractual penalties can only be provided for in the case of a breach of post-termination covenants (and it is doubtful if they can be enforced during employment).
A global guide to ‘restrictive covenants’

Poland

If a contractual penalty is not stipulated or is too low, it may be possible to obtain damages, but this can be difficult as there is a need to prove the loss incurred.

Furthermore, in the case of breach of a post-termination non-competition covenant, the former employer can withhold the payment of compensation from the former employee.

Restraining injunctions in non-competition matters are usually not granted by Polish court and their enforceability is uncertain.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Pensions schemes are still uncommon in Poland and there is no established practice in this respect. In any case, restrictive covenants would not be relevant to or enforceable against pension benefits.

Multinational stock plans are usually subjected to foreign laws. To the extent such plans are structured as civil law arrangements rather than part of the employment relationship, such choice of law would generally be valid. The applicable law should therefore be consulted to confirm the enforceability of the restrictive covenants.

Local stock plans, governed by Polish law are much less common. Depending on the legal structure of the plan, certain restrictive covenants could be admissible.

Deferred cash compensation schemes and similar benefits other than pensions and stock plans are usually provided for in employment agreements and the general rules concerning restrictive covenants are applicable.

ii. Which covenants are typically imposed?

Stock plan participants or persons eligible for deferred cash compensation are usually employees, so basic restrictive covenants are already included in their employment/non-competition agreements. Therefore, most typically, additional documents (stock plan documents or deferred compensation arrangement) usually add to the existing protection by providing for forfeiture mechanisms.

iii. What sanctions are/can be imposed by the employer for non-compliance?

If there is an enforceable forfeiture provision in the relevant documentation, the sanction for breach of an applicable covenant is the forfeiture of the award/benefit.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

Enforceability of forfeiture provisions depends on the legal structure of the benefits that are to be forfeited. In the case of civil law arrangements (most stock plans arguably fall within that category), some flexibility is available. In the case of labour law arrangements (such as deferred cash compensation), the use of forfeiture mechanisms is more restricted, although still possible.

Forfeiture mechanisms should be structured so that compliance with the relevant covenant is deemed a condition precedent for eligibility for the relevant award up to the date the employee becomes eligible. It is not possible to forfeit an award if the misconduct breach occurs after the date on which the employee has become eligible for the relevant award/benefit.
Poland

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

In principle, an employment agreement (or other arrangement with an employee) cannot be less favourable to an employee than the relevant provisions of law. Any contractual provisions that are less favourable to an employee when compared to the provisions of labour law are invalid, and in such case the appropriate legal provisions will apply instead. The employee will not be bound by less favourable provisions even if he signs the agreement. For instance, if compensation for a post-termination non-competition covenant has not been stipulated or has been stipulated at 5% of the employee’s salary, the statutory minimum (25%) would still apply, regardless of the contractual provision.

Contributed by Roch Pałubicki & Agata Miętek
Russia

A. OVERVIEW:

In Russia employment is regulated by the Labour Code and not by contract law (Civil Code). Labour law restricts the liberty of the parties to determine their relationship. The Labour Code contains a more or less exhaustive list of covenants which the employee can make in favour of the employer. Restrictive covenants (except confidentiality clauses) are not included in the list and therefore considered invalid. The employment relationship ends with the resignation or dismissal of the employee. The law does not provide for obligations or duties surviving termination of employment, which outlaws post-termination covenants (except non-disclosure of manufacturing secrets). The law does not preclude the employer and the employee from entering into additional covenants regulated by contract law (e.g. loans, leases, etc.). Such covenants should be possible, in particular, with regard to intellectual property rights. However, civil law contracts can not regulate aspects of employment.
Russia

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

No, non-competition covenants are considered contrary to the individual’s liberty to make free use of his ability to work as guaranteed by the Constitution and the Labour Code. The Labour Code further does not allow covenants which are less favourable for the employee than the law. Employees are free to take a second employment during the term of their contract provided the primary employment leaves them sufficient time to perform their duties towards both employers. Only the general director of a company (and, if provided by the articles of association, the members of the executive board) must seek the employer’s approval for a second employment.

i. Are they capable of being valid?
No.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?
N/A

iii. Is it necessary to pay an employee during the period of the covenant?
N/A

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

There is no reason for treating non-contact clauses differently from non-compete clauses. It is possible to classify customer data as confidential information (manufacturing secrets). The employee is prohibited from using protected confidential information in their personal interest. They should also surrender records containing confidential information upon termination of employment. An employer alleging a breach of the non-disclosure covenant must prove that the contact was the result of the illicit use of confidential information. It is not sufficient to prove that the contact took place. The illicit use of confidential information is deemed an act of unfair competition.

i. Are they capable of being valid?
No.

ii. What does it take to show they are valid?
N/A

iii. Is it necessary to pay an employee during the period of the covenant?
N/A

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Non-solicitation clauses are not permitted for essentially the same reasons as non-compete and non-contact clauses.

i. Are they capable of being valid?
No.
Russia

ii. What does it take to show they are valid?
N/A

iii. Is it necessary to pay an employee during the period of the covenant?
N/A

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Non-disclosure covenants are common. They apply only to manufacturing secrets (know how), i.e. information having real or potential commercial value as a result of its being unknown and not freely accessible by third parties. Information is protected only where the employer takes sufficient measures to protect it from unauthorised access and use by third parties. This implies, in particular, the definition of the information treated as confidential, the restriction of the access to such information by establishing and enforcing internal rules on how to deal with such information, keeping an inventory of the persons having access to confidential information and marking records containing confidential information (pursuant to the law documents must bear the inscription “Commercial Secret” and indicate the name and address of the information owner). The inclusion of non-disclosure covenants into employment agreements is part of the measures which the employer must take for the protection of their manufacturing secrets. The law further provides that employees must return records containing confidential information upon termination of their employment, respectively destroy the records or delete the information under the employer’s control. This duty is commonly repeated in the text of employment agreements.

The Labour Code grants the employer the right to dismiss an employee in the event of a breach of a non-disclosure covenant. Theoretically the employer should also be able to sue the employee for damages, but unfortunately the relevant provisions of the applicable laws (Civil Code, Labour Code and Federal Law on Commercial Secret) conflict, and it is generally considered that employers have little chances of being awarded damages under current law.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Employment in Russia is always governed by Russian law; a choice of law is excluded.

i. Can an employer impose a dispute resolution method on the employee?
No. Employment disputes are normally settled in court. Under the Labour Code the employer, with the consent of the employees, can form a bi-partite commission to decide employment disputes, but in most cases the parties are free to go to court without passing first through the commission. In any event the decision of the commission can always be appealed. Mediation is possible, but cannot be imposed.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

The breach of employment duties and, in particular, the disclosure of confidential information entitles the employer to take disciplinary sanctions and to eventually dismiss the employee. However, it is necessary to strictly comply with the formal procedure defined by labour law in order to correctly dismiss an employee, and dismissals are frequently challenged in court. Employers therefore often prefer negotiating a termination agreement. A termination agreement would typically provide for the payment of a lump sum to the employee upon termination, but has the advantage of settling the dispute. Normally termination agreements can be disputed in court only if the employee is able to prove that he entered into the agreement under pressure. In Russia it is unusual for employers to sue employees. Under the Labour Code the employer can only sue for damages, and there are limitations to the amounts which can be awarded. The law excludes, in particular, claims for lost profit. Company officers can be sued pursuant to the relevant provisions of corporate law.
Russia

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Employee benefits, pensions (except compulsory retirement insurance) and stock plans are at the employer’s discretion. All claims must be settled upon termination of the employment. The employee can claim benefits only if and to the extent these are stipulated in the individual employment contract and/or in internal rules on incentive payments (bonus plans). Payments made under bonus schemes cannot be recovered. In our opinion it is possible to extend pension or stock option plans beyond the employment, but in this case the employee’s entitlements would be regulated by contract law, respectively the conditions applicable to the relevant pension scheme or, in the case of stock options, security law.

ii. Which covenants are typically imposed?

Many Russian companies tend to follow international standards and practices developed by human resources managers.

iii. What sanctions are/can be imposed by the employer for non-compliance?

It is common for incentive plans to provide for the forfeiture of benefits or awards in particular circumstances or to provide that benefits are at the employer’s full discretion. It is not possible to claim back bonuses after they have been paid out. Employment law does not regulate pension plans or stock options.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

The law limits the possibility for the employer to change the terms of the employment contract. Changes are permitted only if the previous conditions cannot be maintained for organizational, technological or other reasons, and a formal procedure must be observed (advance notice, etc.). Changes can never take effect retroactively. This applies to non-discretionary bonus payments, discretionary payments are by definition at the employer’s discretion.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

A court will not apply provisions of the employment contract if it considers such provisions invalid. The court does not have the right to re-write such provisions. An employer who imposes conditions of employment which are contrary to labour law can be fined (for corporate entities up to 50’000 RUR, which is currently the equivalent of 1,500-1,600 USD, for company officers from 1,000 to 5,000 RUR). In the worst case the labour inspection can order the company to suspend its business operations for a period up to 90 days.

Contributed by Secretan Troyanov Schaer
A. OVERVIEW:

While a non-compete duty is implied during employment, post-termination restrictive covenants require the agreement of the employer and the employee. In order to be valid the employer must have an actual business or commercial interest and pay the employee adequate compensation in consideration for such restriction. The duration cannot exceed two years for qualified employees and six months for non-qualified employees. Enforcement is primarily before the Social Courts.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Post-termination non-competition covenants cannot be imposed by the employer, but may be mutually agreed by the employee and the employer.

i. Are they capable of being valid?

Yes.
Spain

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

They have to comply with the following requirements:

• the duration of the post-termination non-competition covenant must not exceed two years for technical experts (qualified employees) and six months for other employees;

• the employer must have an actual business or commercial interest to protect;

• the employee must receive adequate financial compensation in return for the covenant, which must be expressly determined at the time when the non-competition agreement is entered into.

iii. Is it necessary to pay an employee during the period of the covenant?

As mentioned above, it is necessary that the employee receives an adequate payment in consideration for the covenants. The payment can be made:

• in monthly instalments, either: (i) during the employment relationship (being expressly set out in the payslip as relating to the covenants, including the amount paid in respect of the covenants); or (ii) after the termination of the contract;

• one lump sum payment (at the beginning or at the end of the restriction period).

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Contact prohibition clauses might be considered non competition agreements (although this issue has not been determined by Spanish legislation). This kind of clause cannot be imposed by employers, but could be mutually agreed with the employees.

i. Are they capable of being valid?

Yes, provided that they comply with the requirements stated in the previous answer for non-compete covenants. Contact prohibition clauses are usually limited to clients and customers with whom the employer has had business contact during a limited period of time preceding the employee’s termination.

ii. What does it take to show they are valid?

The requirements stated above under section b ii apply.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

According to case law, non-solicitation of employee clauses are considered non-competition agreements. This kind of clause cannot be imposed by employers, but can be mutually agreed with the employees.

i. Are they capable of being valid?

Yes.
ii. What does it take to show they are valid?

The requirements stated under section b ii above apply.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

It is common to agree an exclusive dedication clause to prevent the employee from rendering services to any other employer or to himself during employment, otherwise employees may simultaneously be employed by more than one employer or be self-employed (provided this would not be considered unfair competition). In order to be valid, the employee must receive, in return for this restriction, economic compensation in addition to the employee’s salary; which is expressly stated in the agreement, otherwise the exclusive dedication agreement is void. The employee may withdraw from the agreement to render services exclusively for the employer by giving 30 days’ prior notice, in which case, the employer will no longer have to pay any compensation.

It has also become usual to include specific clauses in the employment contract imposing the obligation of confidentiality, since within the scope of the labour Law there is not a specific regulation that covers the duty of secrecy. These clauses often define the length of time the obligation will last, details of the information, documents and data which is deemed confidential, and include an obligation on the employee to return all documents and copies related to the information obtained during the employment. The clause usually expressly states the prohibition on disclosing confidential information to third parties, unless the employee has prior authorisation.

Other restrictions may apply if the employee receives special training from the employer in order to carry out a specific project or perform a certain job. In this case, employer and employee may enter into a “permanence agreement”, which requires the employee to render services for the company for a maximum period of two years. Should the employee leave the company before the agreed term, the employer would be entitled to claim damages, which would usually be predetermined and set out in the contract.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law impacts on the interpretation and effect of the terms of the covenant. However, a choice of law made by the parties cannot have the result of depriving the employee of the protection afforded by the mandatory rules of the law which would be applicable in the absence of choice (the law of the country in which the employee habitually render services; or, if the employee does not habitually carry out his work in one country, the law of the country in which the employer has its place of business; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract must be governed by the law of that country). The principles of Spanish law will therefore apply to restrictive covenants if the employee habitually works in Spain.

i. Can an employer impose a dispute resolution method on the employee?

In order to have access to the Labour Courts in Spain, employees must attend a conciliation hearing with the employer before the competent Conciliation, Mediation and Arbitration Service. Provided that no agreement is reached at that stage, employees then have the option of filing a claim before the Courts. Therefore no specific dispute resolution method would be included in the contracts.

The choice of jurisdiction has been declared void by the Spanish Supreme Court if its application alters the criteria established by Spanish law for territorial competence. The aim is to protect the weakest party of the employment relationship (e.g. the employee).
Spain

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

If the employee breaches the covenant, the employer is entitled to:

- the claw-back of any amounts paid in return for the restriction;
- damages, provided that they can be evidenced;
- the payment of a penalty, if agreed by the contract and deemed appropriate and proportionate by the Court.

If the employer fails to pay the agreed compensation, the employee is entitled to request payment of the relevant amount from the employer with an additional surcharge of 10%, unless it can be shown that the industrial or commercial interest has disappeared.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

   i. Do the same principles of enforcement outlined above at g. apply?
       Restrictive covenants are, in general, not relevant to, or enforceable against, employee’s benefits, pensions and stock plans.

   ii. Which covenants are typically imposed?
       See section h i above.

   iii. What sanctions are/can be imposed by the employer for non-compliance?
       See section h i above.

   iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?
       See section h i above.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

No, the covenant will be found to be void.

Contributed by Lydia Barrena
A. OVERVIEW:

There is no specific provision regarding restrictive covenants under the Turkish Labour Code (the “Labour Code“). Under the principle of “freedom of contract” set out in the Turkish Code of Obligations (the “Code of Obligations”), it is possible to include restrictive covenants in an employment contract provided that certain conditions are fulfilled. Moreover, as a general rule, any matters which are not regulated under the Labour Code will be subject to the rules and provisions of the Code of Obligations which regulates the freedom of contract principle.

In practice, it is common to incorporate and agree on post-termination restrictive covenants and obligations in the employment contracts, especially for senior employees. The most common restrictive covenant included in employment contracts is in relation to non-competition.
Turkey

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Under the Code of Obligations, “the employee may undertake in writing not to compete with the employer after the termination of the employment contract, especially not to establish a competing business, not to work in another competing business, or may undertake to refrain from engaging in any other kind of activities with a competitor business.”

Accordingly, if an employee has the opportunity to gain knowledge of the clients, trade secrets and/or business of the employer, a covenant may be included in the employment contract preventing the employee from conducting any activity which competes with the business conducted by their employer. Such a non-competition covenant is permitted under law only where the employee may cause substantial harm to their employer by using information obtained from the employer.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The Code of Obligations imposes a number of conditions that must be satisfied for a non-competition covenant to be valid. There must be a common understanding between the parties that the employee knows the employer’s customers and confidential information and that, accordingly, there is a risk that the employee may cause considerable loss to the employer by using such information.

In addition, non-competition covenants must be reasonable with respect to their term, geographical application and the nature of work to which the prohibition applies.

What is considered a reasonable duration for a non-compete covenant will differ according to the practices in the relevant market; however, the common practice of the Turkish Competition Board is to allow a non-compete covenant of a maximum two year duration provided that this is compatible with market conditions. The period may be shorter if the conditions in the relevant market are changeable within a very short time frame, such as 2 to 6 months, as in the banking and finance markets, etc. Only special circumstances (determined on a case-by-case basis) will justify a duration of over two years for a non-compete covenant. Moreover, the term of the non-compete covenant (even if it is less than two years) may be reduced by the court if the court determines that the term is unreasonably long, given the specific circumstances surrounding the case.

The Code of Obligations also stipulates that, in order to be valid, a prohibition on competition must be in writing.

In the event of a breach of the non-competition covenant by the employee, the employee will be liable to compensate the employer for any loss suffered. If a penalty has been included, the employee shall be released from the non-competition covenant by paying the penalty fee. However, if the employer proves that that the loss suffered is more than the penalty paid, the employee will also need to compensate the employer for the additional amount.

The non-competition covenant will terminate if there is no interest of the employer worthy of such protection. Furthermore, if the employment contract has been terminated by the employer on invalid and unjustifiable grounds, or by the employee for a reason attributable to the employer, then the non-competition restriction shall be deemed to have terminated.

iii. Is it necessary to pay an employee during the period of the covenant?

No.
Turkey

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, if agreed with the employee. Additionally, a confidentiality clause may also be inserted in the employment contracts to be effective during the term of the employment contract and/or following termination.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
The prohibition of an employee contacting the employer's customers/clients after termination of an employment contract is not regulated under Turkish laws, so there are no set validity conditions. However, based on the principle of “freedom of contract”, it is possible to include a post-termination clause prohibiting contact with customers/clients in an employment contract.

iii. Is it necessary to pay an employee during the period of the covenant?
No.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes, if agreed with the employee.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
The non-solicitation of employees is not regulated under Turkish law, therefore, there are no set validity conditions. However, based on the principle of “freedom of contract”, it is possible to include such a covenant in an employment contract.

Under the Labour Code, there is also a mechanism similar to non-solicitation covenant. Please see section e below for further details.

iii. Is it necessary to pay an employee during the period of the covenant?
No.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

There are certain restrictions that can apply during or after termination of employment.

The employment contract imposes an obligation on the employee to act honestly and in compliance with the principle of fidelity owed to the employer during the course of his employment contract. Within the scope of the obligation of fidelity, the employee is expected to acknowledge and protect the interests of the employer, keep undisclosed its commercial secrets, inform the employees about all current and prospective detrimental issues that may arise in relation to the workplace, and refrain from any and all acts and behaviour that may have a negative effect on the work or the workplace, during the course of the employment. A breach of the obligation of fidelity may lead to the employee compensating the employer for any associated losses and/or termination for cause.
It is also common to restrict the use or disclosure of confidential information and company property, during employment and after its termination.

The employee’s obligation to return employer/company documents has also been regulated under the Code of Obligations. The Code of Obligations obliges the employee to immediately return all items/documents he has obtained during the performance of his duties for the employer. A clause regarding the return of the employer’s documents or property, such as computer, cell phone etc., may also be included in the employment contract.

Lastly, under the Labour Code, there is a mechanism similar to a non-solicitation covenant. Accordingly, if an employee leaves their job before the expiry of the notice period or before the end date of the contract, a new employer may be responsible, in conjunction with the employee, if:

- the new employer caused the termination of employment of the employee;
- the new employer employs this employee intentionally; and
- the new employer continues to work with this employee after being made aware of the breach in respect of the notice period by the employee.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Under Turkish International Private Law, Turkish courts have exclusive jurisdiction in respect of employment contracts and lawsuits regarding the employment relationships in the event the habitual workplace of the employee is situated in Turkey. The applicable law can be freely determined, provided that the minimum level of protection acknowledged under mandatory provisions of the labour legislation where the employee’s workplace is established is maintained. Therefore, the provisions regarding restrictive covenants under Turkish law will need to be considered if the employee habitually works in Turkey.

i. Can an employer impose a dispute resolution method on the employee?

The Labour Code states that parties may agree that conflicts arising from unjustified or unjust termination of the employment contract can be resolved by way of arbitration. Accordingly, in the event that the employment contract has been terminated on unjust grounds, or terminated without showing any ground, the parties may decide to bring the conflict before arbitrators. However, such conflict must be brought before arbitrators within one month following termination of the employment contract.

The Court of Appeal is of the opinion that the employee is economically dependent on the employer and thus in a weaker position. Accordingly, case law indicates that even if there is an arbitration clause under the contract, the employee and the employer will still need to agree on arbitration after the termination of the employment contract in order for such arbitration clause to be binding on the parties.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Covenants are usually linked to a penalty fee which becomes automatically due upon breach of the covenant. However, if there is a conflict between the employer and the employee, a court decision will be required in order to enforce the penalty fine.
Turkey

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Restrictive covenants are usually not relevant to employee benefits, pensions and stock plans. However, as per the principle of “freedom of contract”, parties are able to freely insert such a covenant.

ii. Which covenants are typically imposed?

There is no typical covenant imposed in this respect. However, stock options, performance awards or private pension plans can include the need for compliance with certain conditions.

iii. What sanctions are/can be imposed by the employer for non-compliance?

The employees who are eligible to such benefits, pensions and stock plans, but who fail to comply with requirements arising from such plans, can be cut off from any discretionary plans without receiving any remuneration whatsoever. However, under the Code of Obligations, if the employment contract is terminated prior to the payment of a bonus, the employee shall be entitled to a pro-rata share of the bonuses based on the time they have worked.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

In the event that a workplace practice has been established due to the regular grant of stocks and payments of such awards, the employer may encounter difficulties in not following such a practice. In particular, an employee could try to bring a claim for the payments before a court on the grounds of a workplace practice.

It is at the employer’s discretion whether to pay any awards or not, or on what conditions to make such payments, provided that such award payments are not agreed in the employment agreement or it has not become a workplace practice due to constant unilateral payments by the employer.

There must be explicit terms in the plans if there is to be any forfeiture of unsettled/unpaid awards. Once such terms and conditions are explicitly stated in the plans, it is possible to forfeit the award. However, the participant will always have the right to file a lawsuit before a court to claim for the awards of which he is deprived. The evaluation of the credible legal basis for such a claim would be subject to the sole discretion of the court.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

ANSWER: In general, parties are able to freely decide on the terms and conditions of contracts they enter into. However, as explained above, the term of the non-compete covenant may be reduced by the court if the court decides that the term is unreasonably long, given the specific circumstances surrounding the case. If a penalty clause is found excessive, the Court can retrospectively reduce the amount based on equitable principles.

Contributed by Irmak Dirik & Melis Buhan
A. OVERVIEW:

Post-termination restrictive covenants are fairly common in English employment contracts, particularly for senior employee or those with valuable connections, relationships or access to confidential information. However, post-termination restrictive covenants are unenforceable unless an employer can establish that: (i) it has a legitimate business interest that it is seeking to protect; and (ii) the restriction goes no further than is reasonably necessary (in scope and duration) to protect that interest.

Legitimate business interests include trade secrets and confidential information, trade connections such as customers or suppliers, and maintaining the stability of the workforce.

Whether a restriction is reasonable is judged at the time the restriction is entered into. Relevant considerations will be the employee’s role, duties and seniority, the nature of the employer’s business, the scope of the restriction (such as what type of activity, trade connections or employees it covers, its geographical scope) and its duration (how long the restriction lasts). To a lesser extent, a court may also consider the length of the employee’s notice period and, in some cases (but this not an established principle), what consideration the employee received.
United Kingdom

The most common remedy for breach of a restrictive covenant is an injunction using the civil courts, to restrain the employee’s or the new or prospective employer’s activities, but other forms of injunction are available. Other remedies include damages for breach of contract and other forms of financial compensation.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, if agreed with the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

An onerous restriction, such as a non-solicitation of clients covenant, would these types of covenants are primarily intended to protect confidential information and trade secrets. More recently, they have also been upheld where the employer can show that a narrower non-solicitation restriction was difficult to police.

In terms of drafting, it is particularly important to make sure that the scope and duration of the restriction is limited, bearing in mind the general principles mentioned in section a above. Non-competition covenants sometimes apply for shorter periods than non-solicitation covenants. The time period of the restriction may also be reduced by any time the employee spends on garden leave (when he continues to be employed under the contract but he has no active duties or work to do).

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement to pay employees during the period of a post-termination restrictive covenant, unlike in some other jurisdictions.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, if agreed with the employee. These can either prevent the solicitation of client/customer or, additionally, the prohibition of acceptance of work from the client/customer even if not previously solicited by the employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The general principles mentioned in section a above apply. These restrictions can cover non-solicitation of, or non-dealing with, customers/clients. Solicitation tends to cover more active targeting of business. Non-dealing prevents the employee from accepting business from a customer even if they had not actively sought out that business. A non-dealing covenant is therefore more difficult to enforce, although it has been upheld where the employer can demonstrate that solicitation is hard to police, and is usually used together with a non-solicitation covenant. It is necessary for the employer to show a legitimate interest in having the covenant upheld. In the context of the contacts prohibition covenant, this interest is likely to be either a fear that the employee might misuse the influence the employee has over clients/customers which has been built up and paid for by the employer, or a concern about the misuse of the employer’s confidential information being used to win business at the expense of the employer.
United Kingdom

These types of restrictions are often limited to prohibiting contact with clients actually known to the employee or for whom he was responsible or had some involvement with in the course of his employment. They are usually defined by reference to a limited period of time before termination e.g. those he had contact with in the 6 or 12 months before termination.

Purely social contact is sometimes permitted, although that can make the restriction difficult to police in practice. In each case the contact which is to be prohibited must have a business element to it, such as looking to compete with the ex-employer’s business, or soliciting business in competition with the ex-employer.

Prospective customers/clients can be included in this type of restriction but this would generally be limited to those that the employer was actively targeting prior to termination.

iii. Is it necessary to pay an employee during the period of the covenant?

No, for the reasons noted in section b iii.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Non-solicitation of employees clauses agreed between the employee and employer have been upheld by the Court. However, it is usually assumed that it is not possible to prohibit the hiring of employees by a former employee.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The general principles mentioned in section a above apply.

Most restrictions of this type will define the employees who cannot be approached or hired by reference to their seniority, grade or level, or their role in or importance to the business. They often only apply to colleagues that the departing employee had a reasonable level of contact with, knowledge of or responsibility for, and within a defined period before the departing employee leaves. Smaller companies may be able to enforce a restriction that covers a wider set of employees.

It is usually assumed that it is not possible to prohibit the hiring of employees by a former employee. Accordingly, in practice, it is difficult for employers to prove that a non-solicitation of employees’ covenant has been broken, because merely showing that the employee has been hired by a former colleague is not necessarily a breach of the non-solicitation covenant. Therefore, non-solicitation of employees covenants are generally the weakest type of covenant and the easiest to circumvent.

iii. Is it necessary to pay an employee during the period of the covenant?

No, for the reasons noted in section b iii.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

There are a variety of restrictions that can apply during or after termination of employment.

A common clause is to restrict the use or disclosure of confidential information and company property, during employment and after its termination. These tend to be defined types of information or property, although these definitions are often much wider than in other types of restrictions. They often do not have a set time limit after termination and instead apply for so long as the information retains its confidential nature.
United Kingdom

Other post-termination restrictions can cover non-solicitation of or non-dealing with suppliers, distributors or intermediaries such as brokers, depending on the employer’s business. These are similar to the customer/client restrictions mentioned above. Employees can be prevented from interfering with the ex-employer’s business or connections, although this tends to require some kind of active attempt or intention to damage the ex-employer’s business.

It is fairly common for restrictions which apply after termination to also be expressed to apply during employment. Restrictions during employment can, however, be wider and more onerous on the employee than those that apply after termination, because employees owe a higher level of duty to their existing employer.

Restrictive covenants are sometimes supplemented by provisions such as a requirement on an employee to inform their employer if they are aware of a raid on the employer’s workforce (a team move), to alert the employer to another employee’s wrongdoing or even to the employee’s own wrongdoing, or to provide a prospective new employer with a copy of the restrictive covenants.

Employees can be restricted from holding themselves out as being connected to the ex-employer once they have left. They can be prevented from making disparaging statements about their ex-employer or its personnel.

Other restrictions may have an impact on an employee’s ability to compete, although they are not restrictive covenants in the standard sense e.g. bad leaver provisions in a bonus plan which apply if an employee leaves and competes with his employer, or deferred compensation that is only payable if an employee does not compete for a period after he leaves employment (see section h). The general principles that apply to standard restrictive covenants can also apply to these types of indirect restriction.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law will be relevant to what law governs the contract (and therefore how the contract should be interpreted and enforced) and the jurisdiction which can hear any dispute in connection with that contract.

In summary, if English law applies to the contract, then it is very likely that the English law principles mentioned above will apply to the interpretation and enforcement of restrictive covenants. If another country’s law applies to the contract but the English court has jurisdiction to hear the dispute, then the English court will generally apply that other country’s law when interpreting the contract, but public policy considerations and mandatory English law could override the interpretation or enforcement of the contract or impact the remedies available via the English court. This potentially creates a double-hurdle, since if the Court takes this approach, for a covenant to be enforced, it would need to be enforceable both in the law of the country specified in the contract itself, and also in accordance with English law principles. Usually under English law, it is much safer to have covenants drafted in accordance with and taking into account English legal provisions.

i. Can an employer impose a dispute resolution method on the employee?

It is very unusual to see alternative dispute resolution procedures imposed in employment contracts.

Since the primary remedy for enforcing restrictive covenants is an injunction, which is available via the Courts, there will be no obvious benefit in having a dispute resolution procedure which prevented the employer from seeking an order for an injunction. Any attempt by an employer to impose a dispute resolution method which required the employee to bring a claim before a Court in, say, the employer’s home country (if this was outside the UK) would be impacted by the Brussels Regulation. Under the Brussels Regulations employees may sue their employer in the courts of the place where the employer is domiciled or in the courts of another member state where the employee habitually works. The employer may only bring proceedings against an employee in the courts of the place where the employee is domiciled.
United Kingdom

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

The most common remedy for breach of a restrictive covenant is an injunction using the civil courts, to restrain the employee’s or the new or prospective employer’s activities. Injunctions are equitable remedies and therefore a court has discretion as to whether or not to grant an injunction.

Other forms of interim or final injunction are available such as those to enforce a garden leave provision, to nullify an unfair advantage gained by unlawful activity (known as ‘springboard’ injunctions), injunctions preventing a third party from unlawfully inducing a breach of contract or to restrain their unlawful activity. Interim orders can also be obtained to obtain delivery or return of documents or disclosure of information about the employee’s activities.

Other remedies include damages for breach of contract and other forms of financial compensation.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Generally, restrictive covenants are not relevant to, or enforceable against, an employee’s pension benefits.

In relation to long term incentive awards, the sanction is usually forfeiture of the award, or, in some cases, clawback of any amounts already paid. The former would not need enforcement (as it would be in the employer’s powers not to deliver the cash or shares pursuant to the award) – although it may be challenged by the participant, but such challenges would generally involve a claim for breach of contract. Employers should ensure that any such provisions do not, in practice, operate as a penalty clause, which are typically unenforceable.

Historically it was usually determined at the time of termination whether a participant would retain his award (“good leaver”) or lose his award (“bad leaver”), and if the award was retained it would usually vest and be paid out at the time of termination. It is becoming more usual for retained awards to be paid out to good leavers at the original vesting date, rather than on termination, which has led to an increase in forfeiture or clawback provisions relating to specified post-termination activities.

A forfeiture of an award or partial award, for prohibited competitive activities can be challenged if the employee claims that the provisions allowing forfeiture are unenforceable as a restraint of trade. The same approach will be taken to evaluating these clauses as is taken when looking at the equivalent clauses in employment contracts.

ii. Which covenants are typically imposed?

See section h i above in relation to pension benefits.

Covenants imposed will tend to mirror the covenants contained in the standard form employment contracts, although there is no requirement that this is the case. As such these covenants could range from non-competition covenants through to non-dealing and non-solicitation of customers clauses.

iii. What sanctions are/can be imposed by the employer for non-compliance?

See section h i above in relation to pension benefits.

Injunctive relief is less common, as the plan documentation does not usually impose a specific prohibition on the relevant behaviour – rather forfeiture of all parts of the award if the behaviour occurs. It is more common for a forfeiture provision to apply to unvested incentive awards if the participant engages in the relevant behaviour. In addition, there may be clawback of amounts paid (or repayment of any value realised on sale of shares delivered) on the vesting of awards. Where shares are delivered, it would be possible to prohibit sale of the shares until expiry of any relevant covenant period, possibly coupled with some form of security over the shares. Injunctive relief may be available if the award documentation contained a prohibition on the relevant behaviour.
iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

See section h i above in relation to pension benefits.

There are generally no specific limits in relation to long term incentive arrangements, although there may be limits on what could be forfeited under certain awards made under UK tax-advantaged arrangements (“approved share schemes”). However, there may be limits to what the employee is prepared to agree to. In addition, the provision must meet the criteria outlined in section a above to be enforceable.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Restrictive covenants that are invalid are unenforceable. A court can apply the ‘blue pencil test’ and sever a particular element (that is considered invalid) of a restrictive covenant and uphold the remainder of the covenant. However, a court will not re-write a covenant. It will only apply the ‘blue pencil test’ if the unenforceable element can be severed without having to modify or add to the remaining wording and if, by doing so, it does not materially change the nature of the original restriction.

Contributed by Mayer Brown International LLP
A. OVERVIEW:

In Argentina, employees’ fidelity duties are regulated by Section 85 of Law No. 20,744 (Labour Contract Law), while non-compete duties are regulated by Section 88 thereof. These regulations establish employees’ obligations to:

(1) maintain confidentiality as regards any information brought to their attention that should be protected in accordance with local legislation and regulations; and to

(2) abstain from executing, on their own account or on the account of third parties, any negotiations that could affect employers’ legitimate interests.

All the above-mentioned duties are applicable during the term of the employment relationship.
Furthermore, according to Argentine legislation, fidelity duties also involve confidentiality duties. This issue has been regulated by Law No. 24,766 (Confidentiality Law), which protects information from dishonest use, so long as that information:

(i) is secret and can not easily be accessed;

(ii) has commercial value;

(iii) has been reasonably protected against disclosure by the person in control of it.

In this context, post-termination restrictive covenants have become normal employment contract practice in recent years, especially where senior employees or other personnel in possession of valuable or confidential information are involved.

Such covenants have their raison d’être in the type of tasks performed by the employees, the responsibility that such tasks generate and the need to avoid the disclosure of this information when the result of investigations, products, formulas or important commercial data might be affected. Thus, the restrictive covenants do not aim to prevent the employee from using the knowledge or expertise acquired in connection with their job, but to protect the employer’s important trade secrets and other sensitive information.

In that regard and in accordance with Argentine labour legislation, it is valid for employers and employees to sign post-termination restrictive covenants.

However, certain conditions must be met in order for these covenants to be enforceable:

(1) Agreements shall only be valid within a specified – and reasonable – scope and period of time; and

(2) Employees shall only assume non-competition obligations in exchange for a reasonable financial compensation; and

(3) The object of protection must be confidential information or a legitimate business interest; and

(4) An employee’s right to work must not be affected.

Whether restrictions are reasonable and enforceable is judged at the time the restriction is entered into. Relevant considerations might be the employee’s role, duties and seniority, as well as the nature of the employer’s business, the temporal and spatial scope of the restriction and the reasonableness of the compensation amount agreed.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The general principles at a. above apply.

Regarding drafting, it is particularly important to ensure the scope and term are reasonably limited. The scope limits should not be excessive to the extent that the employee’s right to work should remain unaffected. A typical term is one to two years from the termination of the employment relationship. Last, but not least, the financial compensation agreed should be reasonable in relation to the post-termination obligations assumed by the employee.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes. As mentioned at a. above, payments are considered compulsory in order for non-competition covenants to be enforceable. This is not a legislated requirement, but is the unanimous opinion of the Argentine labour courts.
Financial compensation must be reasonable, in accordance with the restrictions required of the employee. It is normal practice to negotiate, approximately, a financial compensation equal to 50% of the employee’s annual remuneration.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The general principles at a. above apply both to non-solicitation restrictions and to non-dealing with customers/clients restrictions clauses. The aim of such clauses is to protect the employer’s commercial information and prevent dishonest behaviour. Thus, this type of clauses generally establish a prohibition for the employee to contact current customers of the employer or access prospective clients by using commercial information which belongs to the employer.

In comparison, though valid, non-solicitation covenants are usually harder to enforce, since evidence of solicitation is generally harder to establish. Nevertheless, both types of clause require legitimate interest affectation to be proved. The validity of both type of clauses will depend on whether a legitimate business interest exists.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes. Please see b. (iii) above.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment); and

Yes.

i. Are they capable of being valid?

Yes, depending on the content of the clause and the particular circumstances of the case.

ii. What does it take to show they are valid?

The general principles at a. above apply.

However, these type of clauses are less common, mainly because of the difficulties establishing and proving breach. This means that, despite the existence of the clause, it will be difficult for the employer to prove that the solicitation of a current employee by a former employee has occurred.

This type of clause not only restricts the employee’s right to hire or not to hire, but might also affect some other employees’ right to work. For this reason, the labor courts can sometimes be restrictive when judging the validity of these clauses.

In summary, the validity will always be a matter of judgement and the courts’ decisions depend upon the specific circumstances of the case. Conditions like seniority, role, responsibility, level of contact or level of knowledge of the employee will be relevant when determining validity.
Argentina

iii. Is it necessary to pay an employee during the period of the covenant?
Yes. Please see b (iii) above.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

No. In principal, the covenants already discussed at a.-d. above are the most common in Argentina.

However, the extent and terms of covenants vary, depending on whether the agreements apply during the term of the employment relationship or post-termination.

Due to the existence of Argentine legislation that regulates confidentiality and non-competition duties during the employment relationship, it is easier to enforce these covenants while relationships are still in force, since the employee’s obligations are not only part of the covenant, but also legal duties that must be fulfilled.

As regards post-termination covenants, restrictions usually tend to restrain:
  (1) competition, to greater or lesser extent; and
  (2) the disclosure of sensitive, valuable or secret information of the employer (both, in general or limited to certain information); and
  (3) the solicitation of current employees by a former employee.

Ultimately, in a direct or indirect way, all these covenants aim to limit the former employee’s ability to compete with his former employer.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

According to Argentine law, labour agreements must be subject to Argentine labour law so choice of law does not apply in Argentina.

This means that, if a restrictive covenant is entered into in Argentina or abroad, but it is executed in Argentina, then Argentinean law will be the governing law. This also means that restrictive covenants entered into, or executed, in Argentina will be interpreted and enforced in Argentina, in accordance with Section 3 of Law No. 20,744 (Labour Contract Law) and Section 1209 of the Argentinean Civil Code.

  i. Can an employer impose a dispute resolution method on the employee?

    No. Imposing alternative dispute resolution methods for labour matters is not permissible in Argentina.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

The most common remedy for the breach of a restrictive covenant in Argentina is the filing of a lawsuit against the contracting employee, generally before a Labour Court.

Such lawsuits can sometimes include the request for interim injunctions to restrain further breaches or unlawful activity from occurring and protect possibly affected information from being disclosed, until the Labour Court reaches a decision regarding the covenant’s validity and, consequently, whether the agreement is enforceable.
In case the covenant is found to be valid, the employer could file a claim for a final injunction, plus financial compensation.

**H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:**

i. Do the same principles of enforcement outlined above at g. apply?

No. Restrictive covenants are not relevant to, or enforceable against an employee’s pension benefits.

On the other hand, in relation to long term incentive awards, if forfeiture or claw back were agreed as part of a restrictive covenant, such clauses could be void or unenforceable.

However, forfeiture of the award, or claw back of the amounts already paid could apply in the context of, or as part of a claim for, the breach of a restrictive covenant.

ii. Which covenants are typically imposed?

Please see h (i) above.

iii. What sanctions are/can be imposed by the employer for non-compliance?

Please see h (i) above. Also, forfeiture can apply directly to unvested incentive awards if the participant engages in the relevant, prohibited behaviour.

On the other hand, where shares have already been delivered, it is possible to prohibit selling the shares until after the expiry of any relevant covenant period.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

In addition to that, in principle, there are no specific limits in relation to long term incentive arrangements. However, all arrangements should meet the criteria outlined above in (a) in order to be valid and enforceable.

**I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?**

Restrictive covenants are unenforceable, when declared invalid by a Court.

The Court cannot modify or “re-write” any piece of the original wording.

If a specific clause in a restrictive covenant is declared invalid, the remaining part of the restrictive covenant can be upheld as valid, provided the remainder is valid and capable of standing on its own.

**Contributed by Joaquín Emilio Zappa**
A global guide to ‘restrictive covenants’

Bolivia

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A. OVERVIEW:
Post-termination restrictive covenants are valid and enforceable in Bolivia so long as their scope is not overly restrictive. Enforcement is primarily by injunction with civil courts.

The most common restrictive covenants include trade secrets, confidentiality and non-solicitation.

Bolivian legislation is highly protective of employees’ rights. The relationship between the employee and employer is regulated by the Labour Law and its applicable regulations.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?
Yes, an employer may require a post-termination non-competition covenant so long as the covenant’s scope is not overly restrictive.
i. Are they capable of being valid?
Yes. As long as the covenant is specific as to the applicable period and area involved.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?
Provided the employer can show a legitimate interest is being protected and the covenant does not affect the employee’s inherent labour rights, it should be valid and enforceable.

iii. Is it necessary to pay an employee during the period of the covenant?
It is not mandatory to pay employees during the period of a post-termination restrictive covenant.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?
Yes, so long the covenant is not overly restrictive.

   i. Are they capable of being valid?
   Yes.

   ii. What does it take to show they are valid?
   The employer must demonstrate that the employee’s contact with customers/clients may harm the employer’s business.

   iii. Is it necessary to pay an employee during the period of the covenant?
   No.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?
Yes. It is possible to impose a clause of non-solicitation.

   i. Are they capable of being valid?
   Yes.

   ii. What does it take to show they are valid?
   The employer must demonstrate legitimate interest and harm.

   iii. Is it necessary to pay an employee during the period of the covenant?
   No.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?
Non-disclosure covenants are the most common provisions incorporated in labour agreements.
F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

If the work is performed in Bolivia for a period exceeding 90 days, Bolivian Law will apply to the agreement regardless of the parties’ choice.

i. Can an employer impose a dispute resolution method on the employee?

No, an employer cannot impose a dispute resolution method. In Bolivia, the labour law does not allow a dispute resolution method other than labour courts and the Ministry of Labour.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Covenants such as those described above (non-compete and non-solicitation) must be enforced in the Civil and Commercial Courts.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Issues relating to employee benefits and pensions must be enforced through labour courts, exclusively.

ii. Which covenants are typically imposed?

Non-compete and non-solicitation covenants may be enforced.

iii. What sanctions are/can be imposed by the employer for non-compliance?

The employer may not impose sanctions directly. It would have to seek damages through civil courts.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

There is no limitation on what an employer may forfeit.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Typically, if a covenant is found invalid it will not render the entire agreement void. The court may not re-write the annulled covenant.

Contributed by Carlos Pinto Meyer
A global guide to ‘restrictive covenants’

Brazil

Contributed by: Tauil & Chequer Advogados

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A. OVERVIEW:

In Brazil there is no legislation which regulates post-termination restrictive covenants. In the same way, there are no legal prohibitions against these clauses. In this sense, these clauses are permitted, since they do not violate any employee rights under the Brazilian Labour Code (CLT).

According to article 444 of the CLT, the employment relationship could be a matter of mutual agreement between the parties, holding harmless principles which protect the labour relationship. In view of that, restrictive covenant disputes can be brought before the labour courts because some labour rights are not capable of being negotiated by employees, even when they are assisted by unions.

On the other hand, the same principle does not apply in relation to non-compete covenants or confidentiality agreements since these are provided for under specific legal provisions.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.
Brazil

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?
It is essential that non-compete clauses are limited not only by term but also in space. In other words, it is necessary to have a geographical limitation on the extent of their reach. Furthermore, non-complete clauses cannot entirely deprive an employee from earning his or her livelihood. Finally, the former employee must be paid a reasonable sum during the term of the non-complete clause.

It is important to emphasize that non-compete clauses are only valid if they protect a legitimate business interest of the employer. In this sense, is necessary to analyze the professional practice, the acquired knowledge and the potential damages of using this knowledge with competitors, in order to verify that there are lawful business interests to be protected.

iii. Is it necessary to pay an employee during the period of the covenant?
Yes. While there is no specific legislation on this point, case law precedents require that the former employee should be paid during the period of the non-compete agreement.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?
Yes.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
See b. ii above.

iii. Is it necessary to pay an employee during the period of the covenant?
Yes, for the reasons noted in b. iii above.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?
Yes.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
See b. ii above.

iii. Is it necessary to pay an employee during the period of the covenant?
Yes, for the reasons noted in b. iii above.
E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Yes, non-disclosure covenants.

These clauses seek to protect the employer’s confidential information. They do not prohibit an employee from working in competition, but rather seek to prevent the departing employee from revealing to the market any secret data acquired during the course of their employment with the former employer. For example, commercial secrets, patents pending, customers’ lists, or any other confidential information. These clauses can also prohibit employees from withdrawing documents without authorization. These clauses are effective even after termination of the employment contract.

It is not necessary to pay the employee during the period in which the non-disclosure clause is effective, because keeping trade secrets confidential is an ethical and professional duty of the former employee.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Restrictive covenants are commonly entered into in the employment contract, and remain effective even after the termination of the employment relationship.

Where the employment contract is entered into in Brazil and that the provision of services is in Brazil, Brazilian laws will apply.

Where services are provided outside Brazil, it is possible for foreign laws to apply.

Previously, Precedent nº. 207 (effective 2012) of the Superior Labour Court, provided that the law governing an employment contract is the one in effect in the place where the services are provided.

Subsequently, the above precedent was overturned with the effect that even if the employee provides his or her services in a foreign, non-Brazilian territory, the applicable law applicable will be Brazilian law.

Of note in connection with the above is that under the Principle of Protection, which is deemed inherent in employment contracts, if the law under which services are provided is more beneficial to the employee than Brazilian law, then that law must be adopted.

i. Can an employer impose a dispute resolution method on the employee?

No. The imposition of a dispute resolution method by the employer violates one of the fundamental principle of the Brazilian system of laws, the Principle of Unrestricted Access to the Judiciary Branch.

Provided both parties consent, the employer and employee can resort to plea bargaining to resolve their dispute.

In relation to the reference of employment-related cases to arbitration, the situation is unclear. At the time of writing, the view of the Superior Labour Court is that arbitration is not appropriate in individual labour-related cases. This area of the law is still developing.

G. ENFORCEMENT: How are covenants typically enforced in your jurisdiction?

Typically, the former employer first sends an extrajudicial notification to both the former employee and the employee’s new employer to notify them about the post-termination restrictive covenants obligations the former employee is subject to.

If the former employee commits an act in breach of the restrictive covenant, the former employer can file a negative covenant claim asking the judge to set a time frame for rectification and compliance with the covenants. If the former employee refuses or is in default, the employer can apply to the judge for an order that the former employee rectifies the breach and complies with the covenant at his or her own expense.
Brazil

In this last type of claim, the judge can order specific performance or, if the claim is considered with grounds, can make an order which sets out the step-by-step actions required to ensure compliance.

If specific performance is not possible, an award for damages can be made. The making of an order for payment of damages does not diminish the court’s ability to impose a fine.

The court is also empowered to make protective awards.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

In relation to employee benefits, pensions and stock plans it is the Labour Court which protects the enforceability of restrictive covenants. In this sense, if employer does not comply with the provision of former employee benefits concession, pensions and stock plans, the former employee can go to Court. It is the most common remedy.

Parties can also elect plea bargaining, provided both agree.

The amounts being claimed need to be specified very clearly, failing which the Labour Court may not recognize each specific payment.

Generally speaking, arbitration will also not be appropriate for these claims for similar reasons as discussed at f. i above.

ii. Which covenants are typically imposed?

It is common be negotiated the extension of the time of health insurance plan, releasing the amount deposited by the company in pension fund and anticipation the vesting period of SOP.

iii. What sanctions are/can be imposed by the employer for non-compliance?

The Labour Court can order payment of the corresponding indemnity for non-compliant behaviour by the former employee, using the economic value of the benefit as the basis for calculation.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

In this context, the employer can just be ordered to retroactively forfeit for non compliance during the previous five years. In relation to the amount involved for the indemnity or penalty, there is no limitation provided by law, but the main reference is related to monthly salary and the former decisions of the Labour Court. In severe cases, damages have been awarded of as much as between 40 to 50 times the employee’s monthly salary.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

A Court can not re-write the covenant. Restrictive covenants that are invalid are unenforceable. However, the existence of an invalid clause does not adversely affect a valid clause.

Contributed by Mauricio Mitsuru Tanabe
A global guide to ‘restrictive covenants’

Canada

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A. OVERVIEW:

Post-termination restrictive covenants are difficult to enforce in Canada, and are generally only recommended for employees who perform significant relationship management in their roles or who have access to valuable confidential information. There are two main types of post-termination restrictive covenants in Canada: non-competition and non-solicitation covenants.

Post-termination restrictive covenants are prima facie unenforceable as a restraint on trade in Canada unless an employer can establish that the provisions are reasonable as between the parties and with regards to public interest. The factors that a court will consider to determine the validity of a post-termination restrictive covenant are: (1) the nature of the employer’s business and the employee’s position; (2) whether the employer has a proprietary right to the information or relationship that it seeks to protect; (3) whether the restriction is sufficiently limited in temporal scope; (4) whether the restriction is sufficiently limited to an ascertainable geographical area; and (5) whether the nature of the restricted activity is sufficiently clear and whether the degree of restriction is warranted.

Provided a post-termination restrictive covenant is enforceable, an employer may be able to obtain an injunction against the restricted activity and damages for breach of contract.
B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

The factors mentioned in (a), above, apply to non-competition covenants.

With regard to the nature of the employer’s business and the employee’s position, if an employer’s business is heavily based on confidential information and the employee was in fact in a position to have had access to such information, there will be a greater justification for a non-compete covenant.

A court will also consider whether the employer has a proprietary right in the information or relationships it seeks to protect.

With regard to whether a non-compete clause is sufficiently limited and specific in its temporal scope, a non-compete covenant in excess of 6 months may be more difficult to justify on the basis of what is reasonably necessary to safeguard the employer’s interests.

Similarly, a non-compete covenant should be clearly limited to an ascertainable geographical area and should not unduly prohibit the employee from finding employment following termination. A restrictive covenant which covers a geographical area which is not ascertainable will likely be void for ambiguity. A restrictive covenant which covers a geographic area that extends beyond what is reasonably necessary to safeguard the employer’s interests will likely be void for unreasonableness.

Finally, a court will consider whether the nature of the activity that is prohibited under the non-compete covenant is sufficiently clear, as well as whether the degree of restriction is warranted. For example, a non-compete covenant which prohibits a prior employee from providing specific services in competition with the employer may be appropriate for high-level employees with significant access to confidential information or key client relationships. Non-compete covenants which are over broad and which restrict activity that does not in fact interfere with the employer’s business will likely be considered unreasonable.

In Quebec, an employer may not avail itself of a non-compete clause if it has terminated an employee’s employment without cause or if it has given the employee reason to terminate the employment relationship.

iii. Is it necessary to pay an employee during the period of the covenant?

While there is no legal requirement to pay an employee during a post-termination restrictive covenant, if the former employee is effectively prevented from finding employment during the period of the covenant, the failure to pay an employee during the same period will likely render the covenant unreasonable.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

i. Are they capable of being valid?

Such clauses may be valid in the form of non-solicitation, non-dealing and non-interference clauses.

ii. What does it take to show they are valid?

The general principles mentioned in (a) and elaborated upon in (b)(ii), above, apply. In particular, a non-dealing or non-interference clause should be specifically tailored to cover relationships for which the former employee had responsibility or involvement with and for which the business can show a legitimate interest in enforcing for the defined period.
If the purpose of the restriction is to protect a client relationship, the duration of the restriction should be no longer than is reasonably required in order for the employer to send a replacement to re-establish and protect the relationship on behalf of the company. Limitation of contact should also be with regard to clients or individuals that are within the knowledge of the employee or which can otherwise be ascertainable by the former employee.

In Quebec, non-dealing clauses may be assimilated to non-compete clauses and be subject to the same conditions of enforceability as described at (b)(ii), above, including the principle that an employer may not avail itself of such clause if it has terminated an employee’s employment without cause or if it has given the employee reason to terminate the employment relationship.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement to pay an employee during the period of a post-termination non-solicitation, non-dealing or non-interference restriction. However, if such restriction effectively amounts to a non-competition arrangement, the considerations in (c)(iii), above, apply.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment); and

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The general principles above apply. Non-solicitation and non-hire clauses regarding former colleagues are more likely to be valid if they are carefully tailored to target the solicitation or hiring of employees who have strong relationships with the employer’s clients or who would otherwise be able to compete with the former employer’s business.

iii. Is it necessary to pay an employee during the period of the covenant?

No.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Other covenants can apply during and after termination of employment to create employee obligations which are greater than the duties of good faith, loyalty and fidelity, which exist at common law. The common law duty of an employee to preserve confidential information of an employer continues after the termination of the employment relationship, to the extent that such information remains confidential to the employer’s business.

The other types of covenants may include restrictions on activities related to the preservation of the employer’s reputation or brand during employment, non-disparagement commitments after employment and non-dealing or non-solicitation provisions targeted at preserving the relationship between the employer and a third party.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law will be relevant to what law governs the contract (and therefore how the contract should be interpreted and enforced) and the jurisdiction which can hear any dispute in connection with that contract.
In summary, if Canadian law applies to the contract, then it is very likely that the legal principles discussed above will apply to the interpretation and enforcement of the restrictive covenants.

If another jurisdiction’s law applies to the contract but a Canadian court can and does assume jurisdiction over the dispute, then the court will generally apply that other jurisdiction’s law when interpreting the contract and determining its enforceability.

However, Canadian courts do not typically give effect to certain types of foreign law, such as blocking legislation, penal legislation, revenue legislation and foreign law which is contrary to fundamental Canadian public policy.

Further, mandatory Canadian law could override the interpretation or enforcement of the contract that would otherwise be available under the law of the other jurisdiction.

Finally, where the remedies available under the other jurisdiction’s law are not available under the law of the forum, the parties’ ability to obtain an effective remedy may be compromised.

In light of the foregoing principles, if a Canadian court is the preferred forum for enforcement of a covenant but another jurisdiction’s law is to apply, Canadian law should nonetheless be considered to ensure that the parties’ intentions and the remedies available to them can be given full effect in a Canadian court.

i. Can an employer impose a dispute resolution method on the employee?

It is unusual to see alternative dispute resolution procedures imposed in employment contracts.

Since the primary remedy for enforcing a restrictive covenant is an injunction, which is available via a court order, there is no obvious benefit in having a dispute resolution procedure which has the effect of preventing an employer from seeking an order for an injunction.

However, it is not illegal to include an alternative dispute resolution procedure in an employment contract. Similarly, the parties may contract to bring claims regarding the contract in a particular jurisdiction through a forum selection clause.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Restrictive covenants may be enforced by means of injunction, an action for damages or both.

As the damages for breach of a restrictive covenant may be difficult to prove, an employer may choose to specify a liquidated damages remedy within the contract. (In Quebec, however, the inclusion of a reference to liquidated damages in the contract may be a bar to pursuing injunctive relief and is therefore not recommended.)

Liquidated damages provisions must be reasonable and not a penalty provision; in this determination, a court will consider whether the sum is extravagant such that it does not reflect a reasonable anticipation of the damages that will flow from the breach at the time that the agreement was made.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Yes.

ii. Which covenants are typically imposed?

Note that, for the reasons at (iv) below, covenants may not generally be imposed in respect of certain registered retirement plans.
Canada

Otherwise, to the extent that there is no statutory basis to prevent a restrictive covenant in an employee benefit or compensation plan, it is becoming more common to see contractual claw back provisions in Canadian bonus, deferred compensation and equity-based plans, particularly among publicly-traded employers.

Most commonly, claw backs have been imposed to require the repayment of bonus payments tied to financial results that are later restated at a lower level. While less common in Canada to date, courts have upheld contractual claw backs to enforce non-competes, and there is no reason to conclude that courts would not in the right circumstances similarly uphold claw backs tied to other types of restrictive covenants.

Under stock option plans or other equity-based arrangements under which securities or units have already been awarded, the claw back may apply to require reimbursement from the proceeds of the underlying securities or units.

In some cases, claw back provisions have been limited to require repayment only of after-tax amounts, since, under the federal Income Tax Act, recipients of bonus payments are generally taxed in the year they are received, and can claim no corresponding deduction if a claw backs payments are required in a subsequent year.

Although less common, non-registered executive retirement plans and other employee benefit arrangements may also contain provisions requiring the plan member to forfeit some or all entitlements under the arrangement should he or she breach a non-compete, non-solicitation or other restrictive covenant. The enforcement of these provisions would generally be subject to the same qualifications generally described above.

iii. What sanctions are/can be imposed by the employer for non-compliance?

The most common types of sanction are claw backs and outright forfeitures of benefits. It is uncommon to impose other sanctions under a benefit plan contract that could be imposed more generally as a matter of the overall employment contract.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

Tax-assisted pension plans registered under federal and provincial pension minimum standards legislation and certain other tax-assisted savings vehicles (including “deferred profit sharing plans” under the federal Income Tax Act) are subject to minimum vesting rules under applicable legislation.

In the case of “registered pension plans”, accrued benefits must vest either immediately or within no later than two years, depending on the jurisdiction. In the case of deferred profit sharing plans, employer contributions must vest after no later than two years. Vested entitlements may not be forfeited, including for violation of a restrictive covenant.

Other than plans for which statutory vesting rules apply, there is no general limitation on retroactivity or retrospectivity of a forfeiture or claw back provision; however, provisions that are not tied to specified time periods are uncommon.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Restrictive covenants that are invalid are unenforceable in whole.

A court is not able to apply a “blue pencil test” to sever elements of a restrictive covenant which are unenforceable (e.g. the duration, geographical scope or nature of the restricted activity).

However, a severability provision in the agreement will increase the likelihood that, while one restrictive covenant may be considered unenforceable, a separate restrictive covenant in the same agreement will be enforceable.

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A. OVERVIEW:
Restrictive covenants often apply to senior employees. Usually, they include non-compete clauses, non-solicitation clauses and confidentiality clauses.

Although confidentiality clauses are widely acceptable, even for an indefinite term, when they intend to protect a legitimate interest that may only be protected by this means, non-compete and non-solicitation clauses are more debateable, because the constitutional right of freedom of work is at stake.

Non-compete clauses have been accepted by labour courts only if they are reasonable in protecting a legitimate interest, which implies that they need to be restricted to a specific area or subject matter that is related to the business of the company seeking to impose it. Additionally, courts have established that these clauses may only be agreed for a reasonable period of time and must be somehow compensated for.
A global guide to ‘restrictive covenants’

Chile

In relation to non-solicitation clauses, on the other hand, although usually agreed by the parties, the labour courts have not stated a criterion on them. In principle, they are valid in relation to contacting clients of the employer. But in relation to hiring former colleagues the validity of these clauses is debateable because it would imply an absolute prohibition of hiring a specific person, which means waiving a constitutional right—i.e. freedom of work—that is inalienable.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, but it must be accepted by the employee. The clause must be included in the release agreement subscribed upon termination of the employment relationship.

  i. Are they capable of being valid?

  Yes, they are but only if they meet the requirements explained above at a.

  ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

  They must be established for a reasonable and determined term, they must be reasonable in protecting a relevant employer’s interest and they have to contemplate a payment.

  iii. Is it necessary to pay an employee during the period of the covenant?

  Yes. Otherwise, the clause is not valid.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, but it must be agreed by the employee when signing the corresponding release agreement upon termination of the employment relationship.

  i. Are they capable of being valid?

  Yes, but only if they meet the requirements above explained.

  ii. What does it take to show they are valid?

  They must be established for a reasonable and determined term, they must be reasonable in protecting a relevant employer’s interest and they have to contemplate a payment.

  iii. Is it necessary to pay an employee during the period of the covenant?

  Yes. As a general principle of all the obligations that somehow restrict competition, they need to contemplate a payment in order to be valid.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

A clause may only be imposed if agreed to by the employee. However, although these clauses are quite common within certain type of employees, the validity is debateable both during and after employment because, from the viewpoint of the employees who are not eligible for hiring as a consequence of these clauses, they not only affect the freedom of work of the party entering into the agreement but they also affect their constitutional rights. Be that as it may, there are no clear criteria established by the labour courts currently.
Chile

i. Are they capable of being valid?
As explained, their validity is arguable because they impede a party that has not entered into the agreement in exercising a constitutional right.

ii. What does it take to show they are valid?
From the viewpoint of the parties entering into the agreement they must be established for a reasonable and determined term, they must be reasonable in protecting a relevant employer’s interest and they have to contemplate a payment. However, from the viewpoint of the employees affected by the clause, the considerations explained above apply.

iii. Is it necessary to pay an employee during the period of the covenant?
Notwithstanding the above comments, yes. If these clauses were taken as valid by labour courts, as a general principle of all the obligations that somehow restrict competition, they need to contemplate a payment in order to be valid.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?
It is common to agree a confidentiality clause when subscribing the corresponding release agreement. These are widely accepted and do not need to contemplate any payment.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?
As all these clauses would be agreed as a consequence of an employment relationship, the only courts with jurisdiction to enforce them are the Chilean courts. That jurisdiction cannot be waived.

   i. Can an employer impose a dispute resolution method on the employee?
   No.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?
Covenants are enforced as an action for breach of contract, claiming damages that are usually limited to payments involved in the obligation.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

   i. Do the same principles of enforcement outlined above at g. apply?
   Yes.

   ii. Which covenants are typically imposed?
   Non-compete obligations during the term of the labor contract are typically imposed.

   iii. What sanctions are/can be imposed by the employer for non-compliance?
   From warning letters to termination for cause, depending on how serious is the breach.
iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

As general rule, earned labour compensations and minor statutory rights cannot be forfeited.

[Note: it will be important to distinguish between (in the UK Remuneration Code provisions requiring forfeiture e.g. if there is a material adverse trading event or misconduct comes to light after monies had been paid – nothing to do with anti-competitive provisions and so excluded from this book) and anti-competition provisions such as restrictive covenants]

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

If a covenant is found to be invalid the Court will declare it void and the effect is that parties will have to be put in the same position as they were before subscribing to the obligation, including restitution of anything paid or delivered.

Contributed by Ricardo Tisi
A global guide to ‘restrictive covenants’

Colombia

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A. OVERVIEW:

In Colombia any kind of restrictive covenant is strictly and expressly prohibited by labour law, since it notoriously opposes the fundamental right to work. The covenant cannot be enforced before any judicial or governmental authority.

Although restrictive covenants are used as contractual instruments intended to protect employers’ legitimate interests, their implementation is prohibited in Colombia. Therefore, even if it is possible to provision said clauses in the employment agreement, or even if the agreement is executed and governed by a foreign law, the stipulation will not be enforceable before any local judicial or governmental authority.

The special safeguard granted by the Constitution, regarding the fundamental right to work, the right of association, the freedom to pursue a profession or office and the impossibility of prohibiting an employee from carrying out their customary work, prevent the enforcement of post termination, non-compete and non-solicitation clauses. Furthermore, it is not only a fundamental principle, but also an express and legally established prohibition, i.e. article 44 of the Substantive Labour Code, which translates as:
“The stipulation by which an employee undertakes the obligation not to work in a certain activity or not to render services for the competitors of the employer, once their employment agreement has concluded is of no effect whatsoever.”

Notwithstanding the above, it is possible to agree with the leaving employee, that in case he/she does not deploy a certain kind of activity or work with certain employers, for a certain period of time, he/she will be granted a monetary sum at the end of the convened term. In this sense, the parties are not stipulating that the former employee is restricted from working, but rather agreeing that in case he/she voluntarily decides not to work for that certain period of time or for a certain industry, he/she will receive a determined money amount. Therefore, it is at the former employee’s discretion as to whether to comply, or not, with the covenant; if he/she does, he/she will be entitled to receive an agreed sum, and even enforce its payment if necessary; in case he/she does not agree to the covenant, the ex-employer cannot judicially enforce compliance, but the ex-employer will no longer need to pay the agreed amount.

In addition to the above, stipulations to irrevocably remain employed for a fixed period are also null, since the employee is entitled to resign at any time. Nonetheless, it is viable that the employer rewards the employee’s seniority through bonuses, or offers him/her loans (i.e. for housing of education) on more advantageous terms than those available in the wider market (i.e. lower interest rates, payment facilities etc.), thus motivating him/her to remain engaged. It is also to be noted that the fundamental and legal restrictions are equally applicable, regardless of the particular quality of the individual (employee, independent contractor, shareholder, etc.)

**B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?**

Yes.

i. Are they capable of being valid?

No.

Any stipulation of this sort is deemed to be ineffective, that is, it is not binding or legally enforceable. However, as explained above, while it is not possible to prohibit the ex-employee from working, it is possible to reward or encourage him/her to decide voluntarily not to do so in exchange for payment.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Not applicable

iii. Is it necessary to pay an employee during the period of the covenant?

Not applicable

**C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?**

Yes.

i. Are they capable of being valid?

As a general rule, no

If the former employee wants to contact the ex-employer’s customers and clients to carry out independent business of his/her own (in good faith), the mentioned restriction would restrain his fundamental right to work, just as a non-compete clause does as discussed above; therefore, the same legal principles apply in this case as in b above and these clauses are also unenforceable.
Colombia

In this case, however, it is also possible not to proscribe the ex-employee from contacting these client and customers people, but instead to award or encourage him/her to decide voluntarily not to do so for a set duration instead.

Alternatively, (the exception to the general rule) parties can agree that the former employee will refrain, whilst carrying out his/her own businesses, to perform acts of unfair competition or act in bad faith, including clientele deviation. This stipulation would be valid and enforceable. Furthermore, even if the parties do not agree upon it, if the former employee carries out this kind of act in bad faith, the ex-employer is entitled to take legal action and to claim damages.

ii. What does it take to show they are valid?

The wording of the clause has to refer clearly and solely to clientele deviation as consequence of the former employee’s bad faith. In ordinary terms, and without the bad faith element, the provision would not be valid.

iii. Is it necessary to pay an employee during the period of the covenant?

No

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes

i. Are they capable of being valid?

No.

Non-solicitation clauses may not be enforceable, since those restrictions may be considered to infringe on or at least threaten to breach legal and constitutional rights of the individuals, set forth in Colombia’s Political Constitution, such as the fundamental right to work, right of association, and the freedom to choose one’s profession or occupation.

ii. What does it take to show they are valid?

Not applicable. These clauses are invalid.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Usually parties agree that any and all confidential information known by the employee throughout the execution of the employment agreement is reserved, and cannot be disclosed to third parties or be used by the former employee for his/her own benefit. This kind of clause can eventually be enforceable, whenever the confidentiality obligation is backed up by the existence of intellectual property; but not so much with information that is not protected under those regulations.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Any and all employment agreements performed in Colombia, are ruled by Colombian law based on the principle of territoriality. Therefore, even if the agreement was executed abroad, or it was expressly provisioned in it that it would be governed by a law other than Colombian law, if the services of the employee will be rendered in Colombia, Colombian law will apply.

Therefore, a choice of law clause has no impact.
Colombia

i. Can an employer impose a dispute resolution method on the employee?

Partially. Since employment matters are considered public matters, the employer cannot prohibit the employee from making a claim before the Labour Courts, regardless of any alternative resolution method agreed.

G. ENFORCEMENT: How are covenants typically enforced in your jurisdiction?

Please bear in mind that post-employment contract stipulations are unenforceable.

The above mentioned agreements are not of a labour nature, nor should they be taken as an extension of labour contract obligations. Any clause of this sort is automatically ineffective. Thus, it does not produce any legal effects and neither can it be executed before legal authorities.

Non-solicitation, contract prohibition and non-compete clauses can be agreed but their execution does not occur as a consequence of a labour agreement. Once the labour agreement terminates, the employee is not obliged to obey the convened terms. Therefore post-termination stipulations can and may be enforced under commercial regulations (such as non-disclosure obligations).

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Restrictive covenants are prima facie ineffective, therefore unenforceable. See comments g. above regarding enforcement.

ii. Which covenants are typically imposed?

The employee can be incentivised by contributions or bonuses of any kind, employee benefits, stock plans or health insurance. However, such rewards cannot be legally taken as covenants. These rewards are intended to merge the employee’s and employer’s interests, guaranteeing no competition, soliciting employees, client deviation and confidentiality violation, among others.

iii. What sanctions are can be imposed by the employer for non-compliance?

None.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

No.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Covenants are essentially invalid in Colombia. The Constitution and the Substantive Code expressly prohibit restrictions of the fundamental right to work, banning every Court from tolerating restrictive covenants linked to labour agreements.

Re-writing these clauses is not possible given their inherent and constitutional invalidity in Colombia.

Contributed by Alvaro Cala, Catalina Santos and Lina Gattás
A. OVERVIEW:
Ecuadorian legislation does not establish any direct regulation regarding restrictive covenants. The Constitution establishes basic principles to be respected and applied regarding freedom of work. In general terms, it is possible to convene between parties issues related to restrictive covenants as an exception to regular covenants only if those covenants are not against constitutional and law principles.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?
Only insofar as they do not violate constitutional and legal regulations.

i. Are they capable of being valid?
Yes, if parties have accepted them and they do not violate any regulations. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?
Ecuador

They need to be in writing, signed and accepted by the parties. This reflects that the parties agree, according to the principle of autonomy of will and according to the freedom of recruitment as stated in Art. 66 number 16 of the Constitution.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Remuneration for restrictive covenants is not regulated by legislation and so an employer may choose to pay the employee during this period as compensation for the restriction.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Such a clause is prohibited because it infringes principles of equality of rights: the right to take free decisions, and the right to be involved in economic activities.

   i. Are they capable of being valid?
      No.

   ii. What does it take to show they are valid?
      Not applicable.

   iii. Is it necessary to pay an employee during the period of the covenant?
      Not applicable.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

It is not possible because it infringes the constitutional right of free solicitation.

   i. Are they capable of being valid?
      No

   ii. What does it take to show they are valid?
      It is not necessary to show anything because there is specific regulation which prohibits these clauses.

   iii. Is it necessary to pay an employee during the period of the covenant?
      Not applicable.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

The most common clause used in covenants is the clause of confidentiality, which determines that the employee will not perform similar activities to those of the employer. Usually, this clause has an indemnification fee in case of breach.
Ecuador

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Usually, the parties may apply any choice of law: courts, national or international arbitration with Ecuadorian or foreign law application. However, in labour issues, the only applicable law is that of Ecuador and the only applicable venue is that of the labour courts of Ecuador; arbitration is not applicable in accordance with the principle that an “employee’s rights cannot be waived”

i. Can an employer impose a dispute resolution method on the employee?

Labour law establishes that labour courts will solve any dispute between individual conflicts and that only collective conflicts could be solved by mediation and arbitration.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Covenants are enforced according to law and pursuant to the provisions in the covenants signed and willingly entered into by both parties. If one of the parties alleges breach of covenant, he/she must file a lawsuit and demonstrate the alleged breach with evidence.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

There are laws regulating these principles. Additional benefits could be agreed additionally.

ii. Which covenants are typically imposed?

As mentioned above, it is not common to have restrictive covenants but below is a generic example of a clause:

iii. What sanctions are/can be imposed by the employer for non-compliance?

Indemnification or any economic sanction provided that sanction is provided for in the covenant.

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

Legislation is silent on this. However, everything will depend on what the parties agree in the covenant, taking into account that the covenant takes effect from the moment it is signed and not retroactively, provided that it does not violate the principles of the Constitution of the Republic of Ecuador, concerning freedoms in general.

[Note: it will be important to distinguish between (in the UK Remuneration Code provisions requiring forfeiture e.g. if there is a material adverse trading event or misconduct comes to light after monies had been paid – nothing to do with anti-competitive provisions and so excluded from this book) and anti-competition provisions such as restrictive covenants]

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

It is void and cannot be re-written.

Contributed by Gabriela Villagómez and Marcelo Proaño
Mexico

Contributed by: Sánchez-DeVanny Eseverri, S.C.

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A. OVERVIEW:

Post-termination restrictive covenants in Mexico are generally unenforceable if they are not properly drafted to secure confidential information after termination of the employment relationship.

Most companies engaging in business in Mexico, with a need to hire employees, are likely to set out post termination restrictions in their employment agreements, and even ask employees to sign an employment termination agreement, aiming to protect their business interests and information assets.

However, such provisions are usually drafted as a restriction on the employee’s ability to engage in business with, or work for competitors. In practice, these restrictions are not enforceable since it is a constitutional right for individuals to carry out any occupation or professional activity, as long as it is legal, regardless of whether or not it competes with the employee’s previous work.

In this sense, instead of prohibiting employees to enter into a relationship with a competitor, it is fundamental to set out post-termination restrictions in a way that obliges employees to avoid the use of confidential information for unfair competition activities against the former employer.
Breach of post-termination restrictions must be claimed before civil courts, not labour. The plaintiff employer must demonstrate not only that the restrictions were known and accepted by the employee, but also that the employee had a privileged position with regard to the employer’s confidential information which made possible the breach, and that the breach is not a natural consequence of the employee’s professional development and knowledge.

In addition, if any person or company hires an employee with the aim of obtaining a trade secret, such person or company will be responsible for all damages and loss caused to the trade secret’s owner.

The unauthorized disclosure of a trade secret is also considered a federal crime, which is punishable with a considerable fine and prison for up to 6 years.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, but just prohibiting the employee to render services for a competitor will not be enough.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Express acknowledgement and consent from employee. Restrictions must be drafted to limit the use and disclosure of employer’s confidential information.

iii. Is it necessary to pay an employee during the period of the covenant?

No.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, under the terms described above relating to confidential information.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

Express acknowledgement and consent from employee. Restrictions must be drafted to limit the use and disclosure of the employer’s confidential information in connection with possible contact with clients, as an act of unfair competition.

iii. Is it necessary to pay an employee during the period of the covenant?

No.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes,
Mexico

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
Express acknowledgement and consent from the employee. Restrictions must be drafted to limit the use and disclosure of the employer’s confidential information in connection with possible solicitation.

iii. Is it necessary to pay an employee during the period of the covenant?
No.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?
No.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?
In general, if an employee is hired in Mexico under Mexican law standards, Mexican courts should decide on the enforcement of restrictive covenants.

If choice of law is applicable, then restrictive covenants would be interpreted under the jurisdiction chosen.

i. Can an employer impose a dispute resolution method on the employee?
No.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?
Before the civil courts. The Labour Courts do not have jurisdiction.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?
The statute of limitations requires an employee to make benefits’ claims within one year. Therefore, any unpaid benefit will not expire until a year as of the moment the employee was entitled to receive such benefit. With regard to private pensions and stock options, traditionally in Mexico, it is agreed that if the employment relationship is concluded, then the employee will only be entitled to what he/she has earned or has vested as at the date on which the employment terminates.

ii. Which covenants are typically imposed?
The payment of non-mandatory benefits, private pensions or stock options can, depending upon the termination reason, be made conditional upon the performance of covenants. Mandatory benefits should be paid at termination.
Mexico

iii. What sanctions are/can be imposed by the employer for non-compliance?

Typical sanctions include termination, with full severance for employee. With regard to non-payment of benefits, it can also have sanctions by the Labour Secretariat that could range from 50 to 5,000 daily minimum wages (approximately USD$250.00 to USD$2,500.00) per affected employee.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

In Mexico, discounts to salaries are very strict. Once the payment of a bonus has been made, it is hard to recover it. Employers are only entitled to collect from employees a month of salary (even if the wrongful payment was higher), and the mechanism for deduction is that only 30% of the difference between the employee’s salary and the daily minimum wage can be done per day. Likewise, the employee has to recognize that he/she has a debt with the employer and agrees to its deduction.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

If a covenant is found to be invalid by the competent Mexican court, then the plaintiff employer will not be entitled to claim breach and, consequently, no damages will be payable.

Contributed by Sánchez-DeVanny Eseverri, S.C.
A. OVERVIEW:
Post-termination restrictive covenants are not common in Paraguayan employment contracts. There is little, if indeed, any case law. The only provision in Paraguayan labour law that establishes a post-termination restriction is related to the obligation of confidentiality. There are no specific rules relating to restrictive covenants. Paraguayan legislation is highly protective of employees’ right. Also, and pursuant to an interpretation of the constitutional right that grants the right to choose work and the provisions of Section 10 of the Labour Code, post-termination covenants would be difficult to enforce.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?
Yes.
Paraguay

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?
They should be drafted so as not to exceed 12 months’ duration, competitors should be clearly identified, and employee’s rights should be balanced with the non-compete prohibition, for example, a lump sum payment if the employee does not breach this agreement, and an equal penalty payment if he or she does.

iii. Is it necessary to pay an employee during the period of the covenant?
No.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?

It must be demonstrated that the obligation was clearly drafted and customers/clients identified when possible, that the employer did everything it could to protect that information, and that the employee was in a position to access and make use of that information. Also, the Court may consider the seniority of the employee.

iii. Is it necessary to pay an employee during the period of the covenant?
No.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

It is possible during employment to have such a covenant contained in the employment contract or as part of the company work regulations. After employment, such clauses would not be possible since they go against the constitutional right to choose work mentioned at a. above.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
Including them as part of the employee’s contractual obligations.

iii. Is it necessary to pay an employee during the period of the covenant?
Not applicable.
Paraguay

**E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?**

The only other post-employment covenant common in Paraguay is the obligation of confidentiality regarding trade secrets and this will bind employees even after termination.

**F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?**

Labour matters are considered matters of public order and choice of law other than Paraguayan law is not an option

i. Can an employer impose a dispute resolution method on the employee?

No.

**G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?**

Not applicable.

**H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:**

i. Do the same principles of enforcement outlined above at g. apply?

Not applicable.

ii. Which covenants are typically imposed?

Not applicable.

iii. What sanctions are/can be imposed by the employer for non-compliance?

Not applicable.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

Not applicable.

**I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?**

The covenant would be void and the Court will not re-write it.

Contributed by Ferrere
Peru

A. OVERVIEW:

Post-termination restrictive covenants are fairly common in Peruvian employment contracts, particularly for senior employees or those with valuable connections, relationships or access to confidential information. However, post-termination restrictive covenants are unenforceable unless an employer can establish that (1) it has a legitimate business interest to protect and (2) that the restriction goes no further than reasonably necessary (in scope and duration) to protect that interest and 3) provided that the employer pays the former employee some money for the duration of the non-compete clause.

Legitimate business interests include trade secrets and confidential information, trade connections such as customers or suppliers and maintaining the stability of the workforce.

Whether a restriction is reasonable is judged at the time the restriction is entered into. Relevant considerations will be the employee’s role, duties and seniority, the nature of the employer’s business, the scope of the restriction (such as what type of activity, trade connections or employees it covers, its geographical scope) and its duration (how long the restriction lasts). To a lesser extent, a court may also consider the length of the employee’s notice period and, in some cases (but this not an established principle), what consideration the employee received.
Peru

The most common remedy for breach of a restrictive covenant is an injunction using the civil courts, to restrain the employee’s or the new or prospective employer’s activities but other forms of injunction available. Other remedies include damages for breach of contract and other forms of financial compensation.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?

Yes, provided that the employer pays the employee some money for the duration of the non-compete clause.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Non-compete clauses are not regulated by Peruvian legislation; however non-compete clauses are commonly used. In case of these clauses being challenged, typically the employer will not be able to enforce the clauses unless the employer pays some money for the non-competition. It is important to note that the Peruvian Constitution establishes the right of freedom to work, free from restriction.

iii. Is it necessary to pay an employee during the period of the covenant?

Generally yes. While there is no legal requirement as such to pay former employees during the period of a post-termination restrictive covenant, doing is recommended to ensure the compliance of the non-compete clause.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients; and

Yes. Employers can establish post-termination clauses in order to prevent contact between the terminated employee and the customer/client. However, clients/customers are free to choose to contact terminated employees for the rendering of services or any kind of business. The obligation will be binding for the employee if he/she receives a compensation for this obligation.

i. Are they capable of being valid?

Yes, if the employee receives some compensation

ii. What does it take to show they are valid?

It is necessary to show that the former employee instigated or developed the contact with the client or customer themselves. Quite often, the client or customer instigates or develops the contact or relationship with the former employee because they have seen, and like, how the employee operated while working at the former employer. In practice, it is difficult for former employers to prove that their customer or client contracts with an ex-employee at the ex-employee’s instigation.

iii. Is it necessary to pay an employee during the period of the covenant?

Yes, if not the clause will not be enforceable.
Peru

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

It is possible to impose non-solicitation of employee’s clauses but, in practice, it will be difficult to enforce even before a labour court. Maybe the company can set forth a clause for damages if the employee hires former colleagues but such a requirement would need to be based on civil legislation, not labour legislation. In Peru people have the right to sign contracts and hire personnel without restriction and these rights cannot be restricted unless the person restricted receives a compensation in exchange for agreeing to that obligation.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid?
In practice, it is difficult for employers to prove that a non-solicitation of employees’ clause has been breached, because proving that the employee has been hired by a former colleague is not necessarily a breach of a non-solicitation clause.

iii. Is it necessary to pay an employee during the period of the covenant?
Not necessarily. The former employer can pay but that payment does not guarantee validity or enforceability. In the event of a dispute, the former employer can seek enforce the clause via the courts.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

There are a variety of restrictions that can apply during or after termination of employment.

A common clause is to restrict the use or disclosure of confidential information and company property, during employment. These tend to be confined to particular types of information or property, although those definitions are often much wider than in other types of restrictions. The former employer can set time limits on the effectiveness of these clauses after termination but this is not common. These clauses are difficult to maintain after the employment relationship terminates.

Other post-termination restrictions can cover non-solicitation of, or non-dealing with, suppliers, distributors or intermediaries such as brokers, depending on the employer’s business. These are similar to the customer/client restrictions mentioned above. Employees can be advised from interfering with the ex-employer’s business or connections, although this also tends to require some kind of active attempt or intention to damage the ex-employer’s business in order to be actionable.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law is not an option in Peru. The Peruvian labour law applies to all employment relationships.

i. Can an employer impose a dispute resolution method on the employee?

It is not common to see alternative dispute resolution procedures imposed by the employer in labour contracts. Both parts could agree in the contract that in case of disagreements these can be solved through alternative dispute resolution procedures. However, the Peruvian Courts have ruled that the use of arbitration clauses to resolve labor disputes is not appropriate and these clauses are unenforceable.
Peru

However, in a collective bargaining scenario, if one of the parties to the negotiation wants to solve the disagreement because the parties are not able to reach an agreement and finish the negotiation, then one of the parties is able to request arbitration with a view to help bring the collective bargaining negotiations to a close.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

The employee or the union could sue the employer for the non compliance with the covenants and the labour judge could order the employee to comply with their obligations.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

It depends. The labour benefits established by law (such as vacations, bonuses in July and December, compensation for time served Among Others) cannot be negotiated, except if the employer and employee negotiate the benefit and the employee receives more than the legal benefit established. If the benefit is not established by the law, then the parties can agree the terms and conditions to apply.

ii. Which covenants are typically imposed?

In Peru it is not common to grant more benefits than the benefits established by the law except some special covenants; house allowance, car allowance; food allowance, but those are no relevant and the others that the unions could negotiated with the employers.

See h. (i) in relation to pension benefits.

Peruvian legislation establishes certain benefits in favor of the employees, with which the employers must comply:

If an employee is in the private pension system (AFP), the employer must withhold from the employee’s gross monthly remuneration an amount equal to 12.50%.

If the employee is the public system (ONP), the employer must withhold from the employee’s gross monthly remuneration an amount equal of 13%.

At the age of 65 years the employees who have contributed to the private system are able to retire and get a pension.

Those who have contributed to the public system must be 65 years old and must have paid to the ONP for 20 years to receive a pension.

The pension can not be seized by any person.

iii. What sanctions are/can be imposed by the employer for non-compliance?

For non compliance, the employer has to start a legal process in order for a judge to determine whether or not if the employer has complied with the obligations. If the employer has not complied with its obligations, then the judge will order compliance and payment of all the amounts due, plus the legal interest plus the cost of the trial. In some case the employer could claim an indemnity for the non-compliance. In that event the employer has to prove that the conduct of the former employee caused damage. In this circumstance the employee will argue that he/she has the constitutional right to work in order to pay all his/her expenses.
Peru

iv. Are there any limits to what an employer can forfeit (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)?

There are no limits.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

Restrictive covenants that are invalid are unenforceable. The court cannot re-write the covenant, but it is important to note that the Peruvian Constitution establishes the right of freedom to work and that restrictions are not applicable. This means that all restrictive covenants that are found to be in breach of principles of the Constitution are essentially invalid, subject then to the exceptions set out earlier in this chapter.

Contributed by Jose Antonio Valdez
Uruguay

A. OVERVIEW:

There are no labour regulations in Uruguay regarding restrictive covenants. Nevertheless, it is common to include post-termination restrictive covenants (for example, non-competition or non-solicitation clauses) in senior employees’ employment contracts.

However, in order for these clauses to be enforceable, doctrine and jurisprudence provides that certain requirements must be met: (i) the prohibition must be justified, for example, there must be a legitimate business interest that the Company is seeking to protect and relevant to the employee’s role; and (ii) the prohibition must be limited regarding scope and duration.

Relevant aspects that will be taken into consideration by a Judge when analysing the reasonableness of a restrictive covenants are, among others: (i) employee’s role, duties and seniority; (ii) the nature of the business; and (iii) the scope and duration of the restriction.

Although these covenants are capable of being enforced using the civil courts, we are not aware of any cases where a company has brought a civil claim against a former employee regarding non-compliance with the agreed covenants. In general these clauses are agreed in order to prevent/discourage employees from competing, disclosing confidential information, soliciting employees, etc.
Uruguay

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes. Please note that there are no labor regulations in Uruguay regarding non-competition clauses.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

In Uruguay, “freedom of work” is a constitutionally recognized right. The non-compete obligation is a limit to this freedom. However, it is understood that the employee can undertake the obligation not to compete, thereby limiting his or her freedom of work, for a certain consideration, as long as the following requirements are met:

a) The non-compete obligation must be agreed in writing; and

b) There must be a reason that justifies the non-compete obligation. This justification is generally found in the position that the employee has in the company. The higher the position and remuneration, the more justified the obligation not to compete after termination of the labor relationship; and

c) The scope of the non-compete provision must be limited regarding:

• Term: The term of the obligation must be reasonable. There is no rule establishing what a reasonable term is but we believe it is reasonable to agree a term between 3 or 6 months, otherwise the employee must receive a payment in exchange for not competing; and

• Scope: The obligation is not valid if contracted on such general terms that it prevents the employee from performing activities unrelated to the ones performed in the company, for companies that are not competitors.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement although it is advisable to pay the employee compensation in exchange for the non-competition obligation provision when the same supersedes, for example, the reasonable term of 3 to 6 months after termination. The latter takes into account that the non-competition provisions limit the above-mentioned constitutional freedom of work.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes. Please note that there are no labor regulations in Uruguay regarding contact prohibition clauses.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

The general principles mentioned above apply regarding, for example, scope, duration and justification.

iii. Is it necessary to pay an employee during the period of the covenant?

There is no legal requirement to pay employees during the contact prohibition period.
D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes. Please note that there are no labor regulations in Uruguay regarding non-solicitation prohibition clauses.

   i. Are they capable of being valid?

      Yes.

   ii. What does it take to show they are valid?

      The general principles mentioned above apply regarding, for example, scope, duration and justification.

   iii. Is it necessary to pay an employee during the period of the covenant?

      There is no legal requirement to pay employees during the solicitation prohibition period.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Yes, a common clause generally included in the employment contracts is that relating to the prohibition of disclosing confidential information regarding the company, its employees, clients or suppliers both during the labor relationship and after termination. This type of covenant often does not have a set time limit after termination and can apply for so long as the information retains its confidential nature.

Clauses preventing employees from making disparaging statements about their ex-employer or its personnel can also be included.

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

The selection of an applicable law different from the Uruguayan one will be considered null and void by a Uruguayan Judge.

   i. Can an employer impose a dispute resolution method on the employee?

      Under Uruguayan labor regulations and conflict of law provisions, it is forbidden for parties to a labor contract to agree on a law that is not Uruguayan law. Choice of law under these circumstances could be declared null by a Court in Uruguay.

      Case law and jurisprudence in Uruguay have held that an employee cannot be prevented from the right to have access to their country of origin justice by agreeing on the application of the law of a different country.

      Therefore, in case of a lawsuit brought by the employee against the company, Uruguayan labour law will apply and Uruguayan Courts will be competent to hear the case.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Although these covenants can be enforced using the civil courts, we are not aware of any case where a company has brought a civil claim against a former employee regarding non-compliance with the agreed covenants. In general these type of clauses are agreed in order to prevent/discourage employees from competing, disclosing confidential information, soliciting employees, etc.
H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

In general, restrictive covenants are not relevant to, or enforceable against, an employee’s pension benefit or stock plan. Note that there are no specific regulations in Uruguay regarding this type of benefits; it will depend on what the parties agree. It is common to agree that the employee will be eligible for receiving the benefit, as long as he/she remains employed when the benefit becomes payable.

ii. Which covenants are typically imposed?

See answer to question above.

iii. What sanctions are/can be imposed by the employer for non-compliance?

It will depend on what the parties have agreed to. Generally, in case of employee’s non-compliance, he/she will not be entitled to receive the benefit.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

No, as there are no regulations in Uruguay regarding this issue, it will depend on what the parties agree to.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

If a covenant is found to be invalid, the same will be null and void and the Judge will not be able to re-write the covenant.

Contributed by Maria Jose Fernandez
A. OVERVIEW:

In looking at restrictive covenants in the United States, one generally has to look at how most of the 50 states treat restrictive covenants, and then look at how a minority of states, led by California, treat them. This chapter will present an overview of both approaches to the degree that they vary.

Most states look at the reasonableness of the restriction, focusing primarily on its duration, its geographic scope and the substantive nature of the activity being restricted. If the term of a restrictive covenant is too long, say five years or beyond, the covenant will likely not be enforced. If the geographic scope is overly broad, i.e., broader than the geographic scope of the employer’s business, it will not be enforced. And if the substantive nature of the business activity being restricted is broader than the one in which the employer operates, it will likely not be enforced.

A similar reasonableness approach is used for covenants not to solicit employees.

The California-like minority takes a much more limiting approach. California, for example, deems covenants not to compete contrary to the state’s public policy and refuses to enforce them, with only two very narrow exceptions. California views covenants not to solicit customers the same way but views covenants not to solicit employees less restrictively.
Finally, there is one overarching exception to all limitations on restrictive covenants in the United States: an employer is entitled to protect its confidential information/trade secrets. Some employers have tried to take advantage of this exception by designating a broad range of information that the employee might come into contact with confidential/trade secret information. However, when put to the test, such broad designations are largely ignored in favour of a rigorous analysis of whether the particular information that the departed employee is accused of having misappropriated is in fact a trade secret. For example, with regard to customer lists, even if such lists are designated confidential/trade secret information in a covenant, the court will ultimately want to be shown that they meet the definition of a trade secret, in particular that customer identities are not generally available in the public domain.

Restrictive covenants are most commonly enforced by way of injunctive relief.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes, but see comments at b. ii. below.

i. Are they capable of being valid?

Yes, but see comments at b. ii. below.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

In most U.S. jurisdictions:

Most United States jurisdictions look at the reasonableness of the restriction – sometimes framed as a “legitimate business interest” inquiry - in terms of three elements:

- The duration of the restriction;
- The geographic scope of the restriction; and
- The substantive scope of the restriction.

With regard to the duration of the restriction, the shorter the restriction, the more likely it will be found reasonable. With regard to geography, if the employer carries on the type of activity being restricted in a particular geographic region, then the restriction is expected to be coextensive with that geographic region, but not broader. Finally, courts will likely only enforce a covenant that seeks to limit competition in the same aspect or segment of the business as the one in which the employer operates.

In California and the minority jurisdictions:

California is a good example of the minority view. It generally prohibits all manner of restrictions on one’s ability to carry on a business or vocation (Cal. Bus. & Prof.Code § 16600), so covenants not to compete are largely unenforceable in California. The limited exceptions are when an individual sells all of his interest in a corporation or partnership, including the goodwill associated with that interest, and then enters into a covenant not to compete. In those limited situations, California courts will enforce a restrictive covenant, but only if it is reasonable in terms of duration, geographic scope and substantive scope.

iii. Is it necessary to pay an employee during the period of the covenant?

It is generally not necessary to pay an employee during the period of a covenant not to compete in the United States.
**USA**

**C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?**

Yes.

i. Are they capable of being valid?

Rarely. The analysis applicable to covenants not to solicit customers is largely the same as it is for covenants not to compete discussed at b. above.

**In most U.S. jurisdictions:**

Most jurisdictions will view a covenant not to solicit customers/clients as what it is in practical effect: a covenant not to compete. Therefore, in those jurisdictions, courts will apply the same reasonableness analysis to these types of covenants as they would to a covenant not to compete.

**In California and the minority jurisdictions:**

In the minority of jurisdictions, like California, courts will likewise disregard the fact that something is labelled a covenant not to solicit customers and clients and will readily deem it a covenant not to compete and treat it as such.

ii. What does it take to show they are valid?

See i. above. Attempts to overcome a jurisdiction’s limitations on covenants not to compete by styling them “covenants not to solicit customers/clients” are largely unavailing in the United States.

iii. Is it necessary to pay an employee during the period of the covenant?

It is generally not necessary to pay an employee during the period of a covenant in the United States.

**D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?**

Yes.

i. Are they capable of being valid?

Yes.

ii. What does it take to show they are valid?

**In most U.S. jurisdictions:**

With regard to covenants not to solicit other employees, most U.S. jurisdictions will consider some or all of the following factors:

• the duration of the restriction;

• whether there was in fact solicitation by the employee, as opposed to the target employee having initiated and completed the departure from his/her employer of his/her own volition;

• whether the restriction is required to protect the legitimate interests of the employer; and

• whether the restriction is unduly burdensome on the employee.
In California and the minority jurisdictions:

The California approach is typical of the minority view.

Generally, covenants not to solicit other employees are permitted in California, provided that the employer seeking to enforce the covenant can meet the reasonableness criteria above and can show that the solicitation caused business disruption or had other significant negative impacts on its business.

Where a departed employee solicits a single, low-level former colleague to leave, a covenant not to solicit will likely not be enforced against him or her.

However, where a departing employee attempts to take a significant number of employees or a significantly important group of employees with him or her and causes severe business disruption or other damage to the employer, the covenant will more likely be enforced. For example, leaving and taking an entire branch office of a company or an entire operating unit of a company would more readily lead to the former employer being able to show significant disruption/damage to the business.

iii. Is it necessary to pay an employee during the period of the covenant?

It is generally not necessary to pay an employee during the period of a covenant in the United States.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Yes. Employment-related covenants that are common in the United States are confidentiality/trade secret provisions, as well as non-disparagement provisions.

Non-disparagement covenants:

To the extent employees throughout the United States use defamation/disparagement to gain an unfair advantage to compete with their former employer, those covenants will likely be enforced.

Confidentiality and trade secret covenants:

As noted at a. above, some employers try to overcome the limitations on their ability to restrict their employees from competing by creating confidentiality provisions that broadly designate a wide variety of information that the employee might come into contact with as confidential/trade secret information and then try to prohibit the use of such confidential information in any future employment.

These attempts to broadly designate may give employers comfort, but courts will ultimately look at whether the particular information that is alleged to have been misappropriated is in fact confidential. Provisions that over-designate confidential information may therefore ultimately prove to be of little value, since courts will tend to look at whether the information does in fact meet the definition of a protectable trade secret. (See Uniform Trade Secrets Act).

In addition to showing that the information at issue is confidential, employers seeking to enforce confidentiality provisions must show that the information was improperly used by the departing employee in his/her new employment. That can be an even more challenging aspect of seeking to enjoin the use of confidential information.

In some jurisdictions, this element of a claim can be aided by the “Inevitable Disclosure Doctrine”, which allows an enforcing party to argue that the confidential information would inevitably be disclosed to the new employer. However, other jurisdictions, including California, have rejected the Inevitable Disclosure Doctrine and require a showing of actual use of the confidential information in the new employment environment.
USA

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Choice of law in the US legal context is complex, and a detailed analysis is beyond the scope of this summary. The key point to note is that a choice of law question can be more complicated than it initially appears based on what is written in an employment contract, related agreement(s) and/or documentation.

In most U.S. jurisdictions:

The majority of jurisdictions tend to follow the choice of law provisions set forth in the restrictive covenant, with at least two significant exceptions: to the extent courts look upon the choice of law as being contrary to that state’s public policy or where the chosen state has no substantial relationship to the parties, it will not be followed. For example, if a New York employer seeks to restrict a New York employee from competing with it, and provides that the laws of another state which has a very pro-enforcement stance on covenants not to compete will govern, the New York court may ignore the choice of law provision.

In California and the minority jurisdictions:

California, representing the minority view, goes several steps further. It considers its laws regarding restrictive covenants to embody an important public policy of the state. California courts are therefore aggressive about not allowing attempts to sidestep the restrictive covenant provisions of California law.

For example, if a California-based employee is involved, California courts are likely to apply California law, irrespective of whether the employee is also employed in another state and irrespective of whether the covenant provides for another state’s law to be applied.

California courts have even been known to exercise jurisdiction over employees based elsewhere who spend only part of their work time in California. Importantly also, an employee who was employed entirely outside of California during the term of his employment but then moves to California and begins to work there will likely fall under the protective umbrella of California law, particularly if the restrictive covenant at issue is adjudicated in a California court.

i. Can an employer impose a dispute resolution method on the employee?

At the time of writing, this area of the law is being actively litigated in the United States generally, and in California in particular.

A major United States Supreme Court decision on this subject, Concepcion vs. AT&T Mobile, was issued in 2011, and it ruled that arbitration provisions in certain consumer contracts were enforceable, which suggests that those in employment agreements would be enforceable as well.

The Concepcion case has given rise to a number of subsequent decisions that have wrestled with the issue whether, and to what extent, arbitration agreements in other contexts, with or without jury trial waivers and/or class action waivers, are enforceable. This is particularly the case in California where prior precedents in that state largely took a contrary view on the enforceability of arbitration provisions.

This summary discussion does not permit an in depth discussion, but suffice to say this area of the law is active and is being closely watched by employment law practitioners as well as business lawyers generally.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Restrictive covenants are most commonly enforced by way of suits seeking injunctive relief.

Often, the harm caused by breaches of a covenant not to compete, a covenant not to solicit or a confidentiality agreement is immediate and ongoing and can be difficult to fully remedy through a complaint for damages.
Injunctive relief and other equitable remedies like disgorgement remain the primary means of enforcing restrictive covenants and confidentiality provisions.

Whilst damages are also recoverable in connection with enforcing a restrictive covenant, employees will at times pursue counterclaims for damages based on an assertion that the covenant is not enforceable. For example, a departed employee who believes his/her covenant is unenforceable, and whom the former employer seeks to prevent from going to work for a competitor could pursue counterclaims of interference with contract and/or interference with prospective business advantage.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

As noted above, injunctive relief is generally the primary means of enforcing restrictive covenants and confidentiality provisions. Because the direct enforcement of such provisions, particularly non-competition clauses, may impair an individual’s ability to earn a livelihood, courts may invalidate, or limit the scope of, such provisions if they are unreasonable.

Further, as discussed above, some states have statutes which render non-competition provisions invalid. So, as an alternative, or as an adjunct, to traditional non-competition provisions, employers may condition the provision of compensation and benefits on compliance with various types of restrictive covenant, such as non-compete and confidentiality covenants.

For example, an employment agreement or benefit plan may provide for the forfeiture of an executive’s compensation or benefits, or even the claw back of amounts already paid to the executive, in the event of violation by the employee of a post-termination restrictive covenant.

The enforceability of these provisions will vary with the type of restriction, the type of compensation or benefit, and with applicable law.

Benefits Subject to ERISA:

In the US, pension and welfare plans are subject to the Employee Retirement Security Act of 1974 (ERISA), a federal statute which pre-empts state laws that relate to benefit plans.

The term “pension plan” under ERISA generally includes both traditional defined benefit plans, as well as various types of defined contribution, “account type” retirement plans that defer compensation until termination of employment, such as Section 401(k) plans, profit-sharing plans, ESOPs, and money purchase plans. Certain statutory vesting and anti-alienation rules in ERISA generally preclude the forfeiture or claw back of an individual’s benefits under a pension plan.

A. Top Hat Plans:

Top hat plans and excess plans are not subject to the same protections. A top hat plan is a plan maintained primarily for management and highly compensated employees. Though subject to ERISA, a top hat plan is not subject to the vesting and anti-alienation rules of ERISA. Top hat plans and excess plans will generally be considered as being contracts between the employer and one or more employees.

Whether a contractual forfeiture provision is enforceable with respect to top hat benefits will depend on federal principles of contract law. While, as noted above, ERISA pre-empts state law, courts applying federal principles of contract law will sometimes treat those principles as informed by state law that would apply in the absence of pre-emption.
USA

For this reason, the discussion of state law principles below, which applies to benefits not subject to ERISA is relevant even to top hat plans.

B. Excess Plans:

Excess plans are plans that provide benefits in excess of certain limits under the Internal Revenue Code. Excess plans are not subject to ERISA and thus a contractual provision for forfeiture or claw back in the event of violation of a restrictive covenant will be determined under relevant state law.

C. Welfare Plans:

Finally, welfare plans (e.g. health, life and disability benefits) while subject to ERISA are not subject to ERISA’s statutory vesting and anti-alienation rules. Like top hat plans, the enforceability of forfeiture clauses with respect to these benefits will depend on the federal common law of contracts, which in turn is informed by the state law principles described below.

Compensation and Benefits not Subject to ERISA:

Salary, commissions, overtime, and bonuses, stock options, restricted stock, SARs, and other types of incentive compensation that do not defer compensation until termination of employment, are not subject to ERISA, absent special circumstances.

The enforceability of a forfeiture or claw back for violation of a post-termination restriction will generally rely on principles of state law, and varies with the type of compensation, the type of covenant and the applicable state’s laws. (See also the discussion of Dodd-Frank below about the possible application of federal law in the event of restatement of corporate financial statements).

As in the case of actions to enforce directly post-termination restrictive covenants, actions to enforce forfeiture and claw back provisions under state law frequently entail difficult choice of law issues that may turn on a choice of law provision in the agreement, contacts of the various parties with different states, such as the place of employment and the place where the parties entered into the contract, as well as on the jurisdiction in which the action is brought and its public policy, if any, regarding non-competition clauses.

For example, assume an individual enters into an employment agreement with a corporation headquartered in Delaware, performs services in Illinois and after terminating employment, takes up residence in North Dakota where he is employed by a new employer. An action by his former employer to enforce a forfeiture clause for violation of a non-competition provision will entail difficult choice of law questions, which in turn may be critical to the outcome of the case on the merits. A discussion of these principles is beyond the scope of this chapter.

State wage protection laws generally preclude the forfeiture of earned but unpaid wages, and the claw back of wages already paid to an employee, at least absent employee consent. The specifics of the laws vary from state to state, but central issues in their application include:

(i) what constitutes “wages” for purposes of the statute, and

(ii) under what circumstances, if any, an employer may apply offsets, deductions or forfeitures to wages.

“Wages” will typically include salary, overtime and commissions that have been earned.

The treatment of incentive bonuses is often unclear and may depend on whether the obligation to pay, and the amount of the bonus, is fixed and determinable or entirely discretionary with the employer and whether it depends on factors other than the individual employee’s performance; further once paid, even a discretionary bonus may constitute wages and, if so, will not be subject to claw back. The treatment of equity compensation varies.

Finally, in many states prevailing plaintiffs in unpaid wage cases may be entitled to double or treble damages, and attorney’s fees.

Even if compensation or benefits are not protected by ERISA or state wage protection laws, a court may nevertheless refuse to uphold a forfeiture for violation of a restrictive covenant clause.
In some states, a provision for the forfeiture or claw back of compensation or benefits in the event of violation of a non-competition agreement is viewed as an indirect restraint on trade that will be analyzed under the traditional reasonableness analysis applicable to direct prohibitions on competition. The courts in such cases will uphold a forfeiture for competition clause only if the restraint on the employee is reasonable in temporal and geographic terms, as well as in the amount and severity of the forfeiture.

In some states, such as California, a forfeiture or claw back provision would be prohibited under judicial interpretations of statutes prohibiting non-competition provisions in contracts.

In other states, forfeiture for competition clauses has been distinguished from covenants not to compete, and held enforceable without regard to the reasonableness of the restraint. In states such as New York, the “employee choice doctrine” permits forfeiture for competition provisions to be enforced, without regard to the reasonableness of the restraint, provided that the employee has an effective choice between retaining the benefit, or competing and forfeiting the benefit; the doctrine does not apply to an employee who is involuntarily terminated.

Note that a provision for the forfeiture of compensation or benefits on account of violations of other types of restrictive covenants (e.g. a covenant not to solicit customers) which have the effect of a non-competition provision will generally be analyzed in the same manner as a forfeiture for competition clause.

ii. Which covenants are typically imposed?

Covenants imposed will tend to mirror the covenants contained in the standard form employment contracts, subject to the enforceability issues described above. As such, these covenants could range from non-competition covenants through non-dealing and non-solicitation of customers clauses and confidentiality clauses. In jurisdictions in which a competition clause is unlikely to be enforced, employers may instead attempt to condition compensation and benefits on confidentiality or other related covenants.

iii. What sanctions are/can be imposed by the employer for non-compliance?

The most common type of sanction with respect to compensation and benefits are forfeitures and claw backs. It is uncommon to impose other sanctions under a benefit plan contract that could be imposed more generally as a matter of the overall employment contract.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

Any such added provisions would be subject to the restrictions described in Section h. i. above.

In addition, even in the case of forms of compensation that are not protected ERISA benefits or state law protected wages, the addition of a forfeiture or claw back provision with respect to compensation already granted or earned, would generally be subject to the employee’s consent under principles of contract law.

Finally, the foregoing which describes provisions in employment contracts and benefit plans for the forfeiture and/or claw back of benefits and compensation in the event of violations of post-termination restrictive covenants are to be distinguished from the claw back provisions of the Sarbanes-Oxley Act and the Dodd Frank Wall Street Reform and Consumer Protection Act.

Under Dodd Frank, public companies will be required to adopt a policy to recover from current and former executives, in the event of an accounting restatement, any such compensation that would not have been awarded under the restated financials.

Under Section 304 of Sarbanes-Oxley, in the case of a public company that undertakes an accounting restatement, on account of material noncompliance with any financial reporting requirement under the securities laws due to misconduct, the SEC is empowered to require the CEO and CFO to return compensation received during the twelve month period following the noncompliant filing.

A discussion of such statutory claw back requirements is beyond the scope of this article.
USA

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

In most U.S. jurisdictions:
In some jurisdictions, courts will “blue pencil” an overly restrictive covenant, which means they will rewrite it to make it enforceable.

In California and the minority jurisdictions:
The more restrictive view typified by California generally prohibits covenants not to compete and requires additional showings to enforce covenants not to solicit employees, there is less occasion to “blue pencil” in those jurisdictions. In fact, the public policy against covenants not to compete is sufficiently strong that some courts have invalidated the entire agreement if it contains such a covenant.

Contributed by Maureen Gorman
Venezuela

A. OVERVIEW:

Venezuelan labour law is deemed a matter of public policy and, therefore, it is imperative (Article 2 of the Labour and Workers Organic Act). It sets basic standards to be met by workers and employers and it cannot be disregarded unless the parties provide for better terms and conditions for workers.

Because labour law is a matter of public order, there is very limited space for negotiation.

Such rigidity conflicts with the general principles of freedom of contract (Article 1160 of the Civil Code), right of property (Article 115 of the Constitution) and freedom of enterprise (Article 112 of the Constitution).

Because of the public policy qualification, disputes are to be settled by court, except that, once in court, the parties may agree to arbitration (Article 6 of the Labour Procedure Organic Act).

There is a general principle of in dubio pro operario whereby, in case of doubt the interpretation would favor the worker (Article 18 (5) of the Labour and Workers Organic Act).
The 2006 Organic Labour Act Regulations (the “Regulations”) contemplate the possibility of post-termination restrictive covenants for a limited time and upon appropriate consideration. Nonetheless, to the extent that the conduct of the ex-worker constitutes a violation of a legal obligation, there may be tortious liability and, if there is a non-labour agreement binding him or her, further covenants may be set, provided the covenants are lawful and proper consideration (money or money’s worth) is given.

B. NON-COMPETE CLAUSES: Can an employer require a post-termination non-competition covenant from an employee?

Yes.

i. Are they capable of being valid?
Yes.

ii. What does it take to show they are valid (legitimate interest, drafting pitfalls to avoid)?

Article 20 of the Regulations establishes that the parties may agree to extend for six months after the termination of the employment, the effects of a clause prohibiting competition of the worker with the employer, provided that the worker is in a management position (direction), has secret industrial or commercial information and has links with the clientele. The non-competition covenant must be in writing and there must be payment of a consideration to the former employee in order for the clause to be effective and valid.

iii. Is it necessary to pay an employee during the period of the covenant?
Yes, payment is necessary for the non-competition clause.

C. CONTACT PROHIBITION CLAUSES: Can an employer require a post-termination clause prohibiting contact with customers/clients?

Yes, but it may be deemed unenforceable.

i. Are they capable of being valid?

Only within the context of the enforcement of a valid non-competition clause.

ii. What does it take to show they are valid?

The claimant would have to establish that such contact would result in a violation of the non-competition clause.

iii. Is it necessary to pay an employee during the period of the covenant?

Only when the payment corresponds to the non-competition consideration referred to in b (iii) above.

D. NON-SOLICITATION OF EMPLOYEES CLAUSES: Is it possible to impose a clause prohibiting solicitation and/or hiring of former colleagues (both during and after employment)?

Yes, but it may be deemed unenforceable.

i. Are they capable of being valid?

Only within the context of the enforcement of a valid non-competition clause.
Venezuela

ii. What does it take to show they are valid?

It would have to be established that the solicitation or hiring was made with the purpose of competing with the former employer.

iii. Is it necessary to pay an employee during the period of the covenant?

The only payment that would be payable would be that owed under a valid non-competition clause, as mentioned in b (iii) above.

E. OTHER COVENANTS: Are there any other types of employment- and post-employment-related covenants which are common in this jurisdiction?

Confidentiality clauses are customary. However, there may be other covenants agreed to in the exercise of the freedom of contract rights established by Venezuelan law.

Such contract would be valid to the extent that the resulting obligation is not deemed illegal, which would include violating public policy (Article 1155 of the Civil Code) and there is proper consideration (Article 1157 of the Civil Code). The obligation may not imply the waiver of an inalienable right.

Such a valid post-employment covenant may be enforced by way of a liquidated damages clause, which may be built as a multiple of the consideration paid for accepting the covenant. The issue must be reviewed on a case-by-case basis

F. CHOICE OF LAW: What is the impact of the choice of law on the enforcement of a restrictive covenant?

Venezuelan law is the only possible governing law of employment relationships in Venezuela.

A foreign governing law could be selected for a non-employment contract, including post-employment agreements.

However, if the relationship is deemed a consequence of an employment relationship, Venezuelan law may displace the selected governing law, given its public policy nature. If the agreement is entered into after the employment has been terminated, and is stated to be governed by a foreign law and the enforcement is sought before a foreign court or arbitration tribunal, the chances of displacement may be lower.

i. Can an employer impose a dispute resolution method on the employee?

Labour law disputes must be brought to Venezuelan labour courts (Article 6 of the Labour Procedure Organic Act). However, the parties may agree to mediation or arbitration once the judicial procedure is initiated.

G. ENFORCEMENT: How are covenants typically enforced in this jurisdiction?

Enforcement may be done by way of an injunction or, more likely, by way of an action claiming damages, including liquidated damages clauses in the relevant agreements.

H. SPECIFIC ISSUES RELATING TO EMPLOYEE BENEFITS, PENSIONS AND STOCK PLANS:

i. Do the same principles of enforcement outlined above at g. apply?

Yes.

ii. Which covenants are typically imposed?

Non-compete and confidentiality covenants. Also, benefits are structured as discretionary and conditional upon absence of any breach of contract or non-exempted early termination.
iii. What sanctions are/can be imposed by the employer for non-compliance?

Considering that the benefits are construed as discretionary and conditional, breach of a covenant may constitute a valid cause for revoking the possibility of vesting or paying the benefit.

iv. Are there any limits to what an employer can forfeit? (e.g. retroactively forfeit for matters prior to adoption of the forfeiture/claw back provisions)

Benefits not paid could be forfeited, provided they were construed as discretionary and conditional, and the breach of the covenants eliminated the possibility of vesting or payment.

I. IMPACT OF INVALIDITY: What happens if a covenant is found to be invalid? Can a Court re-write the covenant or is it void?

In principle, the covenant would be void and no re-writing would occur. However, to the extent that the covenant is deemed to be excessive and in violation of the law, the court may limit the enforcement of the covenant to the extent it is legal.

Contributed by Jaime Martínez Estévez and María Clara Curé Gómez
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