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.

This is why the Guide to Restrictive Covenants was created, serving over 40 key countries. Within are discussions on non-compete covenants, non-solicitation covenants and non-solicitation of employees’ clauses, issues relating to employee benefits, pension, stock plans and more...

An essential publication for anyone involved in employment law, it has been compiled by lawyers from a major international law firm, as well as partner companies based in other jurisdictions.
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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.
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.
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 companies 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.

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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

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.
A global guide to ‘restrictive covenants’

Denmark

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.
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).
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.
Egypt

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.
Egypt

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 employers 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.
A global guide to ‘restrictive covenants’

Egypt

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.

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.

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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 hi 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 hi 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
A global guide to ‘restrictive covenants’

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.
Finland

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
A global guide to ‘restrictive covenants’

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.

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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.
A global guide to ‘restrictive covenants’

France

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.
A global guide to ‘restrictive covenants’

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
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.
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.
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.
Germany

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 employees 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.
A global guide to ‘restrictive covenants’

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.
Greece

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.
Hungary

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Contributed by: Bán, S. Szabó & Partners

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.
Hungary

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).
A global guide to ‘restrictive covenants’

Hungary

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.
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.
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 company, 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 Svanhvit Axelsdottir
Israel

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.
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.

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

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 by 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 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.

Contributed by Svanhvít Axelsdóttir
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.
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.
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.
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
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 requirements 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 employees 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.
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).
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.
A global guide to ‘restrictive covenants’

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

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Contributed by: Secretan Troyanov Schaer

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 global guide to ‘restrictive covenants’

Spain

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.
Spain

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 global guide to ‘restrictive covenants’

Turkey

Contributed by: Pekin & Pekin

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.
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.
Turkey

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.
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)?

A 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.
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.
United Kingdom

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.

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